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VOLUME 92,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME AND APPELLATE COURTS OF ARKANSAS,
KENTUCKY, MISSOURI, TENNESSEE, TEXAS,
AND INDIAN TERRITORY.

PERMANENT EDITION.

MAY 9—JUNE 20, 1906.

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ALSO, ADDITIONAL TABLES FOR VOLS. 4, INDIAN TERRITORY REPORTS; 117, KENTUCKY REPORTS; 118-115, MISSOURI APPEAL REPORTS.

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IN THE INDEX.

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JUDGES

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OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

ARKANSAS—Supreme Court.

JOSEPH M. HILL, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

BURRILL B. BATTLE.

JAMES E. RIDDICK.

CARROLL D. WOOD.

EDGAR A. McCULLOCH.

INDIAN TERRITORY—Court of Appeals.

JOSEPH A. GILL, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WM. H. H. CLAYTON.

HOSEA TOWNSEND.

WILLIAM R. LAWRENCE.

KENTUCKY—Court of Appeals.

J. P. HOBSON, CHIEF JUSTICE.

JUDGES.

THOMAS H. PAYNTER.

W. E. SETTLE.

ED. C. O'REAR.

T. J. NUNN.

HENRY S. BARKER.

JAMES E. CANTRILL.

JOHN D. CARROLL, COMMISSIONER OF APPEALS.

MISSOURI—Supreme Court.

THEODORE BRACE, CHIEF JUSTICE.

Division No. 1.

THEODORE BRACE, PRESIDING JUDGE.

ASSOCIATE JUDGES.

WILLIAM C. MARSHALL.¹

HENRY LAMM.

LEROY B. VALLIANT.

WALLER W. GRAVES.²

Division No. 2.

GAVON D. BURGESS, PRESIDING JUDGE.

ASSOCIATE JUDGES.

JAMES D. FOX.

JAMES B. GANTT.

Court of Appeals at Kansas City.

E. J. BROADDUS, PRESIDING JUDGE.

ASSOCIATE JUDGES.

• JAMES ELLISON.

J. M. JOHNSON.

Court of Appeals at St. Louis.

CHARLES C. BLAND, PRESIDING JUDGE.

ASSOCIATE JUDGES.

RICHARD L. GOODE.

ALBERT D. NORTON.

¹Resigned April 7, 1904.

²Appointed to succeed Judge Marshall.

TENNESSEE—Supreme Court.**W. D. BEARD, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****JOHN S. WILKES.
W. K. McALISTER.****JOHN K. SHIELDS.
M. M. NEIL.****TEXAS—Supreme Court.****REUBEN R. GAINES, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****THOMAS J. BROWN.****F. A. WILLIAMS.****Court of Criminal Appeals.****W. L. DAVIDSON, PRESIDING JUDGE.****JUDGES.****JOHN N. HENDERSON.****M. M. BROOKS.****Courts of Civil Appeals.***First District.***W. H. GILL, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****R. A. PLEASANTS.****T. S. REESL.***Second District.***T. H. CONNER, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****I. W. STEPHENS.****OCIE SPEER.***Third District.***H. C. FISHER, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****W. M. KEY.****J. A. EIDSON.***Fourth District.***J. H. JAMES, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****W. S. FLY.****H. H. NEILL.***Fifth District.***ANSON RAINEY, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****JOHN BOOKHOUT.****J. M. TALBOT.**

COURT RULES.

COURT OF APPEALS OF INDIAN TERRITORY.

Adopted February 15, 1896, and Revised to June 17, 1904.

Rule I.

TERMS OF COURT.

There shall be held two terms of court a year, one of which shall commence on the second Tuesday in June and the other on the fourth Tuesday in September of each year. (Adopted and promulgated October 5, 1901.)

Rule II.

ATTORNEYS.

Attorneys holding license to practice law in the Supreme Court of the United States, or in the courts of the several districts of the Indian Territory, may be enrolled as attorneys of this court on motion, and exhibition of such license at time of motion.

Provided: That attorneys of record of Supreme Courts of other states and territories may, upon motion, appear specially in particular cases. (Adopted and promulgated June 17, 1904.)

Rule III.

MOTION FOR NEW TRIAL.

In a motion for a new trial, filed in any district of the United States court in this territory, it shall be necessary to set out in detail the different particular errors relied upon to secure a new trial, and this court will not consider any ruling or action of any of the district courts of this territory, unless objection and exception was made and taken at the time of the trial, as the same is shown in the record in any given cause, and such ruling or action be set out in the assignment of errors, as required in paragraph 2 (b) of rule X. (Adopted and promulgated June 17, 1904.)

Rule IV.

TRANSCRIPT.

All transcripts shall commence with the style of the court in which the controversy was decided, and the name of the judge presiding when the decree, judgment, or order in the case was rendered, to reverse which the appeal is prayed or a writ of error intended to be prosecuted, and its date, as: "Pleas before A. B., Judge of the United States Court for the ——— District of the Indian Territory, on the ——— day of ———, 19—;" the names of all parties litigant as

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they stood when the controversy was decided, with the nature of the suit or motion, as:

J. K. Plaintiff,	} Action on Promissory Note.
against	
L. M. Defendant.	

When an order of court is mentioned, the date must be distinctly stated and not by reference to the day and year aforesaid.

No paper shall be more than once copied; when it occurs a second time, let it be referred to by the page in the preceding part of the record.

When depositions are taken on interrogatories, in making up the transcript, the answers must follow immediately after the questions to which they are responsive.

When an equity case has once been before this court and a transcript is again called for, to have error which occurred after its return corrected, the second transcript shall begin where the former ended; that is, with the judgment of this court, which should be entered of record in the United States court of the district in which the case originated, omitting the opinion of the appellate court, —the appeal or supersedeas bond to be the last paper copied.

At the beginning of every transcript there must be prefixed an index, or table of contents, referring to the pages of record, where the matter referred to is copied, as:

Complaint	Page 1
Exhibit A. (note of J. B. to C. F.).....	" 3
Answer	" 4
Exhibit B. (deed from A. to B.).....	" 5
Decree (or judgment).....	" 6
Appeal	" 7

And so on to the end, referring to the material points of the whole record. There should also be marginal notes on each page indicating the subject-matter thereof.

The fee for the transcript must in all cases be certified, also the cost in the United States court of the district where a supersedeas bond has been filed, specifying by whom paid.

Rule V.

OMISSIONS FROM TRANSCRIPT.

The clerks of the courts in each district, in making up transcripts of records to be transmitted to this court, shall not, where

the defendant has appeared, set out any summons or other writ or process for appearance, or the return thereof; but in lieu thereof shall say (e. g.), "Summons issued, —, 19—; served —, 19—" and if any pleading be amended, the clerk shall treat the last amended pleadings as the only one of that order in the cause, and he must refrain from copying any pleading that is withdrawn, waived or superseded by amendment, unless it is called for by the bill of exceptions or by instructions of counsel in writing; and no clerk shall insert in any transcript any matter touching the organization or adjournment of the court, or the impaneling or swearing of the jury or the names of the jurors; or mention of any continuance or commission to take testimony or the return thereto, or notice to take depositions, or the caption or certificate of the officer before whom taken, or any other merely incidental matter, unless the same be specially called for by the bill of exceptions; or in cases in equity by written instructions to the clerk from either party. Such instructions shall be filed by the clerk and copied in the transcript.

Rule VI.

CONTENTS OF TRANSCRIPTS AT LAW.

In civil cases at law, the transcript shall set out, after the caption, a copy of the complaint, the exhibits, if any; then the statement as to the summons; then the answer; the exhibits, if any; then the orders and papers referred to therein, in immediate succession up to and including the final judgment; then the record entry of filing motions for new trial and in arrest of judgment, and the order of court thereon; the prayer and granting of appeal; the filing of the bill of exceptions; the bill of exceptions, with the papers therein referred to; the supersedeas bond, if any; then the certificate, duly signed and sealed.

Rule VII.

TRANSCRIPT IN CHANCERY CASES.

In chancery cases, after the statement as to the court, judge and parties, the complaint should be copied in transcript, unless an order of the court properly precedes it, then the exhibits referred to; then statement as to summons; then the order of court previous to filing answer; then answer and exhibits referred to therein. In all such cases the whole of the evidence shall be embodied in the transcript unless the parties shall agree upon an abbreviated statement thereof.

Depositions by the clerk shall be introduced as follows:

"Depositions read on the part of the plaintiff.

"Depositions of A. B. taken for plaintiff at — on — day of — 19—."

"Depositions read for defendant.

"Depositions of C. D., taken for defendant on the — day of — 19—."

"Decree." "Appeal and supersedeas bond, if any. Opinion of the court."

Rule VIII.

TRANSCRIPT IN CRIMINAL CASES.

Upon appeal in criminal cases, after the caption, the transcript shall begin with the return of the information or indictment into court, unless a motion shall have been made to set aside the information or indictment; and in cases of motion to set aside indictment the proceedings impaneling the grand jury shall also be copied in the transcript. Then should follow the information or indictment, the pleadings by the defendant, and subsequent proceedings in the case.

Rule IX.

PRINTING RECORDS.

1. On the filing of the transcript in every case, the clerk of this court shall cause twenty copies of the same to be printed and shall furnish three copies of the record so printed, to each party, at least fifteen days before the day on which the same is set down for hearing.

2. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record (which in no case shall exceed the sum of eighty cents per page) before ordering the same to be done.

3. If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the cost of printing, the case may be dismissed.

4. In case of reversal, affirmance, or dismissal with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given. (Adopted and promulgated January 6, 1900.)

Rule X.

BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court at least fifteen days before the case is called for argument twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain in order here stated:

(a) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(b) A specification of the errors relied upon, in law cases, shall set out separately and particularly each error asserted and intended to be urged; and in equity cases the specification shall state, as particularly as may be, in what the decree is alleged to be erro-

neous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to, totidem verbis, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(c) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specifications of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. Where the case is reached in the regular call of the docket, and there is no compliance with this rule by either party, the case shall be dismissed at the cost of the appellant.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

7. The briefs so filed under this rule shall be printed in the same style, of the same size and on paper of the same quality and of same character and style of type as prescribed for transcripts under Rule 9, adopted this day. (Adopted and promulgated April 2, 1898.)

Rule XI.

MOTIONS.

All motions shall be in writing, and filed with the clerk before presentation to the court, and by him noted on the docket. The motion shall be endorsed with the number and style of the case, the character of the motion, and name of the attorney presenting the same and, except in cases where all the facts relied upon to support the motion are of record, such motion shall be supported by affidavit. Such motion will be decided after the hearing by the Court, up-

on reconvening after a recess or adjournment.

No motion shall be heard without reasonable notice has been given to counsel upon the opposite side of the case, except where, in the opinion of the court, an emergency exists.

Proof of the service of notice, except where there is written waiver or acceptance thereof, shall be by affidavit, filed with the clerk of this court, together with a copy or duplicate of the notice served. (Adopted and promulgated June 17, 1904.)

Rule XII.

RE-HEARING.

A petition for re-hearing after judgment, may be presented at the term at which judgment is entered, or within fifteen days thereafter or at any time by special leave granted during the term, and must briefly and distinctly state the grounds, and if presented in vacation within said fifteen days such petition shall be presented to one of the Judges of said Court, who, if he be of opinion that the same should be granted, shall endorse thereon the date of presentation of such petition to him, and order the same to be filed with the Clerk of said Court, and, at the same time, order a stay of all proceedings in said cause until the hearing of the petition by said Court at the succeeding term thereof. (Adopted and promulgated September 25, 1902.)

Rule XIII.

MANDATE.

In all cases finally determined in this court, a mandate or other proper process in the nature of a procedendo, shall be issued at the termination of sixty days after the final disposition thereof, unless otherwise especially ordered by the court, for the purpose of informing the court below of the proceedings of this court, so that such proceedings may be had in such courts as to law and justice may appertain. (Adopted and promulgated January 6, 1900.)

Rule XIV.

APPEAL MAY BE DISMISSED, WHEN

In all civil cases when the appeal has been taken more than ninety days and a supersedeas bond filed, and the appellant has not filed in the office of the clerk an authenticated copy of the record, the appellee may at any time file in this court a certified transcript of the judgment, order, or decree appealed from, the order granting the appeal and the supersedeas bond, with his motion to dismiss the appeal or affirm the judgment; and the appeal shall be dismissed or the judgment affirmed at the cost of the appellant, unless good cause be shown against it: Provided, a notice of ten days of such

intended motion be given to the appellant or his attorney of record.

Rule XV.

ORAL ARGUMENT.

One hour on each side shall be allowed for oral argument in each case and no more, without special leave of court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, but a fair opening of the case shall be made by the party having the opening and closing arguments. The plaintiff in error or appellant shall be entitled to open and close the argument, but when there are cross appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to the opening and concluding argument. The party having the concluding argument if he shall have used one hour in his opening argument may be allowed fifteen minutes time in addition, in which to make a closing argument.

Rule XVI.

SUMMONS AND WARNING ORDER ON WRITS OF ERROR AND APPEALS GRANTED BY THE CLERK OF THIS COURT.

When a writ of error is issued or an appeal granted, a summons shall issue commanding the appellee to appear at the ensuing term and defend. If the summons be returned not executed, an alias may issue at any time; and when it shall appear that the appellee is a nonresident, notice shall be given by warning order that he appear by a day to be fixed, which order shall be published weekly for at least four weeks in some newspaper published at the place of holding this court, the first of which publication shall be at least thirty days before the appearance day fixed as aforesaid, and an affidavit of such publication shall be filed with the clerk. The cause shall stand for hearing in the same manner as if notice against such appellee had been returned executed.

Rule XVII.

BILLS OF EXCEPTION.

Bills of exception shall be so prepared as only to represent to the appellate court the rulings of the court below upon some matter of law, and shall contain only such statement of facts as may be necessary to explain the bearing of the rulings upon the issue or question involved; and if the facts be undisputed they shall be stated as facts, and not the evidence from which they are

deduced; and if disputed or a defect of proof be the ground of ruling or exception the evidence shall be set out at length. In no bill of exceptions shall any deed, will or other documentary evidence be inserted at length, but shall only be briefly stated according to its import and effect, unless the nature of the question raised and decided renders it necessary that it should be inserted in extenso; nor shall any document be more than once inserted as large in any transcript. Either party shall have the right to have any or all of the testimony in any case or all documentary proof inserted at length, it being stated at whose instance the same is so inserted, that costs may be awarded as the matter so incorporated may be deemed proper or not, to have been set out in full.

Rule XVIII.

Where in any law case in any of the districts of the United States court in this territory, at the time the verdict of a jury is rendered or a finding of the court is made when the case is submitted to the court without a jury, either party desires to file a motion for a new trial, and gives notice thereof to the court, the court shall not render final judgment in the case until the party has an opportunity within the time provided by statute to file such motion for a new trial, and if such motion for a new trial be filed within the time allowed by statute, then the court shall not enter final judgment, until such motion for a new trial shall be finally determined and ruled upon.

Rule XIX.

PRACTICE, WHEN NO SPECIFIC RULE.

In cases where no provision is made by statute or by these rules, proceedings in this court shall be in accordance with the practice in the United States circuit court of appeals for the Eighth circuit.

Rule XX.

DEPOSIT.

On filing the original transcript with the clerk of this court, the appellant, or plaintiff in error shall deposit with the clerk the sum of ten (10) dollars for the payment of clerk's costs. If this amount is exhausted, the clerk may call on the party occasioning any additional costs, to advance a further sum of ten (10) dollars. Any amounts so advanced and not used shall, at termination of the case, be returned to the party entitled thereto.

COURT OF APPEALS OF KENTUCKY.**In Force April Term, 1906.**

I. In accordance with section 118 of the Constitution, this court after January 1, 1896, will be divided into two departments, each one of which shall consist of three judges, besides the Chief Justice, who shall preside over each department. Each division shall sit on alternate days during each week, when not in joint session, to hear arguments and motions and deliver opinions. Opinions shall be delivered as the judgment of the court without reference to the department delivering them. When the Chief Justice is absent, or, if present, from any cause fails to preside, the judge next oldest in commission shall preside with each department, and shall require the presence of a judge from either department when necessary to constitute a majority of the entire body. The cases, when submitted, shall be assigned by the Chief Justice to each department, and in such a manner as to equalize the burden.

II. Whenever a case involves a constitutional question, either federal or state, or in any case where, in the opinion of the Chief Justice, the importance of the case requires, both departments shall hear the argument, whether oral or written, and pass on the questions involved; and in cases where the judges composing one department do not concur, it shall be the duty of the Chief Justice to notify the other department, and have the question at issue disposed of in joint session.

When a majority of either department, including the Chief Justice, shall desire a joint session for the purpose of passing on any question or hearing any cause, the entire board shall be assembled for that purpose.

III. That in all cases or appeals hereafter filed, or now filed and not submitted, it shall be the duty of the appellant to file his brief twenty days prior to the day the case is set for hearing, and the appellee to file his brief ten days prior to that time, and a failure to do so by the appellant shall cause a dismissal of the appeal without prejudice, and upon the part of appellee, he will, if in default, be required to pay the costs up to the date of filing his brief. No oral argument will be ordered or heard on the part of the party in default unless his brief is filed as herein provided. When the briefs are in, or the brief of the party not in default, an oral

argument will be ordered if desired, and a time fixed for the hearing.

All cases will be decided as nearly as practicable in the order of their submission.

IV. Unless by leave of court oral argument will be limited to one hour on the side.

When cases are orally argued, further time beyond one day will not be given for briefs; the cases will immediately be sent out to the judges in rotation, and will be taken up at once before other cases.

V. Records not made out in a legible handwriting, or not indexed, are to be condemned, and the clerk making out such record to be prohibited from collecting anything therefor; and the clerk of this court will disregard the expense thereof in taxing cost without any special order in the case.

VI. When two members of a department desire it, a rehearing shall be granted.

VII. When the record of a former appeal in the same cause is necessary to the decision of a subsequent appeal, or when a record already in this court is made part of a record in another case, and not copied into the transcript, the attorney for the appellant must see to it, on pain of having the appeal dismissed, that such old record is placed with the new record before the cause is submitted.

VIII. A party intending to move that the clerk of the inferior court or the adverse party shall be adjudged to pay the costs resulting from a violation by such clerk or party of subsection 11 of section 737 of the Civil Code, shall make such motion at or before the submission of the cause, and not thereafter; and such motion shall indicate the portions of the record claimed to have been improperly copied, and the pages of the transcript where they may be found.

IX. If the motion is against the clerk, he must be served with a copy of the written motion at least five days before the cause is submitted.

X. If an appellant or his attorney, or an appellee with a cross-appeal, or his attorney, shall, for any purpose, withdraw the record from the clerk's custody without the special order of the court, and fail or neglect to produce it in court on call of the case for

submission or argument, the appeal or cross-appeal, on motion of the adverse party, shall be dismissed for want of proper prosecution.

XI. Ten days' notice of a motion to affirm as a delay case must be given appellant or his attorney, otherwise such motion will not be heard until the case is called for trial on the day it is set on the docket.

XII. Where time is extended to file a petition for rehearing, and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the clerk in the clerk's office within the time shall be held sufficient. The clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the judges.

XIII. Petitions for rehearing shall be considered by a judge other than the one who delivered the opinion in the case. The petition must be printed, and ten copies must be filed.

XIV. Ordered, that there be held three terms of the Court of Appeals in each year as follows:

September term, beginning third Monday in September, and ending the second Saturday in December.

January term, beginning first Monday in January, and ending the last Saturday in March.

April term, beginning second Monday in April, and ending the first Saturday in July.

XV. Ordered, that no extension of time for filing a petition for rehearing will be granted except upon the affidavit or statement of the attorney or client stating sufficient cause therefor.

XVI. Cases once adjudicated by this court, and again brought up by appeal may be advanced by leave of the court on motion of either party.

XVII. There shall accompany every brief a classification of the question discussed. The classification may be indicated by a "word" which suggests a subject, or by a brief synopsis of it.

The authorities relied upon shall be cited under the appropriate heading.

XVIII. No case on the appearance docket will be passed for oral argument unless there be filed by counsel a statement showing the legal questions involved, and the court shall deem them new and of sufficient importance to require oral argument.

XX. Except in cases presenting novel questions, opinions of the court will, for the present, be delivered without elaboration.

XXI. Adopted March 7, 1901, by Kentucky Court of Appeals. When a circuit court clerk makes a typewritten transcript for use in the Court of Appeals he shall use a record ribbon

(black); when he makes a manuscript transcript for the same purpose he shall use only one side of the paper.

For a clerk to disregard either of the foregoing requirements is to take the risk of having the transcript condemned.

XXIII. Notice to the adverse party must be given of all motions made in this court, where it can reasonably be done: Provided, however, that this rule shall not apply to motions made on the regular calling of the cases.

XXIV. In all cases submitted with leave to brief, the brief must be filed in thirty days after leave is given, unless further time is allowed by the court. After submission, briefs must be filed in open court.

XXV. No person holding the position of clerical assistant to a judge of this court shall practice as attorney in the court or be employed or act in any way as such in any case pending therein.

XXVI. In any case where only a question of law is relied on, the parties being all sui juris may file in the clerk's office an agreed statement of the facts shown by the evidence, also of the question or questions of law raised; and in such case the clerk shall copy into the transcript such agreed statement of facts in lieu of a copy of the evidence, and the transcript shall be treated as a complete record.

XXVII. Hereafter this court will conclusively presume, after submission, that records brought up to this court on schedule filed in the clerk's office of the inferior court, as prescribed by section 737 of the Code of Practice, is the complete record, and that all parties interested have consented to try the appeal on such record. Before submission the court will, in its discretion, allow a transcript of other parts of the record to be filed when deemed necessary in furtherance of justice.

XXVIII. Counsel for appellant or appellee, if he wishes the record printed, may, within thirty days after a record has been filed in the clerk's office, file a statement with the clerk of this court indicating the parts of the record he thinks are essential to the hearing of the appeal, and, if filed by the appellant, stating concisely the grounds of reversal relied on; and thereupon the clerk shall send to the counsel for the opposing side a copy of the statement thus filed, and if said opposing counsel does not, within thirty days, file with said clerk a statement of other parts of the record deemed essential by him, the parts indicated, as before stated, shall be deemed and treated as the complete record, and the adverse party shall be deemed to have consented to a hearing on the parts indicated. If such notice shall be sent to counsel for appellee, and he wishes to pray

a cross-appeal, and he thinks other parts of the record not indicated are necessary to illustrate his cross-appeal, he shall in the statement filed by him state that he expects to pray a cross-appeal, also concisely the grounds of reversal relied on by him, and indicate not only the additional parts of the record necessary to illustrate the appeal, but the cross-appeal; and in the event a cross-appeal is to be prayed the clerk shall send a copy of said statement to the counsel for appellant, who shall, if he wishes other parts than those mentioned in the statement filed by counsel for appellee, within thirty days so indicate by a statement filed with the clerk, and if he shall not do so within the time named the appellant shall be deemed to have consented to a trial on the cross-appeal on the parts of the record indicated. In the event the appeal shall be docketed prior to the time when this rule may be executed, the case shall be continued to a subsequent day in the term, or, if necessary, to the next term of the court, upon a statement duly signed and filed by the counsel for one side or the other that he intends to avail himself of this rule. The clerk shall cause to be printed such parts as shall be thus indicated and for his services required by this rule shall be allowed such sum as may be indicated by this court, to be taxed as costs against the unsuccessful party. Whoever shall designate parts of the record to be printed shall deposit with the clerk such sum as he may estimate will be necessary to meet the cost of printing. If counsel for either

party shall cause unnecessary parts of the record to be printed, such order as to the costs may be made as the court shall think proper. If either party shall willfully omit any part of the record essential to the proper decision of the case, the printed transcript will be rejected and the cost of printing will be adjudged against him.

This rule shall not take effect until the September term, 1903, and shall not apply to any case where the amount involved is less than \$5,000, nor where the appeal is docketed prior to that term. Where the recovery is other thing than money, the party asking the record printed shall file his affidavit and the statement of his attorney that it is of value \$5,000.

XXIX. The Commissioner of Appeals will report to the court in consultation on such cases as may be referred to him, and he will prepare opinions as may be directed by the court. He will have no voice in the decision of a case; opinions prepared by him will be subject to the approval of the court, and when approved will be entered as the judgment of the court.

TAX ON APPEALS.

Counsel, in writing briefs, are requested by the court to write only on one side of the paper.

The tax on appeals is one dollar, and in all cases must be paid to the clerk of the Court of Appeals before the cases will be filed.

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OF THE

KENTUCKY COURT OF APPEALS.

Compiled by W. B. O'CONNELL, Deputy Clerk Kentucky Court of Appeals.

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THE SOUTHWESTERN REPORTER.

VOLUME 92.

PENDLY v. ILLINOIS CENT. R. R. CO. et al.
(Court of Appeals of Kentucky. March 21,
1906.)

1. APPEAL—REVERSAL—DAMAGES.

Though Civ. Code Prac. § 341, provides that a new trial shall not be granted on account of the smallness of damages in an action for injury to the person or reputation, this does not prevent a plaintiff in whose favor a small verdict has been given from obtaining a reversal on the ground of other errors.

2. JURY—PEREMPTORY CHALLENGES—NUMBER.

Under Ky. St. 1903, § 2258, giving each party litigant the right to peremptorily challenge three jurors, where there were two defendants they were entitled to only three peremptory challenges, and not to three each.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Jury, § 609.]

3. SAME—IMPANELING JURY—WAIVER OF ERROR.

Where a party objected to the ruling of a court permitting three peremptory challenges to each of the defendants, and saved proper exceptions thereto, error in the ruling was not waived by failing to move to discharge the jury after it had been completed, and by accepting the jury as finally impaneled without objection.

4. NEGLIGENCE—PLEADING—DEGREE OF NEGLIGENCE.

Though an action for injuries alleged gross negligence, the plaintiff was entitled to recover on proof of ordinary negligence resulting in the injuries.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 204, 209, 212.]

5. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Error in instructing in an action for personal injuries, that the finding must be for the defendants, unless the jury believed that the plaintiff was injured by their gross negligence, was erroneous and prejudicial to plaintiff, though the jury found a verdict for a small sum in favor of the plaintiff.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by Floy Pendly against the Illinois Central Railroad Company and the Paducah City Railway Company. From the judgment, plaintiff appeals. Reversed.

Oliver, Oliver & McGregor, for appellant. Trabue, Doolan & Cox, Wheeler, Hughes & Berry, and J. M. Dickinson, for appellees.

CARROLL, C. In this action against both of the defendants to recover damages

for personal injuries, a verdict for \$50 each was returned against them. The plaintiff, who is the appellant here, concedes that under section 341 of the Civ. Code Prac., providing "a new trial shall not be granted on account of the smallness of damages in an action for an injury to a person or reputation," this case cannot be reversed alone because the damages are not adequate compensation for the injuries received, but contends that the court committed serious errors to her prejudice in the trial of the case and that the small verdict was due to these erroneous rulings. If errors affecting the substantial rights of appellant were committed by the trial court, the fact that she cannot obtain a reversal of the case because of the small amount of damages recovered, does not preclude this court from granting her a new trial if it should be granted for other reasons appearing in the record.

On the trial of the case, the right to have a jury drawn from the box in the manner provided in section 2267, Ky. St. 1903, was waived, and a jury was impaneled without reference to this section. The record shows that the plaintiff, as provided in section 2258, Ky. St. 1903, giving each party litigant the right to peremptorily challenge three jurors, did peremptorily challenge 3 of the 12 jurors, and thereupon the panel was filed and accepted by plaintiff and tendered to the defendants, who were each permitted to and did over the objection of the plaintiff peremptorily challenge three of the jurors so accepted, or six jurors in all. The plaintiff saved proper exceptions to this ruling of the court and relies on this error for reversal. In *Soudousky v. McGee*, 4 J. J. Marsh. 267, this section was passed on by the court in construing a statute which declared that "each party litigant shall have the right of peremptory challenge to one-fourth of the jury summoned," and held "that the 'parties litigant', mean the antagonist sides of the controversy. If there should be a plurality of plaintiffs, they are all only one party litigant. So a plurality of defendants constitute one, and but one party to the suit. The plaintiff can challenge peremptorily no more

than three jurors." And this rule applies to the defendants, no matter how many there may be. In *Cumberland Telephone & Telegraph Company v. Ware's Admr.*, 74 S. W. 289, 24 Ky. Law Rep. 2519, this case was approved, and it was held that when a jury was drawn under section 2267, the plaintiffs and defendants, no matter how many there might be, could only strike three names from the list. It is therefore not material so far as this question is concerned, whether the jury were selected in the manner provided in section 2267 or without reference to that section. In neither case can the defendants or plaintiffs peremptorily challenge more than three jurors.

It is said, however, that conceding there was error committed by the court in allowing these appellees a peremptory challenge of six jurors, that the error was waived by the appellant in failing to move to discharge the jury after it had been completed, and in accepting the jury as finally impaneled without objection. We do not think this point is well taken. The purpose of the Code, in requiring objections and exceptions to rulings of the court, is to call the attention of the court sharply to the question in controversy in order that the court may correct his ruling if he concludes that it was erroneous. It is not necessary to persist in making objections and exceptions of the same character and to the same subject-matter when the attention of the court has been fairly directed to it, as in this case. When the appellant accepted the full jury and tendered it to the defendants, they only had the right to peremptorily challenge three jurors, leaving nine jurors accepted by the appellant in the box. When they were permitted to remove six jurors, a substantial right of the appellant was taken from her. Three jurors that she had accepted, and was entitled to have try her case, were taken off the jury without authority of law.

The petition in the case alleged that the injuries were caused by "the gross carelessness, recklessness, and willful negligence of the defendants." The answers of the defendants deny that they were guilty of any degree of negligence. The court instructed the jury that unless they believed from the evidence that the appellant was injured by the gross negligence of the defendants, they must find for the appellees. The appellant complains of this instruction and contends that although her petition charged that the defendants were guilty of gross neglect she had a right to recover upon proof that they were guilty of ordinary negligence, and of the correctness of this we have no doubt. Gross neglect is the highest degree of neglect now recognized by our statute, and under a petition charging gross neglect, the plaintiff may recover for any lesser degree of negligence. *Claxton's Admr v. L. & B. S. Ry. Co.*, 13 Bush, 636; *L. & C. L. R. Co. v. Case's Admr.*, 9 Bush 728; *N. N. & M. V. R. Co. v.*

Glenn, 11 Ky. Law Rep. 579; *Forkner v. Kean*, 32 S. W. 265, 17 Ky. Law Rep. 654.

Counsel for the appellee insist that, although the instruction of the court in the respect named was erroneous, they were not prejudicial to the appellant, because the jury found that the defendants were guilty of gross neglect, and must have so determined before they could find any damages at all, and therefore the question which resolved itself in the mind of the jury was how much damages they should find, admitting that the defendants were guilty of gross neglect. What influences operated on the mind of the jury in making their verdict we do not know, nor is it within our province to inquire. It is, however, certain that the court erred in instructing the jury that they could not find for the plaintiff unless they believed appellees were guilty of gross negligence. Upon the whole case, we have reached the conclusion that the appellant's substantial rights were prejudiced by the rulings of the lower court and she is therefore entitled to a new trial.

Judgment is reversed, and cause remanded, with directions to proceed in conformity to this opinion.

DITTO v. SLAUGHTER.

(Court of Appeals of Kentucky. Feb. 20, 1906.)

1. WITNESSES—COMPETENCY—ACTION AGAINST WIFE.

Under the express provisions of Civ. Code Prac. § 606, in an action against a married woman which might have been brought against her if she had been unmarried, either the husband or wife may testify, but not both of them.

2. EVIDENCE—THREATS—ADMISSIBILITY.

In an action against a married woman on a note, where the defense was duress, it was proper to permit defendant to testify as to threats made by the payee, alleged to have been communicated to her by her husband; but such evidence was admissible for the sole purpose of showing defendant's state of mind when she signed the note, and not as evidence that the payee made them.

3. TRIAL—INSTRUCTIONS—PURPOSE OF EVIDENCE.

The court should have expressly charged that the threats could be considered only for the purpose of showing defendant's state of mind.

4. BILLS AND NOTES—INVALIDITY OF NOTE—NOTICE TO PAYEE.

Where a note was given by a married woman for the purchase price of corporate stock, the transaction having been carried on through the husband and the stock having been worthless, as was known to the seller, it was sufficient to put him upon notice that the husband or someone must have misrepresented the value of the stock, or that the wife was incompetent to protect herself in a business transaction.

5. SAME—PLEADING—PROOF—VARIANCE.

Where, in an action on a note, the petition alleged that it was given in consideration of certain shares of stock, and such fact was also recited in the note, plaintiff could not prove facts showing another consideration.

Appeal from Circuit Court, Daviess County.
"Not to be officially reported."

Action by J. W. Slaughter against Clara L. Ditto. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Sweeney, Ellis & Sweeney and Little & Slack, for appellant. Geo. W. Jolly, for appellee.

NUNN, J. This action was instituted by appellee against the appellant upon the following writing: "Owensboro, Ky., June 30, 1903. \$1,650.00. Sixty days after date I promise to pay to the order of J. W. Slaughter the sum of sixteen hundred and fifty dollars for value received of him, with interest thereon from date until paid, at six per cent. per annum. This note is executed as the purchase price of thirty three shares of stock of the Owensboro Pants Manufacturing Co. this day transferred to me by said Slaughter, and said stock is hereby pledged as collateral security for said stock. Clara L. Ditto." Indorsed on the back: "Credited by \$1,000 paid October 15, 1903." By this action appellee sought to recover a personal judgment, and to enforce a lien upon the shares of stock to satisfy the same.

The appellant filed an answer and counterclaim, and several amended answers, in which she denied all liability on the note, and sought to recover of the appellee on her counterclaim the \$1,000 she had paid thereon. She set out elaborately and in detail the reason why she was not bound to pay the note, and why she should be permitted to recover of the appellee the \$1,000. The substance of her reasons was as follows: That the note was executed without any consideration; that the shares of stock alleged to have been sold to her were worthless, and without any market value, which fact was known to appellee, and was not known to her, at the time she executed the note; that the note was procured from her by the fraud and duress of the appellee, and that she paid the \$1,000 thereon by reason of the fraud and duress of appellee, that it was obtained from her without any consideration; and that there was an implied obligation on his part to return it. She tendered with her answer the shares of stock, and relinquished to appellee all claims thereto. The appellee declined to accept the shares of stock, and controverted all the affirmative matter in her pleadings. The evidence of appellant was heard, and on motion of appellee the court gave peremptory instruction to the jury to find for appellee.

The facts as they appear in the record leading up to the execution of this note are as follows: Sometime prior to the date of the note there was established in Owensboro a corporation known as the "Owensboro Pants Manufacturing Company." The corporation had obtained insurance on the property to the amount of \$68,000. J. H. Ditto, the husband of appellant, was the president, appellee, J. W. Slaughter, and others, were the directors. The property of the corpora-

tion was destroyed by fire. The insurance company declined to pay the loss. J. H. Ditto and two or three others, connected with the company, were arrested on the charge of burning the property. It appears that J. H. Ditto desired to employ the law firm of Miller & Todd to act in his defense. When he approached them upon the subject he ascertained that appellee and Brown and Reinhardt, stockholders in the corporation, had employed this firm to sue him (Ditto) for damages on the charge or fraud and deceit practiced in the sale of the stock to them, claiming that they had paid Ditto more than the stock was worth.

Appellant alleged that the firm of Miller & Todd declined to engage in the defense of her husband by reason of objection from appellee, and other stockholders named. Miller testified that appellee did not object to his firm engaging in the defense of Ditto, but that his firm declined on account of professional reasons, unless these claims of the stockholders, whom they represented, were settled. Miller also stated that on the day the note was executed, and while the courthouse bell was ringing, calling persons interested in the trial of Ditto to the courthouse, appellee and Brown and Reinhardt were in his office. Ditto came in, and they had a few words in his presence, then passed into a back room and had some conversation that he did not hear. They returned into the room and requested him to prepare a note, which he did. Ditto took the note, and in a short time returned and delivered it to the appellee. He then went to the courthouse with Ditto to aid him in his defense. According to Mr. Miller's evidence he had no knowledge when he wrote the note that Mrs. Ditto was to sign it. He supposed that Ditto would sign it.

It appears from the evidence, without contradiction, that about 10 days prior to the execution of this note the directors of the pants company had met with the representatives of the insurance companies and compromised; the pants company accepting \$30,000 in full satisfaction of all its claims on the insurance. It was shown that this made the pants company insolvent, and its stock was worthless, and had no market value, and that appellee knew this and appellant did not. Appellee also alleged, and proved by her own testimony, that she never had any desire to purchase any stock of the pants company; that she did not know anything with reference to the value of the stock; that the subject of buying stock in the corporation was never mentioned to her by any one, until her husband brought her the note sued on; that she was frightened and distressed at that time on account of her husband's troubles; that she was not then in a condition of mind to consider this subject of purchasing stock in that company, or any other; that her husband at the time he presented the note to her for her signature

said that appellee would not consent for Miller to defend him unless she executed the note, and also appellee had stated that unless the note was executed he would become a witness and relate some facts, with reference to the burning of the pants company's property, which might make it go hard against him. Under these circumstances she was forced to sign the note. She also testified that she paid the \$1,000 on the note under like threats made by appellee, which were reported to her by her husband. That is, that appellee would go before the grand jury and relate facts with reference to the burning which might cause an indictment to be returned against her husband. Appellee objected to all that part of appellant's testimony with reference to statements made to her by her husband. The court overruled the objections. The appellant then offered to introduce her husband, to prove by him that appellee did make the statements and threats as reported to her by him. The court sustained an objection to this testimony.

It is expressly provided by section 606, Civ. Code Prac., that in an action like the one at bar either the husband or the wife may testify, but not both. As the wife testified on the trial, the court did not err in refusing to let her husband give evidence. This court is equally divided on the question as to whether the lower court erred in permitting appellant to testify as to the threats made by appellee alleged to have been communicated to her by her husband; therefore, the action of the lower court is affirmed in this matter. But all agree that if admitted, the court should have expressly charged the jury that they could not consider these alleged statements and threats so communicated to her as any evidence that appellee had made them, but this evidence was permitted alone for the purpose of showing, if it did tend to show, the state of mind of appellant at the time she signed the note; that is, whether her signature was obtained to the note by fraud or duress. If her husband did communicate these threats to appellant, and they were false, then he committed the fraud and force upon her; but if the communications were true, the wrong was committed by appellee. If appellant had not testified, she might have introduced her husband as a witness, and proven by him the conversations and transactions with the appellee with reference to the execution of this note, and the communications he made to his wife as coming from the appellee, and her apparent condition and state of mind at the time she signed the note. But she could not prove anything she said to him, with reference to the matter, not only for the reason that she was his wife, but because she was a party to the action, and could not prove her statements to make evidence in her own behalf.

We are of the opinion that the court erred in giving the peremptory instruction. There

was some evidence introduced tending to show that a fraud had been practiced upon the appellant, and that the appellee had received the benefit of it. It was proven in this case at the time appellee sold his stock to appellant it was worthless and had no market value, and he knew that fact. When J. H. Ditto left the office of Miller & Todd, with this note, and returned in a short time with the appellant's signature thereto, and the appellee accepted the note without comment or objection, the jury might have concluded from these circumstances that appellee had sent him, or at least consented for him to obtain his wife's signature. The surrounding circumstances were sufficient to put him upon notice that her husband, or some one, must have misrepresented the value of the stock which he had sold her, or that she was incompetent to protect herself in a business transaction.

The appellee cites the cases of *Fightmaster v. Levi*, 17 S. W. 195, 13 Ky. Law Rep. 412, and *Hall v. Hall*, 82 S. W. 289, 26 Ky. Law Rep. 555, as upholding his contention and right to recover in this action. The cases are not similar to this. The vendee Levi and the mortgagee Hall parted with their money or property, without any knowledge or notice that Mrs. Fightmaster and Mrs. Hall had been defrauded or forced by threats of their husbands to sign the deed and mortgage. But suppose Levi and the mortgagee Hall had not parted with their money or property, had received the property without any valuable consideration paid at the time, and it had been shown that their wives had been defrauded or forced to sign the documents; in such event, the results of the cases cited would have been different. To illustrate the proposition: Suppose appellee had been the owner of a horse known by him to be worth only five dollars, and appellant's husband had used unfair means and made a sale of the horse to her for two hundred dollars, and took her note payable to appellee, reciting in it that it was for the purchase price of the horse, and delivered the note to appellee, should the courts compel her to pay the note? We think not. In such a case the principle announced in 6 A. & E. Ency. Law, 701 (12th Ed.), is applicable: "When the inadequacy of consideration is very gross fraud will be presumed, for though in such a case there may be no positive evidence of it, yet, when the inequality is so great as to shock the conscience, the mind cannot resist the inference that the bargain must in some way have been improperly obtained."

The appellee's counsel contends in his brief that the true consideration for the note was not the shares of stock, it was something else, and cited authorities to the effect that proof is permissible to show the true condition to be other than that stated in the contract; but this rule cannot apply in this case, for the reason that it is not only recited in the note, but it is also alleged in the petition, that the

shares of stock were the consideration for the note, and it has often been decided by this court that a party should not be permitted to prove facts at variance with the allegations of his pleadings.

The judgment of the lower court is remanded, for further proceedings consistent with this opinion.

MURPHY v. WHITESIDES.

(Court of Appeals of Kentucky. March 1, 1906.)

1. GARNISHMENT—SERVICE OF ORDER—LIEN.

An order of attachment served on execution defendants does not create a lien on any of their property in the hands of persons on whom it was not served as a garnishee process.

2. SAME — EFFECT — KNOWLEDGE OF GARNISHEE.

The garnishment of funds in the hands of a garnishee for a certain amount does not authorize him to withhold from the defendant a greater amount, though he knows that the judgment on which the order of garnishment is based was for a greater sum than the amount named.

3. SAME—COMPROMISE OF WILL CONTEST—SHARE OF LEGATEE.

Where an order of attachment was served on an executor after the compromise of a will contest, the interest of a legatee was subject to the attachment only to the extent of the amount he was to receive under the compromise.

Appeal from Circuit Court, Nelson County.
"Not to be officially reported."

Attachment proceedings by Mary Murphy against W. P. Whitesides. From the judgment, plaintiff appeals. Affirmed.

J. A. & G. S. Fulton, for appellant. Morgan Yewell, for appellee.

PAYNTER, J. The appellant obtained a judgment against Al Whitesides for \$250 with interest thereon at the rate of 6 per cent. per annum from October 19, 1883, until paid, and costs, subject to a credit of \$50, May 15, 1885. The appellant also had a judgment against S. B. Hinkle and James H. Yager on the same obligation for the same amount. Executions were issued upon these judgments, and returns of no property found were made. On March 22, 1904, this action was filed against the three execution defendants on the judgments, and returns of no property found, and a general order of attachment was obtained and served alone on the execution defendants. There was indorsed on the order of attachment that the object of the proceeding was to attach the property of all the defendants and particularly against the interest of the defendant Al Whitesides, in and to the property devised to him by Marinda Whitesides. The debt described in the attachment was the sum for which judgment had been rendered, with interest from October 19, 1883. The only execution of the orders of attachment was by serving copies on the execution defendants. It appears that Marinda Whitesides, mother of the defendant, owned some bank stocks and a house and lot in Bloomfield of the

value of about \$2,700 or \$2,800. The appellee, W. P. Whitesides, was a child of the testatrix, and he and other interested parties were going to contest the will. He had only been devised \$10 of the estate. To avoid the contest the parties agreed to let the will be probated, and each of the interested parties were to receive a certain part of the estate. Al Whitesides had been nominated executor of the will, but never qualified. After this action had been instituted, W. P. Whitesides qualified as executor of the estate. Eli H. Brown obtained an attachment against Al Whitesides and attached in the hands of appellee, W. P. Whitesides, as executor, a small sum. Thus the matter stood when the appellant filed an amended petition and had an order of attachment issued and attempted to attach, in the hands of appellee, W. P. Whitesides, a sum sufficient to pay the appellant's judgment against Al Whitesides. The appellee, W. P. Whitesides, paid to Al Whitesides all of the estate that was coming to him from the compromise agreement, except enough to satisfy the Brown attachment, and \$250 at 6 per cent. interest from October 19, 1904, and \$16.65 costs of former suit subject to a credit of \$50 of May 15, 1885, and \$30, the estimated cost of this proceeding. The reason why the appellee, W. P. Whitesides, retained only enough in his hands to pay \$250, with 6 per cent. interest from October 19, 1904, and \$16.65 costs, subject to a credit of \$50 and the \$30 estimated costs, was because the order of attachment served on him only attached in his hands a sum sufficient to pay these amounts.

The original order of attachment served on the execution defendants did not create a lien upon any of their property in the hands of anybody, as it was neither served on any one as garnishee, or on any one holding any of their property in his hands for them, or either of them.

The appellant insisted that the appellee, W. P. Whitesides, had personal knowledge of the amount of the judgment which she had recovered against Al Whitesides, and therefore he ought to have withheld an amount sufficient to pay the judgment, regardless of the amount sought to be attached in his hands by the so-called copy of the order of attachment. The order served on W. P. Whitesides was not a copy of the original order of attachment, and, if it be of any force at all (which is doubtful, because the law contemplates that a copy of an order of attachment shall be served upon a garnishee or the creditor of the execution debtor), the garnishee can only be bound to account for the amount which he is commanded to withhold by the paper which is served upon him. He is not required to go to the record and find what amount is sought to be recovered in the action, neither is he required to look up the sheriff and examine the original order of attachment. The mere fact that the gar-

nishee may have knowledge that plaintiff's claim is greater than the amount sought to be attached in his hands does not make him responsible beyond the amount which he is commanded to withhold by the paper served upon him. The appellee, W. P. Whitesides, had no right to withhold from Al Whitesides any sum beyond that which was attached in his hands. Proceedings by attachment are summary and extraordinary and to be good must conform to all the requirements of law. *Pool v. Webster*, 3 Metc. 278.

W. P. Whitesides was interested in the estate of his mother, and he had the right to compromise with his brother as to the interest he should have in it. The order of attachment served on him could not have had a retroactive effect. It could not alter the transaction between the brothers in the settlement which they made. The garnishee cannot be placed in a worse position than he would be if he were sued by the defendant. The right of an attaching creditor cannot rise above the right of the defendant. A garnishee can make any defense which he could have made in a suit by the defendant. So the only amount which was due Al Whitesides by the appellee, W. P. Whitesides, was the amount which was coming to him under the compromise agreement, and he never could have recovered more than that amount from W. P. Whitesides. Hence, the appellant could not do so.

The judgment is affirmed.

HUNT v. NANCE et al.

(Court of Appeals of Kentucky. March 8, 1906.)

1. TRIAL—TRANSFER FROM LAW TO EQUITY.

Where, in an action of ejectment, defendants claimed title under a deed which plaintiffs by reply and amended petition attacked as a fraudulent conveyance, the case was properly transferred to the equity docket, under Civ. Code Prac. § 6, subsec. 1, and section 10, subsec. 4.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 30.]

2. REGISTERS OF DEEDS—COUNTY CLERKS—INSTRUMENTS ACKNOWLEDGED BEFORE PREDECESSOR IN OFFICE.

Under Ky. St. 1903, §§ 510, 511, providing that, if the office of county clerk shall be vacated leaving any instruments of writing unrecorded which shall appear to have been acknowledged or proved in part, the incoming officer may receive the complete acknowledgment and record the same, or, if they appear to have been acknowledged or proved ready for record, or to have been acknowledged or proved before another officer, the incoming clerk shall record them, and that the clerk of each county court shall record all instruments of writing which shall be lodged for record properly certified, a deed which is acknowledged before and certified by a county clerk or his deputy may, though not filed or lodged for record during his term, be properly recorded by his successor in office.

3. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE OF PRIOR DEED.

Actual notice of the existence of a deed, even though it be unrecorded, defeats the right

of a purchaser of the land at subsequent sale, unless the deed is fraudulent.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 474-476.]

4. ALTERATION OF INSTRUMENTS—DEEDS—INTERLINEATIONS—CONSENT.

Interlineations made in a deed after acknowledgment and delivery, but before being recorded, and with the consent of the parties and for the purpose of altering the estate conveyed, do not affect its validity as between the parties, nor render it inadmissible in an action of ejectment to show title in the grantee.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Alteration of Instruments, § 89.]

5. FRAUDULENT CONVEYANCES—RIGHTS OF SUBSEQUENT CREDITORS.

A voluntary conveyance from a brother to a sister is not fraudulent as to a subsequent creditor of the grantor, unless actual fraud is shown.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 189, 331.]

6. SAME—FRAUDULENT INTENT—EVIDENCE—SUFFICIENCY.

In a proceeding by a judgment creditor to recover land conveyed by the judgment debtor before the cause of action resulting in the judgment arose, evidence held insufficient to show that the judgment debtor had the creation of the debt evidenced by the judgment in contemplation at the time of the conveyance.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by May Hunt against Q. E. V. Nance and others. Judgment for defendants, and plaintiff appeals. Affirmed.

D. G. Park, for appellant. Crice & Ross, for appellees.

SETTLE, J. This appeal involves the title to 80 acres of land in McCracken county which the lower court adjudged to be the property of appellees, though this action was instituted by appellant to recover it. As originally brought the action was one of ejectment, but, upon the filing of the answer and other subsequent pleadings, it became a case of which only a court of equity could take cognizance. Stripped of all irrelevant matter, the answer as amended contained a denial of appellant's title and asserted title in appellees to the land in controversy by purchase and deed from T. J. Sanderson, the former owner, accompanied by actual and continuous possession upon their part of the land from the date of the purchase. The affirmative allegations of the answer were traversed by reply, in which, as well as by amended petition, the deed from Sanderson to appellees was attacked by appellant upon the grounds that it was a voluntary conveyance without consideration, made in contemplation of Sanderson's insolvency, and to defraud his creditors. The amended petition and reply were controverted by answer and rejoinder respectively. It appears from the record that Sanderson was indebted to appellant in a considerable amount upon a judgment recovered by the latter against him in the Graves cir-

cult court for slander; that executions had duly issued on the judgment and been returned "no property found," as to the greater part thereof. Furthermore, that after the return of the executions appellant instituted a second action in the same court against Sanderson to enforce the payment of the judgment, in which she procured an attachment that was levied on the land in controversy. The attachment was sustained by judgment of the court, and the land sold in satisfaction thereof, at which sale appellant became the purchaser. The sale was confirmed by the court, and later appellant received through the court's commissioner a deed to the land. Subsequently she brought this action to obtain possession of the land. Appellees were in possession of the land when it was sold under attachment, and also at the time of and before the institution of the slander and attachment suits; but they were not parties to either action.

After the issues were so changed by the pleadings as to make this a case for equitable relief, the lower court, on appellees' motion and over appellant's objection, transferred it to the equity docket. It is now insisted for appellant that this was error. Under the issues made by the pleadings, if the conveyance from Sanderson to appellees was not fraudulent as to the former's creditors, it unquestionably passed to appellees, or at least to appellee Q. E. V. Nance, the title to the land in controversy. Upon the other hand, if fraudulent, only a court of equity jurisdiction could properly adjudge it so. In many cases courts of law will afford relief against fraud or mistake, as where one is sued upon a note or other contract to which his signature was obtained by fraud. In such case he may in a court of law resist its payment on that ground. But only a court of equity has jurisdiction to cancel or declare void a deed or other instrument, whether upon the ground of fraud or mistake. By the change in the issues made by the pleadings such was the relief sought by appellant in this case, and, this being true, the transfer of the case to the equity docket was not only proper, but indispensably necessary. Section 6, subsec. 1 and section 10, subsec. 4, Civ. Code Prac.; Story's Eq. Juris. (12th Ed.) vol. 1, § 184; Reese v. Walton, 4 B. Mon. 513; O'Connor v. Henderson Bridge Co., 95 Ky. 633, 27 S. W. 251, 983; Wimmer v. Ficklin, 14 Bush, 194.

It is contended by counsel for appellant that the chancellor erred in admitting as competent evidence the deed by which Sanderson conveyed the land in controversy to appellees, because it was acknowledged by the grantor before, and the acknowledgment certified by, a deputy of the predecessor in office of the county clerk by whom it was recorded, and was not lodged in the clerk's office during the term of office of such predecessor. We do not think this contention is sustained by the statute. A deed that is

made, acknowledged, and certified according to law during the term of one clerk of the county court, though not filed or lodged for record during his term, may be lodged for record and recorded during the term of his successor in such office. Indeed, sections 510, 511 of the Kentucky Statutes of 1903 make it the duty of the county clerk to record a deed when lodged in his office for record, if acknowledged and certified according to law, whether such acknowledgment was taken before and certified by his predecessor in office, a deputy of the latter, or any other officer authorized to take and certify acknowledgments of deeds, and without regard to whether such deed was or not lodged in the clerk's office during the term of office of his predecessor. The deed in question appears to have been properly acknowledged and certified, and in addition its execution and delivery are sufficiently established by other evidence appearing in the record to make it good, not only as between the parties, but also against a subsequent creditor or purchaser with notice of its existence. Moreover, its execution and delivery seem to be admitted by appellant, for we find on page 2 of her reply this averment: "She says she did not know of the existence of the deed alleged until shortly after it was recorded, and could not by reasonable diligence have discovered sooner, and she did discover it only a short time before her attachment was issued and levied on the land in controversy on August 27, 1900." The foregoing is an admission that appellant had actual notice of the existence of the deed relied on by appellees before her attachment was issued or levied on the land, and consequently before her purchase of it at decretal sale in satisfaction of her judgment. So, if the recording of the deed were invalid, and the instrument should be given no other effect than as a mere bond for title, the notice appellant received of its existence would defeat her purchase at the judicial sale, unless it was executed to defraud Sanderson's creditors. "Notice to the creditor at any time before he may purchase affects his conscience, and he may be compelled in obedience to the equity evidenced by the bond or unrecorded deed to transfer the legal title to the party against whom he ought not in good conscience to hold it." Baldwin & Co. v. Crow, 86 Ky. 679, 7 S. W. 146; Low & Whitney v. Blincoe, 10 Bush, 331; Morton v. Robards, 4 Dana, 258; Lain v. Martin, 63 S. W. 286, 23 Ky. Law Rep. 438; and Perry v. Trimble, 76 S. W. 343, 25 Ky. Law Rep. 725.

It is, however, further urged that, after the deed in question was acknowledged and delivered, and before it was recorded, certain interlineations were made in it, the effect of which was to make it convey Q. E. V. Nance a mere life estate in the land with remainder to her children, instead of a fee-simple title to her, as it was originally written, and that for this reason it should have been excluded as evidence. We cannot assent to this view

of the matter. The interlineations were frankly admitted by the parties, with the claim that it was done for the protection of the grantee's infant children by a former husband. If this be true—and it is uncontradicted—it is manifest that it did not affect the validity of the deed as between Sanderson and Mrs. Nance, or discredit the genuineness of the conveyance. Whether the interlineations should be treated as mere surplusage, not affecting the conveyance as originally intended and made by the parties, or whether it invested the infants with any interest in the land, we need not decide. Obviously, the interlineations did not divest Mrs. Nance of all title to the land, or restore the title to Sanderson, the grantor.

The only question left for consideration is, was there any fraud in the conveyance? The evidence clearly shows that the deed from Sanderson to appellee Q. E. V. Nance was executed October 21, 1892, acknowledged October 26, 1892, at once delivered to the grantee, and recorded January 4, 1898. It was executed and delivered several years before appellant's suit for slander was brought against Sanderson, also before the alleged slanderous words concerning appellant were spoken by Sanderson, and recorded before appellant's second or attachment suit was filed. It was further shown by the evidence, without contradiction, that, at the time of the execution and delivery of the deed, Sanderson's only indebtedness was \$300, and this sum he had borrowed to pay for the land when it was conveyed him. Its payment was assumed by appellee as the consideration of the sale and conveyance of the land to her. The note was in fact paid by her through her father shortly after she received the deed. So, according to the evidence, there seems to be no doubt of the genuineness of the conveyance, or as to the sufficiency of the consideration. But if this were not true, and the evidence authorized the conclusion that the conveyance, being from a brother to his sister, was purely voluntary and without consideration, it would not necessarily make it fraudulent or void as to a subsequent creditor or purchaser. To make it so, under the statute, actual fraud must be shown. In *O'Kane v. Vinnege*, 108 Ky. 34, 55 S. W. 711, it is said on this subject: "Appellees' contention rests upon the averments that conveyances to Mrs. McCann and from her to Mrs. O'Kane were not bona fide, and were not intended to divest Mrs. O'Kane of title; that they were a mere device resorted to by the grantor and grantees to enable appellant to cover up and hide his property. If a party be indebted at the time of a voluntary conveyance of his property, such conveyance is presumed to be fraudulent as to those debts; and this presumption as to prior debts does not depend upon the intentions or circumstances of the party conveying, or the amount conveyed. The law will not permit an inquiry to be made into these matters,

or give them any weight or influence. As to subsequent debts, the creditor who assails a voluntary conveyance must show in addition circumstances justifying the presumption that the intent of the conveyance was fraudulent, before the land conveyed could be properly subjected to the payment of such debts." *Rose v. Campbell*, 76 S. W. 505, 25 Ky. Law Rep. 885; *Frazer v. Frisbie Furniture Co.*, 86 S. W. 539, 27 Ky. Law Rep. 688.

In the case at bar it was incumbent on the appellant to prove actual fraud in the conveyance, which has not been done, and, in the absence of such proof, fraud cannot be presumed as to a subsequent debt like that sued on. The character of the transaction in question, and the circumstances surrounding the execution and delivery of the deed, make it impossible to believe that Sanderson or appellee at the time of this conveyance could have had in contemplation the creation of the debt evidenced by appellant's judgment, or that the former would several years subsequently utter against the appellant the slander for which the judgment was obtained.

For the reasons indicated the judgment is affirmed.

GEORGE T. STAGG CO. et al. v. BRIGHTWELL.

(Court of Appeals of Kentucky. March 14, 1906.)

1. MASTER AND SERVANT—PERSONAL INJURIES—DEFECTIVE MACHINERY—EVIDENCE—SUFFICIENCY.

In an action by a servant for personal injuries caused by the falling of machinery alleged to have been insecurely fastened to the ceiling joists, evidence held to support a finding that the fastenings were insufficient.

2. DAMAGES—EXCESSIVENESS—PERSONAL INJURIES.

Where a healthy man 42 years of age was permanently injured so as to render him unable to walk without a cane, preventing him from following his usual occupation and causing him great and continuous pain, \$7,000 damages were not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 372-396.]

3. APPEAL—REVIEW—NECESSITY OF BILL OF EXCEPTIONS.

Alleged improper argument of counsel cannot be reviewed on appeal, where it is not preserved in any bill of exceptions.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2431.]

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Action by T. B. Brightwell against the George T. Stagg Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Ira Julian, for appellants. James Andrew Scott and W. C. Marshall, for appellee.

CARROLL, C. This is a second appeal of this case. The opinion reversing the former judgment, in favor of appellee for \$9,000, may be

found in 82 S. W. 454, 28 Ky. Law Rep. 887, and recites very fully the facts, which are in substance the same as on this trial, and may briefly be stated as follows:

The appellee was an assistant engineer at one of two distilleries owned by appellant, and on February 10, 1903, was directed by the first engineer to go to the yeastroom of the distillery, known as the "O. F. C. Plant," to cut a belt that operates the machinery, and that had become too long. With the assistance of one John Wilson, an employé, a piece of the belt was cut out and the belt relaced. While the machinery was running slowly, Brightwell and Wilson attempted to put the belt over the pulley, Wilson standing on a ladder, placing the belt on the pulley, and Brightwell standing underneath the belt with a long piece of timber in his hand holding up the belt, so that Wilson could adjust it. Just as the belt was put on the pulley, the shafting and machinery, which weighed some 600 pounds, and that was attached to the ceiling, fell, striking the appellee and seriously injuring him. The negligence attributed to appellant consisted in the unsafe and insecure manner in which the planks to which the shafting and machinery was attached were fastened to the ceiling joists. It appears that these planks were fastened to the ceiling joists by lag screws, and the appellee introduced several witnesses who testified that lag screws were not safe or sufficient to hold these planks, and that when the strain came on the machinery it pulled the lag screws out, thereby precipitating the planks and machinery. It was also in evidence that the safe and proper manner in which to fasten these planks to the ceiling joists would be by bolts going entirely through the joists and secured on the top by a nut.

The appellant introduced a number of witnesses, architects, mechanics, and builders, who testified that the lag screws were safe and sufficient for the purposes for which they were used. Upon this issue, which was the principal one in this case, the evidence was very conflicting, and a preponderance of it favored the view of appellant, but the jury heard the witnesses, and it was entirely within their province to determine from the evidence before them this question, and they found that the lag screws were not a safe and sufficient fastening, and that in this respect appellant was guilty of negligence, and this court will not interfere with their conclusion on this controverted question of fact.

There is no serious complaint made of error in instructing the jury. In fact, the instructions given, with the exception of two new instructions given at the instance of appellant, were the same instructions given on the former trial of the case. Nor does it appear that there was any error prejudicial to appellant in the admission, or rejection of evidence.

It is, however, earnestly contended that the verdict is excessive, and that the judgment of the lower court should be reversed for this

reason. The judgment appealed from is for \$7,000—quite a large sum of money—but under the facts of this case it cannot be said to be excessive. The appellee, at the time of his injury, in February, 1903, was about 42 years of age, and with the exception of occasional, but not serious, spells of illness, had been for years a vigorous, strong, healthy man. He is now, as a result of the injuries sustained, virtually a physical wreck. The usefulness of one of his legs is almost entirely destroyed. He is obliged to walk at all times with a cane, and cannot follow his occupation as a carpenter, or lift anything heavy, nor can he climb up or go down a stairway without great discomfort, and has suffered severe pain almost continually since the accident and at nights is compelled to lie on one side altogether. Taking into consideration appellee's age, his physical condition, and his ability to make a good living, it cannot be said that \$7,000 is more than fair compensation for the mental and physical suffering that he has already undergone, and is reasonably certain to suffer in the future, and for the permanent impairment of his power to earn money. These elements of damage are to be taken into consideration, in cases like this, in determining what will fairly compensate a person who sues to recover for personal injuries. It is an irreparable misfortune for a man of good health and industrious habits, in the prime of life and usefulness, to be suddenly so seriously crippled as to make him a permanent invalid, compelled to go through life attended by discomforts and pains that will increase with passing years, and make him a burden to himself and those whose company and association he might otherwise enjoy. Money is an inadequate recompense for injury, pain, and suffering, but the law cannot offer any other redress, and, as there is no criterion of damages by which to measure in dollars and cents the amount of recovery, it has been wisely left to the judgment and discretion of a properly instructed jury, and their finding, when it appears to be supported by evidence and is not grossly excessive, will not be disturbed.

It is also earnestly contended that counsel for appellant, in their argument of the case, were guilty of such improper conduct as to authorize its reversal. The alleged improper argument is presented in the motion for a new trial, and in the affidavit of the attorney for appellant, which was allowed to be filed over the objection of the appellee. It does not appear in any bill of exceptions; and it has been frequently held by this court that errors committed during the trial of a case that are relied on in this court as grounds of reversal must appear in a bill of exceptions, prepared in the usual form. It is not sufficient to present them for the first time in a motion for a new trial, even if they are supported by affidavits, as in this case. It is proper, however, to say that the court has considered carefully the alleged improper argument of

counsel, and has reached the conclusion that, even if this assumed error had been properly excepted to, it would not furnish grounds for reversing this case.

It is therefore adjudged that the judgment of the lower court be affirmed.

JENKINS et al. v. BERRY, Circuit Court Judge.

(Court of Appeals of Kentucky. March 14, 1906.)

1. CHARITIES—JUDICIAL SUPERVISION—MANAGEMENT OF TRUST PROPERTY.

Provisions of a will creating a charitable trust, requiring the trustee to make annual reports to the circuit court of a certain county, but not requiring them to make annual settlements or to settle at all in such court, or to file with their annual reports vouchers showing the expenditures made by them, nor requiring the court's approval of the reports, did not give the judge of such court the right or authority to proceed against the trustees and undertake an investigation of their management of the trust property and its funds, or to require them to file vouchers showing expenditures made by them.

2. SAME.

Where a will creating a trust for the establishment and maintenance of a hospital gave the circuit court no authority to supervise the management of the hospital and its funds, the fact that some of the patients received in the hospital are treated and cared for at the expense of a city, or other districts of the county, does not in any way enlarge the jurisdiction of the court or confer on the judge thereof any right to interfere with the management independently of an action properly instituted by a duly authorized person.

"To be officially reported."

Petition for writ of prohibition by J. O. Jenkins and others, trustees under the will of Elizabeth Speers, against A. S. Berry, a judge of the Campbell circuit court. Writ awarded.

Hodge & Wolfe, for petitioners. C. L. Raison, Jr., and Hazelrigg & Hazelrigg, for respondent.

SETTLE, J. This is a second application made to this court by the petitioners, J. O. Jenkins, John L. Pythian, and W. E. Senour, trustees of Speers' Hospital, for a writ of prohibition against the defendant, A. S. Berry, judge of the Campbell circuit court, to prevent his alleged interference with the trust created by the will of Elizabeth Speers, deceased, by virtue of which they control that eleemosynary institution.

The particular interference complained of in the petition is that after the petitioners, as trustees of Speers' Hospital, filed their annual report for the year 1905, in the Campbell circuit court, as directed by the will of Elizabeth Speers, the defendant, as judge of that court, referred the report to the master commissioner, who thereafter reported his disapproval of the same because it was unaccompanied by "exhibits or vouchers" for expenditures made by the trustees. Thereupon the defendant, as judge of the

court, ordered the trustees to file such "exhibits and vouchers" on or before December 12, 1905. The latter failed to file the vouchers as ordered, and defendant on December 13, 1905, issued against them a rule, returnable on the 18th of the same month, requiring them to appear in the court of which he is judge and "show cause, if any they can, why they have failed to comply with the order of court herein to file vouchers with their report." The several foregoing orders were made by the defendant upon his own motion when there was no action or other proceeding against the trustees pending before him and without notice to them. Indeed, they received no information thereof until the service of the rule upon them. A general demurrer and answer were filed to the petition by the defendant. The answer attempts to justify his acts and conduct complained of upon the ground that as the will of Elizabeth Speers requires the plaintiffs, as trustees of the Speers Hospital, to make annual reports to the court of which he is judge, it is his official duty to investigate the reports and to require vouchers showing expenditures made by the trustees. In the opinion granting the writ of prohibition on the first application, we endeavored to plainly show what powers are conferred upon the trustees of the hospital by the will of the testatrix, and what relation the Campbell circuit court sustains to the hospital and trustees, and we now refer to that opinion (Jenkins, etc., v. Berry, etc., 83 S. W. 594, 26 Ky. Law. Rep. 1141), as it satisfactorily expresses the mind of the court on all the questions therein decided.

In the opinion it is said: "But in no reference to what may be done by the court is it said in the will that it is given any visitatorial or other supervision over the hospital, or any control over the trustees in the manner of maintaining and conducting the hospital. But, while no such power can be exercised by the Campbell circuit court by virtue of the will, it may under the general power inherent in a court of equity interfere upon proper grounds, and in a proper action or proceeding to prevent such acts or conduct upon the part of the trustees as would, if unrestrained, result in serious injury to the trust estate, or loss to the beneficiaries of the trust. * * * And hence we conclude that in order to authorize a chancellor to inquire into the alleged mismanagement of trust property, or a misappropriation of a trust fund dedicated to a charitable use, his jurisdiction must be invoked by some one interested in the execution of the trust, or in the name of the Attorney General as the representative of the state, in an action or proceeding authorized by law to be instituted for that purpose. In this case no action or proceeding against the trustees had been instituted or was pending in the Campbell circuit court at the time the several orders and rules complained of

were made and entered. The judge of the circuit court acted solely of his own volition, and upon his own motion, and without information or action on the part of any one. We are of opinion that he was without jurisdiction. * * * In yet another part of the opinion, *supra*, in commenting on the language of Mrs. Speers' will as to the powers conferred upon the trustees in respect to the trust fund and hospital, it is said: "The language here employed is comprehensive. Indeed, it leaves everything to the judgment and discretion of the trustees. They are not required to consult with or be advised by others as to the manner in which the hospital is to be maintained or conducted, nor can they be interfered with in their control of the institution from any source unless guilty of such mismanagement, extravagance, or fraud as would endanger the trust estate, or violate the rights of the beneficiaries."

It is true that there is a provision of the will that requires the trustees to make annual reports to the circuit court, but it does not require them to make annual settlements, or to settle at all in that court, or to file with their annual reports vouchers showing the expenditures made by them, nor does it require the court's approval of the trustees' reports. But while this is true, if the reports made by the trustees are deficient or unsatisfactory, or unaccompanied by receipts or vouchers for sums claimed to have been expended by them, or if a settlement, or settlements on the part of the trustees be necessary to show the condition of the trust fund and property, suit for any and all these purposes may be brought by any person interested in the trust estate, or by the Attorney General. We do not think, however, that the judge of the Campbell circuit court has himself the right or authority to arbitrarily institute such an action or proceeding, or, in the absence of the bringing of such an action by another, to himself proceed against the trustees and undertake an investigation of their management of the hospital and its funds, as he seems to think it his duty to do in this case. It appears from the record before us that the Attorney General, acting upon the opinion in the former case, has instituted an action against plaintiffs as trustees in the Campbell circuit court for an investigation of their management of Speers' Hospital and to require an accounting at their hands of all property and money received by them under the will of Elizabeth Speers, deceased, and expended for the hospital, and that this action is undetermined and yet pending in the Campbell circuit court before a special judge. There is no reason why an amended petition may not be filed in the pending action attacking the report of which defendant complains, if it be insufficient or incorrect. By this means the production and filing of the vouchers could be required of the trustees. Doubtless a suggestion from

defendant to the counsel in charge of the action mentioned that the report should be investigated would induce the filing of the necessary amendment and bring about the desired investigation.

We do not see that the fact that some of the patients received in the hospital are treated and cared for at the expense of the city of Newport, or other districts of Campbell county, can in any way enlarge the jurisdiction of the Campbell circuit court, or confer upon the defendant, as the judge thereof, any additional right to interfere with the trustees' management of the hospital, independently of an action properly instituted by a duly authorized person or persons, for an investigation of its condition and an accounting by them for the sums they have received for the benefit of the institution.

There is no question of the right of the trustees to control the affairs of the hospital, nor is it denied that their authority to do so is conferred by the will of its founder. If there has been any mismanagement of the hospital or misappropriation of its funds, it should be investigated and righted, but it must be done in a proper action, conducted according to legal forms and the established rules of practice obtaining in courts of equity. Upon the state of case here presented we think the defendant is without jurisdiction or authority to proceed against the trustees of Speers' Hospital in the manner and as attempted by him.

Wherefore the demurrer to the petition is overruled, the answer adjudged insufficient, and plaintiffs are awarded the writ of prohibition as prayed in the petition.

LINN v. HAGAN'S ADM'R.

(Court of Appeals of Kentucky. March 16, 1906.)

1. ANIMALS — TRESPASSES COMMITTED BY STOCK — CONTRIBUTORY NEGLIGENCE — EFFECT.

One suing for a trespass on his land committed by the cattle of another cannot recover for any damage which by the exercise of ordinary care he could have prevented.

2. REPLEVIN—COUNTERCLAIM FOR TRESPASS.

In an action for the possession of cattle alleged to be wrongfully held by defendant, the only question is as to the ownership of, and the right of possession to, the cattle, and defendant cannot set up a counterclaim for damages for trespass to his land committed by the cattle on escaping from plaintiff's premises; Ky. St. 1903, § 4646, prohibiting cattle from running at large, and giving him a lien on the cattle for the trespass, which should be enforced by action.

Appeal from Circuit Court, Bullitt County. "Not to be officially reported."

Action by Francis J. Hagan's administrator against J. H. Linn. From a judgment for plaintiff, defendant appeals. Affirmed.

See 87 S. W. 1101.

Nat W. Halstead and Greene & Van Winkle, for appellant. F. Hagan, for appellee.

NUNN, J. This action was brought, on February 10, 1903, by appellee Hagan, to recover the possession of about 25 head of cattle, which he alleged were wrongfully withheld from him by the appellant. The appellant answered, but did not deny that appellee was the owner of the cattle. He alleged that a vote had been taken in Bullitt county, under section 4846, Ky. St. 1903, and that a majority had voted to prohibit cattle from running at large in that county, and that the vote had been counted, certified, and recorded as required by the statute. That the appellee had suffered, or permitted the cattle sued for, to run at large in violation of the statute, and they had trespassed upon and damaged his property, and that he had impounded them, by the direction of the sheriff, and kept and fed them for three days, for which he charged \$198. That the cattle injured his property to the amount of \$100, and he pleaded the \$298 as a counterclaim. On the trial the court permitted the appellant to assume the burden of proof, and, at the close of his evidence, the court, upon motion of appellee, gave a peremptory instruction to the jury to find for the appellee.

It appears from the proof that the parties to this action were close neighbors, but were not upon the best of terms. It is evident that appellant knew the cattle of appellee. On the morning of the 12th of February, 1903, these cattle got out of the field, where they were kept, and walked up the public highway to the gate, which was open, and they entered the front yard or lawn of appellant, which contained about two acres. Appellant saw them about the time they entered, and, instead of driving them out, and saving his grass and shrubbery, he closed the gate and kept them on his lawn during the day, while he sent one of his hands to the county seat to get instructions from the county judge and sheriff what to do with the cattle or how to impound them under the law. Then he took them to his stock barn, and fed them until the next Monday, when they were taken from him by the order of delivery issued in this action.

Appellant's conduct in this case, according to his own showing, did not authorize the court to allow him but little, if any, of his claim. It would have been an easy matter to have saved nearly all the trouble and expense incurred, by having this hand he sent to Shepardsville drive the cattle home, or notifying the appellee so that he might send for them. There is a general rule of law that requires a person being damaged to use ordinary care and diligence to prevent and avoid as much injury and damage as possible, and a person will not be allowed to recover for any damage that could have been prevented by the exercise of ordinary care. We have said this upon the supposition that the claim of appellant for damages could have been properly pleaded as a counterclaim in this action. But in our opinion the lower

court did not err in refusing to allow the appellant to plead the counterclaim. The only question that could legally be tried, in an action like this, under the issues made in the pleadings, was the ownership and the right of possession of these cattle. And even if appellant had proven that the stock law referred to was in force in the county, which the court refused to permit him to do, the issue would have been the same. While the statute would have given him a lien on the cattle for the injury he received by reason of their trespasses, it does not authorize him to withhold the cattle from the owner, until the damages are paid. He should have permitted the owner to take possession of his cattle, and enforced his lien by action, like any other mere lienholder.

The judgment of the lower court is affirmed.

HESTAND v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 20, 1906.)

1. INTOXICATING LIQUORS—LOCAL OPTION LAW—VIOLATION—EVIDENCE—SUFFICIENCY.

Under the direct provisions of Ky. St. 1903, § 2557b, the possession of United States special tax stamp (commonly called United States license) for carrying on the business of a retail dealer in spirituous, vinous, and malt liquors, or the having of such stamp or license stuck up at the place of business in such territory, is prima facie evidence of the violation of the local option law.

2. CRIMINAL LAW—APPEAL—VERDICT—CONCLUSIVENESS.

The Court of Appeals has no power to reverse a judgment of conviction in a criminal case on the sole ground that there was not sufficient evidence to sustain the verdict, being restricted to the single inquiry whether there was any evidence before the jury conducting to show the guilt of the accused.

3. INTOXICATING LIQUORS—LOCAL OPTION LAW—VIOLATION—QUESTION FOR JURY.

On a prosecution for violation of the local option law, evidence examined, and held sufficient to authorize the jury to find defendant guilty.

4. CRIMINAL LAW—STIPULATIONS AS TO EVIDENCE—EFFECT.

Where, in a prosecution for violation of the local option law, defendant agreed that the law was in force in the county in which the offense was alleged to have been committed, the failure to prove the fact on the trial was immaterial.

Appeal from Circuit Court, Monroe County.

"Not to be officially reported."

John B. Hestand was convicted of violation of the local option law, and he appeals. Affirmed.

Geo. T. Duff, Baird & Richardson, Thermon Spear, and Miller & Jackson, for appellant.

NUNN, J. The appellant was in 1905, at the June term of the court, convicted, and fined \$60, for selling whisky by retail, in violation of what is known as the local option law. He asks a reversal, and assigns only one cause; that is, there was no evidence

showing that the appellant was guilty of the charge.

There were only two witnesses introduced on the trial, the prosecuting witness, and the appellant. The prosecuting witness testified as follows: "I told him (appellant), in his house or yard, that I wanted some whisky, and gave him 50 cents, and he went and was out of my sight about 5 to 15 minutes. I do not know exactly about the time, as I did not keep it; but that is my best recollection about it, and he brought and gave me one pint of whisky, either in his house or about his yard, I do not know where he got it. This was in Monroe county, Ky., and in the town of Tompkinsville. This is not the same transaction I testified about this morning." We copy the appellant's testimony in full: "I know J. M. H. Jones. Yes; I furnished him the liquor like he says; but I never sold him no liquor in my life. He gave me 50 cents and told me to get him some liquor, and there were some people from Defeated Creek here, and they wanted some liquor, and I put Jones' money in with them, and I went and bought five gallons and a pint from Sam Yorkley, who lived one half mile from here, and brought Jones' liquor to him, which was one pint. I did it as a matter of accommodation to Jones. I made no profit on the liquor. Jones never paid any part of the buggy hire, nor for my time, and I had no interest in the liquor." He was then cross-examined as follows: "Now, John, did you not give the same testimony in the trial of your other case this morning for selling liquor to this same Jones, Saturday, and say that these Defeated Creek men were the men that you put Jones' money in with? Answer. Yes; they are the same men. Question 2. Have you not been engaged in retailing liquors for the past two years? Answer. No. Question No. 3. At the time you let Jones have this liquor, did you have government license to sell spirituous liquors? Answer. I do not have to answer that, do I, Judge?" Whereupon the court told him that he did, and defendant responded: "What do I want with government license, when Sam Yorkley has them? Question. Answer my question, did you not have government license, at the time you let Jones have this liquor? Answer. Let's go to Owensboro and see."

It is provided in section 2557b, Ky. St. 1903, as follows: "The possession of United States special tax stamp (commonly called United States license) for carrying on the business of a retail dealer in spirituous, vinous, and malt liquors, or the having of such tax stamp or license stuck up at the place of business in such territory shall be prima facie evidence of guilt under this section." This court has no power to reverse a judgment of conviction in a criminal case upon the sole ground there was not sufficient evidence to sustain the verdict, being restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the ac-

cused. See *Vowells v. Com.*, 83 Ky. 193, and *Patterson v. Com.*, 86 Ky. 313, 5 S. W. 387. These cases have often been approved by this court since they were rendered.

There was evidence introduced which authorized the jury to conclude that the appellant was guilty of the charge. He received the money and delivered the whisky, but he claimed that he did it only as a favor to the prosecuting witness—that he had no interest in the matter whatever. The jury was not bound to believe every statement made by the witness. It was their province to weigh and consider all the evidence, and in doing so they had grounds for concluding that the appellant was too free in granting accommodations, and making up purses with the Defeated Creek people to buy and distribute liquor, and to furnish his own conveyance and go to the country for it, without charge, and this in connection with the fact that the appellant had license from the government authorizing him to sell, which the statute makes prima facie evidence of guilt. The jury had the right to conclude from appellant's evidence that he had government license to sell liquor by retail, and that he sold the whisky to Jones.

The appellant also claims that the appellee failed to prove that the local option law was in force in that county. This is true, but the bill of exceptions shows that appellant agreed that it was in force.

For these reasons, the judgment is affirmed.

CITY OF PADUCAH v. RAGSDALE et al.
(Court of Appeals of Kentucky. March 22, 1906.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—VALIDITY.

There is no constitutional or statutory provision requiring previous notice of the enactment of an ordinance before it shall become effective, and it is no objection to the validity of an ordinance that it takes effect immediately.

2. SAME—SUBJECTS AND TITLES.

The subject of an ordinance was the prevention of certain animals of the bovine kind running at large in the city. There were seven sections. Section 1 provided that no cow, calf, or other animal of the bovine kind should be permitted to go at large on any of the streets, alleys, or uninclosed lots or ground in the city, and provided for confinement of such animals until released by law under the provisions of the ordinance. Section 2 set forth the duties of the officer taking up any animal, and specified the procedure for enforcing the penalty by fine and sale of the animals. Section 3 provided for the owner's release of cattle from the pound. Section 4 provided for costs and fees. Section 5 provided a punishment for wrongful release of cattle impounded. Section 6 repealed an existing ordinance so far as in conflict with the new. Section 7 provided that the ordinance should be in force from its passage and approval and publication. *Held*, that the different sections were all germane to the subject, and not more than one subject was embraced.

3. SAME—VALIDITY.

Under an ordinance to prevent cattle running at large, providing that, when cattle were impounded, the judge should issue a summons

against the owner commanding him to appear in court and show cause why he should not be fined for violation of the ordinance, and why the animal should not be sold, etc., the plea of not guilty by the owner puts the burden on the prosecution to prove his guilt beyond a reasonable doubt, and it is no objection to the validity of the ordinance that it requires the owner to prove his innocence or suffer a fine.

4. CONSTITUTIONAL LAW — DUE PROCESS OF LAW.

An ordinance providing for punishing the owners of cattle permitting the same to run at large in the city, and for proceedings in rem against the property itself, is not within the inhibitions of the state and federal Constitutions against depriving the owner of his property without due process of law, especially where the owner is given a day in court and the property can in no event be sold without a judicial trial of its liability, and in view of the authorization of Ky. St. 1903, § 3058, subsec. 12, giving cities power to regulate or prohibit the running at large of cattle within the limits of the city, and to authorize the impounding of same.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 812, 813.]

5. CONSTITUTIONAL LAW — REMEDY BY APPEAL.—MUNICIPAL ORDINANCES—VALIDITY.

That an ordinance providing for the fining of cattle owners who permit their cattle to run at large in the city, and for sale of the impounded cattle for payment of costs and expenses, does not provide for an appeal by the property owner, is no objection to its validity.

6. MUNICIPAL CORPORATIONS — POWERS OF COUNCIL—APPEALS.

A city cannot regulate the matter of appeals by ordinance. That is alone for the Legislature to do.

7. ANIMALS — RUNNING AT LARGE — STOCK LAWS—REPEAL BY IMPLICATION.

Ky. St. 1903, c. 122, which allowed rural communities to adopt a stock law by vote, by which the running at large of stock might be prohibited, did not profess to alter or amend the various city charters, which had expressly given cities the right to legislate through their councils on the subject, and did not repeal the charter provisions by implication.

Appeal from Police Court of Paducah.

"To be officially reported."

Controversy between the city of Paducah and S. P. Ragsdale and others. From the judgment, the city appeals. Reversed.

T. B. Harrison and A. B. Barkley, for appellant.

O'REAR, J. This appeal is prosecuted under the provision of section 3063, Ky. St. 1903, from a judgment of the police court of Paducah, a city of the second class, declaring invalid the following ordinance duly enacted by the city's legislative department:

"An ordinance to prevent certain animals of the bovine kind from running at large in the city of Paducah.

"Be it ordained by the general council of the city of Paducah, Kentucky:

"Section 1. That no cow, calf, or other animal of the bovine kind, shall be permitted to go at large upon any of the streets, alleys, or unenclosed lots or ground in the city of Paducah. The foregoing shall not apply where such animals are being driven through the city or from one place to another, for

the purpose of being slaughtered, or to be placed in any pen or enclosure. Should any such animal be found going at large in violation of this ordinance, the same may be taken up by any policeman, or other person appointed by the chief of police, and taken to some place provided by the city, for the confinement of such animals, and there kept until released by law or under the provisions of this ordinance.

"Sec. 2. The officer taking up any animal under the last section shall forthwith make a statement of the fact in writing under oath, stating the name of the owner, if known, and file said statement in the Paducah city court, where it shall be kept as part of the record of said court. If said statement shall disclose the name of the owner of such animal, the judge of said court shall issue a summons against said owner, commanding him to appear in said court to show cause, if any he can, why he shall not be fined \$5 for violation of the preceding section, and why such animal shall not be sold to satisfy the cost and charges of taking up, keeping or selling same. If said affidavit shall state that the owner of such animal is unknown, or absent from McCracken county, Kentucky, the court shall make a warning order on said affidavit, warning said owner to appear in said court within five days after that date and show cause why such animal shall not be sold to satisfy the cost and charges of taking up, keeping and selling such animal; and the court shall appoint a regular practising attorney in said court to defend for such absent or unknown owner, if, when such owner has been duly summoned or warned as herein provided, the court shall determine that there has been a violation of said section by such animal having run at large within the limits of said city, then the court shall make an order describing said animal and the mark thereon, and direct the chief of police to sell same at public outcry to the highest bidder for cash in hand. The chief of police shall sell such animal, and out of the proceeds pay the costs and charges of such proceedings, and the remainder, if any, he shall pay over to the city treasurer, to be held by him subject to the order of said owner, but if said owner has not been actually summoned, no sale of such animal shall be made until notice of such sale has been published in some newspaper, published in Paducah, at least three days before such sale, describing the animal to be sold.

"Sec. 3. If the owner of any such animal taken up as provided for in the two preceding sections, shall appear before the court at any time before the sale as provided for in the last section and pay all costs and charges for the taking up, impounding and keeping of such animal, and all the cost, the court shall order the restoration of such animal to the owner.

"Sec. 4. The officer taking up any animal under the preceding sections, shall be allowed

his fees and costs, to be paid and collected only out of the proceeds of such animal, or out of the fines and costs assessed against such owner, and there shall be taxed as costs in each case the following fees: To the officer taking up such animal, 50 cents for each animal, and 50 cents per ——— each day for the keeping of each animal while impounded.

"Sec. 5. Whoever shall unlawfully molest or prevent any officer from taking up and impounding any such animal, or shall open the enclosure in which such animal is impounded for the purpose of releasing such animal, shall be fined not less than \$5 nor more than \$20 for each offense.

"Sec. 6. So much of any ordinance now existing in conflict with this ordinance is hereby repealed.

"Sec. 7. This ordinance shall be in force from its passage and approval and publication.

"Adopted May 4, 1905, by the board of aldermen.

"Adopted May 16, 1905, by the board of councilmen.

"Approved by the mayor of Paducah June 5, 1905."

As the judge of the police court stated his reasons at some length in his judgment, we will discuss and dispose of them in the order presented.

1. It was held that the ordinance was probably defective because it took effect immediately, and gave the owners of cattle in the city no notice by which they could regulate themselves and their property according to the new conditions. The statutes provide that ordinances shall be passed only under certain formalities, as to publication and the like. It was intended by these provisions that citizens and all others concerned should, at their peril, keep posted concerning enactments of ordinances affecting the city's welfare and government. But in the absence of such statutory regulation, admitting that the ordinance was within the power granted to the municipality, there is no constitutional provision requiring previous notice of the enactment of an ordinance before it shall become effective. All ordinances, when regularly adopted, are necessarily matters of public record, of which everybody who may be concerned by them must take notice. The only restriction on this point in the Constitution is that no *ex post facto* law shall ever be adopted. This ordinance is in no sense subject to that vice. It operated alone on future acts.

2. It was thought the ordinance embraced more than one subject. The subject of this ordinance is the prevention of certain cattle from running at large in the city. Various features of the subject are treated by different sections of the ordinance. All are germane to the subject named. A full discussion of this question may be found in the court's recent opinion in *City of Louisville v. Wehm-*

hoff, etc., 116 Ky. 812, 176 S. W. 876, 79 S. W. 201.

3. The police court held that the effect of the ordinance was to require the owner to appear in court and prove his innocence or suffer a fine. This clause of section 2 of the ordinance is claimed to have that effect: "If said statement shall disclose the name of the owner of such animal, the judge of said court shall issue a summons against said owner commanding him to appear in said court and show cause, if any he can, why he shall not be fined \$5 for violation of the preceding section, and why such animal shall not be sold," etc. This clause does not, as was supposed, presuppose the guilt of the owner of the stray animal. It merely provides for his being summoned that the question of his guilt may be tried. When summoned, his plea of not guilty, as in any other misdemeanor or charge of violating an ordinance of the city, puts the burden upon the prosecution to prove his guilt beyond a reasonable doubt. If the animal was found at large upon the streets of the city under such circumstances as the ordinance penalizes, it would make a *prima facie* case of guilt against the owner. So does the possession of a United States revenue license to retail liquor in a local option district constitute *prima facie* evidence of guilt against the person to whom issued. Section 2557b, subsec. 2, Ky. St. 1903. Yet it has not been thought that the statute was invalid. It has been held to the contrary. *Hestand v. Commonwealth* (decided March 20, 1906) 92 S. W. 12.

4. The main attack upon the ordinance, however, is upon its constitutionality; it being asserted that it deprives the owner of his property without due process of law, and thereby violates both the state and federal Constitutions. The subject is not at all new. The impounding of stray cattle which wandered upon another's land damage feasant was early practiced at the common law, and has ever since in some form been continued wherever the common law prevails. As close akin to it in principle is the right of the public to be protected from damage by estrays. This right is exercised under the police power inherent in government, whether state or municipal. The running at large of stray cattle in a populous community is treated generally as a kind of public nuisance—one that endangers the safety and the property of the citizens. It is therefore competent to regulate the matter by punishing the owners, as well as by proceeding as in *rem* against the property itself. *Cooley's Const. Limitations*, 247, 741. In some enactments of by-laws of this character forfeiture of the stock without office found was provided. In this country these provisions are held generally to be void, as "contrary to the genius of our laws and institutions." *Cotter v. Doty*, 5 Ohio, 394. Such forfeiture is not always void, however. It is only where the forfeiture is exacted without trial or a day in

court of the owner of the property. But, where the Legislature expressly grants the power to forfeit the property, after the owner upon trial has been found guilty, the forfeiture will be enforced. Dillon's Mun. Corp. § 150; Smith's Modern Law of Municipal Corporations, § 612. The owner of private property, it is true, is protected in his ownership and use, but he must so use and control it as not to injure his neighbor or the public. While the former has only his private action for damages, the latter may take more summary action, and, as its sovereign will may declare by penal statute, may deprive such careless owner of the means of inflicting perpetual injury upon the community by the negligent use of his property. Such is the power of the public to abate nuisances, even in certain instances to the destruction of property.

In this state the subject has not gone unattended. In the early part of the last century there were statutes authorizing patrols of certain towns to take up and confine negro slaves found running at large under certain named conditions. No provision was made for the trial of the owner for suffering the slave to be at large. In *Jarman v. Patterson*, 7 T. B. Mon. 644, slaves were declared to be "under the law on the same footing with living property of the brute creation." It was held that such an imprisonment, likened by the opinion, as it was in fact, to an impounding of animals found at large, was a legitimate exercise of the police power by the state's authority, and was not an infringement of the constitutional right of the owner to have the liability of the slave to imprisonment tried in court. The rigor of that opinion has not been since maintained. In *McKee v. McKee*, 8 B. Mon. 433, the question was the right of the town of Lancaster to impound hogs found at large upon its streets, and to sell them. The court observed: "The running at large of hogs in a town may be regarded as a public nuisance, which this ordinance is designed to prevent and abate. We perceive nothing in the mode of proceeding unconstitutional or inappropriate, nor is the penalty imposed deemed excessive or unreasonable." While the court treated the proceeding as one in rem, it was said that "due notice was served upon the owner of the hogs, and he was made a party to the proceeding."

In *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208, where the ordinance of the town of La Grange imposed a fine on the owner who suffered his hogs to run at large on the streets of the town, as well as made it the duty of the town marshal to sell the hogs after three days' notice, it was held that the

forfeiture of the property without a trial was unconstitutional. The ordinance was held to be valid otherwise. Section 8058, Ky. St. 1903, defining the powers of cities of the second class as to what ordinances they may enact, empowers them, by subsection 12, "to regulate or prohibit the running at large of cattle, cows, hogs, goats, and all other animals within the limits of the city, and to authorize the impounding of same." While a somewhat similar grant of power was held in *McKee v. McKee*, supra, to confer by implication the right to forfeit the stray hogs, this ordinance does not provide for a forfeiture. It merely makes the live stock liable for the fine and costs of the proceeding, after a trial in a judicial tribunal, which is a purely penal proceeding. Section 348, Dillon, Munic. Corp. As the owner of the property is given a day in court, and as the property in no event can be sold without a judicial trial of its liability, it is not a taking of property without due process of law to take up the cattle found astray in the city, and to sell them under the proceedings authorized by this ordinance.

5. The ordinance was thought to be invalid for the further reason that it did not provide an appeal to the property owner. Then every ordinance, from a conviction of which an appeal was not provided, would likewise be invalid; but this is not so. Many penal actions have no appeal provided. It is solely within the legislative discretion whether an appeal in any case shall be granted. In the first half century of the commonwealth there were no appeals allowed in any criminal case, though capital. Besides, the city could not regulate the matter of appeals by ordinance. That is for the Legislature alone to do.

Lastly, it was held that chapter 122, Ky. St. 1903, which allows rural communities to adopt a "stock law" by vote, by which the running of stock at large might be prohibited, applied to cities also. The statute does not profess to alter or amend the various city charters, which had expressly given to the several cities the right to legislate through their councils on this subject. All this legislation should be considered together as a whole, rather than fragmentarily and as antagonistic, as repeals by implication are disfavored. We are of opinion that the ordinance is a valid exercise of police power by the city under the express grant to it by the Legislature.

The judgment of the police court dismissing the warrant is reversed, and cause remanded for proceedings not inconsistent herewith.

12

BROMLEY'S ADM'R v. WASHINGTON LIFE INS. CO.

(Court of Appeals of Kentucky. March 20, 1906.)

1. LIFE INSURANCE — BENEFICIARY — INSURABLE INTEREST — COLORABLE ASSIGNMENT.

In accordance with a contract between insured and one having no insurable interest in his life, life policies were taken out payable to insured's estate, and assigned to the third person, to whom also they were delivered by the agent. All premiums were paid by the assignee from whom insured received a certain sum for the transaction. *Held*, that the policies were void, and not collectible by the administrator.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 166.]

2. SAME—INCONTESTABLE CLAUSE.

A life policy, void at its inception for lack of insurable interest, is not rendered valid by a clause declaring it incontestable after one year.

3. WITNESSES — PARTIES—TRANSACTION WITH DECEDENT — TESTIMONY FAVORING OTHER PARTIES.

An assignee of a life policy, made defendant by the administrator bringing action thereon, is competent to testify as to transactions with the deceased, in behalf of the company denying the validity of the policy.

Appeal from Circuit Court, Carroll County.

"To be officially reported."

Action by George W. Bromley's administrator against the Washington Life Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. J. Orr, T. S. Orr, V. H. Abbott, and W. S. Pryor, for appellant. Thos. W. Bullitt and John S. Gaunt, for appellee.

HOBSON, C. J. In December, 1900, George Bromley made an arrangement with Otis Bates by which he was to have his life insured for \$1,000, and Bates was to pay the premiums and pay him \$50 for the policy, which was to be assigned to Bates by Bromley. He made the application for the policy in Washington Life Insurance Company, which issued the policy on January 29, 1901, the policy being payable to his estate. Bromley and Bates then came to the office of the local agent. Bates was fixing to pay the premium and Bromley asked him if he would not take another \$1,000 on the same terms. He agreed to pay the premiums and pay him \$25 for another policy of like amount. Bromley then applied for another policy and the application was sent on, the agent retaining the policy which had come and Bates giving the agent a check for \$127.64, the premium on the two policies. On February 18, 1901, Bates gave Bromley a check for \$75 for the two policies as promised. The policies were assigned by Bromley to Bates. The assignment on the policies is dated March 25, 1901. The policies were never delivered to Bromley, but remained in the hands of the insurance agent until the assignment was put on them and he then delivered them to Bates. When

the subsequent premiums fell due on the policies they were paid by Bates; after this Bromley died and this suit was brought by his administrator to recover on the policies. Bates was made a defendant and by his answer set up that the policies belonged to him. The insurance company pleaded the facts above stated, insisting that the policies were a wagering contract and void. On final hearing, the court dismissed the petition of the administrator and he appeals.

The proof shows clearly that Bates had no insurable interest in the life of Bromley, and while the assignment on the policies is dated March 25, 1901, the proof is clear that the policies were taken out by Bromley for the purpose of assigning them to Bates, under the arrangement that Bates was to pay him \$75 for them and pay the premiums. In other words, the arrangement was simply that Bromley was to get \$75 for having his life insured for Bates' benefit, Bates to pay the premiums on the policies. It is conceded that if the policies under this arrangement had been made payable to Bates they would have been void, as he had no insurable interest in the life of Bromley. But it is insisted that as they were made payable to Bromley's estate and were assigned by him to Bates, only the assignment is void, and that his administrator may recover of the insurance company. There would be force in this, if the policies had been delivered to Bromley and the assignment to Bates had been a subsequent and independent transaction. But the proof leaves no doubt that Bromley did not contemplate insuring his life for the benefit of his estate at any time. He contemplated simply getting \$75 out of the arrangement. The policies were never intended to be delivered to Bromley. Bates was to pay the premiums and get the policies. The policies did not become effective until the first premium was paid. Bates paid the premium upon the idea that the policies were to be assigned to him and for this reason they were left in the hands of the insurance agent until the assignment was made, the delay in closing up the matter being due to the fact that the parties had to wait for the second policy to come. To hold such an arrangement good would be to shut our eyes to the truth and to enforce a mere form. The law does not allow one who has no insurable interest in the life of another, to insure it for his benefit, for the reason that it is a mere wager and holds out a temptation to fraud, the insurer having no interest in the life of the assured and having a direct interest in his death. *Baye v. Adams*, 81 Ky. 368; *Warnock v. Davis*, 104 U. S. 779, 26 L. Ed. 924; *Keystone Association v. Norris*, 115 Pa. 446, 8 Atl. 638, 2 Am. St. Rep. 572; *Steinback v. Diepenbrock*, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, 70 Am. St. Rep. 424. In the latter case the court said: "The insured, instead of taking out a policy payable to a person having no insurable interest in

his life, can take it out to himself, and at once assign it to such person. But such an attempt would not prove successful, for a policy issued and assigned under such circumstances, would be none the less a wagering policy, because of the form of it. The intention of the parties procuring the policy would determine its character, which the court would unhesitatingly declare in accordance with the facts, reading the policy and the assignment together, as forming part of one transaction." The cases of *Prudential Life Insurance Company v. Cummins' Adm'r*, 44 S. W. 431, 19 Ky. Law Rep. 1770, *New York Life Insurance Company v. Brown's Adm'r*, 66 S. W. 613, 23 Ky. Law Rep. 2070, and *Griffin's Administrator v. Equitable Assurance Society*, 84 S. W. 1164, 27 Ky. Law Rep. 313, may be distinguished from this case. In the first case, there was no assignment of the policy to the person who paid the premiums and the court simply held that the fact that a stranger paid the premiums did not invalidate the policy. In the second case, the assignee testified that he had no interest in the policy until it was assigned to him subsequent to the delivery. In the last case the insurance company had paid the money to the persons to whom the policies were payable and after this was sued by the administrator of the assured. The court in deciding that the insurance company was not liable used this language: "The transaction as to each policy was clearly a speculation upon the hazard of human life, and consequently a gambling scheme, pure and simple, which rendered the policies void, because against public policy; and, if void, no cause of action against appellee exists in favor of Griffin's administrator for the recovery of the proceeds."

It is also insisted for the plaintiff that as the policies contain a clause to the effect that they are incontestable after one year, the company cannot rely upon this defense. But the incontestable clause is no less a part of the contract than any other provision of it. If the contract is against public policy the

court will not lend its aid to its enforcement. The defense need not be pleaded. If at any time it appears in the process of the action that the contract sued upon is one which the law forbids, the court will refuse relief. The parties to an illegal contract cannot by stipulating that it shall be incontestable, tie the hands of the court and compel it to enforce contracts which are illegal and void. If this were allowed, then the law might be evaded in all cases and the aid of the court might be secured in aid of its infraction. In *Hall v. Coppel*, 7 Wall. 559, 19 L. Ed. 244, the United States Supreme Court said: "The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, '*Ex dolo malo non oritur actio*,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

Lastly it is insisted that Bates is not a competent witness. He cannot testify for himself as to any transaction had with the decedent, but he may testify for the insurance company. The administrator by making Bates a defendant to the action cannot deprive the insurance company of the benefit of his testimony. As between the insurance company and the administrator Bates does not testify for himself. *Dovey v. Lam*, 77 S. W. 383, 25 Ky. Law Rep. 1157.

Judgment affirmed.

DAVIES v. EPSTEIN.

(Supreme Court of Arkansas. Dec. 2, 1905.)

1. DEDICATION—TOWN PLATS—CONSTRUCTION—PRESUMPTIONS.

The plat of a village showed a street 50 feet wide, parallel with the shore of a lake and abutting thereon, and other streets at right angles thereto, but did not show the meander line of the lake, though the name of the lake appeared on the plat next to the street; no intervening space between the street and the lake being shown. *Held*, to raise a presumption of a dedication, giving the public access to the lake.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 3, 4, 42, 43, 91-94.]

2. EVIDENCE—DECLARATIONS AGAINST INTEREST.

On the issue of the dedication to the public of the land lying between a lake front and certain platted lots and blocks as shown on a town plat, evidence of a declaration of the owner of the land that he had dedicated the water front to the public use was admissible as a declaration against interest.

3. DEDICATION—EVIDENCE.

Where a plat of land on a lake shore raised the presumption of a dedication of a street abutting on the lake shore, and the shore to the public, there being also evidence of a declaration by the owner of the land that he had dedicated the water front to the public use, the fact that a deed from such owner of a lot described by number on the plat contained a recital declaring the margin of the lake to be the front line of the lot, though the dedicated street was between the lot and the lake was insufficient to overcome the presumption of the intent to dedicate the lake shore.

4. INJUNCTION—CONVENIENT USE OF PROPERTY—OBSTRUCTION.

Where it appeared that the convenient use of plaintiff's property situated on the shore of a lake would be materially impaired by an illegal obstruction about to be erected between the property and the lake, and that the market value of the property would be thereby depreciated, injunction lay against the continuance of the obstruction and for its abatement.

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Action by Sam Epstein against Walter Davies. Decree for plaintiff, and defendant appeals. Affirmed.

This is a suit in equity brought by appellee, Sam Epstein, against appellant, Walter Davies, to restrain the latter from erecting a building on the sloping bank of Lake Chicot, between the town of Lake Village, as laid out and platted, and the water's edge. The tract of land fronting on the lake (then known as Old River Lake) on which the town of Lake Village is situated, was originally owned by John Summers, who, on July

8, 1856, laid out and platted the town, caused the plat to be recorded, and thereafter sold lots according to the descriptions on the plat. The plat shows a street 50 feet wide running north and south, parallel with the lake front and abutting thereon. This street is denominated on the plat "Front Street," and other streets are laid off on the plat running west at right angles. The plat does not show the meander line of the lake, but the words "Old River Lake" appear thereon immediately in front of the street, indicating the situation of the lake and that Front Street abutted thereon. The front section of the plat is shown below.

Another survey and plat was made a short time before the commencement of this suit, showing an irregular meander line of the lake front. By action of the water in washing away the top of the bank, the same has become more sloping, and by this process, as well as by recession of the waters of the lake, the space between the top range of the slope or bank and the water's edge has been widened. It is also shown that at present the top range of the bank or slope is only 10 to 20 feet from the front of the west line of Front street, thus leaving only that much of the street as originally platted clear of the top range of the slope, and that the street as now used by the public encroaches upon the fronts of the lots abutting thereon. The plaintiff is the owner of lot No. 49, according to the plat, and has a building thereon used as a hotel, and the defendant began the erection of a building in front of plaintiff's lot, near the water's edge and 9 feet east of the original platted east line of Front street. This suit is brought to prevent the erection of the building by defendant, on the alleged ground that Summers, the original owner, dedicated the water front to the public, and that the plaintiff will suffer special injury by reason of the obstruction of his frontage on the open lake. The defendant denied that any land east of Front street was dedicated to the public use by Summers; set up title in himself to the land under mesne conveyances from Summers and by adverse possession for more than seven years. The conveyances from Summers, under which defendant claims title, describe all of the original tract of land except that part covered by the town of Lake Village. Other facts deemed important to state are mentioned in the opinion. The court rendered a decree in

Old River Lake

Front Street 50 Feet Wide

104 1/2	104 1/2	104 1/2	104 1/2	209 Ft.	74 1/2 Ft.	104 1/2 Ft.	104 1/2	104 1/2
82	81	66	65	50	49	24	23	2
104 1/2	104 1/2	104 1/2	104 1/2	104 1/2	104 1/2	74 1/2 Ft.	104 1/2 Ft.	104 1/2
84	83	68	67	52	51	26	25	4
								1
								3

favor of the plaintiff, perpetually enjoining the defendant from erecting the building on the land in question, and the defendant appealed.

James R. Yerger and Robinson & Beadel, for appellant. John G. B. Simms, for appellee.

MCCULLOCH, J. (after stating the facts). The primary question presented for our consideration is whether Summers, the original owner, dedicated to the public use all the land on the lake front east of the platted lots and blocks, for in no other way does the plaintiff claim any right to prevent the defendant from occupying the land on which he is about to build. An owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys, and by selling lots by reference to the plat, dedicates the streets and alleys to the public use, and such dedication is irrevocable. 18 Cyc. pp. 455, 456, 457, and cases cited; Elliott on Roads & Streets, § 117. He will also be held to have thereby dedicated to the public use squares, parks, and other public places marked as such on the plat. Archer v. Salinas City, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145; Bayonne v. Ford, 48 N. J. Law, 292; Rhodes v. Brightwood, 145 Ind. 21, 43 N. E. 942; Pierce v. Roberts, 57 Conn. 31, 17 Atl. 275. The fact depends upon the intention of the owner to dedicate to the public, as clearly and unequivocally manifested. It is held, however, that "the intention to which courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts." 13 Cyc. p. 452, and cases cited; Elliott on Roads & Streets, §§ 124, 156. It becomes, therefore, a question of fact in this case to determine whether the owner dedicated the land in controversy.

We think it is clear from an examination of the plat filed by Summers, that he intended to dedicate to the public use all the land between the front tier of lots and the bank of the lake. The plat shows no intervening space between Front street and the lake. The lake was then and is now a navigable body of water and, manifestly, he did not intend to cut the town off from access to the water. Yet, unless the conclusion is reached that he dedicated this strip, the effect will be to entirely cut off access to the water, as there are no streets or ways laid off on the plat from Front street to the water's edge. It is inconceivable that the owner intended to lay out a town on the banks of a navigable water and to parallel the bank with a street, and at the same time entirely cut it off from access by the public. This is contrary to reason, and to the obvious intention of the owner in selecting the site for the town. Under such circumstances a presumption necessarily arises of a dedication that will give the public access to the water.

In the case of Village of Wayzata v. Railroad Co., 50 Minn. 441, 52 N. W. 914, the court said: "Where the grant or dedication to the public is for the purpose of passage and goes to the water, the conclusion—there being no indication of a contrary intention—is inevitable that the grant or dedication was intended to enable the public to get to the water for the better enjoyment of the public right of navigation." See, also, Mayor, etc., v. Morris Canal Co., 12 N. J. Eq. 543; Barclay v. Howell, 6 Pet. (U. S.) 498, 8 L. Ed. 477; Webb v. Demopalis, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; Yates v. Judd, 13 Wis. 126; Rowan's Ex'rs v. Portland, 8 B. Mon. (Ky.) 232; Parish v. Stephens, 1 Or. 59; Alves' Ex'rs v. Henderson, 16 B. Mon. (Ky.) 131.

In Rowan's Ex'rs v. Portland, *supra*, the Kentucky Court of Appeals said: "That the town extended to the Ohio river, leaving no space between the town and the water, is a position which, in our opinion, does not admit of question. There is no line dividing or separating the town from the river. And if there were, it should rather be presumed that the space between such line and the river was thus discriminated for the purpose of showing that it was intended for some use of the town different from that of the ordinary streets and public grounds (or that the cross streets, at least, were intended to be extended to the river at some future day) than that a town located upon the bank of such a river, and at point selected for its commercial advantages, should be wholly shut out from free and common access to the river. The unreasonableness of this latter presumption has been more than once declared by this court, and the fact that a town is laid off upon the bank of a navigable river has been held to be sufficient evidence of its extending to the water, unless a contrary intention is manifestly indicated."

The Supreme Court of Alabama, in the case of Webb v. Demopalis, *supra*, in discussing a state of facts quite similar to that presented in this case, said: "The river thus being a leading inducement to the location of the town and to the purchase of lots therein, it would have been singular, indeed, if the proprietors of the site had not made provision looking to the utilization of this waterway by those who had been induced in great part to settle there, because of the facilities for transportation offered by it, and the public at large, by so laying out the town as to afford easy access to the river from the town, and vice versa. They did not fail to make such provision, but left the whole river front of the city open, unobstructed, and free of access. * * * As to the extent of this dedication, or rather, as to the limits of the street as dedicated, with reference to the river, there cannot, we think, be two opinions, so far as the question depends upon the intention of the proprietors of the soil. In view of the considerations which led to

the establishment of a town at that point, the advantages expected to accrue to the inhabitants thereof from the facilities for transportation and commerce, which the juxtaposition of this waterway offered, and the necessity to utilize and conserve these advantages by affording the public ready and unobstructed access to the river—considerations to which we have before adverted—and in view of the fact that, as appears from all the maps, no disposition of any part of the river front to private uses was contemplated by the founders of Demopolis and the dedicators of this street, the conclusion cannot be resisted, that they intended that this street should embrace all that part of the site of the town which lay between the numbered lots and the water's edge at all stages of the river. In no other way could their manifest purpose of providing a common highway, not only along, but to and on the river, be effectuated."

It has been held that "one who records a plat, and marks upon it spaces that appear to form no part of any platted lots, dedicates the land represented by the spaces thus excluded to a public use." Elliott on Roads & Streets, § 119; Porter v. Carpenter, 39 Fla. 14, 21 South. 788; London, etc., Bank v. Oakland, 90 Fed. 691, 33 C. C. A. 237; Hanson v. Eastman, 21 Minn. 509; Sanborn v. Chicago, etc., Co., 16 Wis. 19; Arnold v. Welker, 55 Kan. 510, 40 Pac. 901; Yates v. Judd, supra. In addition to this, we have the testimony of one witness as to a positive declaration by the owner, several years after the alleged dedication but whilst he was yet owner of the land, that he had dedicated the water front to the public use. This was competent as a declaration against interest. Cribbs v. Walker (Ark.) 85 S. W. 244; Allen v. McGaughey, 31 Ark. 252; Eaton v. Sims, 59 Ark. 611, 28 S. W. 429.

The only fact proved tending to negative an intention on the part of the owner to dedicate to the water front is that, in a conveyance of a lot described according to the number on the plat, executed less than a year after the filing of the plat for record, the owner inserted a recital declaring the margin of the lake to be the front line of the lot so conveyed. We do not think this is sufficient to overcome the presumption of an intention to dedicate arising from other facts and circumstances proved. Mayor, etc., v. Morris Banking Co., supra. This is not inconsistent with the dedication, as he may have intended to convey the fee, subject to the public use, so as to give his grantee special authority to prevent invasion by strangers of the front at that point. Indeed, if the recital of this deed be given literal effect it would negative any intention to dedicate Front street, because, if he conveyed to the margin of the lake, he necessarily included the street in the grant. This he could not do, for the reason that his previous dedication was irrevocable. Upon the whole proof, we entertain no doubt

that a dedication of the water front to the public use was intended by the owner, and his subsequent grantees must be held to an observance of it.

Nor do we think that appellant has sustained his claim to title by adverse possession. The occupancy by his grantors was not of such a character, nor of such continuous duration in point of time, to warrant a finding of continuous adverse possession for a period of seven years under a claim of ownership.

The only remaining question is whether appellee has shown such a special and peculiar injury on account of the obstruction, not suffered in common with the public affected by it, as to give him the right to maintain a suit for injunction against its continuance and for its abatement. We think that, under the established principles of equity on the subject, he has done so. Draper v. Mackey, 35 Ark. 497; Packet Co. v. Sorrels, 50 Ark. 466, 8 S. W. 683; Wellburn v. Davies, 40 Ark. 83; Texarkana v. Leach, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68. It is proved that the convenient use of appellee's property will be materially impaired by the obstruction about to be erected in front of it, and that the market value of his property will be depreciated thereby. This unquestionably gives him the right to prevent the obstruction.

The decree is therefore affirmed.

DICKINSON et al. v. ARKANSAS CITY IMP. CO.

(Supreme Court of Arkansas. Feb. 10, 1906.
On Rehearing, March 24, 1906.)

1. HIGHWAYS—OBSTRUCTION—ACTION TO RESTRAIN.

Equity has cognizance of an action to restrain one from obstructing streets and alleys on which plaintiff's lots and blocks abut.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 430.]

2. EQUITY—RETENTION OF JURISDICTION ACQUIRED.

Where a complaint to restrain defendants from tearing down fences on plaintiff's property and from interfering with plaintiff in renting the land stated no grounds for the exercise of equity jurisdiction, the defects in jurisdiction were supplied by a cross-complaint of defendants seeking to restrain plaintiff from obstructing streets and alleys on which lots and blocks owned by defendants abutted, since, where a court of equity rightfully assumes jurisdiction for one purpose, it may grant all the relief, either legal or equitable, to which any of the parties show themselves entitled in the subject-matter of the controversy.

3. TAXATION — SALES — VALIDITY — DESCRIPTION.

A tax sale and a deed executed pursuant thereto, describing the land sold as "part E. ¼ N. E. ¼, sec. 32, T. 12 S. R. 1 W. 55 acres, were void because of the imperfect and uncertain description.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1519-1522.]

4. ADVERSE POSSESSION—COLOR OF TITLE—DEFECTIVE TAX DEED.

The two-year statute of limitations does not run under a tax deed void for imperfect and uncertain description of the land sold.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 463, 465.]

5. TAXATION—SALE AFTER PART PAYMENT OF TAXES—VALIDITY.

A tax sale of land for the whole of the taxes assessed, when part of the taxes thereon have been paid, is void.

6. SAME—SALE FOR EXCESSIVE AMOUNT.

A tax sale made for an excessive amount is void.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1350.]

7. LANDLORD AND TENANT—ADVERSE POSSESSION.

Tenants of property cannot acquire title by limitation under a tax deed, their possession not being adverse.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 199-209.]

8. DEDICATION—HIGHWAYS—WHAT CONSTITUTES.

Where land owned in common was platted, and subsequently divided among the tenants, each receiving certain lots and blocks, the fact that lots and blocks were still owned by the several alleged dedicators or their privies was of the same force in effectuating the dedication of streets and alleys inter sese as if sales of lots had been made to third parties, and either of such dedicators might object to the revocation of the dedication if the objection was manifested in apt time.

9. SAME—RIGHTS OF PUBLIC IN DEDICATION—REVOCATION.

Where none of the lots and blocks in platted property were sold to third persons, and the streets and alleys had never been thrown open to public use, neither the public nor third parties had rights in such dedication, and the owners of the property could revoke the same.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 79.]

10. SAME—REVOCATION—HOW EFFECTED—ABANDONMENT OF PURPOSE OF PLATTING.

Revocation of a dedication of streets and alleys of a town plat may be accomplished either by an affirmative act in recalling it, or by an abandonment of the scheme pursuant to which the land was platted; the question of abandonment being one of fact, occurring where the object of the use for which the property is dedicated wholly fails.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 79.]

11. SAME—SUFFICIENCY OF EVIDENCE.

Where property owned in common was platted by the owners for the purpose of bringing the land within the limits of an incorporated town and of selling the lots and blocks therein at a profit, but no lots were sold nor any of the streets thrown open to public use, no effort being made for more than 20 years since the dedication of the streets and alleys on the plat to bring the land within such city limits, the land having been continuously fenced and cultivated as a farm, and such fences being rebuilt when washed away by overflow and the platted streets again obstructed thereby, an intent to abandon the whole scheme was manifested, justifying a holding that the dedication of the streets and alleys was no longer in force, although one of such owners testified that he expected at some time to sell the lots and have the territory added to the town; there being nothing in such testimony warranting a definite or reasonable expectation that the scheme might soon be accomplished.

12. BOUNDARIES—HIGHWAYS—LOTS AND BLOCKS—DESCRIPTION BY NUMBER.

A conveyance of lots and blocks in platted property, describing them by number only, passes the fee to the center of the streets and alleys on which they abut, subject to the rights of the public use of the same as highways.

13. DEDICATION—STREETS AND ALLEYS—VALUATION—REVERSION.

When streets on which lots described by numbers only in the conveyance thereof are vacated or the use of the same abandoned, they revert to the owners of the abutting lots.

On Rehearing.

14. LANDLORD AND TENANT—LEASES—RENTAL—EVIDENCE.

Where a tenant remained in possession of leased premises after expiration of his lease, though unable to agree with his lessor upon terms of lease for the succeeding year, except as to the amount of rent, the lessor's agreement to rent for such sum constituted an admission by him that the same was the proper amount of rental.

Appeal from Desha Chancery Court; M. L. Hawkins, Chancellor.

Action by the Arkansas City Improvement Company against J. W. Dickinson and others. Decree for plaintiff, and defendants appeal. Affirmed on condition that plaintiff within 10 days remit the decree for rent down to \$50; otherwise, that part of the decree to be reversed.

In 1881 John D. Adams, Mrs. M. L. Dickinson, wife of J. W. Dickinson, and Mrs. M. W. Lewis, wife of E. C. Lewis, owned as tenants in common a large body of land situated near the corporate limits of the town of Arkansas City. Mrs. Dickinson also owned separately an adjoining tract containing 80 acres. Anticipating a rapid growth of the town so as to encompass the land, the parties named laid off the said land into blocks and lots with streets, avenues and alleys intervening, and platted them as an addition to the town. There were three separate plats, one called "Highland Addition," another "North Highland Addition" and the other "Dickinson's Addition." Two of the plats were never placed of record, and the other was recorded since the commencement of this litigation. Nor have the corporate limits of the town ever been extended so as to embrace any part of the land in question. After platting the lands, the parties partitioned among themselves the lands held in common and executed partition deeds, describing the lots and blocks by numbers and reciting the fact that they dedicated to the public use all the streets and alleys (except certain therein named) and reserved two blocks to be held in common "for park purposes and other uses as they may hereafter determine." On June 15, 1882, they formed a domestic corporation called the Arkansas City Real Estate & Improvement Company and each conveyed to said corporation certain lots and blocks embraced in said additions. The plaintiff herein, Arkansas City Improvement Company, a foreign corporation, acquired title to said lots and blocks

under mesne conveyances from said Arkansas City Real Estate & Improvement Company, as recited in the opinion of this court in the case of *Steers v. Kinsey*, 68 Ark. 360, 58 S. W. 1050, wherein the title was adjudged to be in said Arkansas City Improvement Company. Appellants Lewis and Mrs. Dickinson acquired title to all the lots and blocks not conveyed as aforesaid to said corporation. In all the conveyances referred to, the property conveyed is described by lots and block numbers and without any other description. None of the streets, avenues, and alleys marked on the plats were ever thrown open to public use, or opened at all, and no effort has ever been made before the commencement of this suit, to have them thrown open to use. Some of the land embraced in the so-called addition has, up to the trial of this case below, been in cultivation as a farm, and a considerable portion of it is woodland and thickets of undergrowth. Farmhouses remain in the platted streets, farm fences cross them, and the land is intersected by two public roads running irregularly without regard to the platted streets. In the case of *Steers v. Kinsey*, supra, a receiver was appointed by the court and took charge of the lots and blocks owned by the Arkansas City Improvement Company and rented the same as a farm to J. W. and M. L. Dickinson from the year 1896 until the termination of that suit in 1900, and from then up to and including the year 1902 Dickinson and wife rented the land from the Arkansas City Improvement Company. The leases to Dickinson and wife were in writing and some of them stipulated that said lessees should keep up the fences and other improvements; and they rebuilt fences which had been washed away by overflow and in doing so fenced up blocks, streets, alleys, etc., into a farm.

At the expiration of the year 1902 the parties were unable to agree upon terms of lease for the succeeding year and the present controversy then arose. The Dickinsons claimed that the streets, avenues, and alleys had been dedicated to the public use, demanded that the same be thrown open to such use, and threatened to tear down the fences obstructing the platted streets and alleys. This suit was then commenced in the chancery court of Arkansas county by the Arkansas City Improvement Company against the Dickinsons to restrain the latter from tearing down the said fences and from interfering with plaintiff in renting the land. It is also alleged in the complaint that the Dickinsons were claiming title to 55 acres of said land owned by plaintiff under tax sales alleged to be void and the prayer is also for a cancellation of said tax deeds. A part of the land was assessed for taxation in the name of M. L. Dickinson as owner for the year 1895 under the following description: "Part E. $\frac{1}{2}$ N. E. $\frac{1}{4}$, sec. 32, T. 12 S. R. 1 W. 55 acres"—and was sold under that description by the collector of taxes on June 8, 1896, to

F. N. Thane, wife of the receiver, H. Thane, who assigned the certificate of purchase to C. F. Dickinson, son of J. W. and M. L. Dickinson. Pursuant to the tax sale a deed was executed by the clerk to C. F. Dickinson according to the above description, who conveyed to J. W. Dickinson. The same land was assessed for taxation in the same name for the year 1897 under the following description: "Erl. E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32, T. 12 S. R. 1 W."—and was sold under that description by the collector to J. W. Dickinson, who received a clerk's tax deed therefor. For the same years a part of the same sectional subdivision was assessed for taxation in the name of Arkansas City Improvement Company under the following description: "pt. E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32 T. 12 S. R. 1 W, 25 acres"—and the taxes extended against it were paid by that company. The defendants filed an answer and cross-complaint, claiming title to 55 acres in the east half of northeast quarter of section 32 under said tax deeds and asserting a right to have all of said platted streets, avenues, and alleys in said additions thrown open in accordance with said alleged dedication and they prayed that the plaintiff be restrained from obstructing the same with fences. They also pleaded title by adverse possession of the 55 acres for a period of two years under said tax deeds. Subsequently M. W. and E. W. Lewis were made defendants on their own motion and filed answer adopting the answer and cross-complaint of their co-defendants, and joined in the prayer for affirmative relief as to the opening of the streets, etc. The cause was heard upon the pleadings and exhibits, deeds, plats, and other documentary evidence, and the depositions of witnesses taken by both sides, and a final decree was rendered dismissing the cross-complaint for want of equity and granting the relief prayed for in the complaint. All of the defendants appealed.

Rose, Hemingway & Rose and J. W. Dickinson, for appellants. F. M. Rogers and W. S. McCain, for appellee.

MCCULLOCH, J. (after stating the facts). Upon the threshold of the case here, appellants present the question that the cause of action stated in the complaint, and the relief prayed for, are not within the jurisdiction of a court of equity and that for that reason the complaint should have been dismissed. Conceding that the complaint stated no grounds for the exercise of equity jurisdiction, the cross-complaint of the defendants, in seeking to restrain the plaintiff from obstructing the streets and alleys upon which the lots and blocks owned by defendants abutted, stated a cause of action clearly cognizable in equity (*Davies v. Epstein* [Ark.] 92 S. W. 19; *Texarkana v. Leach*, 66 Ark. 40, 48 S. W. 807, 74 Am. St. Rep. 68; *Packet Co. v. Sorrels*, 50 Ark. 466, 8 S. W. 683) and thus

supplied the defects in jurisdiction. *Radcliffe v. Scruggs*, 46 Ark. 96; *Crease v. Lawrence*, 48 Ark. 312, 3 S. W. 196. Where the court of equity rightfully assumes jurisdiction for one purpose it may grant all the relief, either legal or equitable, to which any of the parties show themselves entitled in the subject-matter of the controversy. *Crease v. Lawrence*, supra; *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821; *Apperson v. Burgett*, 33 Ark. 328; *Conger v. Cotton*, 37 Ark. 286; *Bonner v. Little*, 38 Ark. 397.

There remain two questions to dispose of, viz., the claim of title of the Dickinsons, appellants, under the tax deeds and by adverse possession for the statutory period of limitation, and the right of appellants to require the opening of the streets and alleys laid out on the plat of the three additions. The tax sale of 1896 and the deed executed pursuant thereto, describing the land as "part E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32 T. 12 S. R. 1 W.," were void because of the imperfect and uncertain description. *Schattler v. Cassinelli*, 58 Ark. 172, 19 S. W. 746; *Cooper v. Lee*, 59 Ark. 460, 27 S. W. 970; *Little Rock & Fort Smith Ry. Co. v. Huggins*, 64 Ark. 432, 43 S. W. 145; *Rhodes v. Covington*, 69 Ark. 357, 63 S. W. 799. Nor does the two-year statute of limitation run under a deed containing such description. A deed failing to describe the land is equivalent to no deed at all. In order to put this statute in operation the adverse holding must be under a deed purporting to convey the land pursuant to a tax sale. The deed under which appellants claim to have held does not purport to convey the title to any land, because none is described therein. *Rhodes v. Covington*, supra. The second tax deed under which appellants claim title is void for a different reason. Conceding that the description, "E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, sec. 32, T. 12 S. R. 1 W.," where the section is not in fact fractional, is sufficient to describe the whole of the east half of the northeast quarter, the record shows that appellee paid taxes for the same year on part of the same subdivision and, this being true, a sale of the tract for the whole of the taxes assessed, when part of the taxes thereon had been paid renders the sale void. A tax sale made for an excessive amount is void. *Goodrum v. Ayers*, 56 Ark. 93, 19 S. W. 97; *Cooper v. Freeman*, 61 Ark. 36, 31 S. W. 981, 32 S. W. 494; *Kirker v. Daniels*, 73 Ark. 262, 83 S. W. 912.

Appellants' plea of the statute of limitation under this deed cannot be sustained for the reason that they were in possession of the land as tenants of appellee, and the possession was not adverse. They could not acquire title by limitation while occupying the lands as tenants of appellee. Possession thus held was not adverse to the rights of the landlord.

Did appellants have the right to require the opening of the streets and alleys in-

dedicated on the plats of the several additions? In the recent case of *Davies v. Epstein*, supra, we approved the generally established doctrine that "an owner of land, by laying out a town upon it, platting it into blocks and lots, intersected by streets and alleys and selling lots by reference to the plat, dedicates the streets and alleys to the public use and such dedication is irrevocable." It is equally well established that "merely laying out grounds, or merely platting and surveying them, without actually throwing them open to public use or actually selling lots with reference to the plat will not as a general rule show a dedication." *Holly Grove v. Smith*, 63 Ark. 5, 37 S. W. 956; *Elliott on Roads*, § 117; *United States v. Chicago*, 7 How. 185, 12 L. Ed. 660. In the case at bar none of the streets and alleys were actually thrown open to use, and no sales of lots to third parties are shown to have been made. However, we think that the fact that lots and blocks are still owned by the several alleged dedicators, or their privies, is of the same force in effectuating the dedication. *Inter sese*, as if sales of lots had been made to third parties. Either may object to a revocation of the dedication, if the objection be manifested in apt time.

The question presented now is not so much that of the original intention on the part of the owners to dedicate to the public use, but whether the dedication has been revoked by the dedicators by an abandonment of the scheme in furtherance of which the original dedication was intended. None of the lots and blocks having been sold to third parties, and the streets and alleys never having been thrown open to public use, neither the public nor any third parties have rights in the dedication. It therefore remained within the power of the owners to revoke the dedication. *Elliott on Roads*, § 150; *Holly Grove v. Smith*, supra; *People v. Underhill*, 144 N. Y. 316, 39 N. E. 333; *Steinauer v. City*, 146 Ind. 490, 45 N. E. 1056. The revocation may be accomplished either by an affirmative act in recalling it, or by an abandonment of the scheme. The question of abandonment is one of fact, and may be said to occur where the object of the use for which the property is dedicated wholly fails. *Bayard v. Hargrove*, 45 Ga. 342; *Board of Education v. Van Wert*, 18 Ohio St. 22, 98 Am. Dec. 114; *Campbell v. Kansas City*, 102 Mo. 326, 13 S. W. 897, 10 L. R. A. 593; *Mahoning Co. Com'r v. Young*, 59 Fed. 96, 8 C. C. A. 27; *State v. Travis County*, 85 Tex. 435, 21 S. W. 1029. It has been often said that the fact of dedication depends wholly upon the intent, as manifested by open and visible acts, to appropriate the land to public use; and it is equally true that the fact of revocation by abandonment depends upon the intent, as manifested by open and visible acts, to abandon the purpose in furtherance of which the dedication was designed. Now

in this case not a single lot has been sold in this "paper city," nor a single one of the streets thrown open to public use. For more than 20 years since the alleged dedication no effort has been made by the owners or any one else, so far as the proof discloses, to bring the land within the limits of the incorporated town of Arkansas City. On the contrary, the land has been continuously fenced and cultivated as a farm. Where the fences were washed away by overflow, they were rebuilt and the platted streets again obstructed thereby. The conclusion is irresistible from these circumstances that the whole scheme for making the additions to the town of Arkansas City has failed and has been abandoned. It is true that one of the appellants testifies that he expects, at some time, to sell the lots and to have the territory added to the town but there is nothing in the testimony to warrant a definite or reasonable expectation that such scheme may soon be accomplished. It appears to be more a hope for future results rather than a definite present intention to bring about the result. There is nothing shown to manifest such intent until the parties had disagreed about the terms of renting the lands again for farm purposes and this suit resulted. It was then too late, after the abandonment of the scheme, for either of the owners to insist upon a dismemberment of the farm property by throwing open the streets and alleys intersecting it. We think the chancellor was correct in holding that the alleged dedication was not still in force and that appellants could not demand the opening of the platted streets, avenues, and alleys.

It is contended by appellants that no title to the streets and alleys on which the lots and blocks of appellee abutted passed because the conveyance, under which appellee holds, describes the property conveyed only by lot and block numbers. A conveyance of lots and blocks, describing them by numbers only, passes the fee to center of the streets and alleys on which they abut, subject only to the rights of the public use of the same as highways, and when the streets are vacated or the use abandoned, they revert to the owners of abutting lots. *Taylor v. Armstrong*, 24 Ark. 102; *Packet Co. v. Sorrels*, 50 Ark. 466, 8 S. W. 683; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373; *Bayard v. Hargrove*, 45 Ga. 342; *Harrison v. Augusta Factory*, 73 Ga. 447; *Elliott on Roads*, § 886; *Banks v. Ogden*, 2 Wall. 57, 17 L. Ed. 818; 13 Cyc. p. 492. It follows that the dedication never having been in any way accepted by the public and having been revoked by abandonment

of the scheme for converting the lands into additions to the adjacent town, the title to the streets, avenues, and alleys passed to the owners of abutting platted lots and blocks as grantees of the original dedicators. That is to say, they own to the center of the platted streets, etc., and of course where they own the lots on both sides, it carries the title to the whole street. This applies, also, of course, to appellants as owners of some of the lots and blocks and their title to the center of the streets, on which their lots abut, is not disputed. Nor is their right to reasonable means of ingress and egress to and from their property disputed. That is expressly recognized and not involved in this litigation. It is only their right to have the streets and alleys, as such, thrown open to use, which is denied by appellee and which by this decision is denied to them.

The decree is therefore affirmed.

On Rehearing.

The court rendered a personal decree against J. W. Dickinson, one of the defendants, for the sum of \$114 for rent for the year 1903 for 30% acres of the land in controversy referred to as a part of the S. E. $\frac{1}{4}$ of section 29 lying west of John's Bayou. The evidence supports the finding of the chancellor as to the number of acres cultivated by Dickinson, but there is no satisfactory showing as to how much of it was owned by appellants and how much by appellee. Counsel for appellee in their original brief as well as the brief on petition for rehearing, do not point out the evidence sustaining the finding, and we are unable to discover any in the record.

Appellant J. W. Dickinson in his petition for rehearing contends that appellee agreed with him upon a rental of \$50 for a subsequent year and urges this as an admission by appellee of the proper amount for the year 1903. This contention cannot be viewed in any other light than as an admission by him that the proper amount of rent should be \$50, and justifies us in sustaining the decree to that extent. So, if appellee will within 10 days remit the decree for rent down to \$50, the same will be affirmed; otherwise, that part of the decree will be reversed, and the cause remanded with directions to the chancellor to hear further proof and ascertain the amount due for rent.

In all other respects the petition for rehearing is denied, and the decree stands affirmed. The cost of appeal will be adjudged against the other appellants.

CHOCTAW, O. & G. R. CO. v. STATE.
(Supreme Court of Arkansas. Dec. 24, 1904.)

Concurring opinion. For majority opinion, see 84 S. W. 502.

McCULLOCH, J. (concurring). I do not agree with the majority of the court, and think that the refusal to furnish cars, under the state of facts described, was an actionable discrimination; but, as the cars were demanded, in this instance, for use in shipping coal out of the state, it was the initial step in an interstate commerce transaction, and falls within the exclusive federal authority. I concur in the judgment for that reason only.

HILL, C. J., disqualified.

WILSON & BEALL v. GAYLORD.
(Supreme Court of Arkansas. Jan. 20, 1906.)

1. EJECTMENT—TITLE OF PLAINTIFF—SUFFICIENCY.

In a suit to recover the possession of land, plaintiff must recover on the strength of his own title, and not upon the weakness of defendant's title.

2. SAME — JUDICIAL SALES — TITLE OF PURCHASER.

Under Kirby's Dig. § 6321, providing that a conveyance in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action, a sale of land under a decree in a suit in personam to enforce payment of levee taxes passes to the purchaser only such title as the parties had at the time of the sale, and proof of a conveyance pursuant to such sale, without further proof that the parties to the suit had title to the land, does not establish sufficient title in the purchaser to support ejectment.

Appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor.

Suit by C. H. Gaylord against Wilson & Beall. From a decree in favor of plaintiff, defendants appeal. Reversed.

J. T. Coston and Chas. T. Coleman, for appellants. W. J. Lamb, for appellee.

McCULLOCH, J. This suit was originally commenced at law in the circuit court of Mississippi county by appellee, C. H. Gaylord, against appellants, Wilson & Beall, to recover possession of the tract of land in controversy, and damages in the sum of \$1,000 for timber alleged to have been cut by defendants. On motion of defendants the cause was transferred to the chancery court, and a final hearing there resulted in a decree in favor of the plaintiff for recovery of the land and the value of the timber cut by the defendants. Appellee, in his complaint, set forth the following chain of title, under which he claimed to be the owner of the land: (1) United States to the state of Arkansas, swamp land grant, September 28, 1850. (2) State of Arkansas to John T. Hanks, certificate of entry, 1858. (3) Deed

from commissioner in chancery to plaintiff under sale made pursuant to the decree of the chancery court of Mississippi county in suit of board of directors of St. Francis Levee District against H. & F. Higginson, condemning the land for sale to pay levee taxes of 1893. Defendant Wilson filed a separate answer admitting that he was in possession of the land as alleged, but denied that plaintiff was owner thereof. He claimed, in his answer, title to the land under a patent issued March 9, 1859, by the state of Arkansas to L. L. Johnson and John C. Palmer as assignees of John T. Hanks, and deeds from the heirs of Johnson and Palmer, but the record does not show that any evidence was introduced in support of his alleged chain of title. So the case rests upon the strength of the title of the plaintiff, who must succeed, if at all, upon that, and not upon the weakness of defendants' title. *Nix v. Pfeifer*, 73 Ark. 199, 83 S. W. 951; *St. Louis Refrigerator & Wooden Gutter Co. v. Thornton*, 74 Ark. —, 86 S. W. 852. The plaintiff, to make out his title, shows a conveyance made to him by a commissioner in chancery pursuant to a decree of that court rendered in 1894 in a suit brought against H. & F. Higginson by the board of directors of St. Francis Levee District to enforce payment of the levee taxes of 1893. It is not proved, however, that the Higginsons ever had title to the land. This decree and the sale thereunder establishes no more than that the title possessed by the Higginsons passed to the plaintiff by virtue of his purchase under the decree. The suit was by the board of directors against H. & F. Higginson in personam, and affected the rights of no persons who were not parties to that proceeding. The suit was brought against the Higginsons as defendants, and the decree was, in terms, a personal one against them for the amount of the levee taxes, penalty, and cost, and a lien on the land was declared therefor.

A decree in a personal action binds only the parties thereto and their privies, and a sale thereunder passes only such title as the parties thereto had at the time of the decree or sale. Kirby's Dig. § 6321; *Wilson v. Spring*, 38 Ark. 192; *Thomas v. Hinkle*, 35 Ark. 450; *McConnell v. Day*, 61 Ark. 464, 38 S. W. 731; *Roulston v. Hall*, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97; *Greenstreet v. Thornton*, 60 Ark. 374, 30 S. W. 347, 27 L. R. A. 735; 17 Am. & Eng. Enc. Law, p. 1010; *Eldred v. Johnson*, 75 Ark. —, 86 S. W. 670; *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001. In *Greenstreet v. Thornton*, supra, this court, speaking of a suit to enforce payment of a local improvement tax on real estate in a city, said: "Where it is not alleged that the owner is unknown and the proceedings are against a certain person named as defendant, and alleged to be the owner of the property, then whether there be actual service upon him, or only constructive service in the manner desig-

nated by the statute, it is notice to him only, and the decree affects only his interest in the land, whatever it may be, and no one else is bound by it." *Waples Proc. in Rem.* § 628; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Hassell v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, 32 L. Ed. 1001.

The proof was insufficient to establish title in the plaintiff. Reversed and remanded, with directions to enter a decree dismissing the complaint.

ST. LOUIS, I. M. & S. RY. CO. v. DAWSON.
(Supreme Court of Arkansas. Jan. 13, 1906.)

1. RAILROADS—FIRES—CAUSE—EVIDENCE.

Evidence that a building near a railroad right of way was discovered to be on fire a few minutes after an engine passed is sufficient, in the absence of any other explanation of the cause of the fire, to justify a finding that it was caused by sparks from the engine.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1730, 1731.]

2. SAME—PRESUMPTION OF NEGLIGENCE.

Evidence that a fire was caused by sparks from a locomotive raised a presumption of negligence on the part of the railroad company.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1710-1712.]

3. EVIDENCE—OPINION OF EXPERT—PROPER OPERATION OF LOCOMOTIVE.

In an action against a railroad company for damages from a fire alleged to have been caused by sparks from a locomotive, an experienced engineer may testify as an expert as to the proper manner of handling an engine when passing combustible material.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2319-2323.]

4. RAILROADS—FIRES—SPARK ARRESTERS—DUTY OF RAILROAD COMPANY.

A railroad company is not absolutely bound to use the safest and best appliances to prevent the escape of sparks from its locomotives, but only to use reasonable care to supply the best and safest contrivances.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1657, 1668-1672.]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by S. W. Dawson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

B. S. Johnson, for appellant. Taylor & Jones, for appellee.

McCULLOCH, J. This is an action against the railway company to recover damages caused by destruction by fire of plaintiff's property, a lot of seed cotton stored in a house near the railroad track.

It is contended that the verdict is not sustained by the evidence. The facts are similar to those in *St. L., I. M. & S. Ry. Co. v. Coombes* (Ark.) 88 S. W. 595, and the principles of law announced in that case are controlling in this.

The plaintiff introduced testimony tending to show that the house containing the cotton was discovered to be on fire a few minutes

after the engine passed, and that there was no other evidence to explain the origin of the fire. The jury were justified, therefore, in finding that the fire was caused by sparks from the engine, which raised a presumption of negligence and placed upon the defendant the onus of exonerating itself. *St. L., I. M. & S. Ry. Co. v. Coombes*, supra. It is not required that the evidence should exclude all possibility of another origin, or that it be undisputed. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause. *Crist v. Erie Ry. Co.*, 58 N. Y. 638.

The testimony was conflicting as to whether defendant was guilty of negligence in failing to provide proper appliances to prevent the escape of sparks, or in failing to operate the engine with due care. We cannot say that the proof was insufficient to warrant a finding of negligence on the part of appellant.

It is claimed that the court erred in permitting a witness introduced by the plaintiff to state his opinion as to the duty of a railroad engineer in the exercise of due care in handling an engine when passing combustible matter. The witness was shown to have been a practical engineer who was qualified by experience to testify on the subject. This was not erroneous. The inquiry was as to whether the engineer was guilty of negligence in the operation of his engine, which is alleged to have caused the fire, and it was competent to show by opinions of men experienced in the operation of railroad locomotives the manner in which the same should be properly operated in order to prevent the emission of sparks when passing combustible matter. The court removed all possible prejudice improperly resulting from this evidence, by giving the following instruction asked by defendant: "The court instructs the jury that, unless it is shown from the evidence that the engineer in charge of said train knew, or in the exercise of ordinary care should have known, that there was stored in the said cotton house loose cotton or other highly inflammable material, it was not his duty to shut off his steam in approaching or passing that part of the track along which said house was situated, and he was guilty of no negligence in failing so to do."

The court gave the following instruction, over the objection of the defendant, and the giving of the same is assigned as error, viz.: "The court instructs the jury that railway companies, being authorized by law to use steam in the operation of their trains, are bound to use locomotive engines which are of the safest construction for protection against the communication of fire therefrom to property along the lines of their roads, and to supply them with the best approved appliances and contrivances used to prevent the escape of sparks and coals therefrom to the endangering of the property of others,

and to use them upon the road with such care and diligence as would be exercised by skillful, prudent, and discreet persons having the control and management of them, and a proper desire to avoid injury to the property along the road. The failure to use such locomotive appliances and contrivances, and such care and diligence, on the part of the companies, will be negligence, and will subject them to recovery for damages occasioned thereby, provided they occur without the contributory negligence of the owner of the property injured or destroyed." The objection urged against this instruction is that it imposes upon the railroad company the absolute duty of supplying its locomotives with the best approved appliances in use to prevent the escape of sparks, instead of only exercising reasonable care in providing such appliances. The objection is well founded.

A railway company is, by its charter, vested with a right to operate its railroad, and is not an insurer of property along or near the line of its road, nor of the safety and perfection of the appliances adopted to prevent the escape of fire from its engines. Its duty is merely to exercise reasonable care to provide the best and safest approved contrivances in use to prevent the escape of fire, and is only liable for a negligent failure in this respect. There may be several different kinds of such contrivances in use by railway companies, and there may be an honest difference of opinion among those competent to judge of the matter, as to which is the best and safest. It is conceded by all that none of such appliances will absolutely prevent the escape of sparks under all circumstances. The railway company is only bound to exercise reasonable care in the selection of such approved appliances from those in use, and is not necessarily guilty of negligence because the kind selected proves in the end not to be the best. Of course, it is competent to show what is the best in order to establish the fact whether or not there has been negligence in making the selection, but it does not necessarily follow, as a matter of law, that the failure to select the best establishes negligence. *St. L., I. M. & S. Ry. Co. v. Coombes*, supra; *Lesser Cot. Co. v. St. L., I. M. & S. Ry. Co.*, 114 Fed. 133, 52 C. O. A. 96; *Rosen v. Railroad Co.*, 83 Fed. 300, 27 C. C. A. 534; *Hagan v. Railroad Co.*, 86 Mich. 615, 49 N. W. 509; *Flinn v. N. Y., etc., Ry. Co.*, 142 N. Y. 11, 36 N. E. 1046; 3 *Elliott on Railroads*, p. 1898.

We are therefore of the opinion that the giving of this instruction was erroneous. It is true the instruction follows the language used by this court in *Railway Company v. Fire Association*, 53 Ark. 163, 18 S. W. 43, but in that case an instruction of the trial court was not under discussion, and the effect of the evidence in support of the charge of negligence was being discussed. The language used therein was a statement in general terms of the duty of the company to

exercise care in the construction and operation of its trains; it being shown by the undisputed evidence in that case that the locomotive from which the fire escaped was in bad condition, and was provided with no contrivances for the prevention of the escape of sparks. The question now presented in the case at bar was not before the court in that case, and was not discussed in the opinion. The language used in that case, with reference to the undisputed facts therein, was not applicable in this case as an instruction to the jury upon the conflicting testimony introduced. It was in conflict with the instructions on the subject given at the instance of the defendant, and was calculated to mislead the jury. *Railway v. Aven*, 61 Ark. 155, 32 S. W. 500; *Fordyce v. Edwards*, 65 Ark. 101, 44 S. W. 1034; *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203, 21 S. W. 104; *Fletcher v. Eagle*, 74 Ark. —, 86 S. W. 810; *St. L. & N. Ark. Ry. Co. v. Midkiff*, 74 Ark. —, 87 S. W. 446.

For the error in giving this instruction, the judgment is reversed, and the cause remanded for a new trial.

DOW v. STATE.

(Supreme Court of Arkansas. Jan. 20, 1906.)

1. HOMICIDE—INSTRUCTIONS ON MANSLAUGHTER.

Refusal of instructions on manslaughter is proper; there being no evidence to reduce the offense to manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 652, 655.]

2. SAME—MANSLAUGHTER—PROVOCATION.

Mere words are not sufficient provocation to reduce a willful homicide to manslaughter.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 69.]

3. SAME.

Provocation on the part of defendant's father-in-law does not justify his killing his wife.

4. SAME—INSANITY AS A DEFENSE.

Great passion brought on without provocation is not such insanity as constitutes a defense for a homicide.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 44.]

5. SAME—EVIDENCE.

Defendant, on prosecution for murder of his wife, having testified that their separation was caused by her parents, it was proper to admit testimony that he had abused her.

Appeal from Circuit Court, Independence County; William L. Moose, Judge.

John Dow appeals from a conviction of murder. Affirmed.

Dene H. Coleman, for appellant. Robert L. Rogers, Atty. Gen., for the State.

RIDDICK, J. This is an appeal from a judgment convicting the defendant, John Dow, of murder in the first degree, for killing his wife, Ella Dow, by shooting her. The facts, in brief, are that John Dow and his wife, Ella Dow, who were negroes, lived at or near

Batesville. The parents of Ella Dow lived near Sulphur Rock, in the same county. Some short while before the killing, Ella Dow had abandoned her husband and returned to the home of her parents. The witnesses for the state say that on the 4th day of April, Dave Peel, his wife, Priscilla Peel, his young daughter, Viola Peel, a son-in-law, Owen Kennedy, and Ella Dow his daughter, the wife of defendant, left their home and started toward the depot. They had gone but a short distance when they met the defendant, John Dow. He had with him a shotgun and a Winchester rifle. He asked them where they were going, and they told him. He then said to his wife: "Ella, get your clothes and let's go home." She declined to do so. Some few more words passed, when his father-in-law, Dave Peel, said to him: "John, you were here yesterday drawing your knife and making your threats, and if you do it again today I will have you arrested." The defendant made no reply to this, but said to his wife: "You are not going to live with me any more?" and she said "No." Defendant then threw up his shotgun and fired at her. He then shot his father-in-law. Both shots took effect, but neither of the parties were killed. His wife, in company with her young sister, ran up the railroad track. Defendant followed them, and his wife, seeing that she could not escape by flight, turned and came toward him with her hands up. He then shot her through the breast with the Winchester rifle, and when she fell to the ground fired another bullet through her head, producing instant death. He then shot at the 15-year old sister. Afterwards he shot himself two or three times, but the wounds were not fatal. He and the other parties, except his wife, recovered. The defendant testified in his own behalf that he went to Sulphur Rock to go hunting with one Fred Waugh; that Waugh had no gun, and he took the extra gun along for Waugh's use. He met his wife and the other parties. We quote his own words as to what followed: "I said, 'Good morning, wife. Do you want to go home this morning?' and before she could say anything Mr. Peel said, 'No, by God, she isn't going a step. I am going to take your God damn scalp,' and I said, 'Mr. Peel, I didn't come for any trouble, and don't mean to have any.' He started toward me with his hand in his pocket like he was going to bring out a revolver or some other deadly weapon, and Owen Kennedy caught him and said: 'You are wrong. Suppose some one would take your wife and keep her. You know white folks would string you up.' And he turned around to me and said, 'I mean every word I say.' I started back to Sulphur Rock down the road I first came, and he followed behind a short distance. He was very close to me, and I started to go around the fence and the road led up the lane, and I started to turn, and he started to fire. The bullet did not break the hide. That deafened me, and I fell to my knees. I proceeded to

try to get up again, and I got a blow on this shoulder. I fell back and caught on my hands and the next lick I got was right there, and that is all I know about it. I never knew any more after I got that lick." But this statement of the defendant that Dave Peel, his father-in-law, had made an assault on him, was contradicted by every witness on the part of the state present at that time. All of these witnesses testified that the defendant met them armed with a shotgun and rifle, and that Dave Peel had no weapon and made no assault. The motion for new trial sets out the errors relied on for reversal. Those exceptions, not brought forward in the motion for new trial, are waived and will not be noticed.

The first ground set out in the motion for new trial is that the court erred in refusing to give three instructions asked by the defendant. These instructions relate to the offense of manslaughter, but even if they were correct it was not error to refuse them under the evidence in this case, for there is no evidence in the case that would reduce the offense to manslaughter. It is well settled that mere words are not sufficient provocation to reduce a willful homicide to manslaughter, and no witness in the case testified that the wife of defendant did anything except to refuse to go home with him. The court correctly instructed that no provocation on the part of his father-in-law would justify him in taking the life of his wife, and even if defendant's testimony was true, there was no other legal provocation.

There was some evidence that the defendant, at the time he shot his wife, was laboring under temporary insanity; but counsel for defendant did not ask for any instruction on that point, and the evidence convinces us fully that he was not insane further than any one who is laboring under great passion may be said to be insane, but passion of that kind, brought on without legal provocation, is no defense at law against the crime of homicide, and the court properly so held. *Vance v. State*, 70 Ark. 272, 68 S. W. 37. If he was not insane, and the evidence, we think, shows that he was not, he was certainly guilty of willful and deliberate murder. While the charge of the court taken as a whole is not quite as clear as it might have been, we see nothing in it that could have prejudiced the rights of the defendant.

The defendant testified in his own behalf that he had never mistreated his wife; that he worked for her, and was devoted to her. The state was allowed to prove by witness Yancey that the defendant and his wife had lived on his place, and to ask him if defendant beat his wife. Yancey replied that he could not say of his own knowledge; that he heard a noise where defendant and his wife were; that witness went there, and defendant's wife complained in his presence that he had abused her, and defendant said nothing. In view of the evidence introduced

by defendant as to his relations with his wife, that the separation between them was caused by her parents, we think this evidence was proper. If testimony relating to his prior treatment of his wife was improper, defendant cannot complain, for he raised the issue by introducing testimony to the effect that he had never mistreated his wife, and that her parents were the cause of the separation. If there was error in such testimony, it was invited by defendant.

Counsel for appellant has, in his brief, argued this case with much earnestness and force, but we cannot agree with him that the evidence does not support the verdict. On the contrary, we are clearly of the opinion that the verdict was right. The evidence is very convincing to us, and we see nothing that would justify us in disturbing the judgment. It is therefore affirmed.

ST. LOUIS, S. F. & T. RY. CO. v. SHAW.
(Supreme Court of Texas. March 15, 1906.)

NUISANCE—DEPOT GROUNDS—LOCATION—SIDE TRACKS—OPERATION OF ROAD—INJURIES TO ADJOINING OWNERS—RIGHT OF ACTION.

Rev. St. 1895, arts. 4492, 4493, requires railroad companies to locate their depot grounds before they construct their roads, and forbids any change to be made therein, and article 4519 provides that railroads shall erect at such depot suitable buildings, etc. *Held*, that side tracks at stations being an essential part of the road, the operation of cars thereon, in the absence of negligence, does not give rise to a cause of action for personal discomfort caused thereby to an adjoining property owner.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by Libbie Shaw against the St. Louis, San Francisco & Texas Railway Company. From a judgment for plaintiff, defendant brings error. Reversed and rendered.

C. H. Yoakum and Head, Dillard & Head, for plaintiff in error. Wolfe, Hare & Maxey, for defendant in error.

WILLIAMS, J. The plaintiff in error (defendant below) constructed its railroad, freight depot and five spur tracks upon its right of way and depot grounds in the city of Denison near the homestead of defendant in error. She brought this action to recover damages for the depreciation in the value of her property, and for the annoyance and discomfort to herself occasioned by the carrying on of the railroad's business and the invasion of her home of the noise, dust, odors, etc., resulting therefrom. The jury found against her as to the claim for damage to her property, but in her favor the sum of \$212.50 as damages for personal discomfort. It is now urged that no case was made entitling plaintiff to such damages. There is no evidence that defendant's business was in any way improperly or negligently conducted, or that the number of tracks, engines, and cars employed by it was greater than was necessary

to properly perform its duties to the public at this freight depot, or that, in the operation of these things, more noise, dust, cinders, odors, etc., were produced than would necessarily attend such operations properly conducted. The case is an attempt to establish a liability for that which is the usual and ordinary operation of the business in a reasonable manner. There is evidence that annoyance and discomfort were caused to plaintiff in her home, and, if this were enough to make out a case for such damages, this court could not interfere with the verdict of the jury. The judgment was affirmed by the Court of Civil Appeals upon the authority of *Daniel v. Railway*, 96 Tex. 327, 72 S. W. 578, and *Railway v. Anderson* (Tex. Civ. App.) 81 S. W. 782. See, also, *Railway v. Mott*, 81 S. W. 285, 10 Tex. Ct. Rep. 445.

Those cases rest upon the doctrine of nuisances; the fundamental proposition underlying all of them being that there had been unnecessary and unreasonable uses by the defendants of their property to the injury of the plaintiffs, consisting in such a location of stock pens, coal chutes, yards, etc., there in question, which the defendants could have located elsewhere, as to unreasonably and unnecessarily interfere with the plaintiffs' use and enjoyment of their property. The underlying idea was that, inasmuch as the particular locations of those structures by the defendants were in no way regulated or controlled by law, the unreasonable locations to the injury of others had not been legalized, but constituted nuisances. The subject was more extensively considered in *Rainey v. Red River T. & S. Ry. Co.* (Tex. Sup.) 89 S. W. 768, and the proper distinction was made between cases of that class and those such as we deem this to be. Here, the defendant, in the location of its right of way, its main track, its freight depot, and such sidings and spurs as were necessary to the proper carrying on of its freight business and the discharge of its duties therein, did only that which the law authorized it to do. In other words, for the public good, its action in these regards, so long at least as it was only a reasonable exercise of the privileges granted, was made lawful; and any incidental damage resulting to members of the public, beyond that caused to their property against which they are protected by the Constitution, is to be regarded as *damnum absque injuria*, which must be borne because the work which inflicts it is authorized by law for the general welfare. Structures like that here existing are only such as the law requires railroad companies to have as a necessary part of their equipment, and requires them to locate, not at designated places, it is true, but yet with proper regard to the public interests. As is pointed out in the *Rainey Case*, this was not true of such structures as were there under consideration and as were involved in the cases first cited, the location of which

the law did not attempt in any way to control or influence. That the right of way and track of a railroad company is excluded by the considerations stated from the operation of the principle of the cases referred to is expressly conceded in the Rainey Case and has long been the settled law (authorities cited below); and this is equally true of depots and their necessary incidents. By articles 4492 and 4498, Rev. St. 1895, railroad companies are required to locate their depot grounds before they construct their roads and are forbidden to change them, and by article 4519 they are required to erect at such depots suitable buildings, etc. It is hardly necessary to add that side tracks at such stations are an essential part of the road and are as much authorized and required as the main line and stations. It cannot be held, therefore, that the mere location of such tracks and stations near to the property of others gives rise to the liability here asserted. If so, the same liability would arise to every one who might be annoyed by trains passing along the main line, for no reason could be given for the liability in one case which would not be valid in support of it in the other; and yet it has often been held that no such liability can be sustained consistently with the law which authorizes the construction of such quasi public works. *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. Law, 241, 13 Atl. 164; *Rex v. Pease*, 4 B. & Ad. 24; *Balt. & Potomac R. R. Co. v. Fifth Baptist Ch.*, 108 U. S. 331, 2 Sup. Ct. 719, 27 L. Ed. 739; *London, Brighton & South Coast Ry. Co. v. Truman*, 11 App. Cas. 45.

The judgment in favor of plaintiff must therefore be reversed, and as the evidence is clear and conclusive that there was no negligence in the carrying on of defendant's business, and as the jury has found that plaintiff's property has not been damaged, judgment will be rendered in favor of defendant.

Reversed and rendered.

TURNER v. WALLACE et ux.

(Supreme Court of Texas. March 1, 1908.)

ADMINISTRATORS—APPOINTMENT.

Where an estate was administered, with the exception of a claim of \$66.66, and final settlement made in 1895, and more than enough property distributed among the heirs to pay the remaining claim, the probate court was not justified in appointing an administrator de bonis non in 1901.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 269, 272.]

Error from Court of Civil Appeals of Fifth Supreme Judicial District.

Application by W. P. Wallace and wife for the removal of P. A. Turner, as administrator de bonis non of the estate of Charles Goldburg. From a judgment of the Court of Civil Appeals (89 S. W. 432), reversing a judgment of the district court, which reversed a county court order granting the ap-

plication and reinstated Turner as administrator, the administrator brings error. Affirmed.

Glass, Estes & King, for plaintiff in error.
S. J. Henry, for defendants in error.

WILLIAMS, J. In this case the judgment of the district court having been reversed by the Court of Civil Appeals, and the cause remanded to the district court, this writ of error was granted, as of course, upon the application of plaintiff in error showing that the judgment of reversal practically settled the case, and not because it was thought that the judgment was wrong. The question whether or not the decision of the Court of Civil Appeals was correct depends upon the following undisputed facts:

Plaintiff in error, on July 24, 1901, was appointed administrator de bonis non of the estate of Charles Goldburg, deceased, but did not qualify until February 8, 1902. On that day the defendants in error, Wallace and wife, the latter of whom is an heir of the decedent, filed a motion in the county court for the revocation of the order granting the administration, which motion set up, in substance, the facts to be stated. In August, following, they filed another paper, in terms seeking a review of the order referred to. In February, 1903, the matter having been held in abeyance until then, the county court made its order, revoking its former one, and discharging the plaintiff in error. The facts upon which such action was founded are that the estate had been previously administered by one Redding, during whose administration some claims had been established against the estate, including one for \$66.66, besides interest, in favor of Allen Bros., which was presented more than a year after the opening of the administration. The present defendants in error in April, 1899, made a motion to remove Redding from the administration, and he filed an account or report, styled "A Final Report and Settlement of Joseph Redding, Administrator," which showed all the property and money received by him and the disposition made of it, and showed also the property remaining on hand, and that a balance of \$9.71 was due to him and \$27.10 due on costs to officers, and stated that "he has accounted for all of said estate that has come into his hands," and prayed that the heirs be required to pay the balance due to him and the costs due to the officers, and that "he be discharged from the further responsibility by reason of said administration." On the 25th day of May, 1895, the county court entered its order, reciting the motion to remove the administrator, and that the grounds thereof were sustained, and that Redding had failed to make a final settlement or any settlement within three years of the grant of letters, and that he had now filed his report of settlement showing that he has accounted for the estate that has come into his hands, and adjudging that the

administrator "be, and he is, hereby removed from the administration of the estate of Charles Goldburg, deceased, and that the said administration be and hereby is closed." The notices required to be given by statute for a final settlement were shown by parol evidence not to have been given. The claim of Allen Bros. had not been paid in the administration, but the costs remaining due were paid by the heirs, and no effort has been made to enforce the small balance due the administrator. After the order recited, the property left in the hands of the administrator, much more than enough to pay Allen Bros.' claim, was delivered to the heirs, and, through a proceeding in the district court and the judgment thereof, was partitioned among them. No effort was made to obtain further administration, until the plaintiff in error, in 1901, filed his application for the purpose of enforcing the claim of Allen Bros., and nothing appears to have been done by him in the administration between the time of his qualification and the revocation of his appointment. The district court on appeal reversed the order of the county court revoking the grant of administration and reinstated it.

Whether or not the Court of Civil Appeals was right in holding as broadly as it appears to have done that the probate record shows the estate to have been so completely administered and closed as to put it beyond the further jurisdiction of the court, and to render any administration had thereafter void, in the absolute sense of that term, we need not stop to inquire. In any view that can be taken of the case the judgment of the district court was properly reversed. Should it be conceded that, if the administration had not been directly attacked and set aside, orders made in it would have been valid against collateral attack, it is still true, we think, that there was no basis in the facts for the proper exercise of the jurisdiction of the court in granting it, and that the court had the power and was under the duty to revoke it upon timely application and a showing of the absence of necessity or justification for it. *Fortson v. Alford*, 62 Tex. 576; *Heath v. Layne*, 62 Tex. 694; *Vance v. Upson*, 64 Tex. 266; *Franks v. Chapman*, 61 Tex. 576; 18 Cyc. 151, 152; *Schouler on Executors*, etc., §§ 152, 153. After the lapse of so long a time from the close of the former administration, during which the property had been divided among and taken possession of by the heirs, it was no proper exercise of its jurisdiction for the court to grant a second administration and thereby consume the property in the expenses thereof merely to enforce a small claim for which the holders had a complete and simple remedy by suit for its collection out of the property which went into the hands of the heirs. *Rev. St. 1895*, arts. 1912, 1913, 1924, 1927; *Montgomery v. Culton*, 18 Tex. 749; *Flisk v. Norvel*, 9 Tex. 17, 58 Am. Dec. 128; *Blinn v. McDonald*, 92 Tex. 604,

46 S. W. 787, 48 S. W. 571, 50 S. W. 931. Whether or not that remedy still exists we need not decide, since, if it has been lost, that fact does not supply a justification for an administration.

The judgment of the Court of Civil Appeals reversing that of the district court is right, and, as the application for writ of error is based upon the admission that no better case can be made by plaintiff in error, it becomes the duty of this court, under the statute, to render final judgment. The judgment of this court will therefore affirm that of the Court of Civil Appeals so far as it reverses the judgment below, and will adjudge that the administration granted to plaintiff in error be revoked and set aside and that he be discharged therefrom.

FLORES v. TERRELL, Com'r, et al.
(Supreme Court of Texas. March 19, 1906.)
PUBLIC LANDS—APPLICATION FOR PURCHASE
—REQUISITES OF APPLICATION.

Laws 1905, p. 159, § 3, provides that an application for the purchase of school land shall be filed in the land office through the mail, in an envelope, and that, when the land is to come on the market at some "future date," the envelope shall have indorsed thereon the description, name of the grantee, date when the land is on the market, etc., and that on receipt of the same it shall be preserved by the commissioner without being opened until the day following the date indorsed thereon. *Held*, that the word "future" did not refer to the date on which the statute was to take effect, but referred to those cases in which the lands would come on the market upon some day in the future, and the commissioner should offer them in advance for sale on that date, and it was not necessary that an application made after the land came on the market should bear such indorsement.

Mandamus by the state, on the relation of Augustin Flores, to compel J. J. Terrell, as Commissioner of the General Land Office, to award to relator a tract of school land. Writ awarded.

J. R. Sanford and W. C. Douglas, for relator. R. V. Davidson, Atty. Gen., and W. E. Hawkins, Asst. Atty. Gen., for respondents.

GAINES, C. J. This is a petition for a writ of mandamus to compel the Commissioner of the General Land Office to award to the relator, as a purchaser, a small tract of school land lying in Maverick and Zavala counties, which he had applied to purchase. R. P. Oden, who had made application to purchase the tract and whose application had been accepted, was made a co-respondent.

The following facts are shown by the pleadings, and are not contested: The parcel of school land in controversy was on the 2d day of June, 1905, duly classified and appraised at \$1.50 per acre. It was at the time subject to a lease which expired on the 30th day of July of that year. Under the statute in relation to the sale and lease of school and asylum lands, which was approv-

ed April 15, 1905 (Laws 1905, p. 159), and which went into effect on that day, this tract came upon the market for sale on the 1st day of September of that year. On that day the relator filed in the land office an application for the purchase of the land at \$2.16 per acre, which, in all respects save one, was in full compliance with the requirements of the statute. The envelope containing this application did not have the indorsement specified in section 3 of the act above cited, and for this reason was rejected by the Commissioner. On the 2d day of September the respondent, Oden, filed his application to purchase, for the sum of \$2.11 per acre, and it is conceded to be in full compliance with the statute in every respect. Thus it is seen that the application of the relator contained not only the higher bid, but that it was in point of time prior to that of Oden, the co-respondent. The simple question therefore is, did the failure of the relator to place upon the envelope the indorsement prescribed in section 3 of the act mentioned render it invalid? So much of that section as speaks of the indorsement of the envelope reads as follows: "Said application, affidavit and obligation shall be filed in the land office through due course of mail and not by any one in person, in an envelope, addressed to the Commissioner of the General Land Office at Austin, Texas, and when the land is to come on the market at some future date the envelope shall have endorsed thereon as follows: 'Application to buy land; Section —, Block —, Grantee —, County —, Date on market —,' and the blanks shall be properly filled out. When the envelope so endorsed is received in the land office it shall be safely and securely kept and preserved by the Commissioner or his chief clerk without being opened until the day following the date endorsed thereon as to when the land comes on the market, and one or both of them shall begin at 10 o'clock a. m., on the day following the day the land comes on the market, to open the envelopes for inspection of the applications and such action as is herein provided for and in the presence of the applicants, if they desire to be present, or in the presence of such person as they may designate to represent them, and said applications shall immediately be filed, together with all other applications received up to that time for the same land." The divergence of construction as between the relator and respondents seems to proceed from the words, "And when the land shall come on the market at some future date." The Commissioner, as we understand the argument filed in his behalf, claims that the word "future" refers to the date on which the statute was to take effect, and that, since this land came upon the market subsequent to April 15, 1905, no application to purchase school lands of the character of that involved in this suit could be valid without the indorsement prescribed by the pro-

vision quoted. We cannot concur in this conclusion. Since, by section 11 of the act itself, all the school lands were taken off the market, the construction claimed would make the provision applicable to all attempts to purchase, whereas the words last quoted were evidently inserted for the purpose of declaring an exception to a general rule.

We think the construction contended for by the relator the true one, namely, that the provision in question was intended to apply to cases in which, by reason of expiration of leases and the like, the lands would come on the market upon some day in future and the Commissioner should offer them in advance for sale on that date. In such a case there exists a substantial reason for making a difference between applications filed previous to the first day of sale and those made thereafter. The object of the law was to sell to the highest bidder, and it was reasonable to presume that, when bids were to be received for future sales, in many cases there would be more than one bidder, and justice required that each competing bidder should be protected in the secrecy of his bid, should he so elect. This was well provided for by prescribing such an indorsement upon the envelope as would apprise the Commissioner that it was an application to purchase such a section of land, and by also prescribing that it should not be opened until the day after the land was subject to sale. But, after the land came upon the market, there was no longer any likelihood of competitive bidding, and no longer any secrecy as to the amount offered. The Commissioner was bound to take the applications as they came, and the first in point of time acquired the right to purchase the land. Hence any provision about the indorsement of the envelope, after the land had come upon the market, was not only unnecessary, but would have been cumbersome and inexpedient. We therefore conclude that, when the Legislature spoke of land "to come on the market at some future date," they meant merely such lands as were to be subject to sale at a time subsequent to the making of the applications, and that the word "future" was intended to relate to the time at which the application was made, and not to the time at which the statute was passed or should become effective.

We are of opinion, therefore, that the relator's application was valid, and that since he was both prior in time and the higher bidder the mandamus should be awarded. It is accordingly so ordered.

MORRISON v. HAZZARD et al.

(Supreme Court of Texas. March 19, 1906.)

1. PRINCIPAL AND AGENT—ACTIONS—PLEADING—AUTHORITY OF AGENT.

In an action for specific performance of a contract made by an agent for the sale of property belonging to the estate of a decedent, a petition not showing that the agent had legal au-

thority to sell the property stated no cause of action against the administrator or heirs of the estate.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 713.]

2. EVIDENCE—VARYING WRITTEN CONTRACT.

In an action for specific performance of a contract to sell land made by agents in behalf of an "estate," evidence that by the words "estate" the parties meant the heirs of certain persons had the effect of varying the terms of the contract, and was not admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1778, 1906-1911.]

3. SPECIFIC PERFORMANCE—PARTIES.

Where a contract for the sale of a tract of land, parts of which were owned by different persons, was made by agents in behalf of all the owners and provided for the payment of a lump sum for all the land, all the owners were properly made parties to an action for specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 345-347.]

4. EVIDENCE — IDENTIFICATION OF LAND — PAROL EVIDENCE.

Where a contract for the sale of a tract of land, parts of which were owned by different persons, stated what proportions of the land were owned by the various parties, but did not describe the location of such proportions in the tract, parol evidence was admissible, in an action for specific performance of the contract, to show the location of each parcel.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2115-2119.]

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by R. H. Morrison against Elizabeth Hazzard, and others. A judgment for defendants was affirmed by the Court of Civil Appeals (88 S. W. 385), and plaintiff brings error. Reversed in part.

Cobb & Avery, for plaintiffs in error. Henry & Henry, Thomas Shearon, and Etheridge & Baker, for defendants in error.

BROWN, J. R. H. Morrison instituted this suit in the district court of Dallas county against Elizabeth Hazzard, a resident of the state of Pennsylvania, B. O. Weller, a resident of Dallas county, Tex., H. A. Kahler, a resident of the state of New York, Franklin Lawrence, administrator, etc., of Archilus Lawrence, resident of Pennsylvania, and many persons who are nonresidents of this state, charged to be the heirs of said Archilus Lawrence and Franklin Lawrence, each deceased; but we deem it unnecessary to give the names of the alleged heirs. The petition alleged, in substance, that H. A. Kahler and B. O. Weller, acting as agents of the defendants, made and delivered to Morrison the following contract in writing:

"Dallas, Texas, May 20, 1901.

"Received of R. H. Morrison through Murphy & Bolanz the sum of \$250 in part payment for lots 7 and 8 in block 97-¼-136, according to Murphy & Bolanz' official map of the city of Dallas, Tex., said lots fronting together 100 feet on the north line of Jackson

street and 90 feet on the west line of Prather street, this day sold by me as agent of the estate of F. Lawrence, 25 feet and E. Hazzard 75 feet to the said R. H. Morrison for the purchase price of \$5,000 upon the following terms: \$3,000 cash, and the balance in two notes of equal payments, and due and payable one and two years after date, with 6 per cent. interest, the interest payable semi-annually as it accrues, with the privilege granted the maker of paying off any or all of said notes at any time before the maturity upon giving 60 days' notice, said notes to be secured by the usual form of vendor's lien and deed of trust upon the property, conditioned upon a good and authentic abstract showing good and acceptable title to the property, and should the title to the property prove not good, and cannot be made good within a reasonable time, say not to exceed 60 days from the date hereof, then I obligate myself to return the said Morrison the sum of \$250 now paid, upon the return and cancellation of this receipt, balance of cash payment to be made and notes and deed of trust to be executed at once upon delivery of special warranty deed properly conveying the hereinbefore described property. It being understood that the property is to be free and clear of all incumbrances of whatsoever nature, including taxes, for the year 1901.

"(Agent of) H. A. Kahler, by B. O. Weller.
"Accepted: R. H. Morrison."

It was charged that Kahler and Weller were the duly authorized agents of the several defendants and fully empowered to make and deliver the said contract in writing. The petition alleged that Mrs. Hazzard and the estate of Archilus and Franklin Lawrence owned the land described in the contract in the following proportions: First. The estate of Archilus and Franklin Lawrence owned that portion described thus: Beginning at the point of intersection at the west line of Prather street with the north line of Jackson street; thence westwardly with the north line of Jackson street, 25 feet; thence northwardly parallel with Prather street, 90 feet; thence eastwardly parallel with Jackson street 25 feet to the west line of Prather street; thence southwardly 90 feet to the beginning. That Mrs. Hazzard owned that portion described as follows: being all of lot 7 and west one-half of lot 8 in block 97-¼-136, etc., beginning in the north line of Jackson's street 25 feet westwardly from the intersection of the west line of Prather street with the north line of Jackson street; thence westwardly with north line of Jackson street 75 feet; thence northwardly 90 feet, to the northwest corner of lot 7; thence eastwardly parallel with Jackson street, 75 feet; thence southwardly parallel with Prather street, 90 feet to the beginning. It was alleged that by agreement the entire property was put

upon sale as a whole with the understanding that the owners should participate in the proceeds in proportion to their interest therein, and that the said agents, Kahler and Weller, were authorized to sell the entire property for a lump sum and to make the contract in the name of all of the parties. Morrison alleged that he paid the cash consideration expressed in the contract at the time it was made, and that he had always been ready, willing, and able to perform his part of the contract and had so notified the defendants. He alleged that the stipulation contained in the said contract, to the effect, that if the title could not be made within 60 days the \$250 should be returned, was, by agreement of the parties, waived, and that time was not the essence of the contract. The petition prayed for specific performance of the contract, and, if it could not be so decreed, then for damages for the difference between the value of the property when the contract was made and at the time of the trial, alleging that at the time the contract was made the 25 feet was worth \$1,500 and that at the time of the filing of the petition it was worth \$5,000, and that at the date of the contract the 75 feet was worth \$3,500 and at the date of the filing of the petition it was worth \$7,500. Plaintiff also prayed that in case he was not entitled to a specific performance of the contract by reason of the want of authority on the part of Kahler and Weller to make it that he should be decreed compensation against the said Kahler and Weller for the damages arising out of the breach of the said contract, charging that he was unaware of their want of authority at the time the contract was made. All of the defendants filed a general demurrer to the petition, and Mrs. Hazzard filed a special exception on the ground that there was a misjoinder of parties and of causes of action. The trial court sustained the general demurrer and exception and the plaintiff, declining further to amend, the cause was dismissed. The Court of Civil Appeals affirmed the judgment of the trial court.

The contract sued on purports to have been made by the agent of the estate of F. Lawrence. The petition alleges that F. Lawrence was administrator and executor of the estates of Archilus Lawrence, and of Franklin A. Lawrence, and Hannah Lawrence, but does not show whether those estates were being administered in Texas, or elsewhere; but it matters not whether the administration was carried on in Texas or in another state, the allegations of the petition do not show any legal authority in the agent to sell the property of the estates, therefore, the petition shows no cause of action against the administrator nor those parties who are alleged to be the heirs of Archilus, Franklin, and Hannah Lawrence. It is alleged in the petition that the parties understood the word, "estate," in the contract, to mean the heirs

of Archilus, Franklin, and Hannah Lawrence, deceased, but there is no allegation that there was any mistake in preparing the contract, or in the language used therein. Parol evidence is not admissible to show that parties to a contract used language in a sense different from its ordinary meaning, for that would effectually vary the terms of the contract. *Moran v. Prather*, 23 Wall. 492, 23 L. Ed. 121; *Wilmering v. McGaughey*, 80 Iowa, 205, 6 Am. Rep. 673; *Pittsburgy v. Locke*, 33 N. H. 96, 66 Am. Dec. 711; 17 Am. & Eng. Ency., p. 11. It follows that the trial court properly sustained the general demurrers of F. Lawrence and those persons who were alleged to be the heirs of Archilus Lawrence, Franklin Lawrence, and Hannah Lawrence. It appears from the contract that it was made on behalf of the estate of F. Lawrence for 25 feet, and on behalf of Mrs. Hazzard for 75 feet, out of the 100 by 90 feet constituting lots 7 and 8 in the block mentioned in the contract. The contract was joint between Mrs. Hazzard and the other parties made defendants herein, and the land was sold for a lump sum of money, so that to enforce the contract it was proper that all of the parties should be joined in one suit that the plaintiff might perform to each party his part of the agreement, and that the consideration might be apportioned among them. The special exceptions on behalf of Mrs. Hazzard, setting up misjoinder of parties and causes of action, were improperly sustained.

The description of the land as a whole is as definite as need be, but the location of the respective parcels of 25 feet and 75 feet within the lots is not given, and the question arises, is extraneous evidence admissible to show the location of each parcel? There being two parcels in the given area, the location of one would necessarily fix the place of the other. The petition describes each parcel and it is permissible to prove the facts by evidence outside the terms of the contract. The general demurrer of Mrs. Hazzard was improperly sustained. *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282; *Giddings v. Day*, 84 Tex. 605, 19 S. W. 682; *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, 40 Am. St. Rep. 818.

The discrepancy between the allegations of the petition and the contract, as to the ownership of the 25 feet, does not militate against our conclusion; for whether it be the property of the estate of F. Lawrence, or the property of an estate of which he is administrator, the contract shows that the two lots are owned by the two titles only, which makes the location of each not only lawfully possible, but practically easy.

Morrison claims damages against the agents who sold the land to him, in case it shall be held that he cannot enforce the performance of the contract against the persons for whom they acted. As this case will be remanded for trial, we do not feel called upon

in the present attitude of the case to discuss the question of the liability of the agents.

As to Elizabeth Hazzard, H. A. Kahler, and B. O. Weller, the judgments of the district court and Court of Civil Appeals are reversed, and the cause is remanded to the district court. As to all other defendants in error, said judgments are affirmed.

HASKELL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

1. CRIMINAL LAW—APPEAL—COMPLETION OF RECORD—CERTIORARI—NEGLIGENCE.

Where appellant in a criminal case prepared a statement of facts which his counsel left with the county judge who promised to sign it, and afterwards, on going to the county judge's office and finding him out, took the statement of facts from his desk, presuming that it had been signed and approved, and had the county clerk file the same without the actual approval of the county judge, there was such negligence on the part of appellant's counsel in not securing the approval of the county judge to the statement that a writ of certiorari would be refused.

2. SAME—STATEMENT OF FACTS—APPROVAL OF TRIAL JUDGE.

The statement of facts and the questions depending thereon in a criminal case cannot be considered, in the absence of the approval of the trial judge to the statement.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2866.]

Appeal from Hunt County Court; F. M. Newton, Judge.

Clio Haskell was convicted of violating the local option law, and appeals. Affirmed.

H. D. Wood, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction is for violating the local option law.

The appellant has filed motion for certiorari, and this motion sets up all the facts upon which the writ is asked. We hold that the application for the writ has no merit, in that appellant shows he prepared a statement of facts, which was duly signed by himself and the county attorney, and presented to the county judge, who thereupon stated that he would sign said statement of facts. Appellant's counsel left the statement with the county judge in his office and retired, and some time thereafter went back to the county judge's office, and found him not in, but found the statement of facts lying upon his desk. Presuming that the county judge had signed and approved the same, as he stated he would, appellant's counsel took the statement of facts and had the county clerk file the same. This shows negligence on the part of appellant's counsel in not securing the approval of the county judge. Therefore the writ of certiorari is refused; and without the approval of the county judge to the statement of facts the same cannot be considered.

The various questions urged by appellant in the record cannot be considered, in the absence of the statement of facts.

No error appears, and the judgment is affirmed.

KILCOYNE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

1. INDICTMENT AND INFORMATION — AMENDMENTS—CHANGE OF NAME.

The insertion and substitution of one name for another as defendant in an information is not erroneous, where the suggestion of the change in the name is made by defendant himself.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 507, 514, 520.]

2. CRIMINAL LAW — FORMER ACQUITTAL — TRIAL OF PLEA—BURDEN OF PROOF.

The burden is on defendant to show, in support of a plea of former acquittal, that the former acquittal was for the same offense as that for which he is on trial.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 674.]

3. SAME—APPEAL—NECESSITY OF STATEMENT.

In the absence of a statement of facts it cannot be determined on appeal whether or not defendant sustained his plea of former acquittal by proof of identity of offenses.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2918-2921.]

Appeal from Hunt County Court; F. M. Newton, Judge.

Lillian Kilcoyne was convicted of keeping a house of prostitution, and appeals. Affirmed.

H. D. Wood, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. This conviction is for keeping a house of prostitution, and fine imposed \$200.

Motion for certiorari was filed in this case as in cause No. 3,284, Clio Haskell v. State (this day decided) supra. The question is the same as there presented, and upon the authority of that case the motion is refused; and the statement of facts cannot be considered, as the same does not have the approval of the judge, and no sufficient cause is shown for such failure.

There was no error in authorizing the substitution of the lost complaint and information. Nor was there any error in authorizing the insertion and substitution of the name "Lillian Kilcoyne" instead of "Clio Haskell." The suggestion of the change in the name was made by appellant.

There was no error in the action of the court with reference to appellant's plea of former acquittal. The charge of the court very properly guarded appellant's rights against a conviction for the offense for which she may have been formerly acquitted in the corporation court. The instruction confined the jury to the consideration of the case within the dates for which a former

acquittal could not have been had. The burden would have been upon appellant to have shown it was the same offense. In the absence of the statement of facts this cannot be determined.

The other assignments cannot be considered in the absence of the statement of facts.

There being no error in the record, the judgment is affirmed.

SEXTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

1. CRIMINAL LAW—INSTRUCTIONS.

Error cannot be predicated on the fact that the portion of a charge, stating that, if a person receives or conceals property stolen by another knowing it to have been so acquired, he shall be punished, fails to state that the receiving and concealing must be unlawful and fraudulent; other portions of the charge having so instructed.

2. RECEIVING STOLEN GOODS — ACCOMPLICE TESTIMONY.

Evidence on a prosecution for receiving and concealing stolen property held sufficient to corroborate accomplice testimony.

Appeal from District Court, Comanche County; N. R. Lindsey, Judge.

Thurman Sexton appeals from a conviction. Affirmed.

R. H. L. Williams and Helton & Jackson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of receiving and concealing stolen mules and horses; the punishment being fixed at five years' confinement in the penitentiary.

The first ground of the motion for new trial complains of the following portion of the court's charge to the jury: "The law further provides, if any person shall receive or conceal property which has been acquired by another in such manner as that the acquisition comes within the meaning of the term 'theft,' knowing the same to have been so acquired, he shall be punished in the same manner as by law the person stealing the same would be liable to be punished." The ground of objection is that the same does not charge the proper punishment—does not charge that the receiving and concealing must be unlawful and fraudulent. Other portions of the charge of the court to the jury instruct them that the receiving must be unlawful and fraudulent. The same objection is urged to the seventh paragraph of the charge.

The main insistence of appellant is that the verdict of the jury is contrary to the evidence, in this, that the law requires the evidence of accomplices should be corroborated, and which is not done. In our opinion the evidence is amply sufficient to corroborate the testimony of accomplices. The facts show that the accomplices, at the instance of appellant, brought the animals to the stock-

pen, and appellant was there and assisted in leading them into the cars; that he got on a horse, went out to where the accomplices were, was seen there by third parties in conversation with the accomplices, and that night the accomplices secured possession of the animals, took them to town, and appellant was there when they were received. It is true no one testifies that appellant opened the gate and permitted the animals to go in, except the accomplices; but the evidence clearly shows that various witnesses were present a short while after the animals were received. The fact that they were sent off in the night, the kind of animals—young mules and a crippled mare—and various facts and circumstances connected with the matter, shows that degree of criminality on the part of appellant that leads irresistibly to the conclusion that the testimony of the accomplices is true, and tends strongly to corroborate their statement of matter.

The judgment is affirmed.

COWAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

CRIMINAL LAW—JURY—OMITTING NAMES FROM LIST.

Defendant does not show error in the clerk omitting from the jury list names which defendant's counsel left thereon; it not appearing they were not erased by the state's counsel.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Luther Cowan appeals from a conviction. Affirmed.

W. T. Pace, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for burglary; seven years in the penitentiary being fixed as the punishment.

Two questions are raised on the motion for new trial: First That the evidence is not sufficient. An examination of the evidence we think fully justified the jury in finding the verdict. And, second, it is contended that he was injured in the manner of the impanelment of the jury. Affidavit was made by Mr. Pace, who represented appellant under appointment of the court: That the jury list was handed him containing 11 names, 1 of which was scratched, leaving 10. Thereupon the court instructed the sheriff to summon five talesmen, and these, after being summoned, were added to the list. This list was then handed over to counsel for examination. That he knew two of the five talesmen personally, Humphreys and Tool, and desired that they should remain on the jury. Having five challenges left, he scratched three of the five talesmen, leaving, as he supposed and believed, the names of Humphreys and Tool. This list he then handed to the clerk, and the jury

was called. He paid no further attention to the matter, thinking the clerk would call the proper names. After the trial the matter was brought to his attention, and he inquired for the jury list, but was informed by the clerk that it had been misplaced or lost. When the jury was impaneled, the attention of appellant and his counsel was called to the fact that Humphreys and Tool were not impaneled as jurors. Concede that appellant left the names of these two jurors upon the list, it is not shown nor intimated that they were not erased by state's counsel. If they were, then they were properly omitted by the clerk. The affidavit does not show that the names were not erased by state's counsel. As presented, it is not necessary to go into a discussion as to whether or not it was the duty of appellant or his counsel to have noticed this irregularity, if there was such, at the time of its occurrence, and not wait until after the conviction was obtained to investigate it. The usual rule is that irregularities in the formation of a jury cannot be inquired into for the first time after the conviction. However, we are not discussing that possible phase of the case.

Because no error is shown, the judgment is affirmed.

DEAN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

1. INTOXICATING LIQUORS — SALE — WHAT CONSTITUTES—EVIDENCE.

Where defendant and another made up a fund with which defendant paid for liquor and turned over to the other his share, it did not amount to a sale by defendant.

2. SAME—LOCAL OPTION TERRITORY—SALE TO MINOR.

A sale of liquor to a minor in local option territory cannot be prosecuted under the statute prohibiting sales to minors, as it is a violation of the local option law.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 34.]

Appeal from Hill County Court; N. J. Smith, Judge.

Martin Dean was convicted of selling liquor to a minor, and he appeals. Reversed.

Wear, Morrow & Smithdeal, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with selling and giving away intoxicating liquor to a minor.

It is admitted that the local option law was in force in the territory where the alleged sale occurred. The evidence shows that appellant and the alleged purchaser raised the sum of \$2 for the purpose of ordering whisky from Waco, and that Milliken was to furnish 50 cents and appellant the remainder. Appellant made the order. When the whisky came, he turned over to Milliken his 50 cents worth of the whisky. This is the case in a nutshell. The court in-

structed the jury, if appellant sold or caused to be sold, or gave or caused to be given, intoxicants to Milliken, he would be guilty. Milliken was a minor, as is appellant. Exception was reserved to this portion of the charge. The following charge was asked: "If you believe from the evidence that Fred Milliken and defendant together ordered whisky for themselves, and that they each furnished their money for the purpose of making said order, and that when said whisky came defendant got the same out of the express office, and gave to said Fred Milliken the whisky that he had ordered and for which he had furnished the money, you will find defendant not guilty." This charge should have been given. There is no pretense that there was a gift. If there was anything, it was a sale. However, we do not believe this is shown by the facts. This charge was directly pertinent to the case made by both sides. The facts stated in the charge would exonerate appellant from a sale.

But, even if there was a sale, the local option law was in force, and this, under the authorities, would operate to suspend the law against sale to minors in such territory while such law was in operation. A further charge was asked: "You are instructed, you must not consider the question of a sale of whisky to the witness Fred Milliken, because the court here withdraws from your consideration the issue as to a sale." This charge was refused. It should have been given. Sale to a minor cannot be prosecuted under the statute prohibiting sales to minor, where the sale occurs in local option territory. If a sale occur, it would be a violation of the local option law. In no event could appellant be convicted for selling to a minor in local option territory. The charge must be, if there is a sale, that it was in violation of the local option law.

The judgment is reversed, and the cause remanded.

WAGGONER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

1. GAMING—INDICTMENT—ISSUES AND VARIANCE.

One may not be convicted of exhibiting a banking game, under an indictment charging betting at a game played with dice, and permitting a game of dice to be played on his premises.

2. SAME—PLAYING WITH DICE AT PRIVATE RESIDENCE.

It is no offense to play a game with dice at a private residence.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 183.]

Appeal from Cooke County Court; J. M. Wright, Judge.

Jordan Waggoner was convicted of gaming, and he appeals. Reversed.

Stuart & Bell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment contains three counts: The first charging appellant with betting at game played with dice, not then and there being played at a private residence; and the second for permitting a game with dice to be played upon his premises or premises then and there under his control, being a public place, to wit, a place where persons resort for the purpose of gaming; and, third, did unlawfully bet at a game played with dice, called "craps," said game then and there being bet at by said Waggoner at a public place, to wit, at a place where people resort for the purpose of gaming. It was tried before the court without a jury. Judgment was entered against him for \$25. The evidence shows that appellant had rented the house, and was living in it as a private residence. The facts further show that there was a good deal of playing in the house with dice, and cogently shows that the game was a banking game. He was not charged with exhibiting a banking game, so that passes out of the case, and a conviction could not be had on that theory. As the evidence shows that the house was a private residence, he could not be punished for playing dice, as it is not a violation of the law to play games of dice at a private residence under our statute. We deem it unnecessary to go into a discussion of the matter as the record is presented as above stated.

The judgment is reversed, and the cause remanded.

ANDERSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

INTOXICATING LIQUORS—LOCAL OPTION ELECTION—COMBINATION OF SCHOOL DISTRICTS.

The commissioners' court has no authority to combine school districts in a justice precinct in a county, for the purpose of holding a local option election therein.

Appeal from Navarro County Court; O. L. Jester, Judge.

D. J. Anderson was convicted of violating the local option law, and he appeals. Reversed.

W. W. Ballew, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for violating the local option law.

On February 15, 1900, the commissioners' court ordered an election in a portion of justice precinct No. 6 of Navarro county. This subdivision of said justice precinct embraces five school districts. The contention is that, under this order of the court, the election was void, because school districts could not be combined. This contention is correct. *Ex parte Heyman* 78 S. W. 349, 9 Tex. Ct. Rep. 140; *Ex parte Mills* (Tex. Cr. App.) 79 S. W. 553; *Ex parte Mitchell* (Tex. Cr. App.) 79

S. W. 558; *Ex parte Wells* (Tex. Cr. App.) 78 S. W. 928; *Board v. Buchanan*, 82 S. W. 194, 10 Tex. Ct. Rep. 652; *Nolan Co. v. Beall*, 81 S. W. 526, 10 Tex. Ct. Rep. 526.

The judgment is reversed, and the prosecution ordered dismissed.

DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

CRIMINAL LAW—RECORD ON APPEAL—STATEMENT OF FACTS.

On appeal from a conviction for violating the local option law, where there was in the statement of facts an instruction to the clerk to insert the orders of the commissioners' court authorizing the local option election, this instruction gave the clerk no authority to copy the orders into the transcript.

Appeal from Limestone County Court; James Kimbell, Judge.

Wash Davis was convicted of violating the local option law, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction is for violating the local option law.

Appellant has filed a motion to strike from the statement of facts the orders of the commissioners' court authorizing the local option election, declaring the result, and placing such law into operation. These orders were not made a part of the statement of facts. In writing the statement of facts, it is stated: "The clerk will here insert the orders." In making up the transcript the clerk copied the orders into the transcript. To do this he had no authority. *Ratcliff v. State*, 29 Tex. App. 248, 15 S. W. 596; *Tyrell v. State* (Tex. Cr. App.) 44 S. W. 159; *Lyon v. State*, 61 S. W. 125, 1 Tex. Ct. Rep. 774; *Hargrove v. State*, 76 S. W. 922, 8 Tex. Ct. Rep. 578. Eliminating these orders, there is no evidence in the record of the fact that the local option law was put into operation. It is necessary, in order to sustain a conviction under this law, that it be shown that the law was in force, and this has not been done.

The judgment is reversed, and the cause remanded.

PINKARD v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

Appeal from Limestone County Court; James Kimbell, Judge.

Louis Pinkard was convicted for violating the local option law, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for violating the local option law. The record in this

case is in the same condition as that in cause No. 3,372, Wash Davis v. State, supra.

For the reasons there indicated, the judgment is reversed, and the cause remanded.

EHLERT v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

CRIMINAL LAW—RECOGNIZANCE ON APPEAL.

A recognizance on appeal from a conviction of misdemeanor failing to show the punishment assessed, as required by Code Cr. Proc. art. 887, does not confer jurisdiction.

Appeal from Wichita County Court; M. F. Yeager, Judge.

Will Ehlerl appeals from a conviction. Dismissed.

H. H. Womack, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for disturbing the peace, the fine imposed being \$10.

The conviction occurred in the justice court, appeal being taken to the county court, where it was dismissed because the appeal bond was defective; and thence appeal was taken to this court. The Assistant Attorney General has filed a motion to dismiss the appeal because the recognizance does not confer jurisdiction on this court, and does not comply with article 887, Code Cr. Proc. The motion is well taken. May v. State, 40 Tex. Cr. R. 196, 49 S. W. 402; Horton v. State, 68 S. W. 172, 4 Tex. Ct. Rep. 895.

The appeal is dismissed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SPROLES & VINES.

(Court of Civil Appeals of Texas. Feb. 17, 1906.)

1. CARRIERS — DELAY — SPECIAL DAMAGES — COMPLAINT.

Where, in an action against a carrier for delay in delivering certain threshing machinery, plaintiffs claimed special damages, in that they lost the benefit of contracts with certain individuals in the neighborhood of the place to which the machinery was shipped for the threshing of 30,000 bushels of grain, a complaint failing to allege the names of the persons with whom it was claimed plaintiffs had such contracts was objectionable.

2. SAME.

A complaint against a carrier for delay in the transportation of certain threshing machinery alleged that plaintiffs used 22 head of horses and 20 men at an expense of not less than \$40 per day; that said men and teams were forwarded to the destination of the machinery, so as to be there on the arrival of the machinery, and that because of the delay, plaintiffs incurred an expense of maintaining such employes and teams during four and a half days at \$40 a day, and that defendant, at the time of the shipment, knew that if there was a delay plaintiffs would be damaged in the manner and form alleged. Held, that the complaint was not objectionable for failure to allege that

defendant was notified of the advance shipment of plaintiffs' men and teams, or that expense or injury would result from such delay and the amount thereof.

3. SAME—EVIDENCE.

Where, in an action against a carrier for delay in delivering threshing machinery, plaintiffs alleged that they had contracted to thresh about 30,000 bushels of grain in the vicinity of the place to which the machinery was shipped; that they threshed 10,000 bushels, but lost the threshing of the remainder, evidence that when the machinery arrived there were two other machines on the ground, and that if plaintiffs' machinery had arrived in time, they would have threshed all the wheat that their competitors threshed, was inadmissible.

4. EVIDENCE—HEARSAY.

Where witness stated that the contracts for threshing certain grain were made with his partner, evidence that B., whom witness met at a certain place, was one of the men with whom his firm had contracted to thresh grain, was inadmissible as hearsay.

5. CARRIERS — DELAY — ACTIONS — INSTRUCTIONS.

In an action against a carrier for delay in transporting a threshing outfit, an instruction on the subject of the carrier's notice of the fact that the delay would probably result in the special damages alleged, authorizing the jury to charge defendant with constructive notice, was erroneous.

6. SAME—DAMAGES.

In an action against a carrier for delay in transporting a threshing outfit, an instruction that the measure of plaintiffs' damages was the expense, if any, incurred by plaintiffs in maintaining their employes and teams during the delay, if any, and the reasonable value of the time lost if any, during said delay "and the loss, if any, they sustained by reason of being deprived of the threshing of any of the crops of wheat, which they had contracted for," was objectionable, as authorizing double damages for the same injury.

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by Sproles & Vines against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiffs, defendant appeals. Reversed.

T. S. Miller and Perkins & Craddock, for appellant.

TALBOT, J. The appellees, Sproles & Vines, a firm composed of W. J. Sproles and T. J. Vines, instituted this suit against the appellant, railway company, to recover damages on account of an alleged delay in the delivery of threshing machinery shipped from Greenville, Tex., to Rhome, Tex.

It was alleged: "That on the 9th day of July, 1903, plaintiffs were the owners and in possession of certain threshing machinery and threshing outfit, and were engaged in threshing wheat and oats for hire. That in the operation of said thresher, it was necessary and plaintiffs did use 22 head of horses and 20 men at an expense of not less than \$40 per day, and were able to and did thresh an average of 1,800 bushels of grain per day, for which they were paid from 8 to 9 cents per bushel, the usual and customary price for threshing grain. That on said date the plaintiffs desired to ship said threshing out-

frank machinery from Greenville to Rhome in Wise county, Tex., a station on the Ft. Worth & Denver City Railroad, situated about 25 miles north of Ft. Worth, and about 75 miles south of Wichita Falls. That prior to said date plaintiffs had engaged, and made contracts to thresh grain crops near Rhome, said station, amounting to at least 30,000 bushels commencing on the — day of July, 1903, which would have required about 18 days to have threshed said grain. That said grain crops were all located in one neighborhood, and plaintiffs would and could have realized a profit over and above expenses of at least \$100 per day during said time, if plaintiffs had threshed said grain. That on said 9th day of July, 1903, plaintiffs applied to the defendant's agent at Greenville to ship said threshing machinery to Rhome, Tex. That the defendant, acting by its authorized agent, who was acting within the scope of his authority, with full knowledge of the purpose and necessity of immediate shipment and speedy delivery of said machinery to and at said station, received said machinery, and undertook for a consideration paid in advance to ship said machinery by the nearest route and to deliver the same within one day and a half time, or by noon of the 10th day of July, 1903. That on said first date mentioned, and prior to said date, plaintiffs had sent, and did send, their employes and teams to Rhome, so as to be there upon the arrival of said machinery, preparatory to commencing threshing of said grain. That on said date plaintiffs, with their employes and teams, were in said neighborhood near Rhome ready to take charge of the threshing machinery on its arrival. That the defendant negligently and carelessly, and with the knowledge of all the facts hereinbefore set forth, failed to ship said machinery by the nearest route, and failed to deliver the same at the time and place agreed to, but negligently and carelessly delayed the shipment and delivery of said machinery until the 16th day of July, 1903, a period of 6 days." The defenses were a general demurrer, a number of special exceptions, and a general denial. A trial by jury resulted in a verdict and judgment for appellees for the sum of \$500, from which this appeal is prosecuted.

The court erred in overruling appellant's fourth, seventh, and eighth special exceptions to appellees' petition. These exceptions questioned the sufficiency of appellees' petition on the ground: (1) that it does not appear therefrom that appellant was notified before, or at the time of making said contract of shipment, with whom appellees had contracted to thresh grain, nor what amount, nor kind of grain, they had agreed to thresh for each of the persons with whom they had contracted; (2) that it does not appear from said petition who the persons were with whom appellees had contracted to thresh the grain mentioned therein, nor when the grain of each was to be threshed.

The damages sought to be recovered were special damages, and did not arise as a natural consequence of a breach of the contract alleged. In such case all the facts giving the cause of action, and upon which the right of recovery depends, must be alleged and proved. That the defendant is entitled to be so apprised of the nature of the demand against it as will enable it to prepare its defenses, is an elementary rule of pleading. *Townsend v. T. & N. O. R. R. Co.* (Tex. Civ. App.) 88 S. W. 302, was an action for breach of a contract of carriage, the plaintiff claiming special damage, as in the present case, on the ground that because of his failure to reach a certain town at the time he would have reached it had defendant performed its duty, he had failed to consummate a "land and cattle deal," by which he would have realized a large profit. It was held that the petition was defective, in that it failed to give "the names of the parties with whom said deal was to be made," and that an objection to it on that ground was properly sustained. The court says: "The defendant was entitled to have the petition state all the facts in regard to the alleged transaction, in order that it might make the investigation necessary to a proper preparation of its defense. Information as to names of the parties with whom it is alleged the deal could have been made was necessary, in order to enable the defendant to investigate and meet the allegation." For the same reason the names of the parties with whom it is alleged the appellees in this case had a contract to thresh grain should have been stated in the petition. The quantity of grain to be threshed was sufficiently alleged, and perhaps it was unnecessary to allege the kind of grain; but the question can be easily eliminated from the case by supplying the allegations before another trial by amendment.

We think the court did not err in refusing to sustain appellant's fifth and sixth special exceptions, to the effect that appellees' petition, wherein it is alleged that they had sent their employes and teams, consisting of 22 horses and 20 men, to Rhome, Tex., to be there on the arrival of the machinery, etc., at an expense of \$40 per day, was insufficient, because it is not shown by said petition that appellant was notified of that fact before or at the time the contract of shipment was made, nor that any expense or injury, nor the amount thereof, would result on account thereof, and because it was not alleged that before, or at the time the contract of shipment was made, the defendant was notified that plaintiffs had said teams in use and men employed, nor how many of each. It was alleged in substance that in the operation of the machinery shipped appellees used 22 head of horses and 20 men at an expense of not less than \$40 per day; that appellees on the 9th day of July, 1903, sent said employes and teams to Rhome, Tex., so as to be there upon the arrival of said ma-

chinery, preparatory to commencing threshing of the grain, which they had contracted to thresh; that on said date appellees, with said employes and teams, were in the neighborhood of Rhome, Tex., ready to take charge of the threshing machinery upon its arrival. It was further alleged that in the operation of the thresher it was necessary, and appellees used 22 head of horses and 20 men at an expense of not less than \$40 per day, and that on account of the delay appellees incurred, an expense of maintaining said employes and teams during $4\frac{1}{2}$ days at \$40 per day; that the defendant at the time it undertook to make such shipment knew that, if there was a delay in the shipment, plaintiffs would be damaged in the way and manner set forth. These allegations in respect to the phase of the case to which they relate, were sufficiently specific, and the exceptions thereto were correctly overruled. After appellee Sproles, while on the witness stand, had stated that on account of the delay in the arrival of his machinery at Rhome, other arrangements had been made by the people whom he had engaged to serve, and there were two machines on the ground, he was permitted to testify over the objections of appellant, that if appellees' machinery had arrived at destination on the 10th day of July, they would have threshed all the wheat that those other people threshed. This was error. Appellees alleged that they had contracted to thresh about 30,000 bushels of grain; that they threshed 10,000 bushels of the same, but lost the threshing of the remaining 20,000 bushels. Having alleged that their damage in this particular accrued by reason of such loss, the evidence should have been confined thereto, and not extended beyond said 20,000 bushels of grain.

We are of the opinion that the court erred in permitting appellee Vines to testify over appellant's objections, that a Mr. Barker, whom he met while he was out near Rhome, was one of the men with whom his firm had arranged to thresh grain. This testimony was objected to on the ground that it was hearsay, and the objection should have been sustained. The witness had stated, in substance, that he did not make the contract with the parties for the threshing of the grain; that his partner, Mr. Sproles, made the contract. It is evident from the answer of the witness to the question his knowledge of the matter was based solely upon what Barker told him. He said: "from his [Barker's] conversation he [Barker] was one." The testimony was hearsay, and should have been excluded. For the same reason appellant's motion to strike out the testimony of the said witness Vines, to the effect that Barker was one of the men for whom plaintiff had arranged to thresh grain, should have been sustained.

The trial court, after charging the jury to the effect, that if the railway company, at the time it undertook the shipment of appellees' "threshing machinery outfit" knew the object and purpose that they had in desiring an immediate shipment, and that if the shipment was delayed appellees would probably suffer loss, etc., to find for appellees, concluded the paragraph with the following language: "In this connection you are charged that whatever is sufficient to put a party upon inquiry amounts to notice, if the inquiry becomes a duty and would lead to knowledge of the required fact." That portion of the charge quoted is assailed on the ground that it requires of the appellant more than was devolved upon it by law. The objection is well taken. It was essential to appellees' recovery of the special damages claimed, that they allege and prove notice to appellant, at the time of the shipment of the machinery, of facts which made a prompt shipment and delivery thereof necessary to avoid probable loss by reason of a failure to do so. The rule of constructive notice, as charged, would not, in our opinion, apply in such a case.

The court's charge on the measure of damages is also assailed, on the ground that it authorizes double damages for the same injury. The jury were instructed that the measure of plaintiff's damages, would be the "expense, if any, incurred in maintaining their employes and teams during the delay, if any, and the reasonable value of the lost time, if any, during said delay and the loss, if any, they sustained by reason of being deprived of the threshing of any of the crops of wheat and oats, which they had engaged or contracted for," etc. We think the charge subject to the criticism made. The lost time referred to in the charge was necessarily that period of time which appellees claim they would have been engaged in threshing the grain contracted to be threshed but for the delay in the delivery of their machinery. They were not entitled to a recovery for such "time lost," and also the loss sustained by reason of being deprived of the threshing of the grain that might have been threshed during such time but for the delay, of which complaint is made. In other words, the measure of appellees' damages, under the pleadings, was the net profits on so much of the 30,000 bushels of grain they had contracted to thresh, as they did not thresh and the threshing of which was lost to them on account of the delay, together with the reasonable cost and expense of maintaining the men and teams during the delay.

We have observed no reversible error in the assignments of error not discussed.

For the errors indicated, the judgment is reversed, and the cause remanded.

J. B. WALLIS & CO. v. WALLACE.

(Court of Civil Appeals of Texas. Dec. 21, 1905. Rehearing Denied Feb. 7, 1906.)

1. ANIMALS—PASTURAGE CONTRACT—ACTIONS—QUESTION FOR JURY.

Where defendant orally agreed to pasture plaintiff's cattle and to put no other cattle or live stock in the pasture, except 8 or 10 head of defendant's cattle, whether defendant's alleged statement that he would not overstock the pasture was a part of the contract was a question for the jury in an action for breach thereof.

2. SAME—IMPLIED PROMISE.

Where defendant orally agreed to pasture plaintiff's cattle at so much a head, and that he would put no other cattle or live stock in the pasture while plaintiff's cattle remained therein, except certain cattle of his own, a provision of the contract that defendant would not overstock the pasture, and that he would keep the fences surrounding it in a reasonably safe condition will be implied.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 42.]

3. SAME—TERMINATION OF AGREEMENT.

The fact that there was no definite time agreed on during which the contract should continue, would not deprive plaintiffs' of their right to recover for the damages sustained while the cattle were permitted to remain in the pasture by virtue of the contract.

4. SAME—DAMAGES.

In an action for breach of a pasturage contract by permitting the pasture to become overstocked plaintiff was entitled to recover the difference between the market value of the cattle immediately prior to their depreciation in value because of lack of feed, considering their then condition and their market value at the time they were removed from the pasture, if any, otherwise the reasonable value of the cattle when so removed.

5. COSTS—WITNESS FEES—BURDEN OF PROOF.

Under the statute providing that only two witnesses to the same fact shall be entitled to witness fees, the burden is on the party complaining of witness fees taxed as costs to establish the fact that the witnesses subpoenaed and in attendance were for the purpose of testifying to the same fact.

Error from Brown County Court; S. C. Coffee, Judge.

Action by J. B. Wallis & Co. against W. J. Wallace. From a judgment for defendant, plaintiff brings error. Reversed.

E. C. Harrell, for plaintiff in error. G. N. Harrison, for defendant in error.

FISHER, C. J. The plaintiffs in error brought this suit against Wallace to recover damages for breach of a verbal contract, in which it is claimed the defendant for a valuable consideration agreed to pasture about 116 head of cattle of plaintiffs in error, and that he would place no other cattle or live stock in the pasture while the 116 head remained therein, except about 8 or 10 head of his own cattle; that the defendant in error breached the contract by placing a large number of other cattle in the pasture, by reason of which the grass was consumed, and that the plaintiffs in error's 116 head were starved and damaged to the extent of \$2.50 per head, amounting in the aggregate to the sum of

\$290. The contract was silent as to the length of time it should continue.

The court after hearing the evidence gave a peremptory instruction in favor of defendant in error which is complained of by the plaintiffs in error by proper assignments raising the question. In our opinion, the evidence was sufficient to require a submission of the issues raised by the plaintiffs' pleadings to the jury. The pasture was either owned or under the control of the defendant in error. The plaintiffs did not rent the pasture, but entered into a contract with the defendant to put in the defendant's pasture 116 head of cattle, at so much per head a month. The cattle at the time they were placed in the pasture, the evidence shows, were in fair condition, and the grass in the pasture was ample to support and maintain the number of head put therein for a reasonable length of time; and it reasonably appears from the evidence that the pasture would not be overstocked with that number of cattle in it. There is evidence to the effect that a few weeks after the cattle were placed in the pasture the defendant permitted other stock to go into the pasture, and the same became overstocked; and, according to plaintiffs' evidence, their cattle when taken out of the pasture some time in October were in an impoverished condition, by reason of the fact that the defendant permitted the pasture to become overstocked. As to whether the statement of the defendant, as shown by the evidence of the witness with whom he made the contract in behalf of the plaintiffs, that he would not overstock the pasture was a part of the contract, was a question to be determined by the jury. It is a difficult matter to say from the evidence that the contract had become executed and all of its terms agreed upon prior to the time that this statement was made; but however, their contract being verbal as to whether the statement was a promise that the pasture would not be overstocked was a part of the contract, was a matter to be determined by the jury, if it should be held important to inquire into that question. But, however, we are of the opinion that even in the absence of an agreement or promise upon the part of the defendant that the pasture should or would not be overstocked, the law, in view of the peculiar terms of the contract, would imply such a promise. As before said, the plaintiffs did not rent the pasture, but merely placed the agreed number of cattle in the pasture at so much per month, which the defendant agreed he would furnish pasturage for. The undertaking being of this character, the law would imply the promise or impose the duty upon the defendant of keeping the fences around the pasture in a reasonably safe condition, and that he would not knowingly suffer or permit the pasture to become overstocked, so as to injure the cattle that he had expressly agreed to furnish pasturage for. These questions were practically settled by

the case of *McAuley v. Harris* (Tex. Sup.) 9 S. W. 680, 684. The fact that there was no definite time agreed upon during which the contract should continue, would not deprive the plaintiffs of their right to recover for the damages sustained while the cattle were suffered and permitted to remain in the pasture by virtue of the contract under which they entered. It is clear from the evidence that so long as the cattle remained in the pasture without objection or protest upon the part of the defendant in error, that the parties treated the contract as continuing. In view of the peremptory instruction, and in view of the fact that we will reverse the case upon that ground, we doubt seriously whether we should pass upon the remaining assignments. But, however, we will express generally our views upon the questions raised.

Those assignments which complain of the action of the trial court in refusing to permit certain evidence with reference to the damages sustained may be disposed of with the statement that, in our opinion, the plaintiffs would be entitled to recover in the event that the verdict would go in their favor, the difference between the market value of the cattle immediately prior to their depreciation in value, taking into consideration their then condition, and their market value at the time they were removed from the pasture, taking into consideration their impoverished condition, by reason of the breach of the contract by defendant not to permit or suffer the pasture to become overstocked. If there was no market value of the cattle at the place or the immediate surrounding country where the cattle were pastured, then the plaintiffs would be entitled to show the reasonable value of the cattle, taking into consideration all pertinent facts that might have any bearing upon this question. The question as presented with reference to retaxing the costs as to witness fees may possibly arise upon another trial. The statute provides that only two witnesses as to one and the same fact will be entitled to witness fees; and if the question should again arise, we would suggest that the burden would be upon the party complaining to establish the fact that the witnesses subpoenaed and in attendance were for the purpose of testifying to the same fact.

For the error stated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

PLANTERS' COMPRESS CO. v. HOWARD.
(Court of Civil Appeals of Texas. Jan. 6, 1906.
Rehearing Denied Feb. 3, 1906.)

LANDLORD AND TENANT—CROPS—LANDLORD'S LIEN—WAIVER.

In an action by a landlord against a buyer of crops on which the landlord had a lien, the evidence showed that the tenant had from time to time sold crops to the buyer; that the landlord had received his part of the proceeds of each sale as rent; that the sales were shown by tickets issued by the buyer on his printed stationery, which tickets the tenant sent to

the landlord. *Held*, that the landlord waived his lien, and the buyer at subsequent sales took the crops free therefrom.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Landlord and Tenant, § 1036.]

Appeal from Bosque County Court; P. S. Hale, Judge.

Action by J. D. Howard against the Planters' Compress Company. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

Crane & Gilbert, for appellant. Cureton & Cureton and Robertson & Robertson, for appellee.

CONNER, C. J. On a former appeal a judgment in appellee's favor was reversed because of the submission of an erroneous charge, as will be seen by a reference to 80 S. W. 119. The case is again before us, and the only assignment of error we deem material is that under which appellant asserts that the testimony does not sustain the verdict and judgment in appellee's favor now under review. Briefly stated, the facts show that appellee rented certain lands in Bosque county to P. A. Holt for the year 1902, upon which said Holt and a son raised, among other things, a crop of cotton. Appellee furnished his tenant certain supplies to enable him to make a crop, and by the terms of the rental contract was entitled to one-fourth of the cotton as rent. This suit was instituted upon the 11th of May, 1903, by appellee against appellant to recover the value of certain cotton alleged to have been raised on the rented premises, upon which he alleged he had a lien to secure several hundred dollars for advances made to said tenant, and which said cotton, it was alleged, had been sold to and converted by the appellant company. On the trial appellee recovered judgment for the sum of \$331.80, and, as before stated, it becomes our duty to determine the sufficiency of the evidence to sustain the verdict and judgment.

It is undisputed that the premises described in appellee's petition were rented as alleged, and that the tenant, Holt, together with his son, raised about 22 bales of cotton, and that appellee furnished advances substantially as alleged. It must also be held from the evidence in deference to the verdict of the jury that appellee gave the tenant no authority to sell the cotton, but, on the contrary, that some time about the 15th of October, 1902, he forbade the sale of any more cotton until the advances made by him had been paid, it appearing from the evidence that some six or seven bales of cotton had been sold by Holt prior to this time without having discharged the lien thereon for advances. It is also undisputed that appellee gave no notice to appellant of the existence of his lien or of his notice to Holt not to sell. The crucial point, however, in the case, is whether the evidence conclusively shows that appellee waived his lien as against appellant, notwithstanding the circumstances hereinbefore stated. Upon this point the evidence is substantially as

follows: Appellee lived some 9 or 10 miles from Valley Mills where appellant was engaged in business. Holt made sales of cotton to the appellant company after October 19th as follows:

Oct.	24.	2	bales,	1,800	lbs.	each,	for	which	it	paid	to	Holt	.....	\$ 81 00
"	29.	1	bale,	"	"	"	"	"	"	"	"	"	.....	47 00
Nov.	1.	1	"	"	"	"	"	"	"	"	"	"	.....	43 44
"	12.	1	"	"	"	"	"	"	"	"	"	"	.....	41 00
"	19.	1	"	"	"	"	"	"	"	"	"	"	.....	42 38
"	29.	1	"	"	"	"	"	"	"	"	"	"	.....	40 00
Dec.	10.	1	"	"	"	"	"	"	"	"	"	"	.....	41 80
"	18.	1	"	"	"	"	"	"	"	"	"	"	.....	33 36
"	28.	1	"	"	"	"	"	"	"	"	"	"	.....	20 48
"	30.	1	"	"	"	"	"	"	"	"	"	"	.....	24 80
<hr/>														
Total,	11	"	"	"	"	"	"	"	"	"	"	"	.....	\$415 24

Previous thereto, during October, Holt had sold to the appellant company some five bales and to others six or seven bales. Upon all cotton sold Holt regularly reported sales, and paid to appellee the rent money. We quote the following from appellee's testimony: "The defendant, Planters' Compress Company, has its plant at Valley Mills, where it had been buying cotton for two or three years. The sales made by Holt to defendant were shown by tickets issued by him on their printed stationery, and these tickets were brought or sent by Holt to me, and the calculations of my part [rent] were made on the back of the tickets, and the rent was paid to me according to the weights and prices shown by the tickets. I have none of these tickets. Holt kept them, but they were exhibited to me. According to the tickets, Holt sold the cotton at from \$40 to \$45 a bale in the seed, and I was entitled to one-fourth of the proceeds as rent. The supplies which I furnished the Holts have never been paid for except as shown by the credits on the accounts attached to my petition, amounting to \$52 or \$53. I called on P. A. Holt several times for a settlement of this account. Up to about the 10th or 15th of October, Holt had sold six or seven bales. He had paid or sent me the rents out of the bales. I called on him after he had sold four or five bales to defendant and he had not paid me any money on these accounts, but he put me off at different times when I would present the matter to him he would keep putting me off with first one excuse and then another, and I began to get uneasy. Several times during the year I called Holt's attention to the fact that I had a landlord's lien on three-fourths of the cotton to secure this supply account. I never at any time consented for said Holt to sell the cotton to the defendant, Planters' Compress Company. He sold it without my consent. About the 10th or 15th of October I forbade him selling any more cotton. * * * After the cotton was removed from the rented premises, it was sold within a day or two after such removal, and as fast as a bale or two was

gathered. * * * Sometimes it would be a day or two after he sold the cotton, and sometimes two or three days, before he would bring me the tickets and pay my rent out of the cotton sold." On cross-examination,

he testified, among other things, as follows: "I think Holt sold two bales to the Schow Bros. before he sold any to the defendant. * * * Holt gathered the cotton, and carried it off, and sold it without my knowing anything about it. I was busy there in the store. I got the rent from the cotton Holt sold to Schow Bros. Holt brought and sent the rent to me, and paid it to me in my place of business. He generally brought or sent the rent to me pretty soon after he sold the cotton. I knew soon after he had sold the cotton to Schow Bros. of its sale to them, and received the rent for it from Holt. I have not sued Schow Bros. for that cotton. I wanted to be sure of my money and they did not buy enough to pay this account, and I wanted to sue the party that bought the bulk of it. The next cotton was sold to the defendant. I think some of the cotton was sold to the defendant in September. All the cotton that defendant bought was in the seed. Think Holt made about 20 different sales of cotton to the defendant. I received the rent. Holt paid me rent on cotton sold to the defendant about 20 times. I knew after Holt had sold the cotton to defendant, and from what he said that he had taken it to Valley Mills to sell. When Holt paid me the rent I knew he had sold the cotton. I knew when each successive sale was made to the defendant by Holt bringing me the tickets for the sales made to the defendant, and knew from that that defendant had bought cotton from Holt. The sales were shown to have been made to defendant by their printed stationery and tickets showing amount of sales, which Holt exhibited to me, showed the weights of the cotton and the prices paid for it, and that the sale was made to the defendant. I never made any express objections to Holt's making sales of the cotton at any time prior to the 10th or 15th of October, and then only made my objection to Holt, and no one else was present. Up to the 10th or 15th of October I made no express objection to any sales made by Holt, and did not then or thereafter notify the defendant that I ob-

jected to any sales made to it by Holt, but I did not consent to any sale. Valley Mills is about 9 or 10 miles from my place of business at Mosheim, and is the railroad station to which I sent my wagon for freight during the fall and winter of 1902. I sent my wagon during the time the cotton was being marketed to Valley Mills for freight and there was a daily mail between Valley Mills and Mosheim, where I live. I did not notify the defendant that I had any interest in the cotton being sold to them by Holt during the fall and winter of 1902 either by letter or otherwise, and they never notified me they were buying cotton. I got the rents from all the cotton sold by Holt to the defendants within a few days after each sale was made. * * * I did not go to see the defendant until after the season was over and their gin had been shut down and all the purchases of the cotton which they made had been concluded. Holt made his objection to paying the account about the 10th or 15th of October. The dispute arose over hauling him water and digging a well. I did not tell Holt anything about selling cotton till about the 10th or 15th of October, when I forbade him selling any more cotton. I did not protest against any sales he made up to October 10th or 15th. I expected him to pay the rent and the advances. I do not know that I would have questioned his authority to sell the cotton if he had paid me the advances like he paid the rent. Do not think I would have done so, because if I had gotten the money for the advances, that was all I was entitled to. I do not think I went to Valley Mills during the time Holt was selling this cotton. I never met any of the parties connected with the defendant company except a Mr. Ellison, and met him after all this cotton was bought. The sales of cotton to the defendant extended over a period of more than two months. They extended from some time in September until some time in December. * * * Every time he came to me with the money for rent I took it because I thought I had a right to. * * * Holt and I had no understanding at all about selling the cotton. He just gathered it and sold it."

The foregoing quotations are taken from the agreed statement of facts found in the transcript, and we feel constrained to hold that it conclusively appears from the evidence as a whole that appellee's lien was waived, and that, therefore, the appellant company took the cotton free therefrom. While the law does not require the landlord to go forth and notify the commercial world of the existence of his lien, he cannot impose upon those purchasing commodities in the open market by knowingly and continuously permitting unauthorized sales in the proceeds of which he participates. With the undisputed knowledge appellee had of the many sales made to appellant in this case, we think the receipt of a part of each successive sale necessarily constituted a ratification of all such

sales and amounted in legal effect to original authority in the tenant to sell. To hold otherwise would be to establish a rule injuriously affecting trade and to permit the commission of wrongs upon those engaged therein. See *Gilliam v. Smither* (Tex. Civ. App.) 33 S. W. 985; *McCollum v. Wood*, Id. 1087.

Inasmuch as the case appears to have been fully developed and fairly submitted to the jury, we conclude that it is in the interest of all parties that further litigation be terminated. It is accordingly ordered that the judgment be reversed and here rendered for appellant.

PACIFIC EXPRESS CO. v. SHIVERS.*

(Court of Civil Appeals of Texas. Jan. 6, 1906. Rehearing Denied Feb. 8, 1906.)

1. MASTER AND SERVANT—NEGLIGENCE—INJURIES TO SERVANT—SUBMISSION TO JURY.

In an action against an express company for injuries to an employé, there was evidence that plaintiff, a member of defendant's truck crew, in moving a heavily loaded truck across railroad tracks to defendant's office, was injured by being struck by the tongue of the truck suddenly swerving to one side as the result of one of the wheels of the truck dropping into a hole in the crossing over the tracks. The truck was an old one, and the king bolt and axles were worn. Plaintiff testified that he had no knowledge of any defect in the truck or of the existence of the hole, and that he had no recollection of ever having used the particular crossing before. *Held* to require a submission of the issues to the jury.

2. SAME—LIABILITY.

Where plaintiff, a truckman of defendant express company, was injured by being struck by the tongue of a truck, owing to the wheels of the truck falling into a hole in a crossing over railroad tracks, and it was shown that defendant's agent directed the performance of the duty undertaken by plaintiff, and knew of the defect in the crossing before the accident, and had complained thereof to the agents of the railroad company, defendant was not released from liability by reason of a contract between it and the railroad company under which the duty of keeping the premises in repair devolved upon the latter.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by J. W. Shivers against the Pacific Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. McCormick, for appellant. R. L. Carlock, for appellee.

CONNER, C. J. Appellee, R. L. Shivers, as the next friend of J. W. Shivers, a minor, instituted this action in June, 1904, to recover of the appellant the sum of \$2,000 for damages alleged to have been sustained by said minor on account of personal injuries received by reason of appellant's negligence. So far as necessary to state, the negligence alleged was, in substance, that said minor had been put to work in an unsafe place and with an unsafe truck, without warning him of the dangers of his employment. It was alleged that the truck, while being pulled by

*Writ of error denied by Supreme Court March 8, 1906.

said minor over a dangerous crossing, was caused to violently deflect, whereby he was thrown with great force and injured. The appellant answered with a general denial, pleas of contributory negligence and of assumed risk, and specially that the premises where the minor was injured, if at all, were the property of and under the exclusive control of the Texas & Pacific Railway Company. The trial resulted in a verdict for plaintiff for \$500, in which amount the judgment from which this appeal has been prosecuted was entered.

Numerous assignments of error have been presented, but none of them, we think, require discussion save those which involve a determination of the sufficiency of the evidence to sustain the verdict, and also perhaps one other, involving the court's ruling upon the evidence. Briefly stated, the evidence tends to show: That J. W. Shivers was a minor between 16 and 17 years old. That at the time of his injuries he was employed by the appellant company as a member of what is designated a truck crew at the Union Station of the Texas & Pacific Railway Company in the city of Ft. Worth, Tex. That extending in an easterly direction from the depot there were some four or five tracks. Across these tracks, extending north and south, were at intervals paved crossings. On the occasion in question, J. W. Shivers, together with two other employees, was engaged in moving a heavily loaded truck from a train on the south track across to the appellant company's office, situated on the north of all the tracks. The crossing pavement, or place where the work was being conducted, was intended to be on a level with the top of the rails; but, owing to the fact that several bricks lying lengthwise with the track had been removed, a hole several inches wide, deep, and long existed, and while J. W. Shivers was pulling or guiding the tongue, and the others were pushing said truck over this crossing, one of the fore wheels dropped into the depression described, causing the tongue of the truck to suddenly swerve to one side, knock said minor down, break his arm, and injure him. There was also evidence tending to show that the truck was an old one; that the kingbolt and axles were worn, whereby the horizontal motion of the tongue was increased. J. W. Shivers testified to several months' experience in this kind of work, but denied knowledge of any defect in the truck, and denied having noticed the hole or depression named, and denied recollection of ever having used the particular crossing before. The evidence, we think, required of the court a submission of the issues to the jury. While there was evidence tending to support appellant's pleas of contributory negligence and of assumed risk, it was as a whole conflicting, and the issues thereby presented were not only for the jury, but also sufficient to support the jury's finding in appellee's favor

on such issues. Appellant's peremptory instruction to find for it was therefore properly refused.

Complaint is also made of the action of the court in withdrawing the contract between the appellant company and the Texas & Pacific Railway Company. By this contract appellant sought to show that the duty of keeping in repair the premises in question devolved upon the Texas & Pacific Railway Company and not upon appellant; but we are of the opinion that appellant can not thus be relieved of the duty of exercising ordinary care to provide a safe place at which it places its employes to labor. It was shown that appellant's agent having power to employ and discharge servants directed the performance of the duty undertaken in this instance; that he at least knew of the defect in the crossing which resulted in the injury for some time before the accident and had complained thereof to the agents of the railway company; and it seems quite obvious that appellant's reliance upon the Texas & Pacific Railway Company was at its own peril. See *Railway Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538; *Railroad Co. v. Rhodes*, 80 S. W. 869, 10 Tex. Ct. Rep. 205; *T. & P. Ry. Co. v. Fenwick* (Tex. Civ. App.) 78 S. W. 548; *Mo. Pac. Co. v. Jones*, 75 Tex. 153, 12 S. W. 972, 16 Am. St. Rep. 879.

The charges given and refused have been examined, but we find no material error in respect thereto as urged; and, believing that the evidence fully supports the material allegations of plaintiff's petition, the judgment is in all things affirmed.

EVANS v. JACKSON et al.*

(Court of Civil Appeals of Texas, Jan. 6, 1906. Rehearing Denied Feb. 3, 1906.)

1. APPEAL—ASSIGNMENTS OF ERROR—SPECIFICATION—MULTIFARIOUSNESS—CONSIDERATION.

Under rules for Courts of Civil Appeals, Nos. 24, 25, and 26 (67 S. W. xv), requiring assignments of error to distinctly specify the grounds of error relied on, and providing that assignments expressed only in such general terms as that the court erred in its rulings upon the pleadings, when there are more than one, etc., without identifying the proceeding, will not constitute a compliance with the statute, assignments of error, raising four distinct questions of law, and asking a reversal of the judgment because of the undisputed facts, because of the court's finding on a plea of the five and ten years' statutes of limitations, and of a finding on the plea of laches and stale demand, were, whether considered as a group of assignments, or as a single assignment, multifarious, and too general to be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3028-3030.]

2. LIMITATION OF ACTIONS — PLEA — SUFFICIENCY.

In an action on a note, given in part payment for land, and assumed by one of defendants on purchasing from the vendee of the land, an answer alleging: "For answer the defendants allege, and plead as a complete bar to

*Writ of error denied by Supreme Court March 8, 1906.

plaintiff's recovery, that, as appears from the petition of," etc., "the last of said installments and the final maturity of all of said indebtedness fell on February 18, 1884," etc.; "that more than four years have elapsed since the accrual of the cause of action on said assumption (of the indebtedness) by defendant, * * * and on said note or notes-themselves, prior to the institution of this suit"—was a sufficient plea of the statute, even as against an exception thereto for insufficiency.

3. LIMITATION OF ACTIONS—BILLS AND NOTES—EVIDENCE—SUFFICIENCY.

In an action on a note, evidence held sufficient to sustain a judgment for defendants based on the five and ten years' statutes of limitations.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by William Evans against J. M. Jackson and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Robt. G. Johnson, for appellant. Q. T. Moreland, for appellees.

SPEER, J. This suit was filed by Sam Evans, as plaintiff, to recover from J. M. Jackson and B. F. Sprinkle upon a note for the sum of \$225, dated October 30, 1883, executed by said Jackson, payable to said Evans, for a part of the purchase price of a lot in the city of Ft. Worth, and secured by an express vendor's lien on such lot. The lot was conveyed by Jackson to defendant B. F. Sprinkle on February 16, 1884, who assumed the payment of the note. The petition sought a foreclosure of the vendor's lien. Sam Evans died pending the suit, and William Evans was properly substituted as plaintiff in the action; he being an heir of Sam Evans, and the other heirs having assigned to him all their interest in the note and land securing the same. The defendants pleaded the statute of four years' limitation to the note sued on. Plaintiff then prayed for the recovery of the land, and the defendants pleaded the five and ten years' statutes of limitations, stale demand and laches, improvements made by Sprinkle in good faith, estoppel of plaintiff to assert his title, and not guilty. There were other issues tendered by the pleadings, but in the view we take of the case they need not be here stated. The case was tried by the court without a jury, and a judgment rendered in favor of the defendants, from which this appeal is prosecuted.

Appellant submits first the following assignment or group of assignments of error:

"Third, fourth, fifth, and sixth assignments of error:

"(3) The court erred in refusing to render judgment for plaintiff for the lot in controversy, and in rendering judgment for defendant, because the undisputed facts are: (1) That Evans sold the lot to Jackson and reserved in his deed an express vendor's lien on the lot to secure the payment of unpaid purchase money; (2) That Sprinkle, in his purchase of the lot from Jackson, expressly as-

sumed the payment of the unpaid purchase money; (3) that said purchase money has never been paid; (4) that, when sued herein for the unpaid purchase money and to foreclose the lien, defendants repudiated the debt, attempting to plead limitation against the note, and set up hostile title in themselves to the lot; (5) that plaintiff only disaffirmed the sale to defendants and set up his superior title to the lot when forced thereto by defendants' said pleas; and (6) the statement of facts discloses no previous repudiation by defendants of plaintiff's or his ancestor's title to the lot of which they had knowledge, or of which they were put on notice.

"(4) The court erred in sustaining defendant's plea of the five-year statute of limitation to plaintiff's suit for the lot.

"(5) The court erred in sustaining defendant's plea of the 10-year statute of limitation to plaintiff's suit for the lot.

"(6) The court erred in sustaining the defendants' plea of laches and stale demand, either against his (plaintiff's) money demand or his suit for the lot.

"These assignments are each a proposition and will be considered together.

"Additional propositions:

"(1) Limitation does not run in favor of a vendee against his vendor, where an express lien is retained in the deed to secure unpaid purchase money, and the purchase money is unpaid, until the vendee repudiates his vendor's title, and the vendor has notice of the repudiation.

"(2) If, after suit by a vendor of land to recover the unpaid purchase price stipulated in an executory contract of sale, the vendee repudiates his liability under the contract, as by pleading the statute of limitation to the debt, the right of the vendor to recover the land revives.

"(3) The principles of stale demand and laches do not operate against plaintiff's legal title to the lot.

"(4) Mere lapse of time does not create the presumption that plaintiff has parted with his legal title to the lot, nor does it create an equitable title in defendants.

"(5) The registration of the deed from Huffman to Sprinkle did not put Evans on notice of said deed.

"Statement:

"In 1883 Evans conveyed the lot to Jackson, who gave the notes sued on for a part of the purchase price; the deed reserving the express vendor's lien. The notes have never been paid. In 1884 Sprinkle bought the lot from Jackson and assumed the payment of the notes. Since that time Sprinkle's possession thus acquired has been continuous. Being sued on the notes, and to foreclose the lien, defendants pleaded the statute of limitations to the notes, or attempting to do so, and set up title to the lot in themselves superior to plaintiff's title. No act of repudiation of plaintiff's superior title by defendants

brought to the notice of plaintiff or Sam Evans prior to said plea appears in the evidence. Plaintiff asserted his superior title when confronted with defendant's claim of absolute ownership and attempted plea of limitations. (See statement of facts proved.)

Whether this be considered as a single assignment of error, or as a group of assignments, clearly the same is in palpable violation of the rules for briefing cases, and cannot be considered by us. In cases submitted to the judge upon the law and facts, the assignments of error are to be governed by the same rules as in other cases (rule 27; 67 S. W. xv), and the courts have uniformly held that an assignment raising two or more distinct questions of law is not that distinct specification of error contemplated by rules 24, 25, and 26. Treated as a single assignment, as we think it should be, this assignment raises at least four distinct questions of law, and is therefore multifarious. By it we are asked to reverse the court's judgment because of the undisputed facts, to consider his finding upon the plea of five years' statute of limitations, to consider his finding upon the plea of the ten years' statute of limitations, and, finally, to consider his finding on the plea of laches and stale demand. This involves the whole case and would require an examination of the entire record. See *City of San Antonio v. Talerico*, 81 S. W. 518, 10 Tex. Ct. Rep. 530; *Cammack v. Rogers*, 73 S. W. 795, 7 Tex. Ct. Rep. 211; *Land Co. v. McClelland Bros.*, 86 Tex. 187, 23 S. W. 576, 1100, 22 L. R. A. 105; *King v. Battaglia*, 84 S. W. 839, 12 Tex. Ct. Rep. 62; *Chicago, R. I. & T. Ry. Co. v. Cain*, 84 S. W. 682, 12 Tex. Ct. Rep. 4; *Western Union Tel. Co. v. Waller*, 84 S. W. 695, 12 Tex. Ct. Rep. 14; *Bell v. Bates*, 81 S. W. 551, 10 Tex. Ct. Rep. 625; *G. & S. A. Ry. Co. v. Fales*, 77 S. W. 234, 8 Tex. Ct. Rep. 629; *Cochran v. Siegfried*, 75 S. W. 542, 7 Tex. Ct. Rep. 948; *Louison & T. C. Ry. Co. v. De Berry*, 78 S. W. 736, 8 Tex. Ct. Rep. 899; *Wells v. Houston* (Tex. Civ. App.) 60 S. W. 183; *Abernathy v. Southern Rock Island Plow Co.* (Tex. Civ. App.) 62 S. W. 786; *International & G. N. Ry. Co. v. True* (Tex. Civ. App.) 57 S. W. 977; *Wise County Natl. Bank v. C. D. Cates et al.*, No. 4,598 this court. In case last cited, which was marked "Not to be reported," in which a writ of error was refused, we held the following assignment to be too general: "The court erred in sustaining the defendants' pleas of usury, because there was a fatal variance between the evidence offered to support the plea of usury; and, second, because the case as pleaded was not proven." The proposition thereunder was: "The defense of usury as pleaded by the defendants was not proven, and therefore the court should have found for the plaintiff." This assignment is probably more specific than either the fourth, fifth, or sixth of the group under consideration.

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The only remaining assignments are the first and second, which question the sufficiency of appellee's plea of the statute of limitations in bar of a recovery on the note. The point is that the plea nowhere specifically declares that the statute of limitation is invoked as a defense in the case. This contention, however, is untenable for the answer does allege: "For answer the defendants allege and show, and would plead as a complete bar to plaintiff's recovery herein, that, as appears from said petition of Sam Evans, * * * the last of said installments and the final maturity of all of said indebtedness fell on February 18, 1884. * * * That more than four years have elapsed since the accrual of the cause of action on said assumption by defendant Sprinkle, and on said note or notes themselves, prior to the institution of this suit. * * * This we take to be a sufficient plea of the statute, even as against appellant's exception for insufficiency.

There is no error apparent of record for which the case should be reversed. Indeed, a consideration of the merits of the case would compel us to hold that the court's judgment finds sufficient support in the evidence upon both the issues of five and ten years' limitations. While appellees entered under the deed from Sam Evans, they, nevertheless, subsequently purchased what they considered a superior title, and placed the same on record, from which time the holding and possession, as the evidence indicates, have been under this deed. All taxes have been paid. More than 10 years elapsed prior to the institution of this suit. There is evidence tending to show repudiation of the Evans title. The suit by Huffman against Evans and Sprinkle, the deed from Huffman to Sprinkle made pending that suit, and the long lapse of time thereafter before the institution of this suit, during all of which time no payments were made to Evans and none demanded, tend to show not only that Sprinkle repudiated the Evans title, but that Evans had notice thereof.

The judgment is therefore affirmed.

JOHNSTON et al. v. FRASER et al.*

(Court of Civil Appeals of Texas. Jan 17, 1906.
Rehearing Denied Feb. 14, 1906.)

1. PLEADING—CROSS-COMPLAINT—PROCESS—SERVICE—PERSONS TO BE SERVED—CODEFENDANTS.

Where a defendant was not cited to answer his codefendants' cross-action, and never appeared, answered, nor paid any attention thereto, matters involved in such cross-action could not be submitted to the jury.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 301.]

2. TRIAL—SUBMISSION ON SPECIAL ISSUES—NECESSITY OF REQUEST.

Where parties requested the court to submit the case on special issues, they should have prepared and requested an appropriate charge sub-

*Writ of error denied by Supreme Court March 22, 1906.

mitting the issues which they deemed essential, and having failed to do so, issues not submitted, should if essential, be resolved in favor of the judgment.

3. HOMESTEAD—SALES—LEGALITY.

A homestead is subject to an actual bona fide sale, and when such a sale is made, and evidenced by a proper deed, duly acknowledged, it is as effective as a sale and conveyance of any other property.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 176, 179.]

4. APPEAL—BRIEFS—NECESSITY OF STATEMENTS.

An assignment of error will not be considered where no statement is subjoined to the proposition under it in appellants' brief, as required by Court of Appeals Rule 31 (67 S. W. xvi).

5. SAME—HARMLESS ERROR—AMENDMENT OF JUDGMENT.

Since Rev. St. 1895, art. 1341, requires the officer executing an order of sale under a foreclosure judgment to place the purchaser in possession within 30 days after the day of sale, an amendment of a judgment of foreclosure made at a subsequent term, so as to add a direction requiring the officer to place the purchaser in possession was not prejudicial to defendants.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by John A. Fraser and others against George A. Johnston and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

L. B. Camp, for appellants. F. C. Davis and Mason Williams, for appellees.

NEILL, J. This suit was brought by John A. Fraser against John V. Spring, Sr., and G. A. Johnston and his wife Annie C., to recover on the promissory note, and to foreclose a vendor's lien on the property for which it was given, described in our conclusions of fact.

The defendants Johnston and wife answered that at the time the note was executed the premises upon which the alleged lien is claimed was their homestead, that the sale of the premises was not real, but simulated, and made for the purpose of allowing Johnston to negotiate the note and raise money thereon; that, though the deed made by them to Spring recites a cash consideration of \$2,000, no consideration whatever, save the note, was paid or given; that the plaintiff Fraser at the time he purchased the note knew that the premises upon which it recites a vendor's lien were defendants' homestead and the pretended sale thereof fictitious. The answer closed with a prayer that their deed to Spring and purported vendor's lien be canceled; and, in the alternative, should it be held that the note constitutes a valid lien on the premises, for a judgment against Spring for the \$2,000 recited in the deed as having been paid them. Spring filed no answer to plaintiffs' petition, was not served with citation of Johnson's cross-action against him, nor did he appear or answer thereto. The case, as between plaintiffs and Johnston and wife, was, upon the request of Johnston, submitted to the jury upon special

issues. After the verdict judgment was rendered against defendant, John V. Spring, Sr., and George A. Johnston for the amount due on the note, and the vendor's lien on the premises as against all the defendants, foreclosed, and the property ordered sold to satisfy the judgment. No specific directions, however, were given in the judgment, requiring the sheriff or other officer executing the order of sale to place the purchaser of the property sold thereunder in possession thereof. But upon motion, which appellants appeared and answered, a writ of possession was awarded at a subsequent time of the court.

Conclusions of Fact.

On the 3d day of April, 1903, John V. Spring, Sr., executed and delivered his promissory note for \$3,000, due 12 months after date, payable to the order of George A. Johnston and Annie C. Johnston, with interest at the rate of 8 per cent. per annum from date, payable semiannually, providing if any the deferred payments of interest were not paid when due the note should become due and payable at the option of the owner thereof, and in case default was made in payment, and the institution of judicial proceedings to collect that 10 per cent. on amount should be added as attorney's fees. Said note was given as a part of the purchase money for the premises described in plaintiffs' petition, and recites a vendor's lien is retained to secure its payment. It was transferred by the payees for value before maturity, and this suit was brought after, by its terms, it became due. The jury found, upon a special issue submitted by the court, that at the time of the execution by Johnston and wife to J. V. Spring of the deed to the property for which the note was given, the intention of the parties was that the conveyance should be a bona fide sale of the property, intending by the deed to convey the title thereof to Spring. As this finding of the jury is not excepted to, and no assignment of error is predicated upon it, it will be deemed conclusive of the facts so determined.

Conclusions of Law.

1. The first assignment insisted upon involves the novel proposition that, in event of a finding by a jury a sale of a homestead claimed by the vendor to be fictitious and simulated was actually and bona fide made with the intention of conferring title, the vendor can recover of their vendee the amount of the cash consideration expressed in the deed, if not actually paid, though it was the intention by all the parties to the deed at the time it was executed that the expression of such consideration was merely for the purpose of better enabling the vendor to negotiate a vendor's lien note made him by his vendee for the land, which was the real and only consideration for the sale, when it was never contemplated by the parties that the expressed cash

consideration should be paid. As interesting as this proposition may be, we are not permitted, in view of the record before us, to pass upon it; for the reason that the defendant John V. Spring, Sr., was not cited to answer appellants' cross-bill, from which the proposition contended for was evolved; and, not being cited, he never appeared, answered, nor paid any attention to it. Therefore it would have been error for the court to have submitted the matters involved in appellants' cross-bill against Spring to the jury. *Harris v. Schlinke*, 95 Tex. 88, 85 S. W. 172.

2. The next assignment of error complains that the court erred in not submitting to the jury a general charge defining a homestead. The appellants, having requested the court to submit the case on special issues, should, if they deemed a submission of the issue of homestead essential, have prepared and requested an appropriate charge submitting such issue. Having failed to do this, such issue, if an essential one, must be resolved in favor of the judgment. *Breneman v. Mayer*, 24 Tex. Civ. App. 164, 58 S. W. 725. In view of the uncontroverted finding of the jury, it would seem that the omission of the issue could not have prejudiced appellants, for such issue would have only become material in the event of a finding that the sale was fictitious and simulated; because a homestead is subject to an actual bona fide sale, and when such a sale is made and evidenced by a proper deed duly acknowledged it is as effective as a sale and conveyance of any other property.

3. The fifth assignment of error will not be considered, because there is no statement, such as is required by rule 31 of this court (67 S. W. xvi), subjoined to the proposition under it in appellants' brief.

4. Since, under article 1841, Rev. St. 1895, the sheriff or other officer executing an order of sale provided for in judgments foreclosing liens is required to place the purchaser of the property sold under such order in possession thereof within 30 days after the day of sale, the appellants were not prejudiced by the amendment of the judgment at a subsequent term expressly directing what was otherwise clearly implied by the judgment.

There is no error assigned requiring a reversal of the judgment, and it is affirmed.

KING v. D. SULLIVAN & CO.

(Court of Civil Appeals of Texas, Jan. 17, 1906. Rehearing Denied Feb. 14, 1906.)

1. MALICIOUS PROSECUTION — BANKRUPTCY PROCEEDINGS.

The malicious institution of proceedings, without probable cause, to have a person declared a bankrupt, is actionable.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 5.]

2. PLEDGES—SALE—GOOD FAITH.

The pledgee of commercial paper taking it as collateral with power to sell, and right of any member of the pledgee's firm to buy, is a

trustee for the pledgor, and having made such sale to a member of his firm for less than the value of the paper, has the burden of showing that he exercised at least ordinary care and diligence to get the best price.

3. COVENANTS—WARRANTY OF TITLE—DAMAGES FOR BREACH.

Defendant having given security including a mortgage on land, for his debt to plaintiffs, executed a warranty deed of the land to them, at a certain valuation, giving a note for the balance of the debt, plaintiffs at the same time executing a contract putting a price on each piece of the land, which gave defendant the privilege of selling the property at any time within two years, he to have whatever he should obtain for it above his said indebtedness. Defendant's title to certain of the land was simply a location on public land, and by the contract it was stipulated that he should obtain patent therefor, and failing to do so should pay plaintiffs \$1,000, the price of such land fixed by the contract. Six months before expiration of the contract, defendant having failed so to do, plaintiffs obtained said patent. *Held*, that defendant's liability for breach of his warranty of title was the cost and expense incurred by plaintiffs in getting the patent, he being entitled to be credited on his indebtedness with what he could have sold the land for during the two years, in excess of \$1,000, less such cost and expenses of plaintiff.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by D. Sullivan & Co. against W. W. King. Judgment for plaintiffs. Defendant appeals. Reversed.

Newton & Ward, for appellant. Ogden & Brooks, J. C. Sullivan, and Wm. Aubrey, for appellees.

NEILL, J. This suit was brought by D. Sullivan & Co. against W. W. King to recover \$2,124.38, an alleged balance due on a certain promissory note, and the further sum of \$1,000 damages for an alleged breach of warranty in the sale of certain lands.

The defendant answered by a general demurrer and general denial, and pleaded in re-convention \$25,000 actual and \$10,000 exemplary damages alleged to have accrued from plaintiffs' wrongful and malicious institution, without probable cause, of bankruptcy proceedings against him in the United States District Court at San Antonio. He also pleaded in re-convention the sum of \$4,071 alleged due him by reason of an agreement between the parties to the effect that, after the sale of certain lands conveyed by defendant to plaintiffs, he was to have the balance of the proceeds of the sale to be made thereof by plaintiffs, after appropriating sufficient amount thereof to the payment of certain indebtedness due by him to them. A general demurrer having been sustained to defendant's plea in re-convention against plaintiffs for instituting the alleged proceedings in bankruptcy, the case was tried before a jury and the trial resulted in a verdict in favor of plaintiffs for \$4,269, upon which a remittitur of \$400 was entered after hearing of the motion for new trial, and final judgment entered for the balance.

The first assignment is directed against

the action of the court in sustaining the plaintiff's general demurrer to defendant's plea in reconvention. It seems to be the well-established rule in this state, as well as in a good many other jurisdictions, that no damages can be recovered of any character against any person for filing a civil suit and prosecuting it against another to judgment upon a claim, real, or unfounded, unless one's property or person is wrongfully seized, or in some manner injuriously affected, by process issued therein. *McCord-Collins Com. Co. v. Levi* (Tex. Civ. App.) 50 S. W. 607; *Johnson v. King*, 64 Tex. 226; *Runge v. Franklin*, 72 Tex. 590, 10 S. W. 721, 3 L. R. A. 417, 18 Am. St. Rep. 883; *Funstall v. Clifton* (Tex. Civ. App.) 49 S. W. 244; *Biering v. Bank*, 69 Tex. 601, 7 S. W. 90. In jurisdictions where this rule obtains, the obverse rule is that the malicious prosecution, without probable cause, of civil proceedings involving arrest, attachment, sequestration, or other interference with person or property, or which is the cause of any special grievance or injury, will, according to the general current of authority, give a right of action. 3 *Suth. on Dam.* § 1235; *Cooley on Torts*, 217-219; 1 *Jaggard on Torts*, 605, 606; *Kinkead on Torts*, § 416. And the writer, after an extended examination of the authorities, can find no exception to the principle that the malicious institution of proceedings, without probable cause, to have a person declared a bankrupt falls within the rule last quoted. *Suth. on Dam.* § 1235; *Cooley on Torts* (2d Ed.), 217, p. 182; *Webb's Pollock on Torts*, 400; *Jaggard on Torts*, 606; *Fraser, Torts*, 121; *Stephens on Malicious Prosecution*, pp. *23, *24; *Sonneborn v. A. T. Stewart & Co.*, 2 Woods, 602, Fed. Cas. No. 13,176; *Id.*, 98 U. S. 187, 25 L. Ed. 116; *Luby v. Bennett*, 11 Wis. 613, 37 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 807, and authorities cited under the proposition in elementary authorities referred to.

It will be seen from reading our citation from *Fraser on Torts* that in England "malicious prosecution" has been defined as "the malicious institution against another of criminal, bankruptcy or liquidation proceedings, without reasonable and probable cause." And that Judge Cooley, in considering the class of cases in which an action may be maintained for malicious institution of a civil suit, after observing that the authorities are not entirely agreed upon such cases, says: "The case of proceedings in bankruptcy is undoubtedly one. If these are instituted maliciously, and without probable cause, and terminate without an adjudication of bankruptcy, an action will lie for the damages sustained. The grounds of this action are that the commission was falsely and maliciously sued out, that the plaintiff has been greatly damaged thereby, scandalized upon the record, and put to great charges in obtaining a supersedeas to the commis-

sion. Here is falsehood and malice in the defendant, and great wrong done the plaintiff thereby." These quotations are deemed enough to show the trend of the authorities cited, which, in our opinion, are, in the absence of any authority to the contrary, sufficient to show that the malicious institution, without probable cause, of a proceeding to have one declared a bankrupt constitutes, after the termination of such proceedings in his favor, a *prima facie* cause of action. From this it follows, that defendant's plea in reconvention, which alleged all the facts essential to constitute such a *prima facie* case and his consequent damage therefrom, was good, at least, as against a general demurrer; and that the court erred in sustaining it.

The second assignment of error complains that "the court erred in instructing the jury to find for plaintiffs against the defendant the sum of \$2,307.22, the balance of the note sued on, because it appears from the undisputed evidence that defendant was only credited with \$250 proceeds of the sale of the Houchins' vendor's lien note, which was purchased by the plaintiffs, for the value of said note at the time of purchase amounted to \$518.05, which amount was by plaintiffs actually collected, and should have been credited on the note." The facts pertinent to this assignment are as follows: The note sued upon was executed on February 17, 1900, by the defendant to plaintiffs, D. Sullivan & Co. for \$3,020.03, payable two years after date with interest at the rate of eight per cent. per annum, with attorney's fees of ten per cent. in the event of the institution of judicial proceedings for its collection; and bears upon its face the following recitations: "Having pledged to the said D. Sullivan & Co., as security for this note and for any other indebtedness or obligation which may be now or hereafter owing to the said D. Sullivan & Co., and for which I may be directly or indirectly bound, with authority to sell the same on the nonperformance of this promise, or of any other promise, or nonpayment of any other indebtedness for which the same is pledged as above stated in such manner as they, in their discretion may deem proper, either at public or private sale, with or without notice, and apply the proceeds, all or any portion thereof, at their discretion, to the payment of this note or any other obligation or indebtedness due or owing to them, as above stated, by me, the following: Two vendor's lien notes of John F. Houchins \$284.44 each (here follows the description of other collaterals). Any member of the firm of D. Sullivan & Co. is authorized to purchase said collateral for their account when sold." Various credits amounting in the aggregate to \$1,404.15, are given the note, among the items of which are the following: "October 3, 1900, Houchins' note, \$300.72; March 27, 1902, proceed-

sale Houchins' note \$250.00." The only other testimony we have found in the record relating to the assignment (and no other is indicated by briefs of either party) is that of defendant, which is as follows: "The two Houchins vendor's lien notes of \$284.44 each were worth during the time of extension, including principal and interest, \$742.85. They were for balance of purchase money due upon the land, one-half of the purchase price having already been paid. The Houchins notes were sold by Mr. Sullivan and bought in by him." This testimony is contradicted. The pledgee of commercial paper who takes it as collateral security holds it as trustee for the pledgor as well as for himself (Byles' Bills, 177; Randolph, Com. Paper, § 795) in furtherance of the purpose for which the pledge was made, and, though he be expressly authorized by the pledgor to sell and appropriate the proceeds towards the payment of the debt it was pledged to secure, he is nevertheless his trustee, charged in the execution of his trust (as are all trustees) with the utmost good faith towards his cestui que trust. The express power given him by the pledgor to sell makes him the latter's agent, and, in the execution of the power, though it authorizes him to sell to a member of his firm, his duty as trustee, as well as agent, requires him to exercise, at least, ordinary care and diligence to obtain the best possible price for the collateral; and, if he make such sale, it is incumbent upon him to show that he has exercised such care and diligence, and a fortiori, is this the case when the sale is made to a member of his firm. As there is an entire absence of any evidence tending to show this, and it appears that the note was of its face value and was sold to a member of the firm for a less sum, it was error for the court to peremptorily charge the jury as complained of.

The refusal of the court to give at appellant's request the following special charge: "You are instructed that if you believe from the evidence that the contract between the parties, expiring on February 17, 1902, was extended to the 1st day of November, 1902; then you are instructed that the defendant, King, had the right, before the expiration of that time, to procure a patent from the state to this 423 acres of land, notwithstanding the fact that the patent was procured from the state by the plaintiffs before the time expired, and the defendant, King, is entitled to recover any excess in amount between the market value of said land, and the value of said land fixed by the contract, together with the amount D. Sullivan & Co. paid to the state for obtaining the patent, and the expenses of procuring the same; and if you find the market value in excess of that amount, then you will find for the defendant, King, the amount of said excess;" and the following portion of the court's general charge: "But, if you find that the fair

market value of the land, excluding the land patented to D. Sullivan, during said time was in excess of the contract price, then he is entitled to recover the excess, and if the excess is less than the indebtedness you find owing by the defendant, then you will find the defendant credit for the amount thereof" — are assigned as errors. As these assignments are cognate, they will be considered together.

So much of the evidence pertinent to them as is necessary to their explanation and consideration will be stated as follows: On February 17, 1900, the defendant being indebted to plaintiffs in the sum of \$9,133.62, secured by a deed of trust on 3,921 acres of land in Wharton, Lavaca, and Colorado counties, a certain lot in San Antonio, 55 shares of corporate stock, the two vendor's lien notes above referred to, and two paid-up policies of life insurance, and, desiring further time to liquidate said indebtedness by a sale of said property, to that end, executed to plaintiffs a general warranty deed to said real estate, and, at the same time, plaintiffs, by a contract in writing, gave him the privilege of selling said property at any time within two years, and in event of a sale thereof, defendant was to have whatever the property brought, over and above said indebtedness. In the contract a stipulated price was fixed upon each piece of property, the total value as thus fixed being \$6,270.00, which lacked \$3,020.03 of equalling such indebtedness; and for such sum the defendant executed plaintiffs the note sued on. Of the land 423 acres was held by location under a certificate, the defendant's title being inchoate, patent not having been issued. In the agreement this land was valued at \$1,000, and it was stipulated that defendant should institute suit and obtain patent therefor; and, on his failure to obtain patent, he was to pay plaintiffs \$1,000, the price thereof fixed in the agreement. On the 10th day of May, 1902, six months prior to the expiration of said contract, D. Sullivan, one of appellees, purchased said land directly from the state and procured a patent therefor, the defendant having failed to obtain a patent. The testimony tends to show that during the existence of said agreement said lands were worth from \$5 to \$10 per acre. The evidence strongly tends to show that the balance of the land was worth less than the sum of defendant's indebtedness.

There was testimony tending to show that the contract of February 10, 1902, above referred to, was, by an oral agreement by the parties, extended to the 1st day of the following November; and there was evidence tending to the contrary, such as to make the question of such extension one of fact. The testimony tends to show that at no time, from the date of the execution of the contract up to the 1st of November, 1902, were the lands described therein, excluding the 423 acres

referred to, worth as much as the amount of defendant's indebtedness to plaintiffs, and that said 423 acres during the period of the alleged extension was worth something more than it was before. Under this state of the evidence we think that the assignment which complains of the court's charge is well taken. No principle is better settled in this state than that an outstanding title purchased by a vendee in possession of land under a warranty deed inures to the benefit of his vendor, and in a suit by the vendee against the vendor for a breach of warranty he is limited in his recovery to the cost and expense incurred in procuring the outstanding title. *McClelland v. Moore*, 48 Tex. 355; *Denson v. Love*, 58 Tex. 468; *Clark v. Mumford*, 62 Tex. 531; *Johnson v. Blum* (Tex. Civ. App.) 66 S. W. 461; *Sedg. Damages*, § 979.

From the facts stated it is apparent that plaintiffs knew defendant's title was inchoate, it being simply a location upon public school land which was unpatented, at the time the deed thereto and the agreement referred to was entered into between the parties. By reason of the purchase they acquired the right, in event of the invalidity of such location, defendant had to purchase from the state; they availed themselves of this right and acquired a perfect title thereto during the subsistence of the agreement for a member of the firm, rendering it unnecessary and placing it beyond the power of defendant to procure by any other means a patent for them; and have treated the land as being subject to sale by defendant by suing him on his warranty. In view of these facts, we can perceive no reason why the rule above stated for the measure of damages should not be applied in this case, nor why the actual market value of the land after deducting the cost and expense of plaintiffs, in purchasing and procuring title thereto from the state, should not, under the agreement referred to, be credited to defendant, in the event it should be shown that during the existence of said agreement, as originally made or extended (if it was extended as claimed by defendant), that such value exceeded the amount of the cost and expense incurred by plaintiffs in acquiring title thereto from the state; and if such credit, together with the other credits, exceeded the amount of indebtedness covered by the agreement and the debt sued for, we are unable to see why the defendant should not recover on his plea in reconviction of the plaintiffs the amount of such excess, if any, to the extent of at least \$1,000 and any amount above that which he could have sold the land for during the existence of such agreement. What we have said demonstrates that the special charge requested by defendant was properly refused. For in no event was defendant entitled, in addition to any excess in the market value of the land over its value fixed by the contract, to recover "the amount D. Sullivan & Co. paid the state for obtaining patent and

expenses in procuring the same." Such "amount" should be subtracted, not added, from such "excess," if any there was.

For reason of the errors indicated the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. RINEY.
(Court of Civil Appeals of Texas. Jan. 20, 1906.)

1. JUDGMENT — CONFORMITY TO ISSUES IN PLEADINGS.

Where plaintiff alleged that he became a passenger on one of defendant's trains at Y., for transportation to Z., and was ejected by the conductor, although he tendered the regular cash fare, he could not recover damages for his ejection on the theory that he had purchased a ticket at X. which he in good faith believed entitled him to transportation to Z.

2. SAME—INVALIDITY OF TICKET.

A passenger is bound to know the contents and legal effect of the ticket or contract upon which he bases his right to ride, and if that ticket has, in fact, expired, he cannot claim the rights of a passenger in good faith, but is rather an intruder, and may be ejected on his refusal to pay the regular fare.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1022, 1425.]

3. SAME — TENDER OF CASH FARE — SUFFICIENCY.

Where a passenger boarded a train at X., with a ticket for Z., which had expired, and on refusing to pay the required fare was ejected by the conductor at Y., he could not, immediately after his ejection, board the train again at Y., and obtain passage to Z. on the payment of fare from Y. to Z., but the conductor was authorized, on his refusal to pay the full fare from X. to Z., to eject him a second time.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1422.]

Appeal from District Court, Cooke County; D. E. Barrett, Judge.

Action by J. M. Riney against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. Terry and A. H. Culwell, for appellant. R. E. Cofer and R. E. Thomason, for appellee. Reversed and rendered.

CONNER, C. J. This suit was instituted by appellee to recover damages in the sum of \$1,000 for an alleged wrongful ejection from one of appellant's passenger trains. The trial was before the court without a jury and resulted in a judgment in appellee's favor for \$25. There is no statement of facts, and the case is presented to us on this appeal from said judgment upon the pleadings and the court's conclusions of fact and law alone. But a single question is presented by the assignments of error, and that is whether upon the facts found appellee was rightfully ejected from the train.

As appellee alleged, he entered and became a passenger on one of appellant's regular passenger trains at Valley View, for transporta-

tion some eight miles south to Sanger, and that when appellant's agent and conductor in charge of said train approached and demanded the fare as such passenger, appellee offered and tendered the full amount of the regular cash fare, which was refused, and thereupon appellee was wrongfully ejected.

The issues as presented by appellant's pleading were to the effect that appellee had entered the train in question at Gainesville, some 10 miles north of Valley View, for the purpose of going to Sanger; that before the train arrived at Valley View said conductor demanded the fare of appellee, which was refused, and that appellee, having refused to present a valid ticket or pay the cash fare, was ejected from the train at Valley View; that, if appellee ever tendered fare in any amount, it was only the fare from Valley View to Sanger, and not from Gainesville to Sanger.

The court's findings, omitting formal parts, are as follows:

"(1) I find that the defendant, the Gulf, Colorado & Santa Fé Railway Company, owns and operates a line of railway extending south from the town of Gainesville, in Cooke county, Tex., to Galveston, Tex.; that extending south from Gainesville said railway line passes through the town of Valley View, which is 10 miles south of Gainesville, and passes through the town of Sanger at a point 8 miles south of Valley View, making the distance from Gainesville, Tex., to said town of Sanger 18 miles.

"(2) I find that on July 4, 1903, that plaintiff, J. M. Riney, purchased of defendant's agent at Sanger, Tex., a round-trip passenger ticket from said Sanger to Gainesville and return good for 10 days, and providing for continuous passage. The use of said ticket was limited to 10 days from the date stamped on the back thereof, which was July 4, 1903, and was not good unless used within 10 days from its date.

"(3) I find that on June 5, 1904, the plaintiff, being in the town of Gainesville, having in his possession said ticket that part of the same from Sanger to Gainesville being already canceled by punch marks, boarded defendant's south-bound train at Gainesville for Sanger, Tex., and that, when said train pulled out from Gainesville and was between said Gainesville and said Valley View, defendant's conductor, while collecting tickets and fares on said train, called upon the plaintiff for his ticket, whereupon the plaintiff presented to said conductor the return portion of said ticket as fare from Gainesville to said Sanger; that said conductor inspected said ticket, and, finding that the same had expired by its limitation nearly 12 months before, declined to accept the same, and informed said plaintiff that said ticket was void and that he could not accept it, and thereupon returned said ticket to said plaintiff and requested him to pay his said fare from said Gainesville to said Sanger; that plain-

tiff then and there insisted that said ticket was good from Gainesville to Sanger, and refused to pay his fare as requested by said conductor; that upon plaintiff's refusal to pay said fare said conductor informed him that he must either pay his said fare or leave said train at Valley View, which was the first station on defendant's railroad reached after leaving Gainesville.

"(4) I find that when said train reached Valley View that plaintiff was ejected from said train by the conductor thereof, which act on the part of said conductor I find was lawful, inasmuch as I find that said ticket, when presented to said conductor by plaintiff, had expired and become void by its terms, and that plaintiff could not lawfully ride thereon.

"(5) I find that said train stopped at Valley View only a few minutes, and that when it pulled out south on its way to Sanger that plaintiff again boarded the same, and that defendant's conductor demanded of plaintiff his fare from said Gainesville to said Sanger; that thereupon plaintiff tendered to said conductor 50 cents and requested the conductor to take from it his fare from Valley View to said Sanger and give him back the change; that said conductor informed plaintiff that he must either pay his fare for that part of the route already traveled on said train from Gainesville to Valley View, as well as the fare from Valley View to Sanger, or he would eject him from said train; that plaintiff proposed and offered to pay his fare from Valley View to Sanger, but refused to pay for the route already traveled from Gainesville to Valley View. Plaintiff still refusing to pay his said fare from said Gainesville to Sanger, the defendant's conductor stopped said train about $1\frac{1}{2}$ miles south of Valley View and requested the plaintiff to leave said train, which plaintiff then and there did. This was about 8 o'clock on the evening of June 5, 1904.

"(6) I find that when the plaintiff boarded defendant's train at Gainesville for Sanger upon said expired portion of his ticket from Gainesville to Sanger that he did so in good faith, believing that he had a right to ride upon said return portion of said ticket to Sanger, Tex.

"(7) I find that by reason of plaintiff's ejection, which occurred after said train left Valley View, that plaintiff suffered damages in the sum of \$25.

"(8) I find that the train upon which plaintiff took passage at Gainesville for Sanger, Tex., was a through passenger train, and that when plaintiff reached said Valley View, and left said train, that he again boarded the same train from which he had been ejected at Valley View and rode thereon until he was again ejected about a mile and a half south of Valley View.

"Conclusions of Law.

"(1) Under the above facts found by me, I find that plaintiff could not lawfully ride,

and was not entitled to be carried upon said train, from Gainesville to Sanger, Tex., upon said ticket, which had expired and become void by its limitation and that when said train reached Valley View that defendant's conductor lawfully ejected plaintiff from said train.

"(2) I find that after plaintiff was ejected from said train at Valley View he again reentered the same with the bona fide intention of becoming a passenger thereon, and with the intention of paying his fare in money from said Valley View to said Sanger, and that said conductor had no right to eject him from said train after the same left Valley View because plaintiff failed and refused to pay his fare over the route previously traveled on said train from Gainesville to Valley View."

We think the court erred in its judgment. Appellee cited in its support the following cases: *Ward v. Railway Co.* (N. Y.) 56 Hun, 268, 9 N. Y. Supp. 377; *Railway Co. v. Breckinridge* (Ky.) 34 S. W. 702; *Railway Co. v. Bryan*, 90 Ill. 126, and note 2, p. 697, of *Hutchinson on Carriers*—and insists, as presented in his most forcible proposition, that "inasmuch as appellee was the holder of a ticket from Gainesville to Sanger, which he had paid for, and inasmuch as he had boarded the train at Gainesville in good faith, believing he had a right to ride on said ticket, and inasmuch as he immediately and peaceably left the train at Valley View, the very first stop after the conductor had refused his ticket and had told him to leave the train, appellee had the same right to take passage from Valley View as any other citizen. The railway company could no more exclude appellee from this train under these circumstances than it could exclude him from any subsequent train on the same day or any following day." Another one of appellee's propositions is that "while an intruder, who boards a train without any right, knowing he has no rights and having paid no fare nor purchased any ticket, may be ejected and cannot take passage on the same train from the point of ejection, yet this rule has no application to a passenger in the position of appellee, holding a ticket, purchased by him, and which he bona fide thinks entitles him to passage."

It is thus apparent that appellee's contention, as also the judgment, rests upon the asserted facts that he was a purchaser and holder of a ticket which he in good faith believed entitled him to transportation from Gainesville to Sanger, and that hence he was not an intruder in his entrance of the train at Gainesville. It is to be observed, however, that appellee makes no such case by his pleading. The case he presents is one of an entry in good faith as a passenger at Valley View, with a tender of the proper fare, etc. He nowhere alleges any fact, any contract, any declaration, custom, or other matter that tends to show either that the

ticket he had was good or that he even thought so when he entered the train at Gainesville, or when he presented it to the conductor between Gainesville and Valley View, nor is any such state of case presented by appellee's defensive pleadings, so that we fail to see how appellee can be permitted to base a right of recovery upon the propositions he asserts. But if mistaken in this view, and if the facts necessary to support these propositions were admissible in rebuttal of any evidence appellant could offer under its pleadings, and if appellee's good faith in any event is material, we nevertheless conclude that the court's findings as a whole indisputably establish that appellee entered appellant's train at Gainesville with the purpose of securing one continuous passage to Sanger, and that he then knew, or ought to have known, that his ticket did not entitle him thereto. The court finds, and it is undisputed, that appellee entered the train at Gainesville rather than at Valley View for the purpose of a continuous passage to Sanger, and that his ticket on its face was a special limited ticket that had expired by its terms nearly a year before. It is possible that he did not actually know that these facts affected its validity, although he has not ventured to so assert, but, if so, it amounted only to mere ignorance, for which the law makes no excuse. The law required him to know the contents and legal effect of the ticket or contract upon which so much reliance is now placed. *Pennington v. Railway Co.*, 62 Md. 95; *M. & T. Ry. Co. of Tex. v. Murphy* (Tex. Civ. App.) 35 S. W. 67; *H. & T. C. Ry. Co. v. Ford*, 53 Tex. 871; *Gulf, Colo. & Santa Fé Ry. Co. v. Henry*, 84 Tex. 678, 19 S. W. 870, 16 L. R. A. 318; *Demille v. T. & N. O. Ry. Co.*, 91 Tex. 215, 42 S. W. 540. Appellee, therefore, was not in the condition of one entering the train at Gainesville in good faith as a passenger. His status was rather that of an intruder, one entering the train with the purpose of asserting a right to ride on a ticket that he knew to be invalid, and the authorities above cited from our own court not only establish the invalidity of appellee's ticket and support the propositions to which they are cited, but also establish the right of the conductor to eject appellee upon his refusal to pay the fare from Gainesville to Sanger when demanded.

We do not think that appellee's ejection from the train at Valley View and immediate re-entrance amounted to an independent undertaking to go from the latter station to Sanger. This at most, we think, constituted but an interruption of the continuous passage appellee had undertaken at Gainesville, and that therefore upon appellee's re-entrance and continued refusal to present a good ticket or pay the regular fare from Gainesville to Sanger the conductor of the train was authorized to again eject him. The cases cited by appellee we think easily distinguishable from the one before us. We will not under-

take to review them minutely, as their full force may be at once seen by an examination, but we think it may be said in general terms that, in so far as applicable at all, they are cases where the passenger ejected had ridden the distance for which he refused to pay, either upon a ticket that was actually valid or that he had actually paid the fare. We have found no case presenting the circumstances of this one, in which it was held that the passenger could recover for the ejection, but very many that support our conclusion to the contrary. The Maryland case hereinbefore cited seems very closely in point. In that case the passenger had purchased a special ticket entitling him to ride in one continuous passage from Perryman's to Baltimore and return. He proceeded to Perryman's on December 13th, and at Perryman's entered the car to return to Baltimore on the 16th day of December, the day after the return coupon had expired by its terms. On his journey back to Baltimore he was required to leave the cars at Back River Station, having declined to pay his fare from Perryman's to Baltimore, after being informed by the conductor that his ticket was not good. After he had left the cars at Back River Station, and while on the platform, he offered to pay the conductor his fare from that station to Baltimore, but the conductor refused to give him admission to the cars on these terms. It appeared in that case that the passenger offered to prove that before he purchased the ticket he was informed by the agent upon inquiry from him that it was "good until used." The court held, however, that the passenger's right was dependent alone upon the contract which was evidenced by the ticket; no authority in the agent to make the quoted statement being shown, and that, while there was evidence that he did not read the ticket, he had ample opportunity to do so, and inasmuch as by its terms it had expired the conductor was authorized not only to eject him, but also to refuse to permit the further continuance of his journey without payment of fare for the entire distance from Perryman's to Baltimore. In the case of *Manning v. Railway Co.*, by the Alabama Supreme Court, reported in 11 South. 8. 16 L. R. A. 55, 38 Am. St. Rep. 225, a passenger interrupted a return journey on a special ticket by stopping over at a station for one day, after which he boarded another train of the railroad at midnight and proceeded unmolested until he passed the station of Montgomery, and was nearing Calera, less than 40 miles from Birmingham, the end of his return journey. Whereupon the conductor in charge of the train discovered that the passenger was travelling on a forfeited ticket, but possibly had not learned that he had so traveled before reaching Montgomery. As a condition of his proceeding further, the conductor exacted of him that he should pay fare from Montgomery to Birmingham, or failing that he would be put

off the train at the next station, which would be Calera. Reaching Calera, the passenger procured from the ticket agent at that place a ticket to Birmingham, and upon that ticket sought to continue his journey on the same train. This the conductor refused to allow him to do, stating that under the road's regulations he could not permit him to proceed unless he would also pay the back fare from Montgomery. The passenger refused to do this, and he was ejected from the train, and the court held that such ejection was authorized, and that the passenger could not recover damages therefor. See, also, *Hall v. Memphis & C. R. Co.* (C. C.) 15 Fed. 57; *O'Brien v. Railway Co.*, 80 N. Y. 286; *Davis v. Railway Co.*, 53 Mo. 317, 14 Am. Rep. 457; *Swan v. Railway Co.*, 132 Mass. 116, 42 Am. Rep. 432; *Railway Co. v. Gants*, 38 Kan. 629; *Johnson v. Railway*, 46 N. H. 213, 38 Am. Dec. 199; *O'Brien v. Railway Co.*, 15 Gray (Mass.) 20, 77 Am. Dec. 847.

Our conclusion, as already indicated, is that appellee could not under the circumstances shown secure a completion of the continuous journey undertaken by him from Gainesville to Sanger by payment of the fare from Valley View only. He could not thus enforce his special ticket or contract for a reduced rate in direct opposition to its terms, or thus compel a service of appellant that neither law nor reason required.

The judgment will be reversed and here rendered for appellant.

TEXAS & P. RY. CO. v. ARNETT.
(Court of Civil Appeals of Texas. Jan. 20, 1906.)

1. CARRIERS—LIVE STOCK—LIMITATION OF LIABILITY—PLEADING.

Where the petition failed to allege that stock had been received by a carrier for through shipment on a contract for through carriage, as provided in Rev. St. 1895, art. 331a, and the answer denied any such contract, it was error to strike out the answer setting up a contract of shipment limiting the carrier's liability to its own line, though the shipment was between points in the state.

2. SAME—CONTRACT OF THROUGH SHIPMENT—EVIDENCE—SUFFICIENCY.

Where the evidence showed that the ultimate destination of a shipment of live stock was a certain stockyard, and that the stock was delivered to a carrier in order that the same might be carried to the yard and sold, but did not show that the carrier undertook to do more than carry the cattle to its station nearest to the yard, a finding that the carrier had undertaken to deliver the stock at the yard by transporting it from its station to the yard over a connecting carrier's line was unauthorized.

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Action by J. D. Arnett against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Ed W. Smith, for appellant. Ed J. Hamner, for appellee.

STEPHENS, J. The court erred in striking out the answer of appellant setting up a contract of shipment limiting its liability to its own line, since, although the shipment was one between points in this state, the petition failed to allege that the cattle had been received by appellant for through shipment "on a contract for through carriage," as provided in article 331a, Rev. St. 1895, and the answer denied the existence of any such fact or contract.

The court also erred in finding that appellant had undertaken to deliver the cattle to the Ft. Worth stockyards, since the statement of facts fails to contain any evidence on that subject. The evidence went no further than to show that the ultimate destination of the cattle was the Ft. Worth stockyards in North Ft. Worth, and that the owners had delivered them to appellant at a station on its road in order that they might be carried there and sold on the market. We find no evidence that appellant undertook to do more than carry the cattle to its station at Ft. Worth, or rather to Belt Junction, the nearest point on its road to the stockyards. It may be that appellee could have shown that the relation between appellant and the carrier from Belt Junction to the Ft. Worth stockyards was such as to render the undertaking of appellant in the first instance one to deliver the cattle at said stockyards; but without such proof the court was not warranted in assuming the existence of any such relation. Although in other cases which have come before us the proof may have established that the company operating between Belt Junction and the stockyards was but the instrument of appellant in making transfers of live stock from its own to connecting lines extending beyond Ft. Worth, we cannot take judicial knowledge in this case of any such fact.

There is also a serious question as to the sufficiency of the petition to warrant the recovery had of damages for a decline in the market from December 14 to December 15, 1904, which can be easily cured on another trial.

For the error first pointed out, the judgment is reversed, and the cause remanded for a new trial.

TEXAS & P. RY. CO. v. WEATHERBY.
(Court of Civil Appeals of Texas. Jan. 20, 1906.)

1. CORPORATIONS—ACTIONS—VENUE.

A railroad incorporated by act of Congress is not a foreign corporation, within the meaning of Rev. St. 1895, art. 1194, cl. 25, providing that foreign corporations may be sued in any county where they may have an agency or representative, or in which their principal office may be situated, but is within clause 23 of that article, providing that suits against railroads may be brought in any county through which the railroad extends.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 2488.]

2. SAME.

Act Feb. 16, 1852, incorporated the S. P. R. Co. Laws 1870, p. 40, c. 26, incorporated the S. T. Ry. Co. Laws 1871, p. 489, c. 272, § 11, authorized the consolidation of such railway companies with the T. P. Ry. Co., and such consolidation was formally recognized and ratified by Laws 1873, p. 313, c. 108. *Held*, that the T. P. Ry. Co., although incorporated by act of Congress, is in effect a Texas corporation, and is not within Rev. St. 1895, art. 1194, cl. 25, prescribing the venue of suits against foreign corporations.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2487, 2488.]

3. CARRIERS—LOSS OF BAGGAGE—ACTIONS—EVIDENCE.

In an action against a railroad for the loss of trunks, it was error to exclude testimony of an agent of the railroad, who knew the condition and contents of the trunks, to the effect that their contents consisted of articles of wearing apparel and family use, of little or no market value.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1564.]

4. PLEADING—BILL OF PARTICULARS—LOST ARTICLES.

In an action against a railroad for the loss of trunks, defendant is entitled to be informed by plaintiff of the several items constituting the contents of the trunks.

5. APPEAL—HARMLESS ERROR—REFUSAL OF BILL OF PARTICULARS.

In an action against a railroad for the loss of trunks, error in failing to require plaintiff to inform defendant of the contents of the trunks was harmless, where it appeared, that the trunks were in defendant's possession and it was already informed of their contents.

6. SAME—ADMISSION OF EVIDENCE.

In an action against a railroad for the loss of trunks, the admission of evidence as to the transportation of the trunks over other railroads before they were intrusted to defendant was, if erroneous, harmless, where the trunks were not transported on any through contract, and the admitted evidence was in no wise material to the issues involved.

7. CARRIERS—LOSS OF BAGGAGE—ACTIONS—DEFENSES—FAILURE TO CHECK BAGGAGE.

Where a passenger's trunks are in fact received by a railroad for transportation, and it undertakes to transfer them without giving any checks therefor, its failure to check the trunks is no defense to an action for the loss thereof.

Appeal from Stephens County Court; A. J. Power, Judge.

Action by Mrs. Mattie Weatherby against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Arthur Speer, for appellant. W. P. Sebastian, for appellee.

CONNER, C. J. This suit was instituted in the justice's court of precinct No. 6 of Stephens county on November 18, 1904, by the appellee against the appellant, for the sum of \$190, the alleged value of the contents of two trunks charged to have been delivered to and converted by the appellant company. So far as shown by the record, appellee's claim was exhibited alone by the following written statement, to wit: "Breckenridge, Texas, November 14, 1904. Texas & Pacific Railway Company to Mrs. Mattie

Weatherby, Dr. Dec. 1903. To damage for loss of two trunks and their contents on the Texas & Pacific Railway in the month of Dec., 1903, between El Paso, Texas, and Texarkana, Texas; value \$190." Appellant filed its plea of privilege in said court, but the same was overruled, and the trial resulted in a judgment for appellee for the full amount claimed. Appellant duly appealed to the county court, and there again presented its plea of privilege, which was again overruled, and a subsequent trial resulted as in the justice's court.

The principal question presented on this appeal from the judgment of the county court arises under the assignments attacking the court's action in overruling the plea of privilege. The facts relating to this question are that appellee at the time of the institution of the suit resided in the precinct in which the suit was brought, and the appellant company then, as now, operated its line of railway through the southeast corner of Stephens county and through said precinct. Appellant at no time had within said precinct or county an office or local agent, and its domicile and principal office was, as alleged, in Dallas county, Tex.; it also having numerous local agents along its line. Appellant bases its right to a ruling in its favor upon the alleged fact that it is a foreign corporation, which, it is urged, brings the case within the twenty-fifth clause of article 1194 of the Revised Statutes of 1895, relating to venue, which provides that foreign, private, or public corporations, not incorporated by the laws of this state and doing business within this state, may be sued in any court within this state having jurisdiction over the subject-matter in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated, etc. It seems clear from the record that appellee's case is within this exception if in fact the appellant company is a foreign corporation. If not, then we think the venue of the suit falls within exception 23 of the article of the statute cited. Exception 23 provides that suits against a railroad corporation may be brought in any county "through or into which the railroad of such corporation extends or is operated." So that the important question for us to determine is whether the appellant company is a foreign corporation within the meaning of the twenty-fifth exception hereinbefore referred to. We conclude that it is not, and that its corporate character is such as to bring it within the terms of the twenty-third exception, also hereinbefore mentioned. While the plea of privilege alleges that appellant is a foreign corporation, we construe this allegation as being a mere conclusion of the party making the affidavit; for we judicially know that the Texas & Pacific Railway Company was incorporated under the acts of the Congress of the United States, and a corporation so

deriving its existence cannot, we think, as before stated, be denominated a foreign corporation in the sense now insisted upon in behalf of appellant.

We are not aware that the precise question has been before presented in this state; but it has been held that the appellant company, by virtue of its incorporation under the acts of Congress, is entitled to remove certain classes of suits that may be instituted against it in state courts to the Circuit Courts of the United States upon the ground that such suit or suits "arise under the laws of the United States" and not on the ground of diverse citizenship. See Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 819; Tex. & Pac. Ry. Co. v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; Tex. & Pac. Ry. Co. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562. In the case of McKee v. Coffin, 66 Tex. 304, 1 S. W. 276, it was held in effect that a United States marshal was not entitled to remove a suit against him to the Circuit Court of the United States merely because he derived his official character by virtue of federal laws or appointment. And it was expressly held by the Supreme Court of Pennsylvania in the case of Commonwealth v. Tex. & Pac. R. R. Co. 98 Pa. 90, that the appellant company is not a foreign corporation within the meaning of one of the revenue acts of that state. In that case the Auditor General and State Treasurer had levied a license tax against the Texas & Pacific Railway Company of \$12,500 on account of its having an office within the commonwealth named for the use of its officers and for the transaction of its business, without having obtained a license from the Auditor General so to do; such license tax being authorized by the revenue laws of Pennsylvania, under the circumstances appearing, against foreign corporations. From the imposition or settlement of such tax the Texas & Pacific Railway Company appealed to the court of common pleas, and filed, among others, the following specification of error: "First, the said settlement is erroneous and illegal, because the Texas & Pacific Railway Company has, by reason of its charter granted by the Congress of the United States, a legal existence in Pennsylvania, and, not being a foreign corporation, is not subject to the provisions of the sixteenth section of the act of June 7, 1879 [P. L. 120]; the said sixteenth section relating to foreign corporations only." The court of common pleas sustained this contention, and on appeal to the Supreme Court the question was there disposed of in the following language: "The general government, in its relation to that of the several states, cannot be considered a foreign government in the ordinary acceptance of that term. Within the sphere of its delegated powers its authority extends over all the states of which it is composed, and to that extent it may be said to be identified with the government of each. Hence a corpora-

tion created by the government of the United States cannot with propriety be called a foreign corporation. It is contended, however, that in a more comprehensive sense all corporations not created directly by state authority may be classed as foreign, in contradistinction to those of exclusively state origin, and that such was intended to be the meaning of the word "foreign," as used in the act. This might be so, if there was anything in the act itself indicative of an intent to use the word in that sense; but there is not. On the contrary, in the fifth section [page 115], which imposes a tax on limited partnerships, etc., they are described as "partnerships organized under or pursuant to the laws of this state, or of any other state or territory, or of the United States, or under the laws of any foreign state, kingdom or government"; thus clearly showing that when the Legislature intended to tax associations created by the general government they used apt words of description for that purpose. The same distinction is observed in other portions of the act, especially in the sixth section. The construction adopted by the learned president of the common pleas is so fully sustained, on principle as well as authority, that it is unnecessary to add anything to what is so well said in his opinion."

We approve what was thus said by the Supreme Court of Pennsylvania, in so far as pertinent to the question of venue before us. In addition to which the appellant company, while directly incorporated by act of Congress, may be said in a very just sense to have been also incorporated by the laws of Texas. For certain it is that prior to 1873 the state of Texas had by legislative acts incorporated the Southern Transcontinental Railway Company (see act approved July 27, 1870 [Laws 1870, p. 40, c. 28]) and the Southern Pacific Railroad Company (see act approved February 16, 1862), granting to them, among other things, the usual powers and privileges of railroad incorporations; and that the appellant company as assignee and successor acquired their rights and privileges by consolidation. Such consolidation of the first two companies named with the Texas Pacific Railway Company was expressly authorized by section 11 of the act of the Texas Legislature passed May 24, 1871 (Laws 1871, p. 459, c. 272); and was later formally recognized and in effect ratified by act passed May 2, 1873 (Laws 1873, p. 318, c. 106). In the absence of constitutional restraints, we know of no objection to the grant of corporate powers by reference to the rights and privileges conferred upon named corporate bodies, and it would seem that the express recognition and approval of the purchase of the franchises of the Southern Transcontinental Railway Company and the Southern Pacific Railroad Company, incorporated under the laws of Texas, amounted to a legislative grant to the appellant company by necessary implication of

all the corporate powers of the former companies. An instance that will perhaps serve to illustrate the thought in mind may be seen by reference to the Birmingham Bridge Company Case reported in 3 Wall. 51, 18 L. Ed. 187, where the charter powers of one corporation were determined by reference to those of another, and where the Supreme Court of the United States declares that "it is not unusual in the legislation of this country to grant vast powers in a short act by referring to and adopting the provisions of other corporations of like purposes." At all events, great property interests, corporate privileges, and rights were conferred and recognized by the several acts of the state of Texas to which we have referred, as may be readily seen by reference to such legislation. Such interests, privileges, and rights have been continuously claimed and exercised by the appellant company since the enactments mentioned, so that to a very material extent at least the appellant company has long been operating under and in accordance with charter privileges and rights especially conferred upon it by the Texas Legislature, and it is in no attitude, we think, to now claim its corporate existence as foreign to this state. We at least conclude that it is not within the meaning of our statutes prescribing the venue of suits against foreign corporations, and that the trial courts, therefore, committed no error in overruling the appellant's plea of privilege.

The judgment must be reversed, however, because of the court's ruling in excluding evidence. Briefly stated, appellee testified that she arrived in El Paso, Tex., on her way from some point in New Mexico, about 11 o'clock, a. m., December 25, 1908; that while on the train, entering El Paso from New Mexico, she delivered baggage checks for the two trunks involved in the controversy to an agent of a transfer company, directing him to deliver the trunks at the Texas & Pacific Depot; it being appellee's purpose to go to El Paso, Tex.; that she went to the Texas & Pacific Depot in El Paso about 6 o'clock on the evening of the day of her arrival, and went to the ticket office and bought a ticket over the appellant's line of railway to El Paso; that she exhibited said transfer tickets to the agent and stated that she "wanted her trunks fixed, and asked him what she must do with them"; that the agent looked at the transfer checks and said to her; "You get on that train at once, and be quick about it, or you will be left. Your trunks are out there on the platform, and are being put on, or will be put on, the train at once." She further testified that the train at the time was standing at the depot; that she rushed out as quickly as she could with her children and got on the train; that "they had time to have checked her trunks if they would have done it." It further appeared that appellee did not hear of her trunks.

thereafter until since the institution of this suit on November 16, 1904. It further appeared, however, from the evidence, that the appellant company, shortly before the institution of the suit, found two trunks with other unclaimed baggage in the city of Dallas, Tex., which the evidence tended very strongly, if not certainly, to show were the trunks in controversy. In this condition of the evidence, appellant offered to prove by J. E. Pitzer, one of its agents, that he knew the condition and contents of the trunks; that the contents consisted of articles of wearing apparel and other articles of purely family use, of no market value, and were not of value to plaintiff exceeding \$50; and that the clothing was soiled, simply made, and of cheap material. This evidence was excluded by the court upon appellee's objection that it was "immaterial." Appellee testified that the value of the contents of the trunks to her was in excess of the amount for which she sued, and it appears that her counsel was permitted to testify that "he did not bring suit for more than \$200 because he wanted to bring it within the jurisdiction of the justice's court and in the precinct through which the Texas & Pacific runs." It hardly seems necessary for us to cite authority to sustain our conclusion that in thus rejecting the evidence of the witness Pitzer the court erred. It was directly pertinent to the material issue of value. And, while not assigned as error, we also suggest that we fail to see why appellee's counsel should have been permitted to testify as quoted.

In view of another trial, we also suggest that it was appellant's right to have appellee state, as far as she could do so, the several items constituting the contents of her trunks. The appellant in the first instance was entitled to have such information in order to enable it to be prepared to meet the issues involved, which, among others, of course, was

the question of value. See *Railway Co. v. Seale* (Tex. Civ. App.) 67 S. W. 487.

The ruling of the court, however, in this respect appears to have been harmless, because of the further fact appearing from the record that the trunks were in appellant's possession and it was already informed of the contents. The ruling of the court in permitting appellee to testify to the transportation of her trunks over other railways, if not proper, was at least harmless. The trunks were not transported on any through contract, and such testimony fails to support any of the material issues involved, but it was perhaps admissible as mere matter of introduction.

We also think that appellant's requested instruction No. 4 was properly refused. That instruction was: "You are charged that the defendant is not required to deliver baggage at point of destination of passenger unless defendant received and checked said baggage." The agent at El Paso denied appellee's testimony to the effect that her transfer checks had been exhibited to him, and that he directed her to immediately take passage, stating that the trunks were on the platform and had been or would be shipped. The conflict of testimony thus presented, however, was for the jury, and if the jury should find that appellee's trunks had been in fact received by appellant for transportation, and that it undertook to do so, and that appellee's failure to secure baggage checks was by appellant's direction, then appellant's failure to check the baggage would constitute no defense.

The effect of appellant's tender of trunks and contents to appellee, as suggested by the evidence and mooted in appellant's brief, is not raised by any assignment of error, and hence is not determined; but for the error of the court in rejecting the testimony of the witness Pitzer the judgment is reversed, and the cause remanded for a new trial.

SMITH v. DAYTON COAL & IRON CO., Limited.

(Supreme Court of Tennessee. April 19, 1906.)

1. STATUTES—CONSTRUCTION—ADOPTED FROM OTHER STATES.

The rule that, where a statute of another state is adopted, the judicial construction of that statute in the state of its origin is imported and written in the statute by the adopting state, is subject to the qualification that the judicial construction of the statute by the state of its origin does not contravene the established policy prevailing on the subject in the adopting state.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 307.]

2. MASTER AND SERVANT—MASTER'S LIABILITY—OBLIGATION TO FURNISH SAFE PLACE IN WHICH TO WORK.

A master engaged in mining is bound to use reasonable care to make the place of work reasonably safe, and he must use reasonable care to ventilate the mine and to shore up and timber the shafts and galleries, and take such other precautions as may be reasonably necessary to prevent the fall of rock, earth, etc., and this duty cannot be delegated, so as to exonerate him from liability for a breach of this duty.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 175, 209.]

3. SAME—MINING BOSS.

Acts 1881, p. 238, c. 170, § 8, requiring one operating a coal mine to employ a competent mine boss to protect the miners in their excavations, though adopted from Pennsylvania after the court of that state had construed the act to exempt an operator of a mine from negligence of the mining boss, if competent to perform the duties, must be construed to impose on the mining boss the duties imposed at common law on the employer to provide a safe place to work, which duty it cannot delegate; and an operator of a coal mine who employs a competent boss is nevertheless chargeable with his negligence, resulting in injury to a miner, since the construction placed on the statute by the courts of Pennsylvania is contrary to the policy of the laws of Tennessee.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 175.]

Appeal from Circuit Court, Rhea County; Joseph C. Higgins, Judge.

Action by Luke Smith, by next friend, against the Dayton Coal & Iron Company, Limited. From a judgment for defendant, plaintiff appeals. Reversed.

A. P. Haggard and Sam H. Ford, for appellant. Burkett, Miller & Mansfield, for appellee.

McALISTER, J. Luke Smith, a minor, brought this suit by his next friend against the Dayton Coal & Iron Company to recover damages for personal injuries sustained while working in defendant's mines.

The declaration embraces three counts, and complains (1) of the negligence of the mine boss in failing to properly inspect the mine; (2) for breach of duty on the part of defendant in failing to furnish plaintiff a safe place to work; (3) the failure of defendant to warn plaintiff of the danger.

A demurrer was interposed to the first and

second counts of the declaration, assigning for cause that defendant was not liable for any breach of duty on the part of its mine boss; it not being averred that it had failed to exercise due care and caution in employing him.

The circuit court, Hon. M. D. Smallman presiding, sustained this ground of demurrer, holding that, if defendant company employed a careful and competent inside overseer or mine boss, as required by section 8, c. 170, p. 238, Acts 1881, and that by reason of the negligence, inattention, or carelessness of such boss the plaintiff was injured, he could not recover on account of such injury.

The third count of the declaration alleged a breach of duty on the part of the defendant in failing to employ a certified mine foreman, as required by chapter 37, p. 51, Acts 1901.

The demurrer to this count of the declaration assigned as cause that the act in question did not take effect until after the accident, and hence compliance with said act was not required.

This ground of demurrer was also sustained by the circuit judge.

A plea of not guilty was also interposed to the three counts of the declaration. There was a trial on this plea, wherein the plaintiff and defendant each presented their evidence as though there had been no judgment on the demurrer. At the conclusion of the evidence the trial judge instructed the jury as follows:

"A demurrer to the declaration was interposed by the defendant and acted on by my predecessor, and I am of the opinion that it reaches all the facts in the evidence, if any there be, which would warrant a recovery, and, being bound by the action of my predecessor on the demurrer, I am of the opinion there are no questions of fact to submit to the jury, and it will be your duty to find a verdict in behalf of the defendant."

This was accordingly done, whereupon plaintiff appealed and has assigned errors.

An examination of the record reveals that the only actionable negligence claimed on the trial was the failure of the mine boss to perform the duties required of him by the statute, and hence the only question presented for our determination is whether the trial judge was correct in his ruling that, as between the coal company and the mine boss, the principle of respondeat superior would not apply for injuries sustained by an employe in consequence of the negligence of the mine boss. This was the question presented by the demurrer and which was resolved in favor of the contention of the defendant company. The proper solution of this question depends upon a proper construction of chapter 170, p. 234, Acts 1881, entitled: "An act to provide for the ventilation of coal mines and collieries for the protection of human life."

Section 8, p. 238, of that act provides as follows:

"That to better secure the ventilation of every coal mine and colliery and to provide for the life and safety of the men employed therein, otherwise and in every respect, the owner or agent, as the case may be, in charge of every coal mine and colliery, shall employ a competent and practical inside overseer to be called 'mining boss,' who shall keep a careful watch over the ventilating apparatus, over the airways, traveling ways, pumps and sumps, and the timbering, and see, as the miners advance in their excavations that all loose coal, slate or rock overhead is carefully secured against falling; * * * and all things connected with and pertaining to the safety of the men at work in the mines."

It should be remarked that no complaint is made that the company breached its duty in employing an unskilled and incompetent mine boss. The contention on behalf of plaintiff is that the circuit judge was in error in holding that the defendant company, having in the first instance employed a competent mining boss, was not afterwards liable for any negligence or breach of duty on the part of said boss. The action of the circuit judge seems to have been based on the construction of our mining statute, which is a transcript of the Pennsylvania act, and which had been construed by the Pennsylvania courts prior to its adoption in this state in 1881.

As already seen, the duties of the inside mining boss are specifically defined by the act of 1881, and the company is required to employ him in obedience to the mandates of the statute. The question presented is whether, in the performance of his statutory duties, the mining boss acts as a vice principal or whether he is a mere fellow servant, as already stated. It is argued that our act of 1881 is a literal copy of chapter 1, Acts Pa. 1870 (P. L. 3), and that at the time our statute was enacted the Pennsylvania statute had undergone a uniform construction by the Supreme Court of that state. It was held by the Pennsylvania court that the duties imposed by section 8 were duties of the mine boss, whom the operator was by law compelled to employ, and, if the mine boss failed to discharge his duties, he was personally liable in damages and also to criminal prosecution. It is admitted that under the first section the company would be liable in damages for a breach of its statutory duty in failing to employ a competent and practical mining boss; but it is insisted that the company, having discharged its duty and employed a competent and practical mining boss, it is not liable in damages for his failure to perform the duties which the statute has enjoined upon him.

In the case of *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 441, it was said:

"Nor do we think liability of the company for the act of its mining boss is changed, where he is appointed pursuant to statute, by the fact that he has a superintendent over him

who has the power to direct and control him. We discover no sound reason for any distinction. In either case the company must appoint a competent and suitable person and provide safe machinery. He [the boss] is to carefully watch and to see for the purpose of protecting from danger all the men at work in the mine, says the statute."

The act was again construed by the Supreme Court of Pennsylvania in 1879, in the case of *Del. & Hud. Canal Co. v. Carroll*, 89 Pa. 374. In that case it was said as follows:

"It is too plain for argument that, if the defendants have not violated said act, they are not responsible. In what respect have they transgressed its provisions? They employed a mining boss as required by the act, and there is no allegation that he was not competent and a practical man. No attempt was made to show that defendants were guilty of negligence in not employing a mining boss, that they employed an incompetent man, or that they employed him without knowledge of his capacity or fitness and without making inquiry as to his qualifications, as a man of ordinary prudence would do. The defendants, having placed such mining boss in charge of the work, are not in default. The negligence of the boss, if it exists, might make him liable to the plaintiffs. It certainly cannot render this defendant liable under this act of the Assembly."

In *Waddell v. Simson*, 112 Pa. 573, 574, 4 Atl. 725, 726, it is said:

"Moreover, as the defendants had complied strictly with the eighth section of the act of March 8, 1870, in providing a skillful and practical overseer or mining boss, and, as they had thus fulfilled the duty imposed upon them by the General Assembly, it is not for this or any other court to charge them with an additional obligation. It is too plain for argument that, if defendants have not violated said act, they are not responsible."

In *Reese v. Biddle*, 112 Pa. 79, 80, 3 Atl. 813, 814, it is said:

"It was plain error to instruct the jury that defendants below are responsible for the negligence of their mine boss. There was no evidence that he was not competent to perform his duties and hence no negligence can be imputed to defendants for employing him."

See, also, *Haley v. Kelm*, Rec., 151 Pa. 117, 25 Atl. 98; *Lineoski v. Susquehanna Coal Co.*, 157 Pa. 153, 27 Atl. 577.

The Supreme Court of West Virginia in *Williams v. Thacker Coal & Coke Co.*, 44 W. Va. 599, 30 S. E. 107, 40 L. R. A. 812, in construing a similar provision in a statute of that state, which was a copy of the Pennsylvania statute, used this language:

"The operator is left no choice, no discretion in the matter. Although he may himself be a practical miner, possessed of all the qualifications of a mine boss, yet under the statute he is compelled to employ such person. The Legislature so far interferes with the private business of the capitalist as to

require him to take into his employment a person whose experience in business and sound judgment equip him for such management and the oversight of the conduct of the mines as to reduce the danger thereof to a minimum. The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so he has discharged his duty to his employes in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss, who is not a vice principal, as his duties are not delegated to him by his employer, but are prescribed by the statute; but he is a fellow servant, and, in case of injury to other employes through his negligence, the master is not responsible."

"It may be stated as a general rule that, when a statute of another state is adopted, the judicial construction and interpretation of that statute in the state of its origin is also imported and written in the statute by the adopting state. This rule, however, is subject to the important qualification that the judicial construction of said statute by the state of its origin does not contravene the well-established policy prevailing on said subject in the adopting state. As said by Endlich on Interpretation of Statutes, p. 518:

"But, as applied to transcribed statutes, this rule is undoubtedly subject to important qualifications. Whilst admitting that the construction put upon such statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding effect has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing, and is subject to the same rules of interpretation as any other legislative enactment. And it is manifest that the imported construction should prevail in so far as it is in harmony with the spirit and policy of the legislation of the home state, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in the face of the latter or to conflict with its settled practice."

In *Jamison v. Burton*, 43 Iowa, 285, it was said:

"The limitation that the construction by another state of a statute of that state enacted here will be valid only when consistent with the spirit and policy of our laws, is eminently proper. For otherwise we could not avail ourselves of the legislative wisdom of other states without introducing along with it incongruous and inharmonious judicial construction."

In *Cole v. People*, 84 Ill. 218, it was said:

"It can hardly be said that the Legislature, in adopting the statute of another state, intended also to adopt a construction in direct

antagonism with our laws and in conflict with a practice that has prevailed under them for a long series of years. At most it is but a presumption and may be repelled when such construction is found to be inconsistent with the spirit and policy of our laws." *McCutcheon v. People*, 69 Ill. 601.

We think these authorities announce the true rule, and we proceed to inquire whether the imported construction of the transcribed statute contravenes the spirit and policy of our laws. At common law a master who is engaged in the business of mining is bound to use reasonable care to make the place of work reasonably safe. He must therefore use reasonable care to ventilate the mine in order to prevent the accumulation of poisonous and explosive gases. He must also shore up and timber the shafts and galleries, and take such other precautions as may be reasonably necessary to prevent the fall of rock, earth, etc. *Amer. & Eng. Ency. Law*, vol. 20, p. 58; *Union Pacific Railway v. Jarvi*, 53 Fed. 65; 8 C. C. A. 433; *Gowen v. Bush*, 76 Fed. 349, 22 C. C. A. 196.

It is assumed by counsel that this court in *Heald v. Wallace*, 106 Tenn. 346, 71 S. W. 80, decided that the doctrine of a safe place to work did not apply to mining operations. In that case it appeared that at the time of the accident deceased was engaged in driving the neck of a room, and under the rules and custom of the company, it was the duty of the miner to make the necessary tests of his room neck and if he discovered it was not safe, he was charged with the duty of sending for the timberman, etc. It was said in that case that, according to the testimony of plaintiff's witnesses, the duty of inspecting the changing top of a room neck is the same as in any other part of the room. This court held that the doctrine of a safe place to work does not apply to such places as are constantly shifting and being transformed as the direct result of the employes' labor. When he engages in a work of making a place that is known to be dangerous safe, or in a work that necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place, and the increased hazard of the place made dangerous by the work, are the ordinary and known dangers. Citing *Finlayson v. Mining Co.*, 14 C. C. A. 492, 67 Fed. 510.

But we did not hold that the company was under no obligation to make its permanent places of work reasonably safe for its employes. We had already held in *Iron Co. v. Pace*, 101 Tenn. 484, 48 S. W. 232, that it is the duty of the master to keep his premises used in the prosecution of his business in a reasonably safe condition, and if he fails to do so he is liable to the servant for all injuries resulting to him from such defects, and that this rule applied to a mining corporation. It was also held in that case that the company was liable for failure

of the mine boss to examine every morning the mines, not only for noxious and explosive gases, but for mine dust or other explosive substances that may endanger the life or health of the miners and remove every such thing, etc., as required by section 8 of the act of 1881. But in that case one of the counts of the declaration proceeded upon the idea that the company had been negligent in the employment of the mining boss and that the latter was incompetent to perform his duties, and there was proof tending to establish this allegation.

It must be admitted in view of the authorities that the duties devolved by the statute on the mining boss were not different from those that the company was obliged to perform at common law, and which the company would not have been authorized to delegate and thereby escape liability for the nonperformance of those duties. What, then, is the effect of the statute requiring the company to employ an inside overseer or mine boss and devolving upon him the duties which, at common law, belong to the company? As already seen, the Pennsylvania and West Virginia courts, in construing this statute, have held that the effect thereof was to shift the responsibility for the negligent performance of these duties upon the mining boss, since the company was compelled to employ him and his duties were specifically defined by the statute.

To the same effect is *Colo. Coal Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251.

Mr. Thompson, in his work on Negligence (volume 4, cl. 4206), in combating the doctrine of the Pennsylvania and West Virginia courts, used the following language:

"The employment of a mine boss or mine foreman: When it is recalled that the duty of exercising care, to the end that the mines shall be a reasonably safe place within which his employes are to work, is an absolute and unassignable duty, it quite readily follows that the owner of a mine does not, by employing a so-called 'mining boss,' or 'mine boss,' or 'mine foreman,' who is competent and fit for his duties, release himself from the obligation of taking those precautions which are necessary for the reasonable safety of his miners, nor from the necessity of taking the precautions prescribed by the statute law, although the statute law requires him to employ a mine boss. The effect of such a statute is to prescribe the duties owing by the master, and the fact that the mine boss is required to be employed to perform those duties does not release the master from the obligation of performing them or of seeing that they are performed. * * * Contrary to the above, we find an untenable and regrettable decision to the effect that a mine owner discharges his full duty to his miners when he complies with the statute requiring him to employ a properly qualified person to discharge the duties required therein as to the care and inspection of the mine, and

is not liable for accidents traceable to the carelessness or negligence of such person, who is a fellow servant with the other miners. Reasoning on similar lines, another court holds that the employment of a competent mine boss, as required by the statute, discharges the full duty prescribed by the statute, and that the employer is not liable for the negligence of the mine boss in the performance of those duties which the statute prescribes shall be performed by him. He is not a vice principal, and his duties are not delegated to him by his employer, but are prescribed by the statute."

On the latter proposition Mr. Thompson cites Pennsylvania and West Virginia cases. The only authority cited by him for his text in opposition to the rulings in Pennsylvania and West Virginia is the case of *Linton Coal Co. v. Persons*, 11 Ind. App. 204, 39 N. E. 214.

In that case the court held that the duties prescribed relating to the safety of the mine are the positive duties of the master and that the statute was intended, not to lessen his duties, but to increase them to the extent of requiring him to employ a competent mining boss to give special attention to the condition of the mine.

In *Gowen v. Bush*, 76 Fed. 349, 22 C. C. A. 196, it was held that an employe, who was charged with the duty of inspecting the mine to see that it was free from gas, was not, while thus engaged, a fellow servant of the miners; and this for the obvious reason that the inspector was in the performance of a duty that devolved upon the principal and the inspector was pro hac vice a vice principal.

In this state the doctrine has always prevailed that it is the duty of the master to provide a reasonably safe permanent place of work for his employes, and that this duty cannot be delegated, so as to exonerate the master from liability for a breach of his duty. In Pennsylvania it appears that a different rule has prevailed. In *Railroad v. Hughes*, 119 Pa. 314, 13 Atl. 289, it was said:

"If, however, the company employed competent and skillful persons for the purpose of inspection, and afforded them reasonable opportunities and facilities for the work under proper instruction, the company will not ordinarily be liable for the negligent performance of the work of their employes, to a fellow employe, unless the company knew, or by the exercise of diligence ought to have known, of the defective manner in which the work was being done. The court then held that a brakeman and a car inspector were fellow servants in the same business and that the former assumed the risk of the negligence of the latter in common service."

In this state, however, it is uniformly held that a brakeman and a car inspector are not fellow servants, but in different and distinct departments of the company's service

(Taylor v. Railroad, 93 Tenn. 305, 27 S. W. 663), and that the company is liable for the negligence of the former whereby an injury is sustained by the latter. So that it is obvious that the rule with reference to a safe place to work and the fellow servant doctrine is entirely different in this state from that which prevails in the state of Pennsylvania; hence the adjudications of that court, exempting a mining company from liability for the negligence of a mine boss employed in obedience to the mandates of the statute, which specifically defined his duties, were in entire accord with the general policy and legal system of that state regulating the relations of master and servant. We are of opinion, however, that the decisions of that state and of the other states which exempt mining corporations from liability for the negligent acts of the mining boss are not in consonance with our general system defining the duties of master and servant.

The act of 1881 is entitled "An act to provide for the ventilation of coal mines and collieries for the protection of human life." But, under the construction of the act contended for, the company is relieved of all positive duty and responsibility in providing safeguards for the protection of human life, when it has appointed a competent and practical inside overseer or mining boss. Surely such a construction could never have been contemplated by the Legislature, in view of the express object and purpose of the statute.

We are therefore of opinion that the judgment of the circuit court sustaining the demurrer was erroneous, and must be reversed, and the cause remanded for a new trial.

BENNETT v. GALLAHER et al.

(Supreme Court of Tennessee. April 19, 1906.)

CONVERSION—DIRECTIONS IN WILL.

Where testator gave his real and personal property to his widow for life for the joint use of herself and children, and authorized her to dispose of the personalty at discretion, and on arrival of any child at age to give the child any property she might desire, preserving equality among the children, empowered her to sell any real estate as she might think best, and provided that at her death any remaining property should be sold and equally divided among the children, there was no equitable conversion of real estate into personalty.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, § 38.]

Appeal from Chancery Court, Anderson County; Hugh G. Kyle, Chancellor.

Suit by James D. Bennett, as administrator of Josephine Bonaparte Bennett, against Martha E. Gallaher and others. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

Webb, McClung & Baker, for appellant. C. J. Sawyer and Young & Young, for appellees.

McALISTER, J. Plaintiff files this bill, asserting a claim to the proceeds of sale of certain real estate under the will of R. G. W. Owens, upon the doctrine of equitable conversion. A demurrer was interposed to the bill, which was sustained by the chancellor, and the bill dismissed. Complainant appealed, and assigned as error the action of the chancellor in sustaining the demurrer.

The said R. G. W. Owens departed this life in Anderson county, Tenn., in 1860, leaving valuable real and personal estate situated in Anderson county. The testator left surviving him his widow, Catherine Owens, and seven children, Martha Elizabeth, Mary Sibella, Sarah Ann, Amanda Jane, Josephine Bonaparte, Margaret M. D., and William Lones. Josephine Bonaparte, one of the daughters of the testator, intermarried with the complainant, James Bennett, in the year 1870, and died in the year 1885, leaving surviving her the complainant, her said husband, and four children.

The controversy in the case arises upon a proper construction of the will of the said Owens, which is in the words and figures following, to wit:

"It is my wish and desire, and I furthermore give and bequeath unto my beloved wife, Catherine, all of my personal property whatsoever, and all of my real estate that I may die seised and possessed of, to have and to hold for her use, and the use and benefit of my children, Martha Elizabeth, Mary Sibella, Sarah Ann, Amanda Jane, Josephine Bonaparte, Margaret M. D., and William Lones, during her natural life; and I furthermore empower my said wife, Catherine, to sell and dispose of whatsoever personal property she may think best, and when each or any of my said children may marry, my wife, Catherine, may give to each one whatever property she may desire, so as to be equal among them; and I furthermore empower my wife, Catherine, to sell any real estate that she may think best, with the advice and counsel of her friends, and at her death I wish whatever property there may be to be sold and equally divided among my above named children. Lastly, I hereby nominate, constitute, and appoint my beloved wife, Catherine, executrix of my last will and testament."

The widow duly qualified as executrix, and used the property until November 11, 1904, when she died, without having disposed of any of the real estate.

It appears from the bill that after the death of the said Josephine Bonaparte, and during the life of the said Catherine Owens, the widow, the children of complainant and his wife, said Josephine Bonaparte, believing that the interest of their mother under the will of her father in the lands described had descended to them as realty sold and conveyed the same for certain considerations, but without the knowledge or consent of

the present complainant, their father. It is further alleged that complainant was appointed administrator of his wife's estate, and on February 14, 1905, commenced this suit for the purpose of collecting the interests of his deceased wife, which descended to her under the will of her father. The bill and the amended bill proceed upon the idea that under the provisions of the will of R. G. W. Owens the real estate therein devised, under the doctrine of equitable conversion, immediately upon the death of the testator, became personal property, and that his wife, the said Josephine Bonaparte, took an interest in the proceeds of the real estate as personal property, and that upon her death her interests in said personalty passed to him as her husband and administrator. There were various assignments in the demurrer, but the cardinal question raised is whether, under the terms of said will, the real estate therein conveyed was converted into personalty upon the death of the testator.

The contention on behalf of the children of the said Josephine is that their interests in the estate of their grandfather descended to them as real estate, and that their father took no interest therein.

Mr. Pomeroy, in his work on Equity Jurisprudence (volume 3, par. 1162), says:

"Time from which conversion takes place. This, like all other questions of intention, must ultimately depend upon the provisions of the particular instrument. The instrument might in express terms contain an absolute direction to sell or to purchase at a specified future time; and if it created a trust to sell upon the happening of a specified event, which might or might not happen, then the conversion would only take place from the time of the happening of that event, but would take place when the event happened, exactly as though there had been an absolute direction to sell at that time. Subject to this general modification, the rule is well settled that the conversion takes place in wills as from the death of the testator."

Mr. Pritchard, in his work on Wills and Administration, in paragraph 457, bottom of page 425, says:

"And where the will directed the land to be sold on the death of testator's widow, and the proceeds to be divided among his children, the personal representative of a child dying before the widow was held entitled to the share to which the child would have been entitled, had he survived the period fixed for the sale."

In 6 Am. & E. Enc. of Law (1st Ed.) p. 668, the author states that "conversion will in general be considered to take place in the case of a will from the death of the testator."

This question arose in the case of *Green v. Davidson*, 4 Baxt. 491. On page 493 of the opinion of this court, the case is thus stated:

"By the will of Joseph Keller, this land is directed to be sold upon the death of the widow and converted into money, and the money to be divided among his children. This disposition of the land is absolute, and not dependent upon any condition, or subject to the discretion of his executors. In such case it seems well settled by authority that the estate passes to the legatees as personalty, and where any of the children, as in this case, died during the life of the widow, or before the land is to be sold, their share will vest in their personal representative. This proceeds upon the ground that the land is to be regarded as converted into money and disposed of by the will as money."

Citing authorities, and continuing:

"From this it results that neither the heirs of F. A. Keller (the son of Joseph Keller, one of the legatees under the will, who died before the life estate fell in) nor their guardian can in any respect recover, but his personal representative is the party entitled to the legacy under the will; that is, the share of the proceeds of the sale of the land." *McElroy v. McElroy*, 110 Tenn. 137, 73 S. W. 105; *Wheless v. Wheless*, 92 Tenn. 295, 21 S. W. 595.

In the case of *Bedford v. Bedford*, 110 Tenn. 204, 75 S. W. 1017, the limitation upon this doctrine of equitable conversion is illustrated. The court said as follows:

"The doctrine of conversion of real into personal property is recognized in this state, and the provision for the sale of real estate and distribution of the proceeds contained in a will is evidence sufficient to show the intention of the testator to make such conversion, and is effective to do so. But the intention to make the conversion must be clear and certain, and the direction to sell the land for that purpose imperative and unconditional. The intention must appear by explicit direction, and the conversion be obligatory upon the executor or trustee. If the direction to sell is made to depend upon contingencies, or discretion is given to the executors to sell for distribution, or divide the property in kind, the intent of the testator to make conversion is not sufficiently evident and positive, and none is effected."

Citing *Wheless v. Wheless*, 92 Tenn. 296, 21 S. W. 595; *Wayne v. Fouts*, 108 Tenn. 145, 65 S. W. 471.

Waiving the question whether an equitable conversion takes place on the death of the life tenant, Mrs. Catherine Owens, or whether it takes place on the death of the testator, the paramount inquiry in this case is whether, under the provisions of this will, there was an equitable conversion of the real estate at any time.

"To operate as a conversion, the direction that the form of the property be changed must be imperative, in the sense of being positive and unmistakable. If the intention, as gathered from the whole instrument, be left in doubt, or the direction allows the

trustee to sell or not as he deems best, the court is not at liberty to say that conversion has taken place, but must deal with the property according to its actual form and character." *Wheless v. Wheless*, 92 Tenn. 296, 21 S. W. 595.

An analysis of the will in question shows the following directions of the testator, viz.: (1) Personalty and realty given to widow during life, for the joint use of herself and the children. (2) Widow authorized to dispose of personalty at discretion. (3) On arrival at age of any child, widow authorized to give said child any property she (the widow) may desire, preserving, however, equality among all the children in the distribution of said estate. (4) Widow empowered to sell any real estate she may think best, with the advice and counsel of her friends. (5) At the death of widow, whatever property there may be (remain) "I wish sold and equally divided among my children."

It is observed that the testator in this last clause directs the sale of whatever property may remain at the death of his widow, and the equal distribution of the proceeds among his children, but this clause must be considered in view of the entire context of the will, with all of its provisions and limitations. It will be observed that the testator has provided, by the third clause of his will, that the widow may make settlements of any property she may think proper on any of the children on their arrival at age, and by the fourth clause the widow is empowered to sell any real estate she may think best with the advice and counsel of her friends. Of course,

however, the proceeds of such sale would be impressed with the trust and limitations of the will, namely, for the joint use of the wife and children during the life of the wife; but under the third clause of the will it is apparent that the widow, during her life tenancy, is authorized to divide up the entire estate among her children, and thus leave no realty for an equitable conversion at her death. As already seen, it was adjudged in *Bedford v. Bedford* that no equitable conversion arose under the will of Benjamin W. Bedford, for the reason discretion was given his executors to sell his property for distribution, or to divide it in kind among his devisees. It equally appears from the will now under consideration that the widow of the testator was authorized to divide up this entire estate among her children at her discretion, preserving, however, equality in its distribution. It thus appears that the equitable conversion of the real estate into personalty at the termination of the life tenancy would be wholly defeated in the contingency the wife chose to exercise the discretion vested in her by the terms of the will. In order to work an equitable conversion, as we have seen, the rule is: The direction of the testator must be absolute and imperative, and, if there is any doubt or contingency controlling the exercise of judgment on the part of the executor or trustee, there is no room for the application of this doctrine.

For the reasons stated, the decree of the chancellor, sustaining the demurrer is affirmed.

STATE ex rel. PROCTOR et al. v. WALKER et al.

(Supreme Court of Missouri. Feb. 26, 1906.)

SCHOOLS AND SCHOOL DISTRICTS—FISCAL MANAGEMENT—BONDS—STATUTORY AUTHORITY—CONSTITUTIONAL LAW.

Rev. St. 1899 § 5157, as amended by Acts 1901, p. 52, authorizes school districts to refund any indebtedness at a lower rate of interest, and provides that no refunding bonds shall be payable in less than 5 nor more than 30 years from their date. Const. art. 10, § 12, declares that any school district incurring any indebtedness shall, before or at the time of so doing, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due and also constitute a sinking fund for payment of the principal within 20 years from the time of contracting the same. *Held*, that where, by inadvertence, no tax was levied for the payment of bonds issued by a school district, the action of the district in issuing refunding bonds under the statute in order to liquidate the former bonds was not violative of the Constitution, though the effect of such action was to defer payment more than 20 years from the contracting of the debt.

In Banc. Mandamus by the state, on the relation of Thomas Proctor, and others, to compel R. W. Walker and another, as members of the school board of the school district of the city of Monroe, to execute certain refunding bonds. Writ awarded.

This is an original proceeding in this court in which the relators ask the court to issue its writ of mandamus commanding and requiring respondents to sign and execute certain refunding bonds as ordered by the school board of the school district of the city of Monroe, in the state of Missouri. The facts upon which relators predicate their right to the writ sought in this proceeding are thus stated in the petition: "Now at this day come relators, and, leave of court first being had, file their first amended petition and respectfully represent and show to the court that they, along with the respondent R. W. Walker, herein, are the duly elected, qualified, and acting members of the school board of the school district of the city of Monroe in the state of Missouri, and that they have been such for many months last past; that the other respondent, Thomas J. Sharp, is the duly appointed, qualified, and acting clerk of said school board of the said school district of the city of Monroe, Mo. The relators further state that on July 1, 1892, the said school district being duly authorized thereto by a vote of more than two-thirds of the qualified voters of the said district, issued bonds of the said district in the amount of \$10,000 in the aggregate, bearing date of July 1, 1892, bearing interest at 5 per cent. per annum, payable semiannually, said bonds and all of them being due and payable July 1, 1912, with an option to pay the same or any part thereof at any interest paying date after 10 years from the issue thereof; that the said school district through its said board, on July 15, 1892, being duly authorized there-

qualified voters of said district, issued the bonds of the said district to the amount of \$5,000, which said bonds bore date of July 15, 1892, and interest at the rate of 5 per cent. per annum, payable semiannually; said bonds were due and payable July 15, 1912, with an option to pay the same on any interest paying date after five years from the issue thereof; that on the 2d day of May, 1893, the said school board of the said district, being duly authorized thereto by a vote of more than two-thirds of the qualified voters of the said district, issued the bonds of the said district in the amount of \$3,000, which said bonds bore interest at the rate of 7 per cent. per annum, and were payable in five years, with the option to pay the same at any time; that at the time each of said issue of bonds was made and ordered, provision was made of record by said district for the collection of an annual tax sufficient to pay the interest on such indebtedness as the same fell due, and to constitute a sinking fund for the payment of the principal thereof within the time same was contracted to be paid; that by failure or inadvertence of the officers the said tax has not been levied and collected to provide for the sinking fund; that it would now be burdensome and oppressive on the taxpayers of said district to pay the interest on said debt and provide for and pay the principal when the same falls due under the original issue of bonds; that the said three issues of bonds amount in the aggregate to \$18,000, and constitute the only debt of said district and do not now and never did since their issue exceed five per centum on the value of the taxable property of said district, and were each and all issued for the purpose of erecting school buildings and furnishing the same in said school district and for no other purpose, and the proceeds of said bonds were, in fact, used for said purpose, and said bonds are each and all valid, binding, and subsisting obligations on the said district, and there is now in the treasury no money to pay the principal of the said bonds or to form a sinking fund to pay the same at the time of their maturity; that the present school board constituted as above set forth under and by authority of section 5157, Rev. St. 1899, as amended in the act of 1901, p. 52, with the respondent R. W. Walker, concurring and voting therefor, on November 15, 1905, duly passed and placed of record an order at a regularly called meeting of the said board, at which meeting of the board all the members thereof were present, to refund all said issues of bonds amounting to \$18,000, and to issue refunding bonds therefor, to bear date December 1, 1905, and to bear interest at a lower rate, to wit, at the rate of 4 per cent. per annum, payable semiannually, which said refunding bonds were made payable 20 years after the date thereof, and at the same time said board, by an order of record, made provision for the collection of an annual tax

sufficient to pay the interest on said refunding bonds as the same fell due and to constitute a sinking fund for the payment of the principal thereof within the time the same was contracted to be paid; that the said board negotiated and contracted to sell, and did sell, the whole of the said issue of the said refunding bonds of \$18,000; that the said bonds were of the denomination of \$500 each, payable to bearer, and were negotiated and sold for not less than their par value; that the said bonds were ordered to be prepared, and the same were ordered to be signed and issued for delivery by said respondents, R. W. Walker, as president of the school board, and by Thomas J. Sharp, as the clerk of the said board; that on the 1st day of November, 1905, under section 5166, Rev. St. 1899, the said board ordered that notice be filed with the State Auditor, that said issues of \$10,000, \$5,000, and \$3,000, as above set forth, were called for redemption; that said notice was filed with the State Auditor on the 5th day of November, 1905; that the said issue of \$10,000 bonds was called for payment on January 1, 1906; that said issue of bonds for \$5,000 was called for payment on the 15th day of January, 1906; that the said issue of bonds of \$3,000 was called for payment on the 1st day of January, 1906; that the said board further caused a notice of said call of the said bonds for payment to be duly published in the *Globe-Democrat*, a newspaper of large circulation, published in the city of St. Louis, Mo.; that the money and funds to meet and pay for said bonds aggregating \$18,000, so issued as aforesaid and called for payment as aforesaid, was to be procured from the issue and sale of the said refunding bonds for \$18,000, ordered as aforesaid, on the 5th day of November, 1905; that said refunding of said debt and bonds would lighten the burdens of the taxpayers of said district and would better the financial situation of said district. These relators further state that said refunding bonds have been prepared and presented to the said respondents to be signed and executed by them, and the law requires that said bonds be signed and executed by them as the officers of the said board of the said school district, and that the respondents have been requested to sign and execute the said bonds as ordered by the said board, but they have failed and refused, and still fail and refuse to sign and execute the same as ordered by the said board; and these relators say that they and the said school district have no means with which to meet and pay the said bonds heretofore issued by the said district and called as aforesaid for payment, and that they are without remedy in the premises by or through ordinary process or proceedings at law; that by reason of the premises the matters herein are of far more than ordinary magnitude and importance to a great number of people, and any delay therein, such as bringing

this proceeding in the circuit court at the first instance, would work an irreparable injury to the said district and to the inhabitants thereof, and these relators therefore pray this court to award against the said respondents an order of mandamus commanding and requiring them to sign and execute said refunding bonds as ordered by the school board of the said district, and for such other process, orders and remedies as may to the court seem to be meet and just."

To this petition respondents filed their return and answer, which is as follows: "Comes now the respondents in the above-entitled cause, and waive an alternative writ or any service herein, and for answer to the petition in said above-entitled cause, state that they admit each and every allegation therein contained. Respondents, further answering, admit that the said R. W. Walker voted to refund the outstanding bonds mentioned in relator's petition. Respondents, further answering, state that the proposed refunding bonds were to be issued by the school board of said school district, under authority of section 5157, Rev. St. 1899, as amended by the acts of 1901, p. 52. Respondents further state that they have been advised by legal counsel, and they verily believe, that said refunding bonds, if issued, would be void, because the said section 5157, Rev. St. 1899, as amended by the acts of 1901, p. 52, and under which said bonds are issued, is in direct conflict with section 12, article 10, of the Constitution of Missouri, and therefore invalid. Respondents, further answering, state that section 12 of article 10 of the Constitution of Missouri clearly prohibits the said school board to suffer the debt evidenced by said present outstanding bonds, to remain unpaid for a period of more than 20 years from the date of incurring said debt, and that said present outstanding bonds have already run for a period of more than 12 years, and the said refunding bonds about to be issued do but evidence a renewal of said original debt for a further term of 20 years, making said debt run more than 20 years from the date of incurring it; and that said proposed refunding bonds are therefore prohibited and void. Respondents, further answering, state that said proposed refunding bonds are void, because section 12 of article 10 of the Constitution of Missouri prescribed that said school board should provide for the collection of an annual tax sufficient to constitute a sinking fund for the payment of the principal of said debt within 20 years from the time of contracting the same. And if said constitutional provision has been complied with there should now be on hand a sinking fund sufficient to pay more than one-half of said bonds, and at the maturity of said bonds there should be on hand a sinking fund sufficient to retire the whole indebtedness, and hence there could be no reason for said proposed refunding bonds. Respondents, further answering, state that no authority could be granted by section 5157,

Rev. St. 1899, as amended by the acts of 1901, p. 52, to the said school board to issue said refunding bonds, because said section 5157 is unconstitutional as above set out. Respondents, further answering, state that they are advised, and that they verily believe, and for the reasons herein mentioned, they will render themselves personally liable in the event they sign and execute said proposed refunding bonds. Respondents, further answering, admit that the matters set forth in said petition are of far more than ordinary magnitude and importance, and that any delay herein would work an irreparable injury to said school district, provided the said proposed refunding bonds would be a valid and subsisting legal obligation, but that the respondents believing said proposed refunding bonds to be void for the reasons herein set forth, join with relators in asking an early adjudication of the matter by this court. Respondents having fully answered, therefore pray this court that the writ of mandamus asked for in this cause be denied, and that the petition of the relators be dismissed."

To this answer relators filed their reply, in the nature of a motion for judgment upon the pleadings, which was as follows: "Now, at this day come the relators, and move the court to order a writ of mandamus prayed for by relators upon the allegations in the return and answer of the relators filed in this cause, because the same gives no good and sufficient and legal reason why the said writ ought not to issue, but shows on the face thereof the allegations of relators' petition are true, and said writ ought to issue."

This constitutes the record in this cause, and it is now before us for consideration.

Dysart & Mitchell, for relators. Thomas N. Dysart, for respondents.

FOX, J. (after stating the facts). It is apparent that this record presents but one question for solution, that is the validity of section 5157, Rev. St. 1899, as amended by Acts 1901, p. 52, which substantially provides that municipalities, counties, cities, and school districts shall have the right to refund these bonds and extend the time of payment thereof under a lower rate of interest. There is no dispute about the essential and necessary preliminary steps leading up to the issuance of the original bonds, evidencing the indebtedness of the school district, nor as to the regularity of the proceedings which authorizes the issuance of the refunding bonds in pursuance of the provisions of section 5157, supra. It is admitted by the return of respondents that the petition correctly states all the facts upon which the authority to issue the original bonds, as well as the refunding bonds, sought to be issued are predicated; hence the sole question presented to this court for consideration is, whether or not, the action of the school board in ordering the issuance of the refunding bonds in pursuance

of section 5157, was and is violative of and in contravention of section 12, art. 10 of the Constitution of this state. In other words, is section 5157 a valid subsisting law, and was the school board, upon the facts alleged in the petition, authorized, in pursuance of the provisions of such law, to order the refunding bonds which are in controversy in this proceeding?

Section 5157, so far as it is applicable to the question in controversy in this proceeding, provides that "the various counties in this state for themselves, as well as in behalf of any township or parts of townships for which said counties may have heretofore issued any bonds, and the several cities, villages, incorporated towns, and school districts are hereby authorized by their respective county courts, and said cities, villages and incorporated towns by their proper authorities, and the said school districts by their respective school boards, to fund any part or all of their bonded or judgment indebtedness, including bonds, coupons, or any judgment, whether based on bonded or other indebtedness at a lower rate of interest, and for that purpose may make, issue, negotiate, sell and deliver renewal or funding bonds and with the proceeds thereof pay off, redeem and cancel such judgments, or old bonds as the same are called for redemption: Provided, that said funding bonds shall not be sold for less than par value thereof, and that in no case shall the amount of the debt of any such county, township, or parts of townships, or city, village, incorporated town or school districts, nor the rate of interest on such debt, be increased or enlarged under the provisions of this chapter; and provided also, that no funding bonds issued under this chapter shall be payable in less than five nor more than thirty years from date thereof, and that such funding bonds shall be on the denomination of not more than one thousand dollars (\$1,000) nor less than one hundred dollars (\$100), and shall bear interest not to exceed five per cent. (5%) per annum, payable annually or semiannually, and to this end each bond shall have annexed interest coupons, and the funding bonds and coupons shall be made payable to bearer: Provided, further, that nothing in this act shall be so construed as prohibiting any county, city, township or school district, that now has or may hereafter have a bonded or judgment debt (except as hereinafter provided) from funding or refunding such debt without the submission of the question to a popular vote whenever such funding or refunding can be done at a lower rate of interest than the debts so funded or refunded bore."

It is insisted by respondents that the act as above indicated, is violative of and in contravention of the provisions of section 12, art 10 of the Constitution of this state. This constitutional provision provides that "no county, city, town, township, school

district, or other political corporation or subdivision of the state, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness: Provided, that with such assent any county may be allowed to become indebted to a larger amount for the erection of a court house or jail; and provided further, that any county, city, town, township, school district, or other political corporation, or subdivision of the state, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting same."

It is made manifest from the terms employed in this provision of the Constitution that the denominating thought in the minds of the framers of that instrument was to surround certain municipalities and other subdivisions of the state with constitutional restrictions upon the subject of incurring indebtedness. It is equally clear that it never entered the minds of the framers of the organic law of this state, by the language used in section 12, article 10 of the Constitution, that after a debt had been incurred in strict compliance with the terms of the Constitution, that the General Assembly should be prohibited from enacting appropriate measures to meet the conditions confronting corporate bodies, which had incurred such indebtedness, providing for the extension and settlement of such indebtedness along lines not prohibited by any provision of the Constitution, and, which, in view of the conditions surrounding the municipality, would be less burdensome to the taxpayers. This constitutional provision, which was leveled at the creation of debts by municipalities more than at the time within which such debts should be paid, when it undertakes to limit the amount of indebtedness, uses no uncertain terms in doing so; but it expressly prohibits the incurring of a liability exceeding a certain per cent. of the taxable property embraced in the territory of the municipality. Then follows the command of the Constitution, that provision for the collection of an annual tax, sufficient to pay the interest on such indebtedness as it falls due and also to constitute a sinking fund for

the payment of the principal thereof within 20 years from the time of contracting the same. Now while these commands of the Constitution are self-enforcing, it is conceded that the failure to comply with them in no wise invalidates the debt, and the creditor or any taxpayer of the municipality may, by appropriate proceeding, compel the compliance with such constitutional provisions. It is significant however that the framers of the Constitution (who were doubtless close observers of human conduct and actions, as well as the many frailties of the human family), must have known that conditions would at some time arise by reason of the carelessness or neglect of duty of officials or otherwise, in which this sinking fund would not be provided for as commanded by the Constitution, which conditions would necessarily demand some extension of the time of payment of such indebtedness; yet they failed to give any expression in the provisions of that instrument prohibiting an extension of the time of payment or appropriate legislation to meet such conditions, providing for the payment of such indebtedness along lines in harmony with careful and prudent business methods. While it may be said that the Constitution by its terms, contemplated that the tax suggested would be levied and collected, and the sinking fund provided to meet such indebtedness when it became due; yet in the event of a failure to make such provisions, as commanded by the Constitution, as heretofore stated, in no way invalidated the debt, it is a valid subsisting indebtedness incurred in compliance with the Constitution, and such provision of the Constitution should not, if susceptible of any other reasonable interpretation, be construed as an inhibition upon the lawmaking power to provide for an extension of time of the payment and refunding of such indebtedness upon terms satisfactory to the creditor and debtor, provided of course that the debt shall not be increased.

We repeat, that if the bondholder or any taxpayer should insist upon a compliance with the provisions of the Constitution in respect to levying and collecting the tax to meet the indebtedness, that there is an appropriate remedy for compelling such compliance; but we are unwilling to say, the debt being in existence, that the terms of the Constitution furnish an absolute barrier to the enactment of appropriate legislation which permits the creditor and debtor to adjust such indebtedness along lines to meet existing conditions and less burdensome to the taxpayers. At least we are of the opinion that if such inhibition upon the lawmaking power was intended by the framers of that instrument, that such intention would have at least been manifested or indicated by reasonably clear and definite terms employed in the instrument. While we do not mean to be understood as saying that the question of the power of the Legislature to enact

section 5157, providing for the refunding of indebtedness of the character indicated in this proceeding, is absolutely without doubt, yet we do mean to say that in the absence in terms of any prohibition of extension of time of payment or of legislation of that character, and in view of the many conditions which might arise concerning indebtedness, permitted by the Constitution and recognizing the Constitution as an instrument of a practical nature, founded upon the common business of life, it is extremely doubtful if any inhibition in respect to extension of time of payment or refunding the indebtedness, was contemplated by the provisions of the Constitution. No one can apply that practical and common-sense rule of interpretation of constitutional provisions as announced by that eminent and distinguished jurist and author, Mr. Story, in his treatise upon the Constitution, without being led to the entertainment of the doubt heretofore expressed as to whether or not any inhibition upon the character of legislation assailed in this proceeding was contemplated by section 12, art. 10, of our Constitution. The rule was thus announced by Mr. Story: "Every word employed in the Constitution is to be expounded in its plain obvious and common-sense meaning, unless the context furnishes some ground to control, qualify or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature founded on the common business of life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." 1 Story, Const. (5th Ed.) § 451.

While legislation of the character involved in this proceeding, providing for the refunding of existing indebtedness and issuing renewal bonds has been upon the statute books of this state for a number of years, yet the precise question so ably presented by counsel for respondents, involved in this proceeding, has never been in judgment before this court. The Supreme Court of Illinois, however, in *Kane v. City of Charleston*, 161 Ill. 179, 43 N. E. 611, has decided this precise controversy under a constitutional provision nearly identical with ours. In that case, as in the one bar, the contention was urged that section 12 of article 9 of the Constitution of Illinois of 1870 put a limit upon the duration of all municipal indebtedness that every municipal debt created since 1870 must be paid within 20 years, and that bonds issued for the purpose of refunding such indebtedness, are but an evasion of the Constitution and therefore void. The response of Mr.

Justice Wilkin to the contentions in that case is so appropriate and applicable to the proposition before us in this proceeding that the length of the quotation from such response will, we trust, be pardoned. He said:

"It is not pretended that a municipal indebtedness, otherwise legally incurred, ceases to be valid and binding against the municipality upon the expiration of 20 years from the date of its being contracted. On the contrary, it is conceded that the obligation of the city to pay the \$20,000 outstanding bonds still exists, and that it can be compelled to pay the same in full, notwithstanding more than 20 years have intervened since their issue. Conceding this to be true, it must also be admitted that if the holders of those bonds should take no steps to compel their payment, and the city should not voluntarily, by some means, liquidate the same, they would continue to be binding obligations upon the municipality, and it could be compelled to pay them at any time within the statutory period of limitation. It cannot, therefore, be said that the Constitution 'puts a limit upon the duration of all municipal indebtedness,' or that it requires absolutely all such indebtedness to be paid within 20 years.

"The real question in the case is, can the city council, when its power to do so is questioned by a taxpayer, issue its bonds in place of or to supply means to meet maturing bonds, or for the consolidation or refunding of the same, thereby consenting to an extension of the original indebtedness, beyond the period of 20 years? In other words, is paragraph 6, § 63, of the statute above quoted (1 Starr & C. Ann. St. pp. 462, 463), void under section 12, art. 9, of the Constitution? That that clause of the statute is broad enough in its terms to authorize, and does expressly authorize, the issuing of bonds like those here in question, cannot be and is not denied. Does the language of the Constitution, which requires the municipal authorities to provide for the collection of a tax sufficient to pay the interest on bonds issued, 'and also to pay and discharge the principal thereof within 20 years from the time of contracting the same,' amount to a limitation upon the power of the Legislature to empower such authorities to refund the indebtedness by issuing other bonds at the expiration of the first period? There is no ground for claiming that this language of the Constitution is an express limitation upon such power of the Legislature, and if held to be such at all, it can only be done by construction or implication. That the language is not mandatory to the extent of affecting the validity of the indebtedness is clear from what we have already said; that is to say, the mere fact that municipal authorities may fail to levy and collect a sufficient tax to pay the interest and principal within 20 years does not affect the validity or binding force of the in-

debtedness. By this we do not mean that municipal bonds issued without an attempt to make such provision would necessarily be valid. That question is not involved in this case, because the bill expressly states that the original bonds were issued in strict conformity with the provisions of this section of the Constitution. It is well-known fact, that however honestly or even wisely public officers may attempt to provide by taxation a sufficient fund to meet an indebtedness maturing 20 years in the future, that effort will often fail, because taxes levied cannot always be collected, and because what may seem to be a sufficient levy at the time it is made, may, on account of changes in the valuation of assessable property, prove insufficient. And so we held in *City of East St. Louis v. People ex rel.*, 124 Ill. 655, 17 N. E. 447 (following the decision of the Supreme Court of the United States in *East St. Louis v. Amy*, 120 U. S. 600, 7 Sup. Ct. 739, 30 L. Ed. 798) that if at the end of 20 years the provision first made proves insufficient to pay the whole indebtedness, the municipal authorities can be compelled to levy a sufficient tax upon the taxable property within its jurisdiction to pay a judgment recovered for any part of the indebtedness remaining unpaid. It being the duty of the city authorities to provide for the payment of this indebtedness, and being authorized to do so by clause 6, § 63, supra, is there any sufficient reason for holding, by construction or implication, that the Constitution renders that statute void? We think not. The Constitution does not say that the indebtedness must be paid within 20 years. It does not say that if, from any unforeseen circumstance, the debt or a part of it remains due at the expiration of 20 years, without a sufficient fund on hand to pay it, the city council may not provide for an extension of the debt. The principle is elementary, and has been applied in cases almost without number by this court, that statutes should not be held unconstitutional where any reasonable construction can be given them which will avoid that result, and that they will not be declared void, as in violation of the Constitution, except where the violation is clear and plain."

It will be observed by an examination of that case that it was argued as it is here, that it was the object of the people in adopting the latter clause of section 12 of article 9 of the Constitution of Illinois, which is the same as section 12, art. 10, of the Constitution of this state, to indicate a policy of the state that municipal indebtedness should not be created to extend beyond a period of 20 years. The learned judge in that case, responding to such contention, said: "We are not disposed to dissent from that view. On the contrary, we think an intention that such a limit should be placed upon such indebtedness is sufficiently manifested by the language of the Constitution

itself. Nor are we disposed to call in question the wisdom of such provision. Evidently it is the duty, under this Constitution, of every city council when it contracts a municipal indebtedness, to faithfully and honestly provide for the levy of a tax sufficient to pay it within 20 years. Failing to do so, it could doubtless be compelled to perform that duty. But the question here is, when the attempted discharge of that duty has failed to accomplish its object, what is the remedy? Does the public policy which should have been carried out but was not, take away from the city council the power given it by the Legislature, as provided in paragraph 6, supra? It is also a matter of public interest that oppressive taxation should, as far as possible, be avoided, and if, in the judgment of the city council, the emergency which has here arisen can be met with less inconvenience and with less oppression by issuing bonds bearing the lower rate of interest, to mature in the future, than by levying a tax to be collected in a single year, we see no reason why, from the standpoint of public policy, it might not be allowed to do so. It was said in *City of Quincy v. Warfield*, 25 Ill. 817, 79 Am. Dec. 330: 'It is true, the provisions of the charter authorizing the issuing of bonds do contemplate that the city council will provide, by taxation, for their payment when due, * * * and establish a sinking fund for that purpose, and doubtless that is the true policy.' Nevertheless, it was held, in that case that the failure to perform that duty did not deprive the city council of the power to issue a new bond in payment of the old, if not prepared to pay it at maturity."

Legislation substantially in form as that assailed in this proceeding, has been in existence in this state for nearly a quarter of a century, and it is but common knowledge that municipalities and other subdivisions of the state have availed themselves of its provisions and put them into practical operation. Its validity has been fully recognized by the people, the legal profession and all officials of this state who were required to perform any duty under the provisions of such legislation; hence it is important that we be not unmindful of the repeated admonition to courts, when they are called upon to pronounce the invalidity of the acts of the Legislature, passed with all the forms and ceremonies required to give it force, that they approach the question with great caution. The presumption is in favor of the constitutionality of this act, and before this court would be warranted in holding it invalid, because in conflict with the Constitution, it should be satisfied of its invalidity beyond a reasonable doubt. *Ewing v. Hoblitzelle*, 85 Mo. 64; *Lynch et al. v. Murphy et al.*, 119 Mo. 163, 24 S. W. 774; *State v. Addington*, 77 Mo. 110; *State ex rel. v. Railroad*, 48 Mo. 470.

We have thus indicated our views upon

the proposition involved in this proceeding. The respondents, by their return, challenge the constitutionality of section 5157, Rev. St. 1899, as amended by the Laws of 1901; hence the burden is upon them to show that said section is plainly and clearly in violation of the provisions of the Constitution; having failed to do so, and it appearing that all the provisions of law in respect to refunding the bonds heretofore issued, as well as those sought to be issued, in renewal of them, have been complied with, it is therefore ordered that the peremptory writ of mandamus be awarded as prayed for in the petition. All concur.

MORGAN et al. v. KELLER et al.

(Supreme Court of Missouri. Division No. 2.
Jan. 31, 1906.)

1. APPEAL—PRESENTATION OF QUESTIONS IN TRIAL COURT—MOTION FOR NEW TRIAL.

A motion to set aside the verdict is equivalent to a motion for a new trial for the purpose of presenting questions for review, especially where it is so treated by the trial court.

2. CONTRACTS—JOINT OR SEVERAL CONTRACT—EVIDENCE.

Though in an action against certain members of a brewing company on a contract for the employment of brokers, several contracts of the different defendants cannot be shown, the admission of evidence of conversations of each of the defendants separately with the plaintiffs was not error where the conversations were connected with, or had reference to, conversations with other defendants, and on one occasion they employed plaintiffs while together.

3. BROKERS—COMPENSATION—RIGHT TO COMMISSION.

In an action for brokers' commissions, an instruction assuming a sale by the brokers was not error where the evidence showed that they produced purchasers able and willing to buy on terms satisfactory to the employers of the brokers, whether the sale was actually consummated or not.

4. SAME—ACTIONS—INSTRUCTION.

In an action for brokers' commissions against stockholders of a brewing company for sale of its property, where the evidence showed that the debts of the company were about \$30,000, that the purchasers assumed this indebtedness, relieving defendants from any liability thereon, and that by the written contract of sale the purchasers relieved defendants of all personal liability on the obligations of the company, not to exceed \$30,000, there was no conflict between an instruction authorizing a recovery of 10 per cent. of the debts of the company from which defendants were to be relieved as sureties, and one authorizing a recovery of 10 per cent. of the debts of every kind of the company.

5. SAME—KIND OF SALE.

Where no time was fixed within which brokers were to sell property, and they negotiated a sale which was consummated by their employers, the employers cannot claim that the sale was not made within a reasonable time.

6. SAME—AMOUNT OF RECOVERY.

Brokers negotiating a sale, on terms accepted by their employers, are entitled to recover their commissions on the entire price, whether it is all paid or not, they not being guarantors of deferred payments.

7. APPEAL—REVIEW—VERDICT.

Where a verdict is supported by some substantial evidence, it will not be interfered with on appeal.

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by J. J. Morgan and others against G. W. Keller and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Thomas Dolan, for appellants. O. V. Buckley, R. G. Blair, W. Jones, and Geo. H. Hubbert, for respondents.

BURGESS, P. J. This is an action by J. J. Morgan and Henrietta Von Ronzelen, who sue under the firm name and style of J. J. Morgan & Co., as partners, and their co-plaintiff, W. H. Gault. At the trial, after plaintiffs' evidence was in, the cause was dismissed as to L. P. Cunningham, who was an original party. The petition alleges: That in the month of December, 1900, plaintiffs were employed by the defendants, George W. Keller, Nicholas Zentner, and L. P. Cunningham, who owned or were the principal stockholders in the Joplin Brewing Company, to sell certain property of the said Joplin Brewing Company, that is, all the property and assets thereof described as follows: Certain real estate located on Main street and Virginia avenue, in Joplin, Jasper county, Mo., and its brewery, ice plant, machinery, saloons, and personal property used in and about the business of said brewing company, and that defendants agreed to pay plaintiffs the sum of 10 per cent. of the price which said property should be sold at to any purchaser or purchasers obtained or procured by the plaintiffs. That the plaintiffs thereupon undertook the sale of said property on behalf of defendants, and through their efforts, exertions, and instrumentality, procured as purchasers for said property R. L. Dennison, C. A. Dall, and F. W. Keasbey, and that on the ——— day of March, 1902, said property was sold by the defendants to said purchasers. That said sale was made by the transfer of the capital stock held and owned by the defendants and others in said Joplin Brewing Company, and said property and assets were sold by transferring all the said capital stock of the defendants and other stockholders to the purchasers thus procured by the plaintiffs, at and for the sum of \$87,500. That said sale was made to the parties procured and produced therefor by the efforts of plaintiffs. That the defendants individually employed and agreed to pay to the plaintiffs 10 per cent. on whatever sum said Joplin Brewing Company should be sold at by defendants to such purchaser or purchasers as should be produced and procured by the plaintiffs, and that upon such sale the defendants became indebted to the plaintiffs in said sum. That plaintiffs have frequently demanded of the defendants that they pay the same to plaintiffs, but that they refused to pay said amount or any other sum. Wherefore, plaintiffs ask judgment for the sum of \$8,750.

Each one of the defendants answered separately and denied each and all of the allegations in the petition contained.

The facts, briefly stated, are about as follows: Plaintiffs Morgan and Von Ronzelen were, at the time of the making of said sale, partners and brokers in the real estate business at Joplin. Plaintiff Gault was also engaged to some extent in the same line of business and his services were engaged in the performance of the contract made by his co-plaintiffs for the sale of said brewery and other property connected therewith. In the latter part of November, or the first part of December, 1900, the defendants employed plaintiff Morgan to sell the brewery plant of the Joplin Brewing Company, as before stated, agreeing to pay him a commission of 10 per cent. of whatever sum it should be sold for by him, Morgan, it being understood that he should not ask more than \$100,000 for the entire property, the reason being that many other parties had had the property for sale, but had failed to sell it, as defendants stated, because they placed the price too high. Morgan's firm took the matter up and communicated personally and by correspondence with prospective purchasers, sending out letters, prospectuses, etc., over the country to parties whom they thought might be interested in such property. Among others approached by Morgan on the subject was Mr. Dinkelbühler of Joplin, and also, through his partner, Mrs. Von Ronzelen, Mr. Busch of St. Louis. In the summer of 1901 he interested Mr. R. L. Dennison in the project. The latter went East where they saw F. W. Keasbey and C. A. Dall, whom he brought to Joplin to look over the property. They were pleased with it; took an option thereon, which was renewed until the 10th day of March, 1902, at which time they had paid on the property or options which they had obtained the sum of \$700. On the said 10th day of March, they concluded the deal, taking over all the property, assets, book accounts, bills receivable, and capital stock. For this they paid, as the purchase price of the entire property, to defendant Keller, \$3,500; to Zentner, \$5,000; to L. P. Cunningham, \$2,500; to George Muenning, \$500; to Seldenstricker, \$100; making \$11,600 in cash; and they assumed \$30,000 of the company's debts, or rather, agreed to relieve defendants of their individual liability to that amount of the company debts. In addition, they gave Zentner \$20,000, par value, in stock in the Middle West Brewing Company, which they had organized; to Keller, \$14,000 and to Cunningham \$8,000 in like stock; making, in all, \$83,600. They took charge of the brewery and began operating it. About the 25th day of March, 1902, some 15 days after the completion of the sale, Morgan asked the defendants for a settlement of his commissions. They refused. The trial of the cause took place before the

court and jury, on January 21, 1903, and resulted in a verdict for the plaintiffs in the sum of \$8,468. Each of the defendants, Zentner and Keller, filed separate motions for a new trial and in arrest, which being overruled, they saved their exceptions and by appeal bring the cause to this court for review. Other facts in evidence will be stated, where thought necessary, in the course of the opinion.

The court, over the objections and exceptions of defendants, instructed the jury as follows: "(1) The court instructs the jury that if you find from the evidence that the defendants employed the plaintiffs to sell for them the Joplin Brewing Company property, and agreed to pay them 10 per cent. on whatever sum it sold for, and the plaintiffs procured F. W. Keasbey and other parties to whom said property was sold, either direct or by transfer of the capital stock of the stockholders of said company, then you should find the issues in favor of the plaintiffs, and assess their damages at 10 per cent. of whatever sum said stock was sold for, together with 6 per cent. interest thereon from the time demand was made, if any demand was made, and if not, then from the time of the institution of this suit. (2) The court instructs the jury that it is admitted by the pleadings that at the time so alleged in the petition the plaintiffs, J. J. Morgan and Henrietta Von Ronzelen, were partners; and if you find from the evidence that it was agreed between the plaintiffs that plaintiff Gault should have a portion of the compensation, and you should further find from the evidence that the defendants Keller and Zentner employed the plaintiff J. J. Morgan to negotiate a sale of the brewery property for them, or to find a purchaser therefor, and agreed to pay him 10 per cent. of whatever sum it sold for, and you should further find from the evidence that through the efforts or instrumentality of the plaintiffs, or either of them, they procured F. W. Keasbey, R. L. Dennison and C. A. Dall, or either of them, to whom the defendants Keller and Zentner, and the other stockholders of the Joplin Brewing Company, sold their stock therein either for cash or on credit, or part cash and part credit, and part in stock in the Middle West Brewing Company, and in part to relieve the defendants Keller and Zentner of their liability on obligations for said Joplin Brewing Company, then you will find the issues in favor of the plaintiffs, and assess their damages at 10 per cent. of the entire purchase price paid, or to be paid, for said Joplin Brewing Company, and that without reference to the fact that defendants did not receive, or were not to receive, all the purchase price of said stock, but some part thereof was paid to other stockholders of said Joplin Brewing Company. (3) You are instructed that it is only necessary, in order to recover in this case, for plaintiffs to have

found or procured the purchaser for the brewery, after the same was placed in their hands for sale. It was not necessary for them to have conducted the sale; this may be done by the sellers themselves without the aid or presence of the plaintiffs, or any of them. (4) You can find the issues against both or either of the defendants, if warranted by the evidence. But if you find from the evidence that either of the defendants did not employ the plaintiffs to sell the property, and you should further find from the evidence that one of the defendants did employ them, and agreed to pay them 10 per cent. for their services on whatever sum the property sold for to the purchaser found by them, then you should find the full amount of 10 per cent. of the purchase price against the defendant or defendants so employing the plaintiffs, regardless of the particular amount or proportion of the purchase money received by such defendant or defendants. (5) In determining the purchase price at which the property sold, if you find for the plaintiffs, you are to ascertain from the evidence the cash paid by the purchasers to all of the stockholders of the Joplin Brewing Company, if any, together with the debts of every kind of said company, if any, either paid or assumed to be paid by the purchasers, and to that add the reasonable value of the capital stock in the Middle West Brewing Company taken or agreed to be taken by the defendants, if any, which value you are to find from the evidence, and on the total amount cast 10 per cent. as the amount of your verdict. (6) The court instructs the jury that, although you believe from the evidence that plaintiffs were not to sell the property for less than \$100,000, yet if you further find from the evidence that defendants voluntarily reduced the price or changed the terms in their sale to Keasbey and others, still the plaintiffs are entitled to recover, provided you find for them under the evidence and other instructions in the case. (7) The court instructs the jury that if you believe from the evidence that the defendants placed the property in question in the hands of plaintiffs for sale, and that plaintiffs, or either of them, brought about the sale by introducing the purchasers, whereby a sale was perfected with defendants, then, and in that case, plaintiffs would be entitled to their commission agreed upon, even though you may believe that the defendants sold said property to said purchasers at a less price than amount at which plaintiffs were to offer said property."

The court, at the request of the defendants, gave the following instructions: "(1) The court instructs the jury that in order for the plaintiffs to recover in this case it is necessary for them to show by a preponderance or greater weight of the evidence that the said Keasbey and Dall were able, ready, and willing to carry out their contract of

purchase made with defendants, and, in determining the question as to whether said Keasbey and Dall are able, ready, and willing to carry out the said contract of purchase, you may take into consideration the fact that they have not paid off the said debts of the Joplin Brewing Company, required to be paid by their contract of purchase, along with all other facts and circumstances in the case, and, unless you find and believe from a preponderance or greater weight of the evidence that said Keasbey and Dall, at the time of the commencement of this suit, were able, ready, and willing to comply with said contract of purchase, you should find for the defendants."

The defendants asked the court to give the following instruction: "The court instructs the jury that before you can find in favor of the plaintiffs in this case, you should believe from the preponderance or greater weight of the evidence that there was a joint employment by defendants of the plaintiffs to procure a purchaser for the property of the Joplin Brewing Company." Which said instruction was by the court given, after having been by the court changed, altered, and modified to read as follows: "(2) The court instructs the jury that before you can find in favor of the plaintiffs, against both defendants G. W. Keller and N. Zentner, in this case, you should believe from the preponderance or greater weight of the evidence that there was a joint employment by defendants of the plaintiffs to procure a purchaser for the property of the Joplin Brewing Company." To the changing, altering, and modifying of said instructions the defendants at the time excepted.

The defendants asked the court to give the following instruction: "The court instructs the jury that if they believe from the evidence that N. Zentner, defendant, placed or fixed the price with plaintiffs to be received for the property at \$100,000, and promises to pay 10 per cent. commission if the sale was made, for said sum, the plaintiffs cannot recover from the defendants." Which said instruction was by the court given, after having been by the court changed, altered, and modified to read as follows: "(3) The court instructs the jury that if they believe from the evidence that N. Zentner, defendant, placed or fixed the price with plaintiffs to be received for the property at \$100,000, and promised to pay 10 per cent. commission if the sale was made for said sum, the plaintiffs cannot recover, and you should find for the defendants, unless you further find defendants varied or changed said price from that of the first negotiations with the plaintiffs." To the changing, altering, or modifying of said instruction the defendants at the time excepted.

Defendants asked the court to give several additional instructions, all of which were refused, but as no point is made upon any

of the refused instructions except one, No. 15, that only will be incorporated in this opinion. It is as follows: "(15) The court instructs the jury that no time being fixed for the plaintiffs to procure a purchaser or purchasers for the property of the Joplin Brewing Company, if the jury believe that plaintiffs were employed to procure a purchaser or purchasers within a reasonable time, and unless you believe from a preponderance or greater weight of the evidence that said purchasers were procured in a reasonable time, you should find for the defendants."

The first question with which we have to deal is the failure of defendants, as plaintiffs contend, to file a motion for a new trial, in the absence of which there is nothing before us for review other than the record proper. It is conceded by plaintiffs that the record entries in the case purport to note the filing of motions for new trial, and that the bill of exceptions also so recites; but they assert that the motions, upon their face, merely "move the court to set aside the verdict of the jury," for reasons assigned in such motions, and that, as they do not ask for a new trial, they are therefore ineffectual for any purpose. Under our practice, the setting aside the verdict of a jury is in effect the granting of a new trial. When the verdict is set aside in a law case, there is nothing upon which to base a judgment, and the case stands just as if no trial had been had. But suppose, as in the case at hand, the motions to set aside the verdict are overruled, not upon the ground that they do not ask for a new trial, but upon other grounds, and the court in this way and in all orders respecting such motions, as well also as in the bill of exceptions, recognizes and refers to them as motions for a new trial? We think not. They were in effect motions for a new trial, which could not have been had unless the verdict was first set aside, in which event a new trial follows as a matter of course. The motions we think sufficient, more especially when recognized and treated by the trial court as such.

The first assignment of error by defendants is with regard to the action of the court in admitting, over their objection, evidence of distinct, separate, and several agreements of defendant Zentner, as well also as of defendant Keller, to prove the joint contract of defendants declared upon in plaintiffs' petition. The defendants are not sued as partners, and, before they can be charged as joint promisors or contractors, it must appear from the evidence that they jointly agreed with plaintiffs to pay the latter, for the services to be rendered by them in the sale of the property described in the petition, 10 per cent. of the purchase price or amount realized upon such sale. If defendants were joint contractors or promisors, they could, under our statutes (sections 889, 892, Rev. St. 1890, which change the common-

law rule), be sued either jointly or separately. But if the contract was several, that is, if each one of the defendants for himself only contracted and promised to pay for the sale of the property, such an one could not be sued jointly with the other defendants, but a suit could be maintained against each upon his individual promise or contract. While most of the conversations of defendants with plaintiffs, respecting the contract for the sale of the property, were conversations with defendants singly, each apart from the other, and there were statements and admissions by defendants, respectively, in evidence tending to show that they were of the character complained of; yet, as a rule, and as the evidence showed, such conversations had some connection with or reference to other conversations previously had with the other defendant regarding said sale. There also was evidence which tended to show that Zentner and Keller, when together with Gault on one occasion, and with Morgan on another, employed plaintiffs to sell the property. The judgment should not, therefore, be reversed upon that ground.

Instruction numbered 1, given for plaintiffs, is complained of on the ground that it assumes that plaintiffs effected a sale of the property, when, in fact, as defendants contend, there was no sale. This contention is bottomed upon the theory that the contract for the disposition of the property was in the nature of an option given to Keasbey and Dall, under which they, in order to secure the stock of defendants Keller and Zentner in the Joplin Brewing Company, which was placed in escrow, were to pay off all the debts of the corporation upon which Keller and Zentner were liable, not to exceed \$30,000, and deliver to Keller — shares of the capital stock of the Middle West Brewing Company, and deliver to Zentner — shares of said stock, although the evidence showed that the stock was still in escrow, Keasbey and Dall having failed to do as agreed. It is true it was an option at first, but when the sale was completed it ceased to be such. At any rate, it seemed to be satisfactory at the time to the owners of the property; and their conduct then and afterwards would more than indicate that they regarded it as a sale to all intents and purposes, and that was all that was necessary to entitle plaintiffs to their commission. In *Gelatt v. Ridge*, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683, it is held that a real estate agent performs his duty, and is entitled to his commission, when he procures a purchaser able and willing to buy on the terms authorized by the principal, and the purchaser is ready, able, and willing to carry out such terms. *Childs v. Crithfield*, 66 Mo. App. 422. It is also held that where the agent is the procuring cause of the negotiations which result in a sale of property at the instance of the vendor, he is entitled to his commission, even though the negotiations

were conducted and concluded by the principal in person. *Beil v. Kaiser*, 50 Mo. 150; *Timberman v. Craddock*, 70 Mo. 638.

It is said for defendants that instruction No. 2, given for plaintiffs, is erroneous and should not have been given, because "employment" by defendants presupposes a joint employment, and there was no evidence to that effect. While the evidence was conflicting upon this feature of the case, there was some evidence which tended to show a joint employment, sufficient possibly to take the case to the jury. It is further contended that this instruction as to the measure of damages is in conflict with plaintiff's instruction No. 5 upon that subject, in that instruction No. 2 tells the jury to take as a part of the estimate of damages 10 per cent. of the amount of the debts of the Joplin Brewing Company from which Keller and Zentner were to be relieved as sureties, while No. 5 tells the jury that they should take into account 10 per cent. of the debts of every kind of said company, when, in fact there was no evidence as to what was the amount of the debts from which Zentner and Keller were to be relieved, nor any evidence as to the amount of the debts of every kind of said company. With respect to the last proposition, the evidence shows that at the time of the sale of the property to Keasbey and Dall the debts of the company were in the neighborhood of \$30,000; and it is further shown by the evidence that this indebtedness was assumed by Keasbey and Dall, and that in this way defendants Zentner and Keller were freed from any liability on account of said indebtedness. According to the written contract entered into between the parties at the time of the sale, the purchasers of the property agreed to relieve Zentner and Keller of all personal liabilities theretofore incurred by them as indorsers of the paper, notes, or other obligations of the Joplin Brewing Company, the same not to exceed \$30,000; so that it is clear there is no real conflict between the instructions named.

The time in which plaintiffs were to make the sale was not agreed upon between the parties, nor was any time fixed by defendants, and as defendants consummated the sale which was brought about by the plaintiffs they are in no position to claim that it was not made within a reasonable time. There was no error therefore in the refusal of the instruction asked by defendants upon that proposition. Nor is there any merit in the contention that the verdict of the jury is excessive. If the plaintiffs were entitled to recover anything at all, it was 10 per cent. of the amount for which the property was sold, whether the terms of the sale agreed upon by the owners of the property and the purchasers were complied with or not. The agents were not guarantors of deferred payments or covenants, but were entitled to their commission when they furnished the buyers and the sale to them was consummated.

They did not have to wait until all deferred payments were paid, and all covenants on the part of the purchasers complied with. The instruction given for defendants upon this feature of the case was more favorable to them than authorized by the law of the case.

The only question in the case in regard to which we entertain any doubt is as to whether the contract sued upon is joint or several. This question was, however, submitted to the jury by the instructions, and the effect and meaning of their verdict is that it is joint. There was some substantial evidence to support the verdict, and under such circumstances we cannot interfere, whatever may be our views regarding the matter.

Finding no reversible error in the record, the judgment is affirmed. All concur.

METROPOLITAN LEAD & ZINC MINING CO. v. WEBSTER.

(Supreme Court of Missouri, Division No. 1. Feb. 22, 1906.)

1. APPEAL—ORDER GRANTING NEW TRIAL—REVIEW.

Where an order granting a new trial appealed from did not specify the grounds on which the new trial was granted the order would not be reversed if sustainable on any of the grounds alleged.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3410, 3423.]

2. EVIDENCE—WRITTEN CONTRACT—PAROL EVIDENCE—FRAUD.

Where, in an action on a corporate stock subscription, defendant admitted signing the articles of incorporation and did not seek to alter or change any part of the same, nor to contradict his contract, but claimed that the articles of association were a fraud, and that his signature was obtained by fraud, parol evidence offered for the purpose of proving the fraud was not objectionable as an attempt to contradict or modify the contract by parol.

3. CORPORATIONS—FORMATION—FRAUD—STOCK CONTRACTS.

Plaintiff was a mere paper corporation. It never had any capital, money, or property, and never carried on the business for which it was incorporated or attempted to do so. It had no creditors, and those who subscribed to its articles never, in fact, paid any money or turned over any property of value to the corporation. *Held*, that plaintiff had no standing entitling it to recover on a subscription contract.

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by Metropolitan Lead & Zinc Mining Company against Elmer Webster. From an order granting plaintiff's motion for a new trial defendant appeals. *Reversed*.

O. H. Montgomery, for appellant. O. H. Nearing and C. V. Buckley, for respondent.

BRACE, P. J. This is an appeal by the defendant from an order of the Jasper county circuit court granting a new trial in an action for the recovery of an alleged unpaid subscription to the capital stock of the plain-

tiff company, in which the verdict was for the defendant.

The petition and answer in the case are as follows:

Petition: "Plaintiff for cause of action states that it is a corporation organized and existing under and by virtue of the laws of the state of Missouri. That the above-named defendant was one of the original incorporators, and a member of the first board of directors of this plaintiff. That on or about the 3rd day of January, 1901, defendant subscribed for 100 shares of the capital stock of this plaintiff, of the par value of \$100 each and thereupon became obligated to pay plaintiff the sum of \$10,000. (1) That payment thereof has been demanded and no part of the same has been paid. Wherefore, plaintiff asks judgment against defendant for the sum of \$10,000 and interest thereon from January 3, 1901, together with its cost herein expended."

Answer: "Defendant for answer to plaintiff's petition denies that on the 3rd day of January, 1901, or at any other time, defendant subscribed for 100 shares of the capital stock of the plaintiff, at the par value of \$100 each, and thereupon became obligated to pay plaintiff the sum of \$10,000, or any other sum. Defendant denies each and every other allegation of said petition, and, having fully answered, asks judgment for costs of suit. (2) Defendant, for a further defense and answer to plaintiff's petition, states: That at and before the signing of the articles of association of plaintiff, as hereinafter set out, and at and prior to the 3rd day of January, 1901, defendant was the owner of an undivided seven-twelfths interest in a mining lease, known as the '49 lease,' the same being a lease upon the following described 40 acres of land, described as follows, to wit: The northwest quarter of the southeast quarter of section 7, township 27 of range 33, in Jasper county, in the state of Missouri, and was also the owner of a 60 ton crushing and cleaning mill, situate upon said lease; which said interest in said mill was of the value of \$6,000, and the said interest of the said defendant in the said lease and mill was of the value of \$18,000. That at and before the signing by him of the articles of association of plaintiff as herein set out, M. W. Clay, a promoter of said plaintiff company, who was then engaged in inducing parties to subscribe for the stock of plaintiff corporation, falsely and fraudulently represented to defendant that said plaintiff company was the owner of mining leases on 1,500 acres of mining land, in Newton county, Mo., near the towns of Dayton and Spurgeon, Mo., and that ore had been developed on said land, and that said leases were for a period of 10 years, and at a royalty of 8 per cent. on all ores to be mined from said land, and that said leases had been delivered and were in the hands of persons to be conveyed to plaintiff corporation. And defendant avers that

said representations were false and fraudulent, that said leases were never transferred to any one to hold for said plaintiff corporation, neither have they nor any of them ever been transferred to said corporation. That by reason of the false and fraudulent representations aforesaid defendant was induced to agree to trade his undivided seven-twelfths interest in said mining lease and mill for \$10,000 fully paid up and nonassessable stock of the plaintiff corporation, and \$1,500 in money, to be paid by plaintiff corporation to defendant, and in furtherance of said arrangement and by reason of the false and fraudulent representations above set out, the defendant was induced to sign the articles of association of plaintiff corporation, and in no other manner, and for no other purpose. That the said plaintiff, at all times, refused to comply with said agreement to issue any stock to defendant or pay defendant any money. And that no stock of plaintiff company was ever issued to defendant. And defendant alleges that no property or money was ever paid or delivered by any one to said corporation, in payment for the capital stock of said plaintiff corporation, or for any part thereof, and defendant having fully answered asks judgment for costs."

The answer contained two other pleas, one of which was withdrawn, and upon the other no evidence was offered, and they are therefore omitted. The reply was a general denial.

The plaintiff to sustain the cause of action, introduced in evidence the following articles of association:

"State of Missouri, County of Jackson—ss.

"Know all men by these presents, that we whose names are hereunto subscribed, do hereby associate ourselves together for the purpose of forming a corporation under the provision of article nine, chapter twelve of the Revised Statutes of eighteen hundred and ninety-nine, and for that purpose do hereby adopt the following articles of association and incorporation, to wit:

"First. The name of the corporation shall be The Metropolitan Lead & Zinc Mining Company.

"Second. The principal office of this corporation shall be located at Kansas City, in the county of Jackson, State of Missouri.

"Third. The capital stock of said corporation shall be one hundred thousand (\$100,000.00) dollars, divided into one thousand shares (1,000) of the par value of one hundred (\$100.00) each. The same has been bona fide subscribed and one-half thereof actually paid up in lawful money of the United States, and is in custody of the persons hereafter named as the first Board of Directors.

"Fourth. The names and places of residence of the several shareholders and the number of shares subscribed by each are as follows: Elmer Webster, Joplin, Missouri,

100 shares. A. M. Earhart, Kansas City, Mo., 300 shares. M. W. Clay, McElhaney, Mo., 300 shares. V. D. Snyder, Kansas City, Mo., 50 shares. Wm. A. Shuman, Kansas City, Mo., 250 shares.

"Fifth. The business of this corporation shall be managed by a board of directors, consisting of five (5); and the following named persons, to wit: W. M. Clay, Elmer Webster, V. D. Snyder, A. M. Earhart, Wm. A. Shuman, shall constitute the said board of directors for the first year.

"Sixth. This corporation shall continue a body corporate for the period of fifty years.

"Seventh. The purposes for which this corporation is formed are as follows: To carry on and conduct a general mining business, such as procuring lands by purchase or otherwise, and mineral leases thereon to prospect and operate the same for mineral substances and deposits, to sell, convey, or otherwise dispose of the same by deed, mortgage, lease, bond or otherwise; own and operate all machinery and improvements necessary to successfully prosecute and carry on said business, and carry on a general real estate business.

"Witness our hands and seals this 7th day of January, 1901.

"Elmer Webster.

"A. M. Earhart.

"M. W. Clay.

"V. D. Snyder.

"Wm. A. Shuman."

The articles were duly acknowledged by the defendant on the 3d of January, 1901, and by the other parties on the 7th of January, 1901, and on the same day were duly recorded. The plaintiff then introduced the certificate of the Secretary of State of its incorporation thereon, dated January 8, 1901, duly recorded on the 9th of January, 1901, and rested its case. Thereupon the defendant demurred to plaintiff's evidence, his demurrer was overruled, and the defendant, over the objections of the plaintiff, introduced parol evidence to sustain his defense. The facts disclosed by this evidence are substantially stated in the brief of counsel for appellant as follows:

"Defendant is and was a hardware merchant in Joplin, Mo. In the year 1900 he owned an undivided seven-twelfths interest in a first lease on 49 acres of mining land for an unexpired term of four and one-half years and at a royalty of 12½ per cent., known as the '49 lease,' and was also the owner of a seven-twelfths interest in a 60 ton crushing and cleaning mill on said lease and that his interest in the lease and mill was worth \$18,000 to \$20,000. He had spent about \$3,500 to \$8,000 in developing it, and not having the money to go ahead with the development, wanted to sell his property, or get some one interested with him. In the fall of 1900, M. W. Clay was in the real estate business in Kansas City, Mo. He went to

Joplin frequently, and on such occasions went to defendant's store, and talked to him about selling his lease and mill. In December, 1900, Clay dropped into defendant's store several times and during these visits told defendant that he and others had organized a corporation, the Metropolitan Lead & Zinc Mining Company, and that this corporation would buy his property. Clay told defendant that this corporation had leases on 1,500 acres of mining land in Newton county, near Spurgeon, a booming mining camp, at a royalty of 8 per cent., a very low royalty, two drill holes in ore and one shaft in ore on this land. Clay also stated that these leases were in the possession of one Earhart for the company. Clay proposed to defendant that this corporation would buy his seven-twelfths interest in his lease and his seven-twelfths interest in the mill and would pay him \$1,500 in cash, and \$10,000 in full, paid up and non-assessable stock of this corporation, and that the company would send down \$25,000 in cash to develop the lease. Clay also said that the corporation had sold stock and had this amount on hand to develop this lease. That on account of these statements and representations as to the large amount of mining land leased at such a low royalty, near the then-booming mining camp of Spurgeon, and the ore developments on the same, defendant agreed to trade his seven-twelfths interest in said lease and mill for said paid-up stock and money. Clay sent corporation papers down for defendant Webster to sign to carry out this arrangement and defendant signed them to consummate this trade and for no other purpose. Defendant testified that he knew but little about corporations, and signed the papers without reading them, relying on the representations of Clay that the corporation would do as agreed.

"Time went on and no money was sent down by the corporation to develop the property or to pay defendant for his interest in the lease and mill. After repeated demands for the money due him under the contract, the secretary and general manager, Earhart, notified defendant that the representatives of the company would be down to Joplin to see defendant about his lease on the 29th day of January. On January 29th Director Snyder, Vice President Clay and Secretary and General Manager Earhart went to Joplin, and then and there defendant Webster tendered them his lease and interest in the mill, and demanded his \$1,500, as per agreement. These representatives of the company said it was a good property, but they wanted the whole of it. They also wanted it for less royalty and for a longer time. Webster informed them that the owner of the land would give a new lease for a royalty of 10 per cent. for a period of 10 years, but the company owning the land would require a payment of \$100 per month rental, whether ore was produced or not. Defendant Webster informed them

that he could acquire the whole lease and make this change. So these representatives of the plaintiff authorized defendant to make this change; acquire the whole property, surrender the old lease and take a new one on the terms proposed, and they agreed that the company would pay him for such new lease and the mill \$6,500 additional to the first arrangement of \$1,500, making \$8,000 in cash, and \$10,000 in paid-up and nonassessable stock of said corporation. In compliance with this agreement, defendant acquired the other five-twelfths interest in the lease and mill, surrendered his old lease, and took a new lease for 10 years at a royalty of 10 per cent., with an arbitrary rental of \$100 per month to be credited on royalty if ore was produced, but, if none was produced, to be paid any way, and paid the first month's rental himself. He notified the company what he had done, and demanded that the company comply with its agreement, but the company never did, it never paid him any money or delivered him any stock under either agreement. In February following the signing of the corporation papers, defendant was asked to participate in a meeting of the company, but refused to do so, and stated that, until the company complied with its contract, he did not consider that he was a stockholder. He was also named in the corporation papers as director, and also elected treasurer, but refused to serve in either capacity because he claimed he was not a stockholder. After this he learned that the corporation had no money; that the members of the company relied on Snyder selling \$25,000 treasury stock at par, but he was unable to dispose of any. He also learned that the leases on 1,500 acres of land in Newton county, near Spurgeon, had never been turned over to the corporation, neither had they ever been delivered to any one for the corporation. He learned that Clay and the other members of the corporation had had a difficulty, and that Clay was to retain these leases and not turn them over to the corporation at all. He also learned that no one had paid in anything on their stock, and that the company had neither money nor property. Under the first arrangement defendant was to receive \$1,500 individually in addition to the stock, but afterwards Clay and Earhart insisted that this money be used to develop the lease, and defendant agreed to it. Clay and Earhart also insisted that the balance of the \$8,000, that is \$6,500, which was coming to defendant under the second agreement, be also divided among members of the company, and defendant agreed that all over the actual cost of the five-twelfths interest should be so divided.

"In answer to defendant's demands that the company pay him the \$8,000, under the last agreement, the members of the company objected to the rental clause. Clay, however, testified, that it was not disputed that the company had no real objection to that clause,

and that the objection was only urged because Snyder could sell no stock, and the company could raise no money to pay defendant for his lease and mill, and that the objection was only an excuse which the company put forward for not paying defendant, as agreed. The company not being able to raise any money, Clay proposed to Snyder to pay in \$50 apiece and accept the lease with the rental clause in it, but Snyder said he did not want to put any money into it until he sold some treasury stock. Defendant now found himself in this predicament: on the faith of the promises of ample money to develop the lease he had surrendered a lease which did not require any payment except the royalty on the ore actually produced and had taken a lease which required a payment of \$100 a month, whether any ore was produced or not. He had also gone on at the request of the members and officers of plaintiff company and incurred considerable expense in acquiring the whole of the lease and mill. He now found himself unable to either make the payments or dispose of his lease, and he lost his whole investment so far as the lease was concerned."

The plaintiff offered no evidence in rebuttal, but at the close of the evidence each of the parties asked for a peremptory instruction in his favor, which being refused, the issues were submitted to the jury on instructions, which need not be set out, as no point is made upon them.

The jury returned a verdict for the defendant, and in due time plaintiff filed its motion for a new trial as follows: "Comes now the plaintiff and moves the court to set aside the verdict of the jury herein and grant it a new trial in this cause for the following reasons, to wit: (1) The court erred in admitting incompetent and improper testimony on the part of the defendant, and erred in refusing to admit competent and proper evidence on the part of the plaintiff. (2) The court erred in refusing proper and legal instructions offered by the plaintiff, and erred in giving improper and illegal instructions on the behalf of the defendant, and on the court's own motion, to wit: all the instructions given for defendant, as aforesaid. (3) The verdict of the jury is contrary to the weight and preponderance of the evidence, and all evidence; contrary to the law, and instructions given by the court; that said verdict was the result of prejudice by the jury and improper remarks and conduct on the part of the defendant's attorneys in the trial of said case, and is without any evidence to support it. (4) On the entire evidence and pleadings the verdict should have been for the plaintiff, and the court should have so directed the jury. Wherefore plaintiff prays that said verdict be set aside and it have a new trial herein."

The court sustained the motion, without specifying the grounds upon which the new trial was granted, as required by statute

(Rev. St. 1899, § 801); and the defendant appealed.

Although the order of the court did not specify the grounds upon which new trial was granted, the order will be sustained if, on any grounds set forth in the motion, it ought to have been sustained. *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554; *Kreis v. Mo. Pac. Ry. Co.*, 148 Mo. 333, 49 S. W. 877. And for the plaintiff, it is contended that the order ought to be sustained on the ground that the court committed error in admitting defendant's parol evidence. It is urged that this was error, because such evidence tended to contradict the written contract of subscription—meaning, of course, defendant's contract of subscription manifested by the articles of association. This contention is based upon an entire misconception of the nature of the defense set up in the answer and of the purpose of the evidence introduced in support of it. The defendant, in his answer, admitted signing the articles of association, did not seek to change or alter the same in any part, and did not introduce any evidence contradicting any of its contractual terms. His defense was that the articles of association was a fraud and that his signature thereto was obtained by fraud, and the evidence which he introduced was for the purposes of proving the fraud. The rule that a written contract cannot be contradicted or modified by parol evidence has never been held to preclude parol evidence tending to prove that the instrument itself was a fraud or that the signature of a party thereto was procured by fraud, and nothing to that effect can be found in the authorities cited in support of this contention, or elsewhere. "Contracts to take stock in a corporation stand upon the same footing as all other conventional obligations. If induced by fraud they create no obligation and the injured party has a right to have them abrogated." 2 *Thompson on Corporations*, par. 1362. This contention based on the first ground stated in the motion for new trial is, therefore, untenable, and is the only ground specifically pointed out by counsel for plaintiff on which it is claimed the motion for a new trial ought to have been sustained, but there is another ground in the motion upon which it may have been sustained, i. e., that the verdict is against the weight of the evidence; and as this was the first trial of the case it was within the discretion of the court to grant a new trial on that ground—a discretion that this court will not interfere with, unless upon the undisputed facts in the case no verdict for the plaintiff would ever be allowed to stand. *Ottomeyer v. Pritchett*, 178 Mo. 160, 77 S. W. 62; *Warner v. Railroad*, 178 Mo. 125, 77 S. W. 67; *Herndon v. Lewis*, 175 Mo. 116, 74 S. W. 976.

Is this such a case? We think it is. It appears from the undisputed evidence in the case that the plaintiff is a mere paper cor-

poration; that those who subscribed to the articles of association never, in fact, paid any money or turned over any property of value to the corporation; that it has not now and never had any capital whatever either in money or property, and that it never carried on the business for which it was incorporated or attempted to do so, and hence has no creditors whose rights need be considered. Can such a sham corporation, in itself a fraud and an abortion, have any standing in court to enforce an obligation to pay for its fictitious stock based upon no capital whatever? No authorities can be cited answering this question, for, so far as we have been able to discover, this is the first instance in which such an attempt was ever made, and long may it be the last, for the courts of this country will never lend their assistance to the maintenance of such a fraud, and that is a sufficient answer to the question. Hence a verdict against the defendant, who was induced to sign the articles of association of this sham corporation by fraudulent representations, and thereafter never participated in its organization or operations, if any it had could never be sustained.

Therefore the order of the circuit court setting aside the verdict was error, for which the same will be reversed, and the cause remanded with directions to the circuit court to enter judgment for the defendant on the verdict. All concur.

WALKER v. WABASH R. CO.

(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

1. RAILROADS—ACCIDENT AT CROSSING—DISCOVERED PERIL—EVIDENCE—SUFFICIENCY.

In an action against a railroad company for death caused by a collision at a road crossing, evidence held insufficient to require submission to the jury of the question whether defendant's servants could have stopped the train in time to have avoided the accident after discovering the peril of deceased.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1165.]

2. REMOVAL OF CAUSES—PROCEEDINGS AFTER REMAND.

Where a case has, on defendant's petition, been transferred to a federal court, and remanded by it to the state court, the acceptance of jurisdiction by the latter does not deprive the defendant of any of its constitutional rights.

3. RAILROADS—CROSSING ACCIDENT—STATUTORY SIGNALS—EVIDENCE—REBUTTAL.

Under Rev. St. 1899, § 1102, providing that crossing signals shall be given by railroad trains 80 rods from the crossing, it is proper, in an action against a railroad company for death caused by a crossing accident, to show, in rebuttal of evidence that the proper signals were given at the whistling post, that the post was nearly 160 rods and not 80 rods from the crossing.

4. APPEAL—PLEADING—EXCEPTIONS.

Where defendant answers over after a motion to strike out an amended petition for departure, and, on appeal, does not show that the motion was overruled and an exception taken, the objection, not only to the amended petition but to a reply referring to the matter in the

amended petition claimed to constitute a departure, is waived.

5. PLEADING — REPLY — CONSTRUCTION AND EFFECT.

Where an amended petition has been filed and an objection to it on the ground that it is a departure from the original petition had been waived by pleading over, a reply which is pertinent to the amended petition is not objectionable on the ground that it in effect amends the original petition.

6. LIMITATION OF ACTIONS — AMENDMENT — NEW CAUSE OF ACTION.

The petition in an action by a father against a railroad company for the killing of plaintiff's minor son in a crossing accident stated the boy's age, the circumstances of the accident, and alleged that deceased's mother had been dead many years. The boy's given name, which was Charles, was, however, erroneously stated to be Elbert, which was the name of plaintiff's stepson, who was involved in the same accident, but was not injured. *Held*, that under Rev. St. 1899, §§ 657, 659, 672, 676, and 865, requiring liberality in the allowance of amendments, an amended petition correctly stating the name of the deceased boy should not, for the purpose of determining whether the action was barred by the one-year statute of limitations, be regarded as setting up a new cause of action.

7. APPEAL — REVIEW — THEORY OF TRIAL.

A case will be considered on appeal on the same theory on which it was tried.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3402-3434.]

8. RAILROADS — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE.

A boy conceded to be *sui juris* and having good eyesight and hearing approached a railroad crossing at a point where the track was visible for several hundred feet, and stopped his team about 50 feet from the track to look and listen. Thereafter he proceeded towards the track with the team at a slow walk, and, though he had been previously warned by his father that it was about train time and also had personal knowledge that this was true, as well as of the direction from which the train would approach, did not again look in that direction until he had driven upon the track, where he was struck by a train running about 60 miles an hour and killed. *Held*, that he was guilty of contributory negligence, as a matter of law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1033.]

Appeal from Circuit Court, Randolph County; John A. Hockaday, Judge.

Action by R. M. Walker against the Wabash Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. S. Grover, for appellant. Willard P. Cave and Aubrey R. Hammett, for respondent.

LAMM, J. Walker, as surviving parent of a minor son, Charles L. Walker, the issue of a first marriage, seeks to recover of respondent on an amended petition \$5,000, damages for negligently killing his said child at a public road crossing on May 1, 1901, in Randolph county. A résumé of the abandoned petition, as well as the trial pleadings, will aid in getting at some of the questions presented here.

Some time in 1902, plaintiff sued for the death of a son named Elbert Walker.

Steps were taken by defendant to remove this cause to the United States Circuit Court. When lodged there, it was by that court (for reasons not shown to this court) remanded to the state court. After being so remanded and on May 5, 1903, two years and four days after the cause of action accrued, plaintiff filed an amended petition, in which he sued for the death of a son named Charles L. Walker. The first petition contained a general averment of negligence, with the additional allegation that the death of Elbert Walker was caused by the negligent omission of the statutory crossing signals. The second petition omitted the general charge of negligence, but counted on the negligent omission of the crossing signals, and made the additional charge that defendant's servants, running the locomotive and train, saw the peril of said Charles L. Walker at the crossing, or could have seen his peril by using ordinary care, and could have prevented the death of the boy by using ordinary care after such discovery. Defendant assailed this petition by a motion to strike out, framed on the theory that there was a departure from the original cause of action and not an amendment, and on the theory that the alleged new cause of action was barred by the one-year statute of limitations, Rev. St. 1899, § 2868. What disposition was made of this motion the record does not show, but we assume it was overruled, though neither that fact is shown, nor is exception noted. Be that one way or the other, on the next day defendant answered by a general denial, and by pleading the original petition counting on the death of "Elbert Walker," followed by the averment that plaintiff never had a son named Elbert Walker, and another showing that the amended petition was filed on the 5th of May, 1903, and that the cause of action therein stated was barred by the express terms of section 2868, Rev. St. Mo. 1899, and is a departure from the original petition. The answer further set up the contributory negligence of Charles L. Walker in that he drove upon defendant's track at the public crossing without looking or listening, when by looking he could have seen and by listening he could have heard the approach of defendant's train in time to have remained away from the track in a place of safety. Averring, furthermore, that plaintiff by negligently permitting his son to drive upon the track in that way had caused his death. Pleading, also, that it is a citizen of Ohio, while plaintiff is a citizen of Missouri, and that the action of the federal court in refusing to hold jurisdiction of the cause had denied the defendant the privilege, right, and immunity claimed by it under the Constitution and laws of the United States, and violated the fourteenth amendment to the Constitution of the United States, and violated section 30, article 2, of the Constitution of the State of Missouri. By reply, plaintiff denied all the allegations of new matter contained in

the answer, and, by way of further reply, averred that "by an error of the scrivener" the name of Elbert Walker, as the name of the minor son killed, was inserted in the original petition, while in truth and in fact the true name was Charles L. Walker, and that Elbert Walker and Charles L. Walker are, and were intended to be, one and the same person, and that person's name was Charles L. Walker. Thereupon defendant assailed the new matter pleaded in the reply by a motion to strike out (1) because it was a departure from the cause of action in the original petition; (2) because the new matter constituted an amendment to the original petition not permitted in a reply; and (3) because the new matter is barred by section 2863, *supra*. This motion was overruled, and defendant duly saved its exceptions.

On the heels of the above ruling a trial was had to a jury, and thereat the following facts were uncovered: Walker's present wife was a widow Peak, who, with herself, brought as a further contribution to Walker's family a minor son named Elbert Peak. It is asserted in appellant's brief that this lad was known as Elbert Walker, but we find no evidence to sustain such contention, and it may be dismissed as a mere plausible conjecture. The Walker family lived in the neighborhood of a coal mine adjacent to the main track of defendant's railroad in Randolph county, at a point between Huntsville and Moberly, which track, barring a slight curve, at the place in hand runs in the general direction of east and west. The two boys, Charles and Elbert, with their father plied the avocation of hauling timber to said mine. The team used, being old and thin, was correspondingly gentle, slow, and safe. The wagon used was without a bed, was equipped with a frame for timbering purposes and with a platform for carrying tools, and, when unloaded, those riding thereon rode on its forward bolster. The public wagon road runs east and west south of, parallel with, and adjacent to, the railroad, and, at some distance west of said mine, turns north, and thence, between wing-fences leading to cattle guards, with a slight slope up for 50 feet after the turn, approaches and crosses the track. This crossing is the locus in quo. The railroad approaches it from the east on a slight curve. At some distance east there is a cut, and from where the railroad leaves the cut it runs on a slight fill up to and over the crossing. Taking into consideration the curve, cut, fill, the lay of the land, the wing-fences, etc., described in the record, it seems to be substantially established that, for several hundred feet up the track, one situated as these boys would be, when at the corner made by said wagon road's turning on the right of way, could see a locomotive and train of cars approaching from the east. Such locomotive and train would be visible for a greater distance, gradually increasing, after the occupants of

such wagon would leave said corner and approach the track proper, say, to a thousand feet or more. The curve being to the south, the situation was such that an engineer on a west-bound train, sitting on the north or right hand side of the locomotive cab, would have his vision intercepted by the boiler, smokestack, and other locomotive appurtenances, so that he could see any one on the dirt road, who was immediately approaching this crossing from the south, for only a short distance of track, say three or four hundred feet, before the locomotive reached the crossing. In this condition of things, and on the 1st day of May, 1901, appellant's west-bound passenger train, on usual schedule time (as we understand the record) approached this crossing in broad daylight, running about a mile a minute. At that same time Charles L. Walker and Elbert Peak were wending their way to this crossing. They had driven said team and an empty wagon from said mine west along said public road to said corner and there stopped, as will presently appear. The boys were riding on the front bolster with their feet dangling close to the doubletree, Charles L. Walker driving. They, with their father, had delivered a load of timber props at the mine, and their father had lingered behind to get a receipt for the delivery. He had warned the boys to this effect: "It's pretty near train time, boys. Notice for the train and be careful and stop at the crossing." Elbert was 12 years old. Charles was 14 years of age, and, in the words of the record, "was in the habit of driving the team, was a quick, active, bright boy, and could see and hear well." Both of the boys were allowed to drive, and were used to driving the team over the crossing for a time estimated at two or three years in the business of timber hauling. The evidence is uncontradicted, also, that in addition to the warning of the father, they knew of their own accord and were conscious of the fact at the time that the train was about due. After stopping at the corner, they went their way and at the crossing a collision occurred. The locomotive struck the hind wheel of, and demolished, the wagon. Elbert, tossed to one side, jumped up and ran after the team, but Charles, was thrown into the air, was caught on the cow-catcher as he fell, and was found mangled and dead thereon when the train arrived at Huntsville, some two miles away. The fireman had been feeding his fire. When he resumed his seat the train was nearing the crossing and he saw, what the engineer could not see at that time, to wit, the boys turning the corner, looking the other way, and evidently intending to cross the track. He warned the engineer, who at once, he says, put on the full force of the air to stop, and thereupon also gave alarm signals. The engine was not reversed. The evidence shows that, at that going rate, the hard and full application of the air was the best means at hand, consider-

ing the safety of the passengers, to stop the train. At least there was no evidence contradicting the testimony of the engineer to the effect that he employed the best and safest means. To stop a train going as this one on that track, under the evidence presented to us in this cause, would take from 1,000 to 1,700 feet, and the evidence all points to the fact that the engine was much closer to the crossing than that when it was discovered that the boys were bent on crossing the track. There was evidence pro and con as to whether the speed of the train slackened, but, in view of the way the case was put to the jury by plaintiff, as will presently be seen, it becomes immaterial, and need not be further referred to. When the collision occurred, the dust of the train somewhat obscured the vision. The fireman and engineer were satisfied they saw both boys escape, and hence proceeded on their way to Huntsville, where, as said, Charles L. Walker's body was found prone upon the cow-catcher. There was substantial evidence that neither the bell was rung or the whistle blown as required by statute, and, per contra, there was strong countervailing proof on that issue of fact. All witnesses agree that alarm signals were given, but they were of no avail considering speed and distance.

It seems at this crossing there is a hamlet or collection of occupied dwellings, and that a number of persons saw the accident who, together with Elbert Peak, testified for plaintiff. Several witnesses say, with indefiniteness as to the exact location, that the boys at a certain time stopped, stood up and looked in both directions. To sum up on this point, we take it, the testimony shows this stop was made at the corner where the public road turns on to the right of way—that is to say, 50 feet from the railroad. Apposite to the fact just pronounced, the boy, Elbert Peak, testified in chief as follows: "As we came down there we turned south (north?) and stopped at the corner and got up and listened for the train, but we did not see or hear it, though we looked both ways; not seeing the train or hearing it we started to cross, and just as we got the horses on the track we saw the train coming * * * we stopped at the corner of the crossing before we went up there; at the corner of the fence as we got on the right of way." Again, on cross-examination, he said: "We drove up towards the railroad and we were going at a walk, walking slow; were down at corner when we stopped, looked, and listened." We think, furthermore, the evidence shows that neither of the boys looked to the east after that stop until they were, to all intents and purposes, on the track and in imminent danger. This sufficiently appears from the following: Elbert Peak, referring to persons they saw at the time of the stop and afterwards, testifies this way: "Did not see anybody else there; saw boys on right of way towards

Huntsville [i. e., west]; didn't know who they were; didn't notice to see what they were doing—whether they were standing still or walking; was looking over that way where they were part of the time, after I stopped, looked, and listened before going on the track; train was right on us when I first saw it, no farther than across this room; * * * we stopped at turn and looked for the train and listened and could not see or hear anything of it and we drove up; the team was a slow one and we could hardly get them to go, and he whipped them up, but by that time the train was right on us, but we did not stop to look or listen, neither of us; we stopped after we passed Mr. Riley, and drove up there without looking any more." It appears further from plaintiff's witnesses that two boys, Kaufmann and Floll, had been fishing and were west of the crossing, say 100 yards or so, coming east on the railroad track or right of way. As there is no evidence showing any other persons except these two boys west of the crossing, we infer they are the boys referred to by Elbert Peak as being on the right of way towards Huntsville. Kaufmann says, testifying for plaintiff: "When I first saw the boys [i. e., Elbert Peak and Charles L. Walker] they were on the crossing, pretty near at it; the horses were going pretty slow. When I first saw them they were looking towards us. I had some fish with me in a bucket. When the engine got close to them one of the boys looked around and saw it and jumped back and started to run for the hind end of the wagon, and the train hit them; he did not look around until the engine was at him; from the time I first saw them until the boy jumped up they were looking down in the direction of me." Floll was also produced by plaintiff and corroborated Kaufmann, and further testified as follows: "When we first noticed the boys they were in the wagon going towards the railroad; the horses' heads were about on the south rail—to the south rail, at the time I first saw them; the boys were looking at us; when they got up to the railroad they looked the other way and saw the train coming; at that time they were just going upon the track; * * * the horses were on the track before the boys looked around and saw the engine; they were across the track; the wagon was in the middle of the track when they looked around; when we first saw them they were on the railroad; they were looking towards us first, and when they got on the railroad, when about the middle of the wagon got there, they looked and saw the engine coming, * * * the horses were over the track when they looked; the horses' heads were about to the track when I first noticed them; at that time the boys were looking at us."

Plaintiff offered himself as a witness and testified to the following things, inter alia: "The name of the boy killed was Charles L. Walker, and not Elbert Walker." On the

question as to how the name Elbert Walker got into the original petition, the only explanatory testimony adduced came from him, and is as follows: "I could not tell you just how that name got in there, but it is wrong; just one boy was killed; I never had a boy named Elbert Walker." The engineer having testified for defendant that he gave the usual statutory crossing signals at the whistling post east of the crossing, the plaintiff was allowed in rebuttal to show that the whistling post in question was not 80 rods from the crossing, but, to the contrary, was nearly half a mile therefrom. To the offer of this testimony the defendant lodged the following objections: (1) As not being in rebuttal; (2) because there is nothing in the pleadings to indicate that it is a ground on which to base their charge of negligence in the petition that the defendant's train failed to whistle at the proper distance from the crossing; (3) that no charge is made in the petition filed in this case about the whistling post not being at the proper distance from the crossing; and (4) because the statutes of the state of Missouri do not require the whistling post to be located at any special point, and for that reason this testimony is incompetent, immaterial, and irrelevant. These objections were overruled, and exceptions saved. Objections were made by defendant to other testimony, but they are without noticeable merit, in our opinion, hence such testimony and objections will be passed by. In sur-rebuttal, defendant offered to show what the rule of defendant company was in regard to whistling for a road crossing. This evidence was objected to by plaintiff "as not being matter in rebuttal, and also as calling for a matter fixed by the statutes," and was by the court excluded on the theory that the case would not be reopened without the consent of the other party, who would not consent. At the close of plaintiff's case, defendant interposed a demurrer to the evidence, which demurrer was disallowed, and exceptions saved. At the close of the whole case, the defendant asked a peremptory instruction to the effect that the plaintiff was not entitled to recover under the pleadings and the evidence. This instruction was refused and exceptions saved.

Six instructions were given for plaintiff. Four of them were instructions severally defining "preponderance of evidence," directing the amount of the verdict, if a finding was made for plaintiff, and directing the forms to be employed. They seem in good form, and need not be noticed. Instructions 1 and 2 are set forth, partly to show the theory of plaintiff below, and are as follows: "(1) If the jury believe from the evidence in this cause that on the 1st day of May, 1901, the defendant's train approached the point mentioned in evidence, and that at such point a traveled public road crossed the defendant's railroad; and that the bell of the locomotive engine which hauled said

train was not rung at a distance of at least 80 rods from said crossing and kept ringing until said engine crossed said public road; and that the steam whistle attached to said engine was not sounded at least 80 rods from said crossing, and was not sounded at intervals until it had crossed said public road; and that plaintiff's minor unmarried son, Charles L. Walker, was approaching said crossing on said traveled public road, driving a road wagon, and that by reason of said failure of defendant's servants upon said train to sound said whistle or ring said bell as aforesaid, the said engine struck said wagon while said engine was crossing said public road, and killed plaintiff's said unmarried minor son, Charles L. Walker, and at the time of said injury the plaintiff's said son, Charles L. Walker, was exercising ordinary care in crossing said railroad, the jury will find for the plaintiff and assess the damages as \$5,000. The term 'ordinary care,' as used in this instruction, means such care as a person of ordinary prudence would exercise under like circumstances. (2) Negligence on the part of the deceased which will prevent the plaintiff recovering in this action must be such as directly contributed to his injury, and consists of the want of ordinary care. 'Ordinary care' means that degree of care which may be reasonably expected of ordinary prudent persons in the situation of plaintiff's said deceased son, at and just before the time the accident occurred, and in determining whether the deceased was using such care, you should take into consideration all the circumstances surrounding him at the time. And the burden of proving contributory negligence on the part of Charles L. Walker rests on the defendant, and unless the defendant has proved such contributory negligence by a preponderance of the evidence, you cannot find for the defendant on that ground." These instructions were objected to, and, exceptions being saved, they are now challenged as erroneous.

For defendant three instructions were given, which, as they further show the theory the case was tried upon, will not be amiss here, thus: "(1) The court instructs the jury that it is the duty of every person approaching a railroad crossing to look and listen for approaching trains, and that this is especially the case where such person has knowledge or is warned that a train is due; and that this duty to look and listen is a continuous duty that ends only when such railroad track has been reached and passed; and in this case even if the deceased, Charles L. Walker, stopped his team at or near the corner of the fence of the crossing, and looked and listened for the approaching train of which he had knowledge and had been warned of, yet if after so stopping and so looking and so listening, said deceased, Charles L. Walker, drove his team slowly on some 40 or 50 feet to the crossing, and onto

the railroad track in front of the rapidly approaching train, which was then dangerously near, and in full view, without at any time after so stopping near said corner, again looking for said train, and was thereby struck and killed, then said Charles L. Walker was guilty of such negligence directly and proximately contributing to his injury and death as will bar a recovery in this case; and if the jury so find the facts to be, their verdict must be for the defendant, even though the jury may find that the defendant's servants operating said train were guilty of negligence with respect to sounding the whistle and ringing the bell on the engine. (2) The court instructs the jury that even though they may find that the train which killed Charles L. Walker was then and there running at 50, or even 60 miles an hour, yet such rate of speed is not in itself a negligent act at the time when, and place where, said train was said to be running. (3) The court instructs the jury that the burden of proof is on the plaintiff to prove by the weight of the evidence the negligent acts charged in his petition, and unless the jury believe and find that the plaintiff has so proved said alleged negligent acts, by the weight of the evidence, fairly considered, then the verdict of the jury must be for the defendant. If the jury find for defendant, the form of the verdict will be: * * *

Objections were made to statements of plaintiff's counsel in his address to the jury and exceptions saved, but the matter involved is not of sufficient consequence, in our opinion, to merit serious attention, and will be treated as by-matter. The jury returned a verdict in favor of plaintiff for \$5,000, and defendant company duly appealed.

1. On this record, it must be held the proof was of such character that the allegation in the amended petition predicated a recovery upon alleged negligence in failing to stop the train after the perilous condition of Charles L. Walker was discovered, or should have been discovered, was not supported by evidence. Respondent recognized and acquiesced in this situation by asking no instruction submitting that theory to the triers of fact.

2. On the other hand, we do not understand that appellant seriously contends a constitutional question is pending before us predicated of the failure of the United States Circuit Court to retain the jurisdiction once graciously handed over by the state court. Complaints of errors committed by that court, if any, should be poured into the ears of the federal court having rightful jurisdiction (and disposition) to correct them. Any other practice would breed confusion and discord. A court having superintending appellate corrective jurisdiction may well be likened to a principal, and by that token the doctrine of respondent superior has sensible application. Then, again, we do not know whether or no appellant is a citizen of Ohio.

All we see by this record is that it said so, and it prayed to be sent to the federal court. Its prayer was answered, but that court turned a deaf ear, and refused to entertain jurisdiction. For aught we know the United States Circuit Court found, as a matter of fact, that appellant was not a citizen of Ohio, or that some fatal infirmity existed in its papers. *Hinc*—if we may be allowed so to speak—*hinc illæ lacrimæ*, perhaps. When the case came back to the state court, what was that court to do? Refuse jurisdiction and again transfer it to the federal court, only to have it handed back once more? It would be hard lines, indeed, if respondent's cause had no abiding place whatever, and if no court would open its door for its entertainment. Such game of shuttlecock and battledore, once well taught and well played, would make ducks and drakes of the law—would make of respondent's cause nothing but a voice crying in the wilderness for some path leading to a courthouse. The federal court had jurisdiction to pass upon its own jurisdiction, and to discern and determine the boundaries thereof. The wisdom and grounds of its determination, we ought not to examine into or sit in judgment upon. The state court could do no less, or no more, than take the case back at the hands of the court it had sent it to. Appellant appeared, filed an answer, submitted to a trial, and now in its brief does not point out to us any constitutional infirmity in the jurisdiction of the state court, nor does it put its finger upon any specific clause of the federal Constitution or the state Constitution which was impinged upon by the reassumption of jurisdiction by the state court. The constitutional questions will, therefore, be put aside.

3. Appellant's objections to the introduction of evidence by respondent in rebuttal tending to show, and in fact showing, that the whistling post was nearly 160 rods, instead of 80 rods, east of the crossing, are without merit. This evidence was typical matter in rebuttal, because, appellant introduced testimony showing that the crossing signals were given, not 80 rods at least from the crossing, but at the whistling post. While appellant was putting in its case was the first time such evidence appeared. By this evidence, it was, of course, assumed that the whistling post in question was the proper place to give the crossing signal. Now, the statutes require the signals to be given at least 80 rods from the crossing. Rev. St. 1899, § 1102. Respondent's rebutting proof tended to destroy the very assumption upon which appellant's testimony was based, to wit, that that particular whistling post was the proper place to give signals. Nor was it necessary for respondent to have plead that the whistling post was not at the proper place. That matter was no constitutive element in his cause of action. The arrangement of whistling posts would seem largely a matter of concern as a convenience to rail-

road employes in complying with the statute. If the post is at the wrong place, such fact will not relieve a railroad company from liability, because the whistling must be done at the place designated by the Legislature, not by a post. The same disposition must be made of the ruling of the court upon appellant's offering evidence in surrebuttal to show what the rules of the company were in regard to whistling for a road crossing. If the offered evidence had tended to show that the whistling post was at the proper place, it would have been competent in surrebuttal and should have been allowed, because that fact had never been challenged as a fact until respondent challenged it in his rebutting evidence. But the offer was not to show that the whistling post was 80 rods from the crossing. It was merely to show what the rules of the company were relating to whistling. Cases might arise where the whistling rules of the company might be pertinent. But in this particular instance the rule laid down by statutory law ought to be the controlling rule, and not the rules adopted to regulate the corporate family concerns of appellant, unless we are to adopt the novel notion that such rules may be allowed to override, or modify the application of, express statute. In conclusion, we incline to the view that of two antagonistic voices, each calling for obedience—one of the law, and one of a company rule—the voice of the law has an obstinate and driving preference for the serious purposes of jurisprudence.

4. By failing to produce here the order, if such there was, of the court, nisi, overruling the motion to strike out the amended petition and an exception to that ruling, and by answering over, appellant waived all right to complain of any departure in the amended petition, considered merely as a departure and without reference to the statute of limitations (*Liese v. Meyer*, 143 Mo., loc. cit. 556, 45 S. W. 282, and cases cited) and hence may not be heard to complain now of such ruling. So, too, the ruling of the court on appellant's motion to strike out parts of respondent's reply, in so far as such ruling affected the mere question of departure, is disposed of by the holding just made, because, when the motion was filed, appellant had waived the departure as such by previously filing an answer. Nor do we consider the objection that the new matter plead in reply constituted an amendment to the original petition not permitted in a reply, as well taken, because the reply was directed to appellant's answer to the amended petition. In fact, the original petition was functus officio, and no matter plead in such reply could be held to be pertinent or impertinent by mere reference to the original or abandoned petition, as contended by appellant, but must be measured by a reference to the amended petition alone. In that amended petition respondent sued for the death of Charles L. Walker. In answer ap-

pellant plead the statute of limitations to any cause of action arising from the death of Charles L. Walker. The reply thereto was, in substance and effect, directed to the avoidance of that plea and was well enough, judged of from the form of the precise objection now under review. The other and more serious question raised on the present motion refers to the statute of limitations of one year, and, as that is fully preserved by the answer to the amended petition, and arises as well on the demurrer to the evidence as on the peremptory instruction asked by appellant, it may be considered presently in connection with those matters.

Although appellant by answering over waived all questions of mere departure, yet there is preserved by the answer to the amended petition the same question in the form of a substantive defense—the answer pleading the statute of limitations—and if it be true that the cause of action stated in the amended petition is a new cause of action, then the plea in bar is well presented. The section invoked as a defense (section 2868) was repealed in 1905 (*Laws 1905*, p. 137) but, as in force up to that time, reads: "Every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of such action shall accrue;" one of the preceding sections of the chapter being the section of the damage act upon which this suit is based. As said, the original petition was for the death of Elbert Walker, while by the amended petition plaintiff sues for the death of Charles L. Walker. It may be well to set forth with some precision the allegations of the original petition referring to Elbert Walker, thus: "Plaintiff states that he is the father of one Elbert Walker now deceased; that the mother of said Elbert Walker died many years ago; that said Elbert Walker, at the date of his death hereinafter mentioned, was a minor, 14 years old and had no children and was unmarried. * * * Plaintiff states that on the 1st day of May, 1901, while said deceased minor, Elbert Walker, was in the exercise of due care, etc. * * * he, said Elbert Walker, was by the negligence, etc. * * * run upon, into and against * * * by reason of which he, Elbert Walker, received serious and grievous bodily injuries, from which he instantly died. * * *" The rule of law applicable seems to be that, "where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point; but where the amendment introduces a new claim, not before asserted, then it is not treated as relating to the commencement of the suit, but as equivalent to a fresh suit upon a new cause of action; the running of the statute continuing down to the time the amendment is filed."

Lilly v. Tobbein, 103 Mo., loc. cit. 490, 15 S. W. 618, 23 Am. St. Rep. 887; *Buel v. Transfer Co.*, 45 Mo., loc. cit. 563. *Valliant, J.*, speaking to this question, said for this court in *Bricken v. Cross*, 163 Mo., loc. cit. 453, 64 S. W. 100, that: "The question whether the date at which the defendants' 10 years' possession should have been complete to give them title should be that of filing the original, or that of filing the amended, petition, depends on the question of whether the amended petition merely restated, in more accurate words, the same cause of action that was stated in the original, or stated a different cause of action, or for the first time stated any cause of action at all." In applying the foregoing rule, the first inquiry ought to be: What is the proper judicial attitude toward amendments with reference to the statute of limitations? The answer, in the language of *Napton, J.*, in *Lottman v. Barnett*, 62 Mo., loc. cit. 170, is: "Amendments are allowed expressly to save the cause from the statute of limitations, and courts have been liberal in allowing them, when the cause of action is not totally different." The rule thus announced is steadily applied. *Lilly v. Tobbein*, 103 Mo., loc. cit. 490, 491, 15 S. W. 618, 23 Am. St. Rep. 887; *Courtney v. Blackwell*, 150 Mo., loc. cit. 271, 272, 51 S. W. 668.

Again, the legislative policy evidenced by statutory provisions for amendments, which provisions are highly remedial, and have been construed, *ex industria*, by the courts to further the very life and purpose of their enactment, should be kept in mind. Thus, by Rev. St. 1899, § 657, it is provided that: "The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any * * * pleading, * * * by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." By section 659 it is provided that at every stage of the action the court shall disallow any error or defect in the pleadings not affecting the substantial rights of the adverse party. By section 660 it is provided that, even after final judgment, the court may correct a mistake in the name of a party or a mistake in any other respect or rectify any mistake or imperfection in matters of form, in furtherance of justice. By section 672 it is provided that "when a verdict shall have been rendered in any cause, the judgment thereupon shall not be stayed, nor shall such judgment, or any judgment after trial or submission, * * * be reversed, impaired, or in any other way affected by reason of the following imperfections, omissions, defects, matters or things, or any of them, namely: * * * Tenth, for any mistake in the name of any

party or person * * * when the correct name * * * shall have been rightly alleged in any of the pleadings or proceedings." By section 676 it is made the duty of a court to construe provisions of law relating to pleadings, and to adapt the practice thereunder so as to secure parties from being misled; to place the party not in fault as nearly as possible in the same condition he would be in if no mistake had been made; to distinguish between form and substance, and to afford known, fixed, and certain requisitions in place of the discretion of the court or judge thereof. Again, by section 865 we are prohibited from reversing a judgment unless we believe that error was committed against appellant materially affecting the merits of the action. The trouble is not with the legislative policy outlined in the foregoing provisions, nor with the rules of law relating to amendments of pleadings, but the pinch comes in applying that policy and those rules to concrete cases. Broadly speaking, it may be said that under cover of an amendment a new cause of action may not be asserted, whether the statute of limitations is involved or not, but such departure, where the statute of limitations is not involved, may be waived by answering over, and may be so waived if the statute of limitations is involved, unless such statute be pleaded as here, by the answer. On the other hand, in blandly applying the statutes relating to amendments of pleadings, the courts have said that a name, even of a party to a suit, is but a means of identity. Thus, process served upon the right person by the wrong name may be, by amendment, made good. *Parry v. Woodson*, 33 Mo., loc. cit. 348, 84 Am. Dec. 51. So, too, in *Harkness v. Julian*, 53 Mo. 238, it was held that a suing administrator may amend by correcting an averment as to his title to the note in suit. In that case, by the first petition plaintiff sued as an administrator of *Elam*. By an amended petition he sued as administrator of *Dysart*, assignee of *Elam*, and the amendment was allowed. So, in *Wellman, Administrator, v. Dismukes*, 42 Mo. 101. That suit was to enforce a vendor's lien. The defense was a failure of title and consideration, and defendant also asked to recover payments made. At the trial it was shown that one *Glasscock* had become vendee of *Dismukes*, and was entitled to stand in his shoes and recover back any money paid on the original purchase of the land. On this showing of facts, the pleadings were allowed to be amended to bring in *Glasscock*, who appeared, answered, and had judgment in his favor. In *Lilly v. Tobbein*, *supra*, an amendment was allowed to a petition in a suit commenced in the name of an unincorporated society, a church, to establish a rejected will. After the five years allowed for commencing such suits, an amendment was held well made which substituted the names of members of

the church, suing in their own behalf and in behalf of other church members, as parties plaintiff.

The test of an allowable amendment has been formulated in the pronouncement that the same evidence and the same measure of damages are the criteria of judging of the allowableness of an amendment. *Scovill v. Glassner*, 79 Mo. 449; *Liese v. Meyer*, supra. But the distinction has been well made that if the test is to be simply that the quantum and quality of the evidence should be precisely the same, then the very purpose of allowing any amendments whatever would be defeated. *Burnham v. Tillery*, 85 Mo. App. loc. cit. 458, 459; *Rippee v. Railroad*, 154 Mo., loc. cit. 364, 365, 55 S. W. 438. It has been further said that the quantity of the evidence is not so much the question as is the quality or character of the evidence. *Burnham v. Tillery*, supra; *Clothing Co. v. Railroad*, 71 Mo. App., loc. cit. 246 et seq. In the latter case many cases were reviewed and cases elsewhere cited with approval holding that the statutory requirement that an amendment "shall not change substantially the claim or defense" refers to the general identity of the transaction forming the cause of complaint; to cases holding that where the gist of the action remains the same, although the alleged incidents are different, an amendment is well enough; to cases holding that where the amended petition is merely an alteration of the modes in which defendant has broken the contract or caused the injury, it is not the introduction of a new cause of action; and to cases holding that one test applied is: "Would the recovery on the original complaint be a bar to a recovery on the amended complaint?" And see an illuminating discussion of the matter now up, by Goode, J., in *Stewart v. Van Horne*, 91 Mo. App. 647. It may be conceded there are discords in the decisions, but we are of the opinion that, in the light of the foregoing case law, and keeping in mind the liberality allowed in making amendments to get at the right of the matter, to avoid costs and bring lawsuits to an end, to avoid the hardships of the statute of limitations, on the one hand, and at the same time, on the other hand, to protect defendants from the injustice of grafting upon one cause of action an entirely different one (i. e., putting new wine in old bottles), or grafting upon no cause of action whatever a good cause of action, the amendment in this case was well enough, because it will be seen that there was but one boy killed in the collision and defendant was notified of that fact. There could be no departure, then, on that behalf in the amendment. It will be seen, further, that the identity of the boy killed was established by his age, 14 years, by the date of the accident, May 1, 1901, by the fact that plaintiff was the only surviving parent of the boy that was killed—all these means of identity were precisely the same in both petitions, and are

entitled to significance in determining the question. So, too, the measure of damages cannot be held to be otherwise than the same, and, moreover, the quantum and quality of evidence called for are precisely one and the same under both petitions. It would be a harsh ruling to hold that although the law permits contracts, statutes, and documents to be judged of by their true intent, discarding mere self-evident tongue and pen lapses, yet that a different rule would be applied to pleadings. In this case, there was no boy named Elbert Walker. The father, in the first petition, was self-evidently suing for the actual boy killed, and not for a myth. He had but the one boy whose mother was dead, and we think defendant could not have been misled or otherwise injured in its substantial rights by the amendment, unless we are willing to hold that a mere mistake, once made, in the Christian name of the person killed, ought to be irretrievable after one year, and hence determinative of the very right of a case—all of which we are unwilling to do.

6. The remaining questions relate to the instructions, and the only material question involved, in our opinion, is whether appellant's peremptory instruction or demurrer to the evidence should have been given. It was once contended that the very heart of the legislative intent in the statute requiring a bell to be sounded for 80 rods on approaching a crossing, or a whistle to be blown at least 80 rods therefrom and sounded at intervals as the crossing is approached, was to avoid the distressful destruction of life and limb at crossings, arising from the momentary lapse of vigilance or other inadvertences of those about to cross a railroad track on a public highway, which inadvertences and lapses, mere minor negligences all, are incident to every phase of human life—that is to say, if one be distraught, preoccupied, dull, or forgetful as he approaches such crossing, the whistle or sounding bell, presaging doom in its note or stroke, may, "as coming events cast their shadows before," recall him to himself, and, perchance, prevent impending results. Indeed, as a matter of a priori reasoning, it might well be said that, as a traveler on the public road and a railway company have mutual and coexisting rights at a public crossing, and, as neither may know when the other may propose to assert that right, the one who intends to occupy such crossing at great speed with such tremendous and death dealing machine as a locomotive engine, should always be held to announce its intention. But all such philosophic speculations are in nubibus, because the courts, in adopting a working theory for our statute, early proceeded on the theory that the man running the locomotive and the man driving the team are both but men after all. Both may have their moments of inattention and inadvertence, and, therefore, both have the corresponding duty of care and

caution. So that while the one (by statutory command) must look for the crossing and give the statutory signals to save life, yet the other (by judicial construction) must also take a hand in saving his own life, and must stop, if need be, so he can hear and look and listen to avoid peril. The logical sequence is that if negligence on the one side and negligence on the other concur there can be no recovery, and such is the uniform rule except in those states where the doctrine of comparative degrees of negligence holds. The statute, thus construed, has been long left intact by our lawmakers and accordingly must be held satisfactory, or it would have been modified. There being no statute regulating the rate of speed at country crossings, no particular rate of speed can be held negligent, and so the court instructed the jury in this case.

The answer pleaded the contributory negligence of Charles L. Walker as a concurring act of negligence avoiding liability. The evidence is undisputed. The boy was of bright intelligence, 14 years of age, and had good eyesight and hearing. Not only so, but there was no confusing circumstances accompanying the accident, no other trains approaching, no other tracks to watch, no other engines puffing as if to start. The view to the east was plain from the corner where the wagon stopped and they looked and listened, for several hundred feet. The train approached the crossing on a slight fill. It may be, as it was going so much as 88 feet per second, that at the time the boys stopped at the corner it was not in sight, for they were obliged to travel 50 feet to get to the track and were going at, say, 3 miles per hour—a mere walk—and a computation will show that while they were covering that 50 feet the train would run nearly 1,000 feet. If we add to that the time lost in starting after their stop and look, we are impressed with the fact the train was not in sight. But it must have come in sight shortly thereafter, and, what is more to the point, while decedent was in complete safety. The evidence and circumstances unitedly are such as to show, beyond cavil or doubt, that neither of these boys ever looked to the east again. Nay, the positive evidence is they looked to the west, and were quite occupied in watching some other boys who were on the right of way to the west returning from fishing. It was full day, and in the middle of the afternoon. They went slowly up the slope to the track, and, when on it, turned their eyes to the east, and became aware for the first time the train was upon them. In this condition of things an adult, male or female, would not be allowed to recover, as a matter of law. *Guyer v. Railroad*, 174 Mo. 844, 73 S. W. 584. *Green v. Railroad* (decided at our October term, 1905, and not yet officially reported), 90 S. W. 805; *Schmidt v. Railroad* (Mo. Sup.) 90 S. W. 36. And under similar circumstances it has been held, by a divided

court, that a bright, intelligent boy, 11 years old, was guilty of contributory negligence, as a matter of law. *Payne v. Railroad*, 136 Mo. 562, 38 S. W. 308. The case at bar is much more pronounced, for these boys knew the train was about due. It was its usual time, and they had been warned and partly acted upon the warning. Besides, they were familiar with the crossing and the danger incident thereto. They had hauled timber over it for several years, and, whatever the preconceived views of the writer be, it seems the case presents a condition of things in which there can be no recovery unless the proposition in hand be threshed over anew and the doctrine of this court winnowed and reformulated. It has been held by us that at a certain age, to wit, eight years, contributory negligence will not be imputed, as a matter of law. *Holmes v. Railroad*, (Mo. Sup.) 88 S. W. 623, not yet officially reported. In *Graney v. Railroad*, 140 Mo. 89, 41 S. W. 246, 38 L. R. A. 633, it was held that on the mere fact of age alone (11 years and 9 months) a boy, small of his age, where the case gave no information in respect to his intelligence, knowledge of the running of trains, or physical activity, the court would not, as a matter of law, declare he was guilty of contributory negligence in standing so near the track as to be in danger of rotary air suction while a train is passing. In that case the boy was standing from two to three feet from the west rail of the track upon which the train was passing. When about one-half or two-thirds of the train had passed, he was seen to turn around, fall upon the ground and roll over under the train, and evidence was introduced showing that his fall and rolling over were produced by the suction or whirling motion of the air caused by the motion of the train. This case was here again, and is reported in 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153. There it was held, *inter alia*, that *Graney's* brightness and intelligence (presumably shown at the second trial) placed him on the same plane as *if sui juris*. Page 679 of 157 Mo., page 279 of 57 S. W. (50 L. R. A. 153).

It keenly touches the heart to see a boy's life crushed out as this one's was, and care must be taken to see that a delicate judicial equipoise is not lost in considering such case. It has been said in some cases that the true rule is, in effect, that where there can be two opinions among reasonable men based on the evidence upon the question of contributory negligence of a youth, the question should be sent to the jury. But where there could be but one opinion about it among reasonable men, it is a matter of law for the court. *Campbell v. Railroad*, 175 Mo. 161, 75 S. W. 86. The rule of law that a youth should not be held to the same degree of care as an adult is one inherent in the nature of things and springs spontaneously in the human mind, because neither the law, nor the parent, nor society judges a youth as an

adult, and this is in accord with *jus naturale*. Thus, it was held by one entitled to speak *ex cathedra*, as follows: "When I was a child, I spoke as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things." Nevertheless, the known danger from a locomotive is as apparent to a bright, experienced boy of 14 as to an adult, and the necessity and office of using his eye is such a primal and simple matter as to be well within the grasp of that age. Can it be said that if this boy had blindfolded himself and in that condition had driven across the track, after the warning he had received and when it was shown that he had knowledge the train was due and might be any instant upon him, the appellant would be liable? We think not. If, instead of blindfolding himself, he did what was the same—that is, turned his face and looked in the other direction, is the principle not the same?

But in this case it is not necessary to allow the case to pass off on the question that, as a matter of law, we should hold that this boy was *sui juris* and guilty of contributory negligence, because, as will be seen by the instructions given for the plaintiff, he asked to have the case submitted on the theory that the boy was *sui juris*, and the degree of care invoked by him in instructions 1 and 2 is the degree of care expected and exacted of ordinary prudent persons. Following that, the defendant was allowed an instruction putting the case to the jury on the theory that the boy was *sui juris*, and that his duty to look and listen for the approaching train was not entirely performed by stopping 50 feet away, and slowly, and without again looking, approaching the track. The case having been tried below on that theory must be reviewed here on the same theory. *Chinn v. Naylor*, 182 Mo., loc. cit. 594, 595, 81 S. W. 1109. On this view, there is no escape from the conclusion that the court, on the undisputed facts, instead of submitting the case to the jury, should have taken the case from the jury. Other objections leveled at respondent's instructions need not be considered.

The cause is accordingly reversed. All concur; MARSHALL, J., in the result.

COBE v. LOVAN.

(Supreme Court of Missouri, Division No. 1. Feb. 22, 1906.)

1. BUILDING AND LOAN ASSOCIATIONS—CORPORATE POWERS—TRANSFER OF MORTGAGE LOAN.

The transfer of a mortgage loan by a solvent building association to another association is *ultra vires*.

2. SAME—FORECLOSURE BY TRANSFeree.

A solvent building and loan association unlawfully transferred a mortgage loan to another association, and thereafter foreclosure proceedings were instituted by the transferee, under the direction of the president of the transferrer association. *Held*, that the foreclo-

sure was void, since, even if the transfer did not pass title to the security, foreclosure by the transferrer association was, by Rev. St. 1889, § 2813, placed under the supervision of the board of directors.

3. EJECTMENT—DEFENSES.

In ejectment by one relying upon a deed given on the foreclosure of a trust deed, defendant, under an answer stating facts showing such deed to be void, was entitled to recover, though he did not ask to be permitted to redeem.

4. VENDOR AND PURCHASER—BONA FIDE PURCHASERS.

One claiming under a quitclaim deed given by the grantee in a deed on the foreclosure of a trust deed is charged with notice of the contents of the trust deed, and of the constitution and by-laws of the building and loan association which was the beneficiary in the trust deed, to which constitution and by-laws reference was made therein.

5. ESTOPPEL—FAILURE TO ASSERT TITLE.

On the foreclosure of a trust deed the property was sold for \$50, and though the foreclosure was void, the landowner permitted the deed to remain on record and unchallenged, and the assets of the purchaser at the foreclosure were purchased by plaintiff for \$80,000. *Held*, that the landowner was not estopped to assert the invalidity of the deed as against the purchaser of the assets; the transaction in question being within the *maxim de minimis*.

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Action by Ira M. Cobe against W. J. Lovan. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Orr & Luster, for appellant. W. P. Campbell, for respondent.

LAMM, J. Cast below in ejectment for block 14 in Maxey's addition to the city of Willow Springs, Cobe appeals.

The petition was in conventional form, laying the ouster as of March 15, 1902. The answer admits possession, denies all other averments, and pleads certain affirmative defenses, which may be summarized as follows: (1) Adverse possession for 10 years under a claim of ownership; (2) that plaintiff and those under whom he claims have not been seised or possessed of the premises within 10 years; (3) that plaintiff claims title by virtue of a foreclosure by advertisement and sale under a trust deed, executed to the Willow Springs Building & Loan Association, a corporation organized under article 9, c. 42, Rev. St. 1889, said deed of trust authorizing the sheriff of Howell county, for the time being, upon the request of said association, to make a sale on default of the payment of interest, dues, and penalties as provided in the deed of trust and the constitution and by-laws of said association, for a period of six months. That such sheriff sold and conveyed the premises, but his proceedings were void for the reason that he was not requested by said association, or by any one authorized to act for the same, to advertise and sell said premises; (4) the sheriff's advertisement, sale, and conveyance, as acting trustee, are alleged

to be void because there was no default; and (5) are void because they occurred several years after said association ceased to do business. Issue having been joined, the state of the proof was such that the court ruled against respondent's defense of the statute of limitations, thus leaving as the sole issue the validity of the trustee's deed from the then sheriff of Howell county, as acting trustee under the building and loan association deed of trust. Stated in free outline, appellant contends that the irregularities, if any, shown in the proceedings leading up to the sale, are not fatal to his right to recover, under the rule laid down in *Schanewerk v. Hoberecht*, 117 Mo. 22, 22 S. W. 949, 38 Am. St. Rep. 631, and later decisions following that case, and the cause should be reversed. Stated in free outline, respondent contends that such irregularities were shown as rendered the trustee's deed void under the rule laid down in *Lovelace v. Pratt*, 163 Mo. 70, 63 S. W. 383, and, hence, his judgment, nisi, should stand.

The facts, much condensed and to some extent stated in their legal effect, are as follows: Lovan resides in Willow Springs on the locus in quo as a homestead. Cobe resides in Chicago and is vice president of the Assets Realization Company. Lovan and Ophelia, his wife, on the 25th day of March, 1890, conveyed the premises to Wilkinson, trustee, party of the second part, for the benefit of the Willow Springs Building & Loan Association, party of the third part, to secure a note dated March 17, 1890, due in one day to said association, promising to pay \$300 for value received with interest from date at the rate of 10 per cent. per annum, payable monthly on a given Monday, which note contains the following further promise: "And I promise to pay said association my monthly dues of \$4 each month, as stockholder in said association, with all penalties assessed on my said stock, according to the constitution and by-laws of said association." The deed of trust contained a provision that if Lovan paid the interest when due and payable, and paid said dues and penalties according to the tenor and effect of the note, and said constitution and by-laws, then the deed should be void. But otherwise, if he failed to pay said interest when due, or failed to pay his monthly dues as stockholder as they accrue, then, in either event, the deed should remain in full force. A provision was inserted for the substitution of the sheriff as trustee upon the absence of Wilkinson from Howell county, providing that, in that event, "the then acting sheriff of said county, upon the request of the party of the third part, shall sell the property herein described, or so much thereof as may be necessary to pay said note, interest and dues and penalties thereon." Provisions relating to notice, place of sale, and the executing of a deed to the purchaser are not questioned, and need not be set

out. The trust deed also contained the usual narration that: "Any statement of facts or recital by said trustee in relation to the nonpayment of the money herein secured to be paid, and of the amount due herein, or any default in the conditions of this trust deed, the advertisement, sale, receipt of money and execution of the deed to the purchaser, shall be received as prima facie evidence of such fact." Certain by-laws of the Willow Springs Building & Loan Association were introduced in evidence. In a nutshell, they provided that there should be a president, a vice president, a secretary, and a treasurer and seven directors. That such officers and directors should constitute the board of managers of the business of the Association. That every person who subscribed stock should then pay \$1 on each share and thereafter pay a like sum to the association at each stated meeting of the board of managers. That the stated monthly meetings of the board of managers should be on the first Monday after the 15th of each month for the purpose of receiving memberships, monthly dues and fines from the shareholders, interest on loans, and to loan the funds of the association and the transaction of other business. Lovan owned three shares. The date of his membership does not appear, and hence no account of payments prior to his loan can be rendered, but on giving his note for \$300 and executing his deed of trust, he received \$135 from the association. Thereafter, at the stated meetings of the board of managers in Willow Springs, he paid \$5 monthly for the months of April to November, 1890, inclusive, making his last payment on December 2, 1890. That date was also the last time the board of managers ever met to receive dues or for any other purpose. From that day to this, as gleaned from the corporate books, there was not a corporate act done or line written by the directors, or the board of managers, or by the corporation itself. The corporate story of what happened may be painfully spelled out in the following from its "Journal Book":

Page 35 of Journal Book is in words and figures as follows: "Willow Springs, Sept. 18th, 1890. Board of Managers and Stockholders of Willow Springs Building and Loan Association met in called meeting for the purpose of considering the question of merging or transferring the Willow Springs Association into the Phoenix of St. Joe, Mo. Mr. Robinson, agent of the Phoenix, explained the Phoenix method of doing business and submitted a proposition for merging the Association into theirs. On motion of Mr. Tetter a committee consisting of W. E. Drew, E. H. Farnsworth and S. W. Wilkinson was selected to ascertain the wishes of the stockholders of this Association as to merging the two Associations. No other business, the meeting adjourned. E. H. Farnsworth, Sec."

Page 36 was as follows: "Willow Springs, Mo., Oct. 28th, 1890. Board of managers met.

Quorum present. After some discussion motion to adjourn to Saturday night, November 1st, 1890. Carried. Adjourned. E. H. Farnsworth, per Patterson."

Page 37 was as follows: "Willow Springs, Mo. Nov. —, 1890. Board met. No quorum. On motion adjourned to meet on December 2nd, 1890. E. H. Farnsworth, Sec."

Page 38 was as follows: "Willow Springs, Mo., December 2nd. Board managers met. Quorum present. Minutes of Sept. 1st-18th and October 28th approved. Report of committee to arrange transfer to Phoenix filed and accepted. Show vote to transfer, Drew, Teeter, Wilkinson, T. Hughes absent, Randel, Lowe, Gaylord, Withaup, ab., Thomas. Yeas 8, absent 2. Bills allowed: S. W. Wilkinson \$25.00 services. E. H. Farnsworth \$55.00 services. S. W. Wilkinson \$5.25 record. Moves to prepare release by secretary. Motion to accept prop. of Phoenix carried. D——, Teet, Wilk, G——, Thos., Farn., Six yeas. Motion to presdt. transfer bills rec. to Phoe. Motion carried to settle treasurer. Gorman and Layker. Report Treas. Allowed withdrawn.

John Kelly.....	\$14 85
Frank Sass.....	40 90
I. S. McDonald.....	18 42
Mrs. S. E. Davids.....	16 75
H. J. Rowe.....	11 25
Farnsworth.....	20 48
	49 63
	22 63

\$194 98"

Meditation, more or less profound, on the foregoing, may result in a conclusion that there was a building and loan association in St. Joseph, Mo., known as the Phoenix; that on September 18, 1890, one Robinson, representing the Phoenix, appeared at Willow Springs before the board of managers, in which meeting possibly some stockholders participated, and there discussed with them a pending proposition of the Willow Springs Building & Loan Association's going out of business and "merging or transferring" itself in or over to the Phoenix; that thereupon a committee was appointed to ascertain the wishes of the stockholders; that another meeting was held by the board of managers in October, at which the matter was discussed but no action taken; that in November, no quorum was present at the meeting; and that on December 2d the board of managers met, eight being present and two absent. If the narration in the record of this meeting, to wit, "Motion to accept prop. of Phoenix carried," be construed into the acceptance of a pending proposition (of unknown terms) on the part of the Phoenix Loan Association to take over the assets and assume the stock and other liabilities of the Willow Springs Building & Loan Association, it may be seen what happened. If the further narration therein, to wit, "Motion to presdt. to transfer bills rec. to Phoe.," be eyed closely and treated to a liberal gloss, it will be further seen what

happened, to wit, that the president of the Willow Springs Association was authorized by this cryptogram to transfer all the bills receivable belonging to the Willow Springs Association to the Phoenix Loan Association of St. Joseph, Mo. What the next narration means, to wit, "Motion carried to settle treasurer," would depend somewhat on the local usage of the word "settle" and does not call for present adjudication. Presently, after this original and astonishing mortuary literature was spread of record, and in the same year, the Phoenix Loan Association notified Lovan that it held his deed of trust and "wanted so much money." To this demand, he stood mute. The record shows that the Phoenix Association at that time held Lovan's paper with indorsements thereon, presumably transfers made pursuant to the action of the board of managers heretofore noted. Shortly thereafter there appeared in Willow Springs the president of the Phoenix Association and other of its representatives, who made demands upon Lovan and wanted to know what he was going to do. To these demands, he replied that he owed nothing to the Phoenix Association; that he got no money from it; that the Willow Springs Association had no right to transfer his loan to the Phoenix Association; and, further, that he owed the Willow Springs Association, but could not pay it because it was not there to pay. Thereat, the Phoenix people demanded an out and out deed to the property, which Lovan refused to make. They then asked "what he would do," and he replied, "nothing," whereupon they went their ways and he saw them no more. Matters remained in statu quo until April, 1891, when there appeared an advertisement by Wilkinson, trustee, foreclosing Lovan's deed of trust. On the morning of the sale day, Lovan notified said trustee to the effect that he had no right to sell under the mortgage, and had better not do it; that there was no Willow Springs Building & Loan Association. The purport of this conversation, as we construe it, is that Lovan based his objection on the theory that he had been ready to pay the Willow Springs Association, in accordance with the constitution and by-laws, at the monthly meetings or its board of managers and as nominated in his bond, but had been unable to find it to do so. This notice resulted in the sale lapsing. Time ran on and finally, in 1897, one Drew, who was the president of the Willow Springs Association at the time of its *felo de se*, then seven years gone, made a written request, over his title as such president, to the sheriff of Howell county to make a sale under the deed of trust on October 11, 1897. It seems Drew appeared in Willow Springs and gave an advertisement signed by such sheriff, as acting trustee, to the printer, and at that time notified him "that the association at St. Joseph had bought the stock of the Willow Springs Association and that he was representing the St. Joseph Associa-

tion; that he was closing matters up for them." Thereafter, on October 25, 1897, at a sale made, the property was struck off to the Phoenix Loan Association of St. Joseph, Mo., at the sum of \$50, and such sale was followed by a trustee's deed reciting, *inter alia*, that the powers of the trustee were executed "at the request of the legal holder of said indebtedness." This deed was placed of record, and matters again lagged along until July 15, 1899, when, upon the application of the state supervisor of building and loan associations, the Phoenix Loan Association was placed in the hands of receivers by the circuit court of Buchanan county. *State ex rel. v. Phoenix Loan Association*, 159 Mo. 102, 60 S. W. 74. Thereafter its affairs seem to have come within the jurisdiction of the United States Circuit Court at St. Joseph, and, on the 23d of February, 1902, a decree of the federal chancellor was handed down confirming a sale to appellant herein of all the assets of the Phoenix Loan Association, and the existing special master in chancery and receivers were ordered to make conveyances effectuating such confirmed sale. Thereafter, by their several quitclaim deeds, said receivers and said special master in chancery conveyed the locus in quo to appellant, Cobe, who thereupon instituted this suit, with the result first aforesaid.

Was that result right? We think so, because:

1. An incorporated building and loan association differs from an ordinary corporation. Among other ways, in the fact that in an ordinary business corporation, stock is subscribed and either paid for at the time, and thus becomes the property of the shareholder, or it is partly paid for and becomes his property subject to future calls upon his subscription, while in a building and loan association the stock subscriber is not the out and out owner of his stock from the start. He pays thereon a minimum monthly payment, and when these monthly payments, with his increment of gains accrued, equal the par value of the share of stock, he is entitled to receive that amount. 4 Am. & Eng. Ency. (2d. Ed.) p. 1004. If, in the meantime, a member has borrowed on his stock, it, by pledge or operation of the loan, remains the property or quasi property of the corporation, and the loan is returned by the payment of interest and stock dues, penalties, etc., the repayment of the loan culminating at the same time the stock itself matures, at which time, in theory at least, the corporation, or a given series of its stock, is liquidated—that is to say, the nonborrowing stockholders have their stock redeemed and the borrowers have their loans canceled. The loans made to borrowers, evidenced by secured notes, together with all stock subscriptions calling for periodical dues, are assets of such corporation. It is self-evident that in a solvent corporation—a going concern—these assets must be kept together to sub-

serve the underlying purposes of the corporation itself, and reach the end in view. If, for instance, these assets could be separated, then the liability on the stock subscription might pass off to, and become the property by assignment of, one vendee, while the same liability in another form, to wit, a note given by a borrowing stockholder, might pass to another vendee, and thus a double liability be asserted against a stockholder. In the case at bar there was no attempt on the part of the Willow Springs Association to separate these liabilities. It parted with them, lock, stock, and barrel, to the Phoenix Loan Association. That is to say, the latter undertook to become the owner of the entire stock subscriptions, as well as all bills receivable based upon loans to subscribers.

We are not dealing with the case of an insolvent building and loan association whose right to collect stock subscriptions and continue business is arrested at a given time by the hand of the law, and whose assets are thereupon collected and marshaled for the purpose of winding up its affairs. There is not a hint in this record that the Willow Springs Association was insolvent on December 2, 1890, at the time its board of managers assumed to part with its assets to a stranger corporation (whose power to purchase may well be doubted), and undertook to make its stockholders recognize a new and distant master residing in another corner of the state. No reason is suggested for this extraordinary performance, and we are cited to no authority giving a board of managers of a building and loan association such capricious power to end its life, to unsettle the vested rights of its members, and to make such rights depend not only on the business vicissitudes incident to the selling corporation, but to take on a new burden of dangers in business vicissitudes arising in the life of the buying corporation. What might have happened if a stockholders' meeting, duly called, had unanimously consented to such proceeding, and after a board of directors had, pursuant to authority by the corporation itself, carried out such scheme, we need not consider. Nor is it necessary for us to consider whether, in a court of equity, the buying corporation might have asserted and established, in a proper proceeding, equitable rights by subrogation or otherwise to the transferred assets. Nor is it necessary for us to consider whether a promissory note, evidencing some incidental indebtedness to a building and loan association and not a loan to a subscriber upon stock, might, or might not be transferred by authorized indorsement. Take, for instance, the emergencies provided for by section 2811, Rev. St. 1889, where loans are allowed to be made to others, who are not shareholders, at such rate of interest as the directors may fix, in case there is no stockholder's demand. If loans so made had been rediscounted for the purpose of creating a fund to subserve a stockholders'

demand, springing into existence during the life of such loan, a different question might arise. Nor are we dealing here with close questions relating to the right of a building and loan association to borrow money for legitimate corporate purposes and hypothecate stockholders' papers to secure such loan. We are dealing with the right to absolutely transfer a loan made to a stockholder and secured on his home, which, under the constitution and by-laws referred to and read into the note and deed of trust, he was entitled to repay to the board of managers of the Willow Springs Building & Loan Association, at Willow Springs, monthly in small installments. And dealing with this case we are of the opinion that the attempted transfer of this mortgage loan by said board of managers to the Phoenix Association was without shadow of legal right and wholly ultra vires. In our view, it is contrary to the reciprocal rights and duties existing between such corporation and its members, and, if the principle were once established, it would result in mischief—lift the lid of a Pandora's box of illa. This is the general doctrine laid down in *Thompson on Build. Ass'ns* (2d Ed.) § 286, and is the doctrine of this court. *Lovelace v. Pratt*, 163 Mo. 70, 63 S. W. 383. See, also, *State ex inf. v. Equitable Loan & Ins. Co.*, 142 Mo., loc. cit. 342, 41 S. W. 916.

2. Appellant insists the case at bar is not on all fours with *Lovelace v. Pratt*, supra, and therefore that case ought not to control this. Let us see about that. The *Lovelace Case* was an ejectment suit, as is this. In that case the title of plaintiff to the locus in quo originated in the foreclosure of a building and loan mortgage, as does the title of plaintiff here. In that case, the building and loan association had transferred its mortgage security to another; so here. In that case, at the request of the transferee of such mortgage security the trustee sold. The gist of the defense in that case was that the building and loan association had no authority to part with the security, and that a foreclosure so procured avoided the trustee's deed; so, too, here. And it is at this point appellant discovers what he urges is a controlling factor in the present case, and distinguishes it from the *Lovelace Case*, to wit, in this case the foreclosure was directed by Drew, the one-time president of the Willow Springs Building & Loan Association. If, now, it be remembered that Drew, in directing the advertisement and foreclosure, admitted he was the agent of the Phoenix Association and was transacting his master's business, and if we add to that admission the further contention of appellant, to the effect that if the title to the security did not pass by the transfer, it must have remained in the Willow Springs Association, and, therefore, that association had the power and duty of directing a foreclosure, we have the present question presented to us in a nutshell. In

disposing of it, it must be borne in mind that the law regards substance, rather than form—the spirit and essence of a thing, rather than the mere dry letter. One may not do by indirection what he cannot do directly; or, as said by Valliant, J., "if it could not be done on a straight line, it could not be done in a circle." To all intents and purposes the act of foreclosure in this instance was procured by the Phoenix Association, and was made for its purposes. Drew was its alter ego, and may not ambush or confuse his position by a mere official designation assumed for the nonce. "Qui facit per alium, facit per se." The transaction finds its counterpart in a very ancient one in which, by uniting a borrowed hand to a real voice, a notable property transaction was brought about. As preserved in an authenticated record, it runs as follows: "And Jacob went near Isaac his father; and he [that is, Isaac] felt of him, and said, the voice is Jacob's voice, but the hands are the hands of Esau." The record of this last case further shows that Isaac's eyes were dim, and, because the hands extended to him were hairy, like Esau's, Jacob effected, in conjunction with a prior trade of birthright for a meal of bread and bean pottage, a transfer of Esau's interest, contingent and expectant—those intended for use, as well as those intended for ostentation. If we may be permitted to loiter afield a moment, it may be said that Jacob by that transaction showed he was well named "the Supplanter" ("sub," under; "planta," sole of the foot, or heel.) The record has it that in the very act of birth he held Esau by the heel, and certainly, by afterwards laying him by the heels, he justified his name. But we are not called upon to review this venerable transaction and adjudicate upon it. Live business presses, and "sufficient unto the day is the evil thereof." Suffice it to say that we see no difference in principle between the *Lovelace Case* and the case at bar. And this is so, because, further, Drew received no direction from the Willow Springs Association whatever. His acting in its name was a mere assumption on his part in the interest, as said, of the Phoenix Association. By statute law existing at the time *Lovan* made his mortgage, foreclosures of stockholders' mortgages were placed under the supervision of the board of directors, and not under the supervision of the president. Section 2813, Rev. St. 1889, reads as follows: " * * * If the borrower falls totally in his payments during the space of six months, or if the balance due by such borrower has been allowed to accumulate until it equals the sum of six month's dues and interest, then the board may, in its discretion, proceed at any time to advertise for sale, under deed of trust, the property pledged to the association by such borrower. * * * "

3. *Lovelace v. Pratt*, supra, must either be overruled, or the case before us must be controlled by it. Appellant contends that the *Lovelace Case* is out of line with *Schanewerk*

v. Hoberecht, 117 Mo. 22, 22 S. W. 949, 38 Am. St. Rep. 631, but we think not. The answer in that case was a general denial, and this is true, generally speaking, of the cases following that. The answer in this case pleads facts showing that the trustee's deed under which appellant holds by mesne conveyances, quitclaim deeds, is void. Under Rev. St. 1899, § 605, a defendant may plead his legal defenses as well as his equitable defenses to a suit at law. As a general proposition, he need not ask for affirmative equitable relief, unless the case admits of it and he chooses to. It would serve no useful purpose to review the Schanewerk Case and the cases following it. That case does not decide that a defendant is cut out of an equitable defense setting forth facts which, if true, show that a certain deed, upon which plaintiff must rely, is void. That case does not decide that in order to make such equitable defense, when well plead, defendant must ask to redeem under every and all circumstances. From whom would defendant redeem in this case, for instance? If the Phenix Corporation got no title, because its sale was brought about in violation of law, it would follow necessarily that appellant got no title; and if he held no title, there was nobody in court from whom respondent could redeem. The learned judge who wrote the opinion in the Lovelace Case was on the bench at the time the Schanewerk Case was decided, and participated in the decision of the cases following that. He, with his learned associates in Division No. 2, could not have been unaware of the doctrine announced in the Schanewerk Case, but evidently distinguished the Lovelace Case, and we think rightly so.

4. But, says appellant, by letting the trust deed remain unsatisfied of record since 1890, and by letting the recorded trustee's deed go unchallenged, as an indicia of ownership, respondent is estopped to now question the validity of either as against appellant, a purchaser without notice. To this contention respondent answers, in one form, in the pioneer figure, and warlike metaphor, following: "Lovan has done what many a good man has done under similar circumstances. He has sat quiet in his castle, blunderbuss in hand, while the wolves howled and prowled through the woods. It so happened that the vice president of the Assets Realization Company is the first to come within easy range." The familiar elements of estoppel are wanting in appellant's case. It cannot be pretended that the indicia of ownership, allowed to remain of record in Howell county, misled appellant to his prejudice and caused a change in his position. He was a resident of Chicago. He dickered for the whole of the assets of the Phenix Association, and paid therefor the sum of \$80,000. It is inconceivable, in the absence of positive proof, that the \$50 purchase of the Phenix Association at Willow Springs had a feather's weight in that

transaction. It comes well within the maxim, "de minimis." Besides, appellant holds under quitclaim deeds, following the trustee's deed in question. He is no such innocent purchaser for value as would entitle him to avoid the effect of outstanding equities, but is charged with notice of the contents of the trust deed foreclosed, of the constitution and by-laws of the Willow Springs Building & Loan Association referred to in that trust deed, and with all that is disclosed by his chain of title, as well as of the statutes of the state, read into the transaction.

In conclusion, in our opinion, respondent under the facts uncovered should be allowed, so far as this case in its present aspect is concerned, to sit unmolested under his own vine and fig tree—if such tree grows in Howell County (on which we express no opinion).

The judgment is accordingly affirmed. All concur.

WELCH v. MANN et al.

(Supreme Court of Missouri, Division No. 1. Feb. 22, 1906.)

1. FRAUDULENT CONVEYANCES—INDEBTEDNESS OF GRANTOR.

A voluntary conveyance from husband to wife will not be set aside at the suit of a creditor of the husband, unless the husband was indebted at the time the conveyance was made, or later became insolvent from causes existing at that time, or executed the conveyance to withdraw the property from the hazard of a contemplated business venture.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 128-131, 138, 245.]

2. FRAUDS, STATUTE OF—EXECUTED CONTRACT.

A fully performed oral contract to convey lands is not within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 340.]

3. HUSBAND AND WIFE—CONVEYANCE BY HUSBAND TO WIFE—CONSIDERATION.

Marriage is a sufficient consideration to support a conveyance from husband to wife.

4. FRAUDULENT CONVEYANCES—CONSIDERATION—RIGHTS OF SUBSEQUENT CREDITORS.

A conveyance from husband to wife in execution of an unenforceable parol promise, made before marriage, will not be set aside at the suit of a creditor of the husband, who became such after the conveyance.

5. SAME—INDEBTEDNESS OF GRANTOR—DATE OF CONTRACTING.

Where a grantor of land had before the conveyance become a party to a contract under which in a certain contingency, he might become liable to pay certain sums, which contingency occurred after the conveyance, the indebtedness of the grantor should, in determining whether the conveyance was fraudulent, be regarded as having accrued when the contingent liability was incurred, and not when the contingency transpired.

6. SAME—INSOLVENCY OF GRANTOR—EVIDENCE.

The fact that at the time of a voluntary conveyance a corporation which the grantor had formed to conduct the business previously owned and carried on by him, and in which he held nearly all the stock, was insolvent, did not show that the grantor was unable to pay his personal debts.

7. SAME—EFFECT OF INDEBTEDNESS.

That the grantor in a voluntary conveyance is indebted at the time does not render the conveyance fraudulent if, after the conveyance, he still had ample means to pay his debts.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 138-145.]

8. SAME—SETTING ASIDE—PROPER PRACTICE.

While a judgment creditor had a right to enforce his judgment by levy on and sale of property held by a grantee of the judgment debtor, and then sue to set aside the conveyance, the better practice is to first sue to set aside the conveyance.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by John S. Welch against Morris Mann and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Scarritt, Griffith & Jones, for appellant. Geo. L. Edwards and Edward D'Arcy, for respondents.

LAMM, J. Helen Mann, born Miles, married Morris Mann on September 27, 1893, and is in possession of certain parcels of real estate in Kansas City, claiming title under two deeds of conveyance. The grantor in one of these deeds, her brother, Oscar L. Miles, by a conveyance dated September 24, 1894, duly of record, conveyed to her lot 32 in Eaton Place, an addition to Kansas City, Mo., for an expressed consideration of \$7,500, subject, however, to two incumbrances, one, \$4,500, the other, a junior lien, \$750. The grantor in the other deed is her husband. His deed dated January 27, 1896, for an expressed consideration of \$5,000, conveys to her lots 1, 2, 3, and 4 in block 3 in Mt. Evanston and the north $\frac{1}{2}$ of lot 20 in Phillip's Place—said Mt. Evanston and Phillip's Place being additions to said city, and which conveyance was duly recorded. One other tract of 10 acres, north of Independence, bearing a diffuse description, and referred to herein as tract "A" for convenience, also passed by this latter deed to Helen Mann. The consideration paid for the Eaton Place tract was the present release of an indebtedness of \$1,500 due from Oscar L. Miles to Morris Mann. No cash consideration passed between Mrs. Mann and her husband, on the second conveyance. One Fish, on the 23d day of March, 1899, commenced a proceeding against Morris Mann in the circuit court of Jackson county, Mo., to recover on sundry items of alleged indebtedness, \$2,044.90, alleged to have accrued at divers dates between October, 1896, and March or May, 1896, and which proceeding ripened into a judgment in favor of Fish on July 3, 1902, in the sum of \$1,500. On that same day an execution issued and was levied on the aforesaid parcels of real estate standing in the name of Helen Mann, including tract "A." After due advertisement, all said tracts, except "A," were sold to John S. Welch, appellant, on September 6, 1902, at sheriff's sale, he bidding and paying for the Phillip's Place tract, \$300;

for the Eaton Place tract, \$150; and for the Mt. Evanston tract, \$200. On the 22d day of the same month Welch received a sheriff's deed therefor, properly acknowledged, and recorded—tract "A," passing off to one Christian Doerr, a stranger, is not directly affected by the present litigation. Welch was not a creditor of Mann. A resident of Kansas City, he bought at the sheriff's vendue, without seeing the parcels of real estate struck off to him or the improvements appurtenant thereto, without having the title examined, and without understanding or attempting to understand the condition of the title. He was moved to his "sight unseen" (or, as some juvenile authorities put it "unsight-unseen") purchase by being assured there was a bargain, and as a speculative venture (i. e., he, in the graphic idiom of the street, preserved in the record, "took a 'flyer'") after consulting with Fish's attorneys. Including the Doerr bid for tract "A," \$600, the net proceeds of the sale, \$1,037.70, were credited on the Fish execution.

On the day following the acknowledgment and recording of his sheriff's deed, Welch lodged in the same court his bill in equity against Morris Mann and Helen Mann, the object and general nature of which was to establish his own title to said real estate, divest the record title of Helen Mann out of her, and vest the same in himself, to have an accounting of rents and profits, to appoint a receiver, to have an injunction against waste, and to obtain possession. The bill proceeds on the theory that Morris Mann was insolvent when the several conveyances to his wife were executed; that among his creditors was the said Fish; that Morris Mann, in spite of said conveyances to his wife, remained the beneficial owner of said real estate; that the sheriff's deed conveyed his title to plaintiff; and that the conveyances to Helen Mann were a part of a fraudulent scheme to hinder and delay Mann's creditors and cheat and defraud them, especially said Fish; that Helen Mann colluded with her husband in said scheme of fraud; and that the conveyances to her were voluntary. To this bill Helen Mann filed a separate answer tendering the general issue, while Morris Mann defaulted, employed no attorneys, and took no part in the trial below as a litigant, nor here on appeal. Late in 1901, or early in January, 1902, Morris and Helen Mann ceased to live together as husband and wife. From 1898 down to September, 1901, their marital relations were strained because of his absenting himself from her at periodic times, and which periodic absences culminated in a final desertion in January, 1902. An infant daughter is the sole product of their union, and for a few months after such desertion the husband provided for his wife and child, and then quit. She brought no property into their joint marital venture, and she and her child are without provision except the parcels of

land in controversy and the usufruct thereof. Prior, we think, to the date of the sheriff's deed relied upon by appellant, and possibly prior also to the date of the judgment in *Fish v. Mann*, the deserted wife procured a divorce, awarding her the custody of her child. Up to the time her husband stepped down and out from his place as the head of his family and cast off the burden of its maintenance, he seems by her tacit consent or acquiescence to have collected such rents as accrued on the several properties conveyed to her, and paid the taxes. On a date, approximately fixed at his failure to provide for her and her daughter, she assumed through her agents the collection of rents, the making of repairs, and the payment of such general and special taxes as the income would permit. It is, furthermore, shown that the Eaton Place property was the home of the Mann family from the time of its purchase down to an uncertain date, possibly in 1896. It is disclosed, also, that the present amount of the incumbrance on it is \$3,000; and that within three months after its conveyance to his wife on September 24, 1894, and before Christmas of that year, the incumbrance existing at the time of its purchase was reduced by the payment of \$1,500 by Mann. What became of the second mortgage of \$750, which should also have been paid off in order to leave the existing incumbrance \$3,000, as above, does not appear. The court below found generally for the defendant Helen Mann, dismissing plaintiff's bill, from which finding and judgment plaintiff prosecutes his appeal.

The issues presented here group themselves logically under the following propositions: It is affirmed on one side and denied on the other that Mann was insolvent at the time of the conveyances to his wife, and that the said conveyances were a part of a fraudulent scheme to hinder and defraud his creditors. And it is affirmed on the one side and denied on the other that the deeds to Helen Mann were made in pursuance of an oral antenuptial agreement, having marriage as a consideration, and that such antenuptial oral contract, if existing, consummated by conveyance after marriage, would be effective as against creditors, prior or subsequent. As this is an equity case to be considered *de novo*, by us, and, under the rule that we should defer somewhat to the superior position of the chancellor, nisi, in weighing oral testimony, it will not be essential to waste time upon mere questions of admissibility of evidence suggested by counsel, pro and con, because the evidence itself is here—the irrelevant, we can discard; the relevant, we can consider. From the above free outline of the case and the foregoing general issues presented for consideration, such a line of cleavage in fact, and possibly in the law applicable to the facts, between the two conveyances under which the wife claims, suggest itself as to point to the wisdom of a

separate consideration of the Eaton Place property.

1. Attending, then, to the conveyance from Miles to his sister, Mrs. Mann, the consideration for which, \$1,500, moved from Mann to Miles; the existing incumbrances being reduced by Mann's payment of an additional \$1,500 before Yuletide of the same year, 1894, should that conveyance be set aside and the record title of Mrs. Mann be vested out of her and into Welch, the purchaser at the sheriff's sale under the *Fish* judgment? We think not. And this for the following reasons:

(1) In the first place a closer presentation of the facts pertaining to Mann's insolvency will appear presently in the consideration of the second conveyance to Mrs. Mann. It will suffice for present purposes to say that on September 24, 1894, Mann was apparently a prosperous and solvent wholesale and retail confectioner in Kansas City; and that at that time he had entered into no contractual relations with Fish, nor is there any hint he contemplated any such relations. On the one hand, it is inferable from the evidence that each and every of his then existing current debts was extinguished. As one hand washes the other, so these hypotheses must be held to neutralize each other. No creditor then existing complains, or has cause to complain, of this conveyance. Nor is there anything in the record to show that it was made to put to one side for a rainy day, i. e., out of jeopardy from a business enterprise in contemplation which might prove hazardous, any portion of Mann's property. The only suggestion made to us, said to point that way, is that, presently thereafter, Mann incorporated his candy business, and that candy business, so incorporated, wrecked itself in the rise of a year, as will hereinafter appear. But we may not allow to this after fact the significance desired by appellant; forasmuch as he has not carried, at least, one burden imposed upon him by the law, and that burden was to show in the absence of existing debts and insolvency, or later insolvency flowing from causes then operative, that this transfer to Mrs. Mann, with his subsequent payment on the incumbrances, was a contrivance to withdraw from the hazard of a contemplated and impending business venture the property in question; since, otherwise, a conveyance to his wife in the form of a gift of a modest portion of his property is not in the teeth or under the ban of any legal principles within our ken. That one must be just before being generous is not only a chip off of a sound block of chimney-corner philosophy, but axiomatic in the law. However, it must also be remembered that when justice to creditors does not dam the waters of marital generosity, they may flow on in due channels, not a whit ruffled or impeded.

(2) In the second place, in a city of 40,000

inhabitants or over, and we take judicial notice of the fact that Kansas City comes within that class, a homestead, exempt from execution or attachment, is allowed of the value of \$3,000. Rev. St. 1890, § 3616; Rev. St. 1889, § 5435. The value of the Eaton Place property, put at \$5,000 at the time of trial, was put at the same figure in 1893. There is nothing from which we can conclude that at the time of the purchase of the equity in September, 1894, that equity was worth more than the \$1,500 actually paid. So that, the property was susceptible of becoming a homestead and remaining a homestead even after the subsequent payment of \$1,500 on the incumbrances. It goes without saying that such homestead might be abandoned and thereby become subject to execution levy and sale. It will be seen from the facts heretofore uncovered that Mann and his family resided at 32 Eaton Place at the time of its purchase, and thereafter for an undetermined time. Now, the testimony is obscure on the question of abandonment, as we read the record. In fact, no testimony was directed expressly to that point, though an abandonment is strongly to be inferred, nor is the homestead law in anywise invoked here as a protection for Mrs. Mann. She was living in St. Louis at the time this case was tried, and has been for some time. Mann also resided there, having come from Duluth, and she procured her divorce in St. Louis. The question of homestead is introduced by us for a purpose soon to be seen. Thus, if it be conceded to appellant that Mann remained the beneficial owner of lot 32 Eaton Place, and if it be further assumed, merely arguendo, that it had never been abandoned as a homestead, then such property would not be the subject-matter of fraudulent disposition; for creditors are not concerned in the disposition of the homestead. *Bals v. Nelson*, 171 Mo. 682, 72 S. W. 527; *Stam v. Smith*, 183 Mo. 464, 81 S. W. 1217. If, on the other hand (and this hypothesis is more to the point), no persons exist who were creditors of Mann in 1894, and who, armed with process, are pursuing their claims, and if Mann procured the conveyance to his wife of property that then became a homestead, exempt at the time from execution levy and sale by his subsequent creditors, why may not such conveyance to his wife remain invulnerable to assault from such creditors, or those standing in their shoes like Welch, although it afterward lost its character as a homestead by abandonment? In other words, may a conveyance of a homestead to a wife, not fraudulent at the time made, become fraudulent in futuro? As this point was not discussed by counsel nor presented in briefs, it would be unprofitable to pursue the inquiry and we leave the matter with an expression of doubt on that proposition, and with the further suggestion that if a conveyance be fraudulent in law or fact, it would seem, it needs must be

so because of its relation, in present, to other then existing facts. If innocent at the time made and if title then vested in the wife, is it consonant with wholesome reasoning to assert that by some legal necromancy presto! change! its birthright innocence is transformed into a sinister contrivance by proof of after happenings?

(3) In the third place, there is proof that during Mann's courtship he offered to convey property to Helen Miles if she would marry him. There is evidence tending to show that this offer was accepted and a marriage contract, based on that consideration, made and consummated. Such antenuptial contract, so looking to a settlement upon his wife to be, is not in writing, is indefinite, and without legal precision; no date is fixed for performance, no specific property is described, and it is proved alone by the testimony of respondent, somewhat lacking in fullness. It may be said of this infirm contract that its specific performance could not have been enforced in court; that it was not only obnoxious to the statute of frauds, but was too indefinite and uncertain for enforced specific performance. The question of its enforced specific performance, however, is mere burnt powder, and not in the case; because, here there was a domestic and voluntary specific performance, here the consummation of the contract is a fait accompli. Nor is a contract fully performed within the statute of frauds. *Maupin v. Railway Co.*, 171 Mo., loc. cit. 197, 71 S. W. 334; *Graff v. Foster*, 67 Mo. 512; *Bank v. Read*, 131 Mo. 553, 33 S. W. 176. In the absence of actual fraud participated in by the wife, which is the case at bar, the present inquiry, it seems to us, may seek alone the consideration. Is marriage a sufficient, a valuable consideration? The question is not new. Marriage is a sufficient consideration to support a conveyance. Such is the doctrine of this court (*Bank v. Read*, 131 Mo. 553, 33 S. W. 176), and elsewhere (*Cohen v. Knox*, 90 Cal. 266, 27 Pac. 215, 13 L. R. A. 711), and is the general rule (*Bump on Fraud*, Conv. [4th Ed.] § 266). In the *Cohen* Case it is said: "Marriage being in its nature permanent, and being the most important of all civil relations, the law will not lightly allow the inducements which have lead up to it to be disturbed." And, again: "Marriage is the highest and most valuable of considerations; and when a conveyance is made upon such consideration, the grantee, if guiltless of fraud herself, is in at least as firm and sure a position as if she had paid in money the full value of the property conveyed." It would not seem pertinent to the conveyance now under consideration to say whether or not the indefinite, parol contract shown in this case, if allowed to remain in abeyance for several years by the wife, and to be consummated a long time after marriage, and after the rights of creditors had intervened, would be tolerated by the law; because, the conveyance in question was made

three days less than a year after marriage; and, as said, the rights of no creditors had intervened either at the date of the deed or at the time of the subsequent payment of \$1,500 on outstanding incumbrances. It may be said that voluntary family settlements made by those not indebted are by the law favored more than any other species of conveyance, and are safe against subsequent creditors unless made with a present fraudulent intent, participated in by both donor and donee, that the donor is to become indebted, and to hinder and delay the collection of such future debts. In our opinion the conveyance of lot 32, Eaton Place, by Miles to Mrs. Mann, ought to be sustained upon the reasoning advanced in this paragraph as well as in the first paragraph of this subdivision of the opinion. And, accordingly, the holding of the chancellor, nisi, is now sustained pro tanto.

2. We now approach the close question in the case, and that is whether the conveyance by Mann to his wife on January 27, 1896, is impregnable to an attack from one standing in the shoes of Fish; i. e., should the finding below be sustained in toto? This question must be considered in the light of the foregoing general proposition that the law favors family settlements when not counter to business morals. We think, too, the following facts are established in this case, viz.: (1) If Mann had a fraudulent design in making this conveyance, his wife did not participate therein. She knew nothing of his personal insolvency or personal debts, if either existed. And (2) the conveyance was without consideration unless it be referred to the parol antenuptial agreement heretofore commented upon. Keeping the foregoing in mind, as well as the other facts hereinbefore uncovered, it will be necessary at this point to state more fully some additional record facts. It seems that prior to the 1st day of March, 1895, Fish, a lawyer and resident of South Bend, Ind., was a subscriber to an underwriting insurance scheme in New York, whereby he and an aggregation of fellow subscribers became severally bound to pay pro rata certain contingent losses on certain insurance policies theretofore underwritten by said subscribers under the style of "Indemnity Fire Lloyds." Policies underwritten by Fish and said aggregation were outstanding and other underwritings contemplated. Profits also stood on the books of said Lloyds to the credit of Fish, who being moved to withdraw from said scheme, on the 1st day of March, 1895, induced Mann to take his place, who pursuant thereto, on said day, executed the following instrument to Fish: "Whereas, Frederick S. Fish, a subscriber to Indemnity Lloyds, has this day transferred to me by written assignment all of his rights and interests as a subscriber and underwriter at the Indemnity, transferring to me all his interests in any profits that may arise upon any and all business under-

written in his name at said Lloyds. Now, therefore, in consideration of such assignment, I do hereby agree to assume and discharge all of his liabilities upon and under any and all policies heretofore underwritten in the name of the said Frederick S. Fish at said Lloyds, and to hold him harmless therefor. In witness whereof, I have hereunto set my hand and seal this 1st day of March, 1895. Morris Mann. [Seal.] Witness: C. B. Gee." Thereafter losses occurred on such outstanding policies during November and December, 1895, and during January, March, April, and May, 1896, and demands were made on Fish by Indemnity Fire Lloyds to pay his pro rata assessment thereof. Fish put the matter to Mann by letter to which he paid no attention. Fish thereafter liquidated his liability, and also paid a certain sum for a full release of all his contingent liability, and instituted suit on Mann's said bond of indemnity in the circuit court of Kansas City, Mo., on the 23d day of March, 1899, to recover said items of loss amounting, as he contended, to \$2,044.90, which suit as said heretofore, ripened into a judgment in his favor on July 3, 1902, in the sum of \$1,500.

Going back a little in Mann's affairs, it seems that prior to September 29, 1894, he was in business in Kansas City, as a wholesale and retail confectioner as partner in a firm of Manning & Mann. Subsequently, about May, 1894, he purchased Manning's interest and continued the business under the style of Morris Mann until September 29, 1894. His confection business is shown to have been the best in Kansas City, save one, as a retailer, and possibly the very best as a wholesaler. His business reputation was excellent and, as presently to be seen, he was possessed of property and means to a considerable extent outside of his confection business. On September 29, 1894, he incorporated his said business under the style of "Mann & Miles Manufacturing Company," authorized by its charter to do the business of manufacturing candles, crackers, cakes, and extracts, and to engage in the wholesale and retail of cigars, candies, confections, and extracts. The Mann & Miles Manufacturing Company was capitalized at \$10,000, divided into 100 shares of stock of the par value of \$100 each, of which he owned 97 shares, paid for by turning over to the corporation his assets as a confectioner, and the good will of the business—then considerable; the corporation assuming his current business debts. The record is in a condition making it impossible to state the amount of these current business debts, but, we think, there is evidence upon which the chancellor could well base a finding that Mann's business as a confectioner at that time was in a healthy condition, and that no fraud was perpetrated or intended by incorporating it; that Mann's stock in the corporation was worth par; and that the corporation, considering its assets as well as

liabilities assumed, was not overcapitalized and had a fair start in life. In one year, one month and sixteen days, to wit, on November 15, 1895, this corporation went to the wall, and made an assignment for the benefit of its creditors; its stock becoming waste paper. The claims allowed under the assignment were \$10,273.89. The assets realized were \$7,229.26. The dividend paid creditors was 52 cents on the dollar. It is insisted by appellant that the seeds of this disaster were planted prior to the birth of the corporation; that the corporation was not wrecked by the vicissitudes of its own business, but by the assumption of Mann's individual debts, a vice said to be inherent in the scheme. It is insisted by respondent that a war in prices broke out between the Mann & Miles Manufacturing Company and other dealers of Kansas City, including a candy trust, and that the result of such razzia was ruin to Mann's enterprise. Evidence was introduced tending to prove both appellant's and respondent's insinuations.

Coming on down to January 27, 1896, the date of Mann's deed to his wife, and attending to his personal debts then existing, the evidence is exceedingly dim and unsatisfactory. As we gather it, however, at that immediate time the only individual debt Mann owed, outside of the Fish obligation, was to the Bank of Commerce of Kansas City, \$1,500, secured by Mann's stock in a pie corporation known as the "Ingram Pie Company," or the "Homemade Pie Company." We do not understand (or hold) that said corporation made all the pies eaten in that great and hungry city, but we do understand from the evidence (and would be inclined to so hold, if necessary) that it had a monopoly in the making and selling of that sad and indigestible commodity known as commercial (as distinguished from political) pie, a commodity abounding in the marts of that town, it is said, and trafficked in for gain; a pie made of the Ben Davis apple (this is pure hypothesis and, hence, obiter), split, dried, and subjected to other forms of mysterious and unpalatable manipulation. In this pie concern Mann owned 21 or 25 shares of the par value of \$100 per share, worth on the market dollar for dollar; witness thereto the testimony of one Pfeifer, who, under the inspiration and sanction of his oath, was allowed to adjudge its corporate solvency in the following formula: "The pie end of Mann's business never busted." If Mann owed individual debts other than those enumerated, the fact is not so well established by the proof as to be the predicate of a finding by the chancellor.

It will be unnecessary to go into the details of Mann's individual assets, but it may be said that, at the time of his conveyance to his wife, he owned other real estate, unaffected by the conveyance, of the value of \$1,520; some of it located near Wichita, Kan., and some in Kansas City, and available

personal assets in paper secured on real estate, in said pie stock and in other forms of assets, in the amount of \$8,000. Respondent tabulates these assets and sums them up as above. Appellant's learned counsel somewhat concedes the tabulation and estimate, while doubting its efficacy, by the following remarks in their brief: "A cursory examination of the table of assets found on page 5 of the brief of counsel for respondent clearly shows that Mr. Mann did not retain under the conveyance to his wife of January 26, 1896, ample means with which to meet his existing debts as required by law, and fair dealing in order to validate a voluntary conveyance to his wife." It may further be said that in the tabulation of assets by respondent's counsel there is an item of Arizona mining stock put in at \$1,000, which, in our opinion, should be much pared down. It may be said on the other hand that there were some odds and ends belonging to Mann, akin to chips and whetstones, yet of some appreciable value, which are not included in the foregoing tabulation of assets. Take it by and large, we should say that Mann's individual personal assets would be more fairly stated at, say, \$7,500. But as this included the Ingram pie stock, which was hypothecated for \$1,500, the latter sum should be deducted from the foregoing assets, leaving, say, \$6,000. If we add to this the value of the real estate retained by him, there would be left assets to the amount of \$7,500 to respond to the Fish obligation, adjudged to be \$1,500. The value of the parcels of real estate conveyed to Mrs. Mann by her husband's deed of January 27, 1896, arrived at partly by the evidence and partly by concession and inference, may be placed as follows: Mt. Evanston property, \$1,500; Phillip's Place property, \$1,000 to \$1,500; tract A, \$2,500. It is but just to say the estimate of tract A is taken from respondent's brief. We find no evidence directed to its value. It is but just to say further that appellant's counsel insist that the above estimate, which coincides with the consideration placed in Mann's deed to his wife, is much too great, but appellant does not put his finger on specific evidence bearing out that contention, and we have been unable to find it, though Mann, as a witness, intimates that the values going to make up the \$5,000 consideration were somewhat sentimental. He does not qualify as an expert on values, and our chief reliance, outside of the value placed on tract A, is upon the evidence of a Mr. Shryock, who impresses us as a fair and competent witness. As to tract A, it may be said that it sold at a sheriff's sale for \$600 under the same conditions that the Eaton Place tract sold for \$150, the Mt. Evanston tracts for \$200 and the Phillip's Place tract for \$300. Taking into consideration the proof as to the actual value of these latter tracts, the bid on tract A, so far as significant at all, would indicate a propor-

tionate actual value in the neighborhood of \$2,000 or \$2,500. In the absence of a more satisfactory basis, we may be permitted to arrive at a value by seizing on the best means presented to us in the record.

Assuming, then, that the value of the real estate conveyed to Mrs. Mann was either \$5,000, or approximately that; assuming, too, that Mann retained in hand at that time \$7,500 in real estate and personal property; and also assuming that Fish was his creditor in the sum of \$1,500 at the time he made the conveyance in question—ought the conveyance to stand? We think so, because:

(1) Within the purview of laws leveled against fraudulent conveyances, Fish must be held a creditor from the date of Mann's contract of indemnity, March 1, 1895, at least a technical and contingent creditor within such purview. The contingent indebtedness contemplated by that contract, when the liability matured, must be referred back to the date of the contract itself. *Frees v. Baker*, 81 Tex. 216, 16 S. W. 900, 13 L. R. A. 340; *Ridler v. Ridler*, 22 Law Rep. (Chan. Div.) 74; *Van Wyck v. Seward*, 18 Wend. 375; *Howe v. Ward*, 4 Greenl. 195; *Bump on Fraud. Conv.* (4th Ed.) § 506; *Johnson v. Murphy*, 180 Mo., loc. cit. 613 et seq., 79 S. W. 909. But conceding that Fish was a creditor, and that appellant as a purchaser under Fish's judgment may invoke the aid of that fact, yet such concession does not settle this case, and this is so for the reason that a conveyance before being overthrown at the suit of a creditor must be afflicted by the infirmity of fraud in fact or in intent; and before a voluntary settlement upon a wife may be avoided by such creditor it must be shown that it was conceived and executed for a fraudulent purpose, or that it had the effect of perpetrating a fraud. In this case we find evidence upon which a suspicion of fraudulent intent on Mann's part might be based, but evidently it was not satisfactory to the chancellor below nor is it to us. That the Mann & Miles Manufacturing Company became insolvent, and was in that condition at the date of the deed is obvious, but Mann was not bound individually for the debts of that concern, and its financial condition and its relation toward its corporate creditors may not have controlling force in this litigation; for it is *res inter alios acta*. We say the evidence might create suspicion of a fraudulent intent, and we say so because that evidence was elicited from Mann himself by deposition. We cannot close our eyes, however, to the fact that Mann, at the time he testified, was dealing at arm's length with his wife and her affairs. He was not a friendly witness, as that term is known to the law, and his testimony must be sifted and weighed. We must rest content with the finding of the chancellor, necessarily implied, that Mann's deed to his wife did not have its origin in a fraudulent purpose.

(2) Was such deed fraudulent in fact? Did

it operate as a fraud upon creditors? The mere fact of a present indebtedness is not conclusive, because the extent of his debt-paying ability remaining has to be considered in answering this question, and the extent of said present indebtedness is a factor. The English rule is stated by Mr. May (May on Fraud. Conv. [2d Ed.] *50) thus: "Where, at the time when the settlement was made, there remained property, not included in it, ample and available for the payment of debts, and no special circumstances of fraud, how can it be said that any creditor was either defrauded or delayed by the settlement? If he had at once taken steps to recover the amount due to him, the settlement would have been no obstacle to his getting his money; but if he neglects to do that, and waits until, by a reverse of circumstances, the settlor becomes embarrassed, it is his own laches, and not the settlement, which has prevented him from being paid in full." And again, the same author (*54) says: "The amount of property withdrawn by the settlement from liability to the claims of creditor must be taken into consideration; for a person may, although indebted at the time, settle some portion of his property, provided that enough is left for satisfying his debts." The same author (*57) says: "In examining the position of the settlor's affairs, the true test is, what is the nature and extent of his liability at the time of making the settlement? Those liabilities, whether they consist of debts actually due, or soon due or merely remote and contingent liabilities, must be estimated as a reasonable and not a sanguine man would estimate them, taking a reasonable view of what seems likely to happen. * * * The question is varied also by the nature of the debt owing; the existence, for example, of a mortgage debt is of no importance." The American rule is stated the same way, stress being laid upon "ample means" remaining and upon such a condition of his means that payment can be enforced by process of law. *Walsh v. Ketchum*, 84 Mo., loc. cit. 430, 431; *Eddy v. Baldwin*, 32 Mo. 369. A voluntary conveyance is not fraudulent per se as to existing creditors. *Pepper v. Carter*, 11 Mo. 540. The circumstances of each case must be considered. And, see, for an elegant formulation of the principles of law governing this question, 14 Am. & Eng. Ency. of Law (2d Ed.) p. 301 et seq., cited approvingly by *Brace, J.*, in *Johnson v. Murphy*, 180 Mo. 597, 79 S. W. 909. Applying the foregoing principles to the facts of this case, it will appear that Mann's debt to the Bank of Commerce must not be taken into account, because it was secured by a collateral pledge of greater amount. It is on the same footing as a mortgage debt under the rule laid down by May. This leaves to be reckoned with his liability to Fish alone. Considering that, we are not prepared to say that a man who has reserved so much as \$7,500 to answer to a liability of \$1,500 may not, by voluntary

settlement upon his wife, part with \$5,000 of his estate. To this complexion the case comes, and we so hold.

(3) While not necessary to this decision, and hence, somewhat by the way, yet, in a given case, we might lay some stress upon the proposition that while a judgment creditor is within his strict legal right in enforcing his judgment by execution levy and sale against property held in the name of another, which he contends such other person is seized of to the use of his grantor, the judgment debtor, and while a purchaser at such execution sale may thereafter lodge his bill to set aside a conveyance in the road of his sheriff's title (*Lionberger v. Baker*, 88 Mo. 447; Rev. St. 1899, § 8171); nevertheless, as a final resort must be made to a court of conscience to clear up the title, the more gracious way is to give the conscience of the chancellor full play by going there first. The modern practice, the more equitable; and, hence, the better course is, after judgment, and before execution levy and sale, to bring a suit to set aside the alleged voluntary conveyance, and, if successful, then subject the property to execution process; because, by the former course, there would naturally result a great sacrifice of the property for the tendency would be to restrict bidding to a class limited to the speculative few who know, or think they know, the facts or shrewdly guess the same. Because, too, such course presents to the record owner the horns of a dilemma; one horn being that by bidding he may thereby furnish evidence tending to prove the judgment debtor the true owner; the other horn being that if he neglects to bid, the property, which he may hold through no actual fraud on his part, may be lost to him because of a state of affairs afterwards, and for the first time, shown to exist when the title is tried. Take this case: here, several thousands dollars worth of property was sold for a small sum, and while inadequacy of consideration alone may not be a ground of equitable interference, yet, coupled with other incidents, it may help to persuade a chancellor's decree. The judgment is affirmed. All concur.

SILING et al. v. HENDRICKSON et al.
(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

1. HUSBAND AND WIFE—CONVEYANCES TO WIFE—EFFECT—PRESUMPTION.

Where a husband, while solvent, buys property and has the title placed in the name of his wife, the presumption is that it was intended as a provision for her.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, § 474.]

2. TRUSTS—IMPLIED TRUSTS—HUSBAND AND WIFE.

Where, on an exchange of property of a wife for real estate, the husband took title in his own name, without her authority, he held under an implied trust for the benefit of her and her heirs.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, § 476.]

3. ATTACHMENT—REAL PROPERTY—NOTICE TO TENANT.

Where, in proceedings for the attachment of real property, in which the defendant was notified only by publication, the sheriff, in levying the attachment, failed to notify the tenant in possession, or to state the fact of such notice and the name of the tenant in his return, as required by Rev. St. 1899, § 388, par. 3, the attachment and sale thereunder were void, though the tenant had actual notice of the proceedings.

4. REFORMATION OF INSTRUMENTS—PLEADING—VARIANCE.

That a bill to reform a deed alleged that by mistake of the scrivener a husband was named therein as grantee instead of the wife, while the evidence showed that the husband directed the deed to be made to him, without the wife's authority, does not preclude an heir of the wife from having the deed reformed in that suit.

5. ATTACHMENT—SETTING ASIDE—CONDITIONS—PRECEDENT.

Where the property of an heir of a wife was taken and sold under attachment as the property of the husband, the heir is entitled to have the attachment set aside without first tendering to the purchaser the amount he paid for the property.

6. SAME.

Where a tenant in possession of real property became a purchaser at an attachment sale thereof, and the evidence was conflicting as to whether he notified the owner, who was served only by publication of the proceedings, and he attempted to prevent other persons from bidding at the sale, there was no error in not requiring a return of the money paid by him before the setting aside of the attachment sale.

Appeal from Circuit Court, Cass County;
W. L. Jarrott, Judge.

Action by George M. Siling and another against John T. Hendrickson and others. From a decree in favor of plaintiffs, defendants Mitchell and York appeal. Affirmed.

Summers & Summers, for appellants.
Chas. W. Sloan, for respondents.

MARSHALL, J. This is a bill in equity to reform a deed, made on the 21st of February, 1898, by John T. Hendrickson and wife to George M. Siling, by having Libbie S. Siling made the grantee therein instead of George M. Siling, or else to compel said Hendrickson to execute a deed to Libbie S. Siling, for the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 28, township 43, range 33, except 13 acres off the south side of the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ thereof, in Cass county, Mo., and to declare void a proceeding and judgment in attachment wherein the defendant Lucy J. York attached said lands as the property of George M. Siling and caused it to be sold under said attachment judgment, and the defendant Charles A. Mitchell became the purchaser thereof, and to set aside the sheriff's deed under said attachment judgment to said Mitchell, and to divest the title out of said Mitchell and out of said Hendrickson and out of said George M. Siling, and to vest the same in the plaintiff Mamie S. Siling, the sole surviving heir of said Libbie S. Siling. There was a judgment for the plaintiffs, and the defendants York and Mitchell appealed.

The issues:

The petition states that on the 1st of November, 1892, Libbie S. Siling became the owner of lots 10, 11, 12, and 13, in block 12, in the town of Stewart City, commonly called Drexel, in Cass county, Mo., as her separate property; that afterwards, on the 21st of February, 1898, Mrs. Siling and her husband, George M., conveyed said lots to the defendant Hendrickson, in consideration of which Hendrickson agreed and promised to sell and convey to Mrs. Siling the property here involved, subject to two deeds of trust thereon aggregating \$700; that Hendrickson undertook so to do, but by mistake of the draftsman the conveyance from Hendrickson and wife was made to George M. Siling, instead of to Libbie S. Siling; that said deed, so executed, was never delivered by Hendrickson to Mrs. Siling, or to any one else for her in her lifetime, and she never, in fact, saw the same; that Mrs. Siling died on the 8th of April, 1898, leaving, surviving her, her said husband and the minor plaintiff, Mamie Siling, her only child and heir at law; that the deed from Hendrickson was delivered to George M. Siling about the 10th of May, 1898, and that he, without reading the same or knowing its contents, delivered it into the custody of one O. K. Reed, then cashier of the bank at Drexel, where it remained until just prior to the institution of this suit, when George M. Siling learned for the first time the true character and contents of the same; that Mrs. Siling never in her lifetime, in writing or otherwise, authorized Hendrickson and wife to execute a deed to said land to any other person than herself, and that prior to her death she had no knowledge of the contents of said deed; that immediately after the death of his wife George M. Siling, as trustee for Mamie Siling, took possession of said lands and rented the same and applied the rents therefrom to the payment of the mortgages on said land; that about the 2d of February, 1901, Mr. Siling leased the land to the defendant Charles A. Mitchell for one year, commencing March 1, 1901, and ending March 1, 1902, and said Mitchell entered into possession of said premises under the terms of the lease; that on the 25th of September, 1902, on petition of the minor, Mamie Siling, the circuit court of Cass county appointed George M. Siling her next friend to prosecute this action, who filed his written consent thereto; that on the 20th of May, 1901, the defendant Lucy J. York instituted a suit by attachment against G. M. Siling, in the circuit court of Cass County, on a note for \$250, dated April 30, 1898; that a writ of attachment was issued therein and was levied upon the land in controversy by the sheriff seizing the land; that the petition in the attachment case, as well as the affidavit therein, charged that the defendant G. M. Siling was a nonresident of the state of Missouri; that an order of publication was made in said cause against G. M. Siling

and published in the Drexel Star, a newspaper published in Cass county; that G. M. Siling was never personally served with any summons or process in said cause, and never appeared to such action, and was not a resident of Missouri at any time while said action was pending, and had no notice whatever of said suit or action until some time after November 4, 1901; that on the 13th of September, 1901, judgment was entered in favor of Mrs. York against G. M. Siling for \$324.24; that afterwards, on the 13th of September, 1901, a special execution against the property here involved was issued on said judgment, and the interest of G. M. Siling therein was sold by the sheriff and purchased by the defendant Charles A. Mitchell for the sum of \$373.14; that on the 4th of November, 1901, the sheriff executed a deed to said land to said Mitchell, and that Mitchell has been claiming title to the land ever since, and refuses to acknowledge the plaintiffs, or either of them, as landlord; that at the time of the levy of the writ of attachment the sheriff gave no notice to the tenant in possession, and did not give such notice at any time before the return day of the writ of attachment; that at the date of the attachment said G. M. Siling had no interest in said land, and claimed none, and that the circuit court never acquired any jurisdiction over the person of said G. M. Siling nor of the real estate; that the judgment, execution, and sale thereunder were null and void, and constitute a cloud on the title of the plaintiff Mamie Siling; that the defendant Hendrickson is a nonresident of the state; that the plaintiff, Mamie Siling and her coplaintiff, as trustee, are entitled to have specifically enforced the contract entered into between the defendant Hendrickson and Libbie S. Siling for the conveyance of said land. The prayer of the petition is for a decree enforcing the contract, divesting title out of Hendrickson, setting aside the judgment in favor of Mrs. York against Mr. Siling, the execution and sale thereunder and the deed from the sheriff to the defendant Mitchell, and divesting title out of Mitchell and vesting it in Mamie Siling; and for an order requesting Mitchell to surrender the possession to the plaintiff, and for further relief. The petition originally contained a second count in ejectment, but on the 5th of January, 1903, the plaintiffs dismissed that count. The defendants York and Mitchell were personally served with a summons in the case. The sheriff's return certified that Hendrickson could not be found in Cass county. There was an order of publication as to him which was duly published, but he failed to appear and made default.

The defendants Mitchell and York appeared and answered and defended the suit. Their answers were general denials, coupled with a special plea alleging the validity of the attachment proceedings and the title of Mitchell obtained thereunder, denying that

Mrs. Siling bought the property from Hendrickson, or that Hendrickson agreed to make the deed to her, but by mistake made it to her husband, and alleging the truth to be that the purchase price was paid by the husband and the deed made to him pursuant to contract, and that he was the real owner of the land at the time of the attachment and of the sale thereunder, and that the amount bid by Mitchell was applied to the payment of the debt from Mr. Siling to Mrs. York, and that Mr. Siling has made no tender of the amount so bid and applied, and is therefore not entitled to any equitable relief. The defendants Mitchell and York further pleaded that George M. Siling was estopped because he had knowledge of the pendency of the attachment suit prior to the rendition of the judgment, and had actual knowledge that judgment had been rendered against the land and execution issued thereon, and that the defendant Mitchell had purchased the same upon execution, and that thereafter Mr. Siling refused to pay the taxes or to pay the interest of the lien or mortgage on said land, and never made any demand on Mitchell for the possession of the land, or for any rent therefor, but acquiesced in the sale and by his consent and conduct ratified the same, and is thereby estopped to set up any want of jurisdiction or other irregularity in the sale. The reply is a general denial.

The case made is this: About 1890, George M. Siling with his wife and child came to Drexel, Mo., and purchased a piece of property and erected a building thereon for hotel purposes, and conducted a hotel; his wife assisting him in so doing. Afterwards he traded the hotel for a farm in Kansas, and then sold the farm. Afterwards, on the 1st of November, 1892, he used \$2,500 of the proceeds of the sale of the farm for the purchase of lots 10, 11, 12, and 13 in Stewart City, commonly called Drexel, and had the conveyance therefor made to his wife, Libbie S. Siling. He afterwards built a house and store thereon, and with the remainder of the proceeds of the Kansas farm he purchased a stock of goods called a racket stock, and he and his family lived on the premises and carried on the business; his wife assisting therein. The defendant Hendrickson owned the 67-acre farm here in controversy, lying in Cass county. The parties agreed to exchange the town lots and house and store for the farm. Hendrickson says they valued the farm at \$2,500, the town lots and residence at \$1,200, and the stock of goods at \$600, and as there was a mortgage of \$700 on the farm, which Mrs. Siling was to assume, that made the value of the town lots, stock of goods, and mortgage equal to the value of the farm. At that time Mrs. Siling was in very bad health, was suffering from consumption, and little hope of her recovery was entertained. Mr. Siling, without the knowledge or consent of his wife, directed that the deed from Hendrickson to

the farm be made to him, for the purpose, as he says, of holding it for the benefit of their child, Mamie Siling. Mrs. Siling executed the deed to the town property to Hendrickson, but according to the testimony of her husband she never saw the deed for the farm from Hendrickson to her husband, never had the deed in her possession, and never knew that the conveyance had been made to her husband, instead of her, and died without ever becoming aware of that fact, or having authorized the deed to be made to her husband. The deed from Hendrickson to Siling was retained by the notary, because the inventory of the stock had not been completed and the consideration had not been inserted in the deed. Mr. Siling says the notary told him he had some further work to do on the deed before delivering it, and that it remained in the notary's hands from the date of its execution, on the 21st of February, 1898, until the 10th of May, 1898. In the meantime Mrs. Siling had died. As the mortgages on the farm were made by Hendrickson, and he was liable primarily therefor, it was arranged and agreed that he should rent the farm for a term of two years at \$200 a year rental and should apply the rent to the payment of the mortgages on the land, and this was done. After his wife's death, Mr. Siling received the deed to the farm on the 10th of May, 1898, and as he was then about to leave Missouri and go to Oklahoma to live, he delivered the deed to the farm to Mr. Reed, the cashier of the bank, and asked him to have it recorded. Mr. Reed did not do so, however, and simply kept the deed in his possession. Siling and child then went to Oklahoma, living there and in Kansas and in Colorado continuously thereafter until the time this suit was brought on the 20th of September, 1902. In 1900 Siling leased the land for one year to one Adams at a rental of \$175, and applied the proceeds of the rent to the payment of the mortgages on the land and the taxes. In February, 1901, Siling leased the land for one year to the defendant Mitchell for a term, commencing March 1, 1901, and ending March 1, 1902. On the 20th of May, 1901, Mrs. York instituted a suit by attachment against G. M. Siling on a note for \$250, dated April 30, 1898, and the land was seized under the attachment writ as the property of G. M. Siling. The sheriff's return recites that he executed the writ of attachment by levying upon and seizing and attaching all the right, title, and interest of the defendant, G. M. Siling, in the real estate, and by filing with the recorder of Cass county an abstract of the attachment, showing the names of the parties and of debt and date of levy, and description of the lands levied on. The defendant Mitchell was at that time tenant in possession of the land. No notice of the attachment was served on him, as required by section 543, Rev. St. 1889, either 10 days before the return day of the writ or at any other time, nor did the sheriff recite the fact

of such notice and the name of the tenant in his return. The attachment suit was entitled, "Lucy J. York, plaintiff, against G. M. Siling, defendant," and the order of publication ran against G. M. Siling, and stated that an action had been commenced against him by petition and attachment in the circuit court of Cass county, the object and general nature of which was to enforce the payment and collection of \$315.42, the amount due on the promissory note executed by him to the plaintiff in the attachment suit on the 30th day of April, 1898, due within one year after date, with interest at 8 per cent.; "that his property had been attached," and unless he appeared at the next term of the circuit court, judgment would be rendered against him and his property sold to satisfy the same. No description of any property that had been attached was contained in the order of publication. The order of publication was duly published in the Drexel Star. Mr. Siling says that he never saw the order of publication, and never knew or heard that the suit in attachment had been brought against him, until about December, 1901; that in the fall of 1901 he was taken sick with typhoid fever, and his mail was not given to him to read until about the last of December, 1901, at which time he learned that there had been a judgment against him in the attachment suit, and that the land had been sold, and that Mitchell, the tenant in possession, had become the purchaser. A number of letters were offered and read in evidence, some from Mitchell to Siling, and one from Mitchell's attorney to Siling, and one from Mrs. York's attorney to Mr. Siling; but none of the letters have been produced, either in whole or in substance, in the abstract of the record, and therefore this court is in the dark as to their exact contents. Mr. Siling says that the letters he received were simply inquiries as to what he would sell the property for, and Mrs. York's attorney says that his best recollection is that the letter he wrote Mr. Siling was after the judgment had been rendered and before the property was sold, and that he did not tell Mr. Siling that the judgment had been rendered, but wanted to know at what price he would sell the land, thinking that Mr. Siling knew, from other sources, the fact that the judgment had been rendered, and would be willing to sell the land at private sale rather than have it sold by the sheriff. The tenant, Mitchell, says that in one of his letters, which was not introduced in evidence, and which Siling says he never received, he told Siling that the attachment suit had been begun. The other letter from Mitchell to Siling and the letter from Mitchell's attorney to Siling were written after the sheriff's sale, and consisted, principally, according to the oral testimony, of a request that Siling would order the cashier of the bank to turn over the deed from Hendrickson to them, so that it could be placed on record. Siling says he never answered

any of those letters, because, after he learned of the sale of the property to Mitchell under the attachment, he intended to come back to Missouri for the purpose of instituting this suit, which he did on the 25th of September, 1902, having immediately previous thereto placed the deed on record. Siling also says that after the institution of this suit he collected the rent from Mitchell for the premises for the year beginning March 1, 1901, and ending March 1, 1902, and that he had, prior to the trial, paid all the taxes on the land and had paid up the interest on the unpaid portion of the mortgage on the land, and had paid a portion of the mortgage, in addition to what had been extinguished by the application of the rents to the mortgage. It appeared from the testimony of Mitchell that prior to the sale he had an interview with the attorney of Mrs. York, wherein the attorney stated that Mrs. York was only interested in having the property bring the amount of her judgment, with costs and interest, and would not bid at the sale beyond that amount. It also appeared from Mitchell's testimony that he agreed with Dr. Bennett, that if he could get a good title to the land for the amount of the judgment, interest and costs, and if Dr. Bennett would not bid at the sheriff's sale for the land, he (Mitchell) would pay Dr. Bennett the sum of \$37.50. Upon this showing, the chancellor entered a decree for the plaintiffs, vesting the title in Mamie Siling and divesting it out of Hendrickson and Mitchell, and, as nearly as can be ascertained from the briefs, for the judgment itself is not set out in the abstract of the evidence, also ordered the defendant Mitchell to turn over the possession to Mamie Siling. What other order was contained in the decree is not clear from the abstract in this case, and, in the absence of the full terms of the judgment, it is impossible to definitely determine. From this decree Mitchell and Mrs. York appealed.

1. On the 1st of November, 1892, Mrs. Libbie S. Siling acquired the title to lots 10, 11, 12, and 13, in block 12, in Stewart City, commonly called Drexel, Cass county, Mo. The consideration for the purchase thereof was paid by her husband. The general rule of law is that where a husband buys property and has the title placed in the name of his wife, the presumption is that it was intended as a provision for her. At the time of the purchase of the land, Mr. Siling is not shown to have been insolvent, and therefore he had a right to have the land conveyed to his wife as a pure gift. So far as this record discloses, neither at the time the land was purchased in 1892, nor when the buildings were placed thereon in 1895, was he indebted in any manner whatever. The note to Mrs. York, which afforded the foundation for the attachment suit, was dated on the 30th of April, 1898, which was after the 21st of February, 1898, when the attempted exchange of property took place.

At the time of that exchange of property, therefore, Mrs. York was not a creditor of Mr. Siling. The negotiations for the exchange of the town property for the farm were conducted by Mr. Siling. Mrs. Siling at that time was ill with consumption and appears to have been confined to her house. She died on the 8th of April, 1898, just 22 days before Siling became indebted to Mrs. York. The consideration for the farm was the town property owned by Mrs. Siling. When the town property was exchanged for the country property, Mr. Siling caused the deed to the country property to be made to him, instead of to his wife. When he did so, however, he became trustee of the land for the benefit of his wife. It was not an express trust, but an implied trust, under the laws of this state. *Rice v. Shipley*, 159 Mo. 399, 60 S. W. 740. Mrs. Siling never knew that the title had been taken in the name of her husband, and died in ignorance of that fact. She never, in writing, or in any other manner, gave her husband any authority so to do. She therefore might, if she had lived, have compelled him to convey to her, or to be declared a trustee for her benefit, but, dying in ignorance of the fact, she did not do so. The deed from Hendrickson to Mr. Siling was not placed on record until just before the institution of this suit, on the 25th of September, 1902. At the time Mrs. York extended credit to Mr. Siling, therefore, she did not do so on the faith of his ownership of the land in question, for the records at that time, and continuously thereafter, until after the land was sold under the attachment judgment, remained in Hendrickson, and it does not appear that Mrs. York knew at the time she extended credit to Mr. Siling anything about Mr. Siling having the title to this property in his name. Mr. Siling explains his reason for taking the title in his name, instead of his wife's name, to be that his wife was in bad health, not expected long to live, and that he wanted the title in himself, so as to be able to handle it for the benefit of their child. Whatever his motives were, he had no legal authority to take the title in his name; but, under the circumstances, he was a mere trustee for the benefit of his wife and her heirs.

2. The next question which presents itself for adjudication is whether or not, under the circumstances stated, the attachment and judgment thereunder passed a good title to the defendant, Mitchell. It is conceded and uncontradicted, that from May, 1898, until September, 1902, Mr. Siling was a nonresident of the state of Missouri. The York suit against him was by attachment. He was not personally served, nor is there any substantial evidence in the case that he ever knew that such a suit had been instituted against him, or that the judgment had been entered, or that the land had been sold, until December, 1901, about 60 days after the sale of the land under the attachment

judgment. He was notified only by publication. The title acquired by Mitchell at that sale, therefore, depends upon the validity of the attachment proceedings. The sheriff in levying the attachment complied with the requirements of section 543, Rev. St. 1889, being now paragraph 3 of section 388, Rev. St. 1899, except that he did not give notice to the tenant in possession at least 10 days before the return day of the writ, and did not state the fact of such notice, and the name of the tenant, in his return. The point here involved, and the construction of the statute applicable to such cases, underwent adjudication by this court in *Walter v. Scofield*, 167 Mo., loc. cit. 553, 67 S. W. 276, and the previous decisions of this court were there analyzed, with the result that it was held that the circuit court never acquired jurisdiction in the attachment case, and that the judgment and sale thereunder, and the subsequent conveyances arising therefrom were void. In respect to the consequences to the purchaser at such a sale, that case was a much stronger case in favor of the purchaser than is the case at bar, for in that case, a third person, an entire stranger to the transaction, became the purchaser, and afterwards other third persons became part owners of the property; while in the case at bar the purchaser was the tenant in possession, and therefore more closely identified with the title. In addition to this, the purchaser in this case, the tenant in possession, has not by his conduct entitled himself to any consideration at the hand of any court, for whilst he says he knew of the institution and progress of the attachment suit, and whilst he says he wrote a letter to Mr. Siling before the judgment was entered, telling him of the suit, still neither the letter nor a copy thereof was preserved or introduced in evidence, and his testimony as to the contents of that letter is not at all persuasive or convincing that he ever wrote such a letter, or if he did write a letter, that it contained information of the institution of the suit. In addition to which, his conduct after the judgment was entered, and prior to the sale, in promising to give Dr. Bennett \$37.50 if he would not bid against him at the sheriff's sale, tends strongly to compel a conviction that instead of notifying the owner of the pendency of the suit, or of the judgment or contemplated sale, he was actively engaged in an attempt to procure the title to the property for himself, for \$373.14, when it is shown that the property was reasonably worth \$2,500.

The defendants seek to avoid the effect of the defects in the proceedings in reference to notice, and of the rule declared in *Walter v. Scofield*, supra, by showing that although the sheriff did not notify the tenant, as the statute requires, still the tenant had actual notice of the pendency of the suit prior to the rendition of the judgment, and therefore the requirements of the statute were met.

This contention, however, is untenable. It might with equal propriety be claimed that a court acquired jurisdiction of a defendant, who had not been brought into court by any sort of process, by showing, dehors the record, that the defendant actually knew there was a suit pending against him. The requirements of the statute are mandatory, and this is so for wise reasons, to wit, that the record shall affirmatively show that the notice that the law requires, was served upon the defendant, and that the matter of whether or not a defendant had notice should not be allowed to rest in parol, nor subject to the temptation of perjury, not implying, however, the existence of such conditions in this case. It was pointed out in *Walter v. Scofield*, supra, that the notice to the tenant in possession, was as essential to conferring jurisdiction in attachments against nonresidents, as was the publication of the notice in the papers, and it was said that the notice to the tenant would probably be a better notice to the owner than the publication, for presumably the tenant would notify the owner. Generally the presumption would obtain, but the facts in this case clearly show that even presumptions of law may not always consist with actual facts, and that tenants may be found, like the tenant, Mitchell, who would fail to notify the landlord, for ulterior purposes of their own. It is no answer to this to say that if the notice had been served the tenant might likewise fail to notify the landlord. The statute is mandatory and requires the notice to be served on the tenant, and unless the statute is obeyed the knowledge of the tenant, outside of the notice required, does not comply with nor fulfill the requirements of the law. If the framers of the statute had intended that the mere knowledge of the tenant of the pendency of the suit should obviate the necessity of the service of the notice, they would have so written the law. That they did not so intend is clearly proved by the fact that they did not so write the law, and such failure so to write the law was not merely an oversight, for such a law would leave the question of whether the court acquired jurisdiction over the owner by notice to the tenant, to depend upon the testimony of witnesses, and would leave the record silent on that subject, so that in case of the death of the tenant, or of the officer serving the writ, it would be difficult to establish the fact by parol testimony. Cases might arise, if the law were so written, in which the officer would testify to the knowledge of the tenant, and the tenant would deny any such knowledge, and the matter would then rest upon which witness the court believed. It is not the policy of the law of this state to permit a jurisdictional fact thus to rest in parol, and it was to exclude a possibility of such a thing that the lawmakers required the sheriff to give notice to the tenant in possession, at least 10 days before the return day of the writ, and to state the fact of such

notice and the name of the tenant in his return, and thus, in this way, to have a record, as to notice, which would be binding as to all parties. It follows from the foregoing that the circuit court never acquired jurisdiction in the attachment suit of *York v. Siling*, and that all the proceedings therein, including the judgment and the sale by the sheriff and the sheriff's deed to Mitchell, were absolutely void.

3. This leaves the case, therefore, the same as if there had never been an attachment suit, or a sale thereunder, and the same as if it was a suit against *Hendrickson* and *George M. Siling* and *Mamie Siling* for the reformation of the deed from *Hendrickson* to *Siling*. It is true, as defendants claim, that the bill alleges that the contract was that the deed should be made to *Mrs. Siling*, and that by mistake of the scrivener, *Mr. Siling* was named as the grantee, and that the evidence shows that *Mr. Siling* directed the deed to be made to him. But it does not follow, as defendants claim, that for this reason all relief should be denied to *Mamie Siling*, the heir of *Mrs. Siling*. The facts established, clearly show that *Mrs. Siling* never knew that the deed had been made to her husband instead of to her, and that she never authorized the deed to be made in that way. If she was still alive there can be no doubt that she could maintain an action against *Mr. Siling* and *Mr. Hendrickson* for the reformation of the deed and have it corrected so as to vest the title in her and divest it out of her husband; and *Mamie Siling*, her heir, has the same rights as her mother would have had.* Neither is it at all important or material that *Mr. Siling* purchased the property with his own money for he gave it to his wife at a time, when, in law, he was entitled to do so without defrauding any existing creditors. When, therefore, the exchange of the property was made and *Mr. Siling* took the conveyance in his own name instead of in his wife's name, he became a mere trustee for her benefit. In other words, her property was given in exchange for this property, and therefore a resulting trust was created in her favor by operation of law, and *Mr. Siling* became simply the trustee of the property. Abundant facts are stated in the petition upon which to predicate relief upon this ground, and therefore the failure to prove the allegations of the petition as to the mistake of the scrivener, does not prevent a recovery by the plaintiff in this case.

4. The defendant *Mitchell*, however, claims that the amount he paid for the property at the attachment sale has not been tendered to him, and that relief cannot be accorded the plaintiff, in equity, in the absence of such a tender.

Two all-sufficient reasons suggest themselves why this contention should not be allowed, to wit: First, this is purely a suit by *Mamie Siling* to recover property which, of right, belongs to her, and she owed *Mrs.*

York nothing. Therefore the money paid by Mitchell for the purchase of the property did not go to extinguish any debt that Mamie Siling owed. Mamie Siling could have maintained this action against her father and the other defendants, as defendants, and would have been entitled to the relief sought without tendering to Mitchell any sum which he had paid for the land, and which had been applied to the extinguishment of her father's debt to Mrs. York. Instead of making Mr. Siling a party defendant, he was made a party plaintiff, but that does not alter Mamie Siling's rights in the case. Second, but, even if this were an action by Mr. Siling, it cannot be fairly said that the conclusion reached by the trial court was erroneous because it did not require Mr. Siling to refund to Mitchell the amount he had paid at the sheriff's sale for the property. The best complexion that can be put on the case is that there was a conflict in the testimony between that of Mr. Siling and of Mitchell as to whether or not Mitchell notified Mr. Siling of the pendency of the suit before the judgment. The chancellor believed Mr. Siling's testimony. Much of the evidence that was produced before the trial court, including the correspondence, is not embodied in the abstract of the record. Therefore this court cannot adjudge the trial court to be in error in its finding of fact as to this question. If Mr. Siling's testimony is true, that Mr. Mitchell did not notify him of the attachment suit until after he had purchased the property, then that fact, together with Mitchell's conduct in attempting to prevent others from bidding at the sale, disentitled Mitchell to ask equitable relief. The conduct of Mitchell here spoken of refers solely to the agreement he made with Dr. Bennett. The conduct of Mrs. York and her attorney, so far as the record discloses, was perfectly legal and proper, and no wrong in respect to bidding at the sale can be attributed to them. Ordinarily where one stands by and sees his property sold for the payment of his debts he cannot be heard to question the sale; and ordinarily where an innocent person has purchased property of the defendant in an execution, and the money is applied by the sheriff to the extinguishment of the defendant's indebtedness, a court of equity will not permit the defendant to set aside the sale without refunding to the innocent party the amount he so paid, and which has been so applied. But that manifestly just rule of law ought not to apply to a case like this, where the purchaser at the sale was the tenant of the owner, and failed to notify the owner of the proceedings, as he was in duty bound to do, and where he, furthermore, prevented other persons from bidding at the sale, and procured title to himself for a sum infinitely less than the value of the property. A court of equity will not regard such a purchaser as an innocent party, and will leave him in the bed he made for himself.

There is no evidence whatever of any estoppel or ratification by Mr. Siling, and there could be none as to Mamie Siling, for she is still a minor; therefore the plea of estoppel and ratification is without merit in this case.

For the foregoing reasons, the judgment of the circuit court is affirmed. All concur.

MITCHELL v. ST. LOUIS, I. M. & S. RY. CO.

(Kansas City Court of Appeals. Missouri. Feb. 5, 1906.)

1. EMINENT DOMAIN—RAILROADS—CONSTRUCTION—OBSTRUCTION OF ALLEY—ACTIONS—EVIDENCE.

In an action against a railroad for obstructing an alley by its track, where defendant admitted that it constructed the road in the alley, a deed whereby defendant assumed the liabilities of another railroad which had previously entered into the contract for the construction of the road in question was not material evidence.

2. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a railroad for obstructing an alley by its track, where defendant admitted that it constructed the road in the alley, the admission in evidence of a deed, whereby defendant assumed the liabilities of another railroad which had entered into a contract for the construction of the road in question, was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4161-4164.]

3. SAME—INSTRUCTIONS.

In an action against a railroad for obstructing an alley by its track, where defendant admitted that it constructed the road in the alley, an instruction submitting the question of defendant's liability, on the ground that it had assumed such liability by virtue of a certain deed whereby it had undertaken to meet the obligations of another railroad, was harmless.

4. TRIAL — INSTRUCTIONS — ASSUMPTION OF CONCEDED FACTS.

In an action against a railroad for obstructing an alley by constructing its road through the same, it was not error for the court to assume in an instruction that the alley was obstructed by the railroad.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 432-434.]

5. MUNICIPAL CORPORATIONS — ALLEYS — VACATION—RESUMPTION OF USE.

Although an alley has been legally vacated, its use by the public for ten years, with the knowledge and consent of the city and the owners of abutting lots, will constitute it a public alley again.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1421.]

6. SAME—MODE OF VACATION.

The mere passage of an ordinance declaring an alley vacated is not sufficient to deprive abutting owners of their property rights in the alley.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1429.]

7. EMINENT DOMAIN—CONSTRUCTION OF RAILROAD—OBSTRUCTION OF ALLEYS—LIABILITY.

A railroad, in constructing its road through an alley which has not been legally vacated, is a trespasser, and liable in damages to the owners of property abutting on the alley.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 257.]

8. TRIAL — DAMAGES — INSTRUCTIONS — CONFLICT.

In an action against a railroad for obstructing an alley by constructing its road therein, an instruction that the jury should estimate plaintiff's damage in a sum sufficient to compensate him for "whatever damages he has sustained" was not in conflict with a charge defining the measure of damages as the difference between the value of plaintiff's property immediately before the obstruction and its value immediately thereafter; but the two instructions, taken together, properly presented the question of damages.

9. TRIAL—VERDICT—GENERAL VERDICT.

Where there are two counts in a petition, each alleging a distinct subject-matter, but the court instructs the jury to find for defendant on the second count, a general verdict for plaintiff, without any finding for defendant on the second count, is not erroneous.

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by George Mitchell against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Martin L. Clardy and E. O. Brown, for appellant. Perkins & Blair and Mooneyham & McCawley, for respondent.

BROADDUS, P. J. This is an action by plaintiff for damages to lot 160 in North Carthage, occasioned by the construction and operation of defendant's railroad across the south end of Summer alley below the surface thereof south of plaintiff's property. The amended petition, upon which this case was tried, is in two counts, and declares on two separate and distinct causes of action. The first count charges the ownership by plaintiff of the lot in question, having a frontage along the west side of McGregor street of 50 feet by a depth of 200 feet west to said alley; that, subsequent to the time plaintiff became the owner, defendant wrongfully constructed and then maintained, without plaintiff's consent, its railroad across the south end of the alley eight or ten feet below the surface thereof, shutting off plaintiff from ingress to and egress from his property, and depreciating the value of his lot, for which damages in the sum of \$700 were claimed. And the second count alleges that defendant wrongfully entered upon the alley in the rear of plaintiff's property, and excavated a deep cut which extended along the entire west end of his lot, to the depth of 5 feet and the width of 20 feet; that said excavation was of a permanent character, by which his property was damaged \$700. The answer was a general denial, coupled with affirmative pleas; that in June, 1873, the city authorities of Carthage duly vacated and discontinued Summer alley, including the part thereof upon which plaintiff's lot abuts; that on March 28, 1904, the corporate authorities of said city duly vacated all that part of Limestone street lying west of the east line of defendant's right of way, thereby cutting off plaintiff from access to the strip in question from the

south. Plaintiff replied that, notwithstanding, the vacation of Summer alley by the corporate authorities of Carthage in June, 1873, said alley was never closed up, but had been kept open and used by the public continuously with the knowledge and consent of the city authorities and the owners of lots abutting thereon for more than ten years before the commencement of this action, thereby establishing the character of said strip as a public alley by prescription. In the year 1900, the plaintiff became the owner of the lot, with dwelling and other improvements, which abutted on what was known as Summer alley. The lot was 50 feet in depth and 200 feet in length, and also abutted on what was known as Limestone street, which intersected said alley about 200 feet south of the west end of said lot. In June, 1873, said alley was declared vacated by the city, and in March, 1904, said Limestone street was also vacated by the city. There was evidence tending to show that the act of the city discontinuing the alley was not effective, that it continued open and was used by the public as a public alley, and was recognized as such by the city of Carthage. In June, 1908, the defendant constructed and maintained a standard gauge steam railroad along said alley, the effect of which was to practically destroy it as a highway. Other facts will appear in the progress of this opinion. The verdict and judgment were for the plaintiff, from which defendant appealed.

The defendant makes several objections to instruction No. 1, given at the instance of the plaintiff, for which there is no foundation, except in one particular, wherein it left to the jury to determine what was a public alley. But as the jury were told correctly in instruction No. 3 what was necessary to constitute a public alley by public user, the objection is without merit. During the progress of the trial, it was shown that the Dalhoff-Bethune & McNerney Construction Company had the contract for building the railroad through the city of Carthage with the White River Railroad Company. The plaintiff then read, over the objections of defendant, a deed from the latter company to the defendant company, whereby the former conveyed to the latter all its railroad property, real and personal, rights, privileges, and franchises in consideration that the grantee would assume and pay all the indebtedness of the grantor incurred in the construction of its railroad, and in the acquisition of its property, and all liabilities contracted by it in connection therewith. Defendant contends, and rightly, that it was not material evidence. As defendant admits, at least it has in this court, that it constructed the road on the alley, it was not necessary to show that it had assumed the liabilities of the White River Railroad Company, which had, prior thereto, entered into the contract mentioned for its construction. But, notwithstanding,

we are unable to see in what way defendant could have been prejudiced by the admission of the deed, for it did not have any tendency whatever to increase its liability or to mislead the jury. And the instruction of the court (No. 2) submitting the question of defendant's liability upon the ground that, by virtue of said deed, it had assumed it, was also harmless for the same reason. Another objection to the instruction is that it assumes that the alley was obstructed by the railroad. Such is the fact. That it was obstructed, there was, and could be, no controversy. There was no dispute whatever on that point. The court, notwithstanding the conceded fact, might well have assumed that a railroad in a narrow alley in a city or town would necessarily obstruct it—in fact, destroy it for all purposes other than for the use of the railroad. *Sherlock v. K. C. Belt Ry. Co.*, 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551.

The plaintiff's third instruction is criticised because the jury were told that although the corporate authorities of Carthage may have vacated the alley before the construction of defendant's road, yet, if the alley had not been "closed up in pursuance of the vacating ordinance" for ten years before the road was built, then it became a public alley, notwithstanding the same had been vacated and discontinued by the city authorities. The objection is not well taken because the instruction was not narrowed down to the limited scope that defendant construes it. It is qualified by the words, "said part of said alley has been opened and unobstructed and used generally by the public as a public alley with the knowledge and consent of the city of Carthage, and the owners of the lots abutting thereon, then said alley was a public alley at the time of the construction of said railroad." If it had ever been legally vacated, the use by the public for ten years with the knowledge and consent of the city and the owners of abutting lots would constitute it a public alley again. But, as we view the matter, the alley had never been vacated. All that was shown was that the city council had passed an ordinance declaring it vacated. This was not sufficient. The abutting owners had property rights in said alley, which could not be taken from them by the mere passage of an ordinance declaring it vacant. And had it been so vacated, it would have reverted to the abutting lot owners. This is too plain a proposition for argument. The defendant, in constructing its road thereon, was a trespasser, and, as such, liable in damages to such owners.

Another objection of defendant to plaintiff's instructions is that the jury were not properly instructed on the measure of damages, and that they are in conflict. In one, the jury are told that in estimating plaintiff's damage they will return a verdict in a sum sufficient to compensate him for whatever damages he has sustained, if any. In the other, the jury are told that they may assess

plaintiff's damages "at the difference, if any, which you may find from the evidence that plaintiff's said lot was worth immediately before said excavation and obstruction of said alley and immediately after the excavation and obstruction," etc. These instructions are not in conflict. And the two instructions, when read together, fairly and fully presented the question to the jury in such a manner as there could be no mistake in their proper application by a jury. And the amount of the verdict, in view of the evidence, shows that no mistake was made in that matter.

There were two counts in the petition alleging distinct subject-matters. At the close of the evidence, the court gave a demurrer as to the second count, that is, the jury were instructed to find for the defendant on that count. The jury returned a verdict for \$200, without any finding for the defendant on the second count as directed. It is insisted that such was error. In *Allen v. Wabash, St. Louis & Pacific Ry. Co.*, 84 Mo. 653, where all the evidence related to but one count, a general verdict was upheld. "When, then, there are several counts in a petition, but all are ignored on the trial except one, and a verdict is founded on that one, such verdict is good." *Dougherty v. St. Louis, Kansas City & Northern Ry. Co.*, 62 Mo. 554. The reason why the verdict should be upheld in this case is that the second count of the petition was more than ignored—it was actually withdrawn from the consideration of the jury as an issue in the case. We are not unmindful of the rule that where distinct causes of action are stated in different counts a general verdict ought not to stand, for the reason that the parties cannot know how far such a verdict disposes of the question of the defendant's liability upon each separate cause of action. In this case, the instruction to find for the defendant on the second count is in the nature of a nonsuit as to the cause of action therein stated.

The defendant has raised a multitude of questions, which we have not specifically noticed, but they have all been disposed of by what has been said. Affirmed. All concur.

DAVIS v. BARADA-GHIO REAL ESTATE CO.

(St. Louis Court of Appeals. Missouri. Dec. 12, 1905.)

1. VENDOR AND PURCHASER — CONTRACT — BREACH—CONCURRENT CONDITIONS—OFFER TO PERFORM.

Where a contract for the sale of real estate provided that the vendee should pay the balance of the price on the tender of a deed conveying a clear title, such obligations were concurrent and dependent, so that the vendee was not entitled to recover damages for the vendor's default until he had tendered the balance of the price, regardless of the vendor's failure to tender a deed conveying a clear title.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 1030.]

2. SAME—INCUMBRANCES—DISCHARGE.

Where a vendor contracted to convey a clear title to certain premises on payment of the price, he was not entitled to insist on full payment before he had discharged the incumbrances.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 877-899.]

3. SAME—PERFORMANCE—WAIVER.

Where a contract for the sale of land required the vendor to convey a clear title on the vendee's payment of the price, it was competent for the parties to waive such conditions by the vendee's failure to object to paying the price because certain incumbrances had not been discharged, and by the vendor's failure to insist on a tender of cash by his failure to object to the vendee's offer to pay on the score that money was not tendered.

4. SAME—CONTRACT—CONSTRUCTION.

An option for the sale of real estate provided that, if at the end of 30 days the option was not accepted by the vendee and the second payment of \$1,500 made, then the sum of \$1,500 paid should be forfeited to the vendor. *Held*, that time was of the essence of the agreement only with reference to the first two payments, and, the second having been promptly made, the option was at an end, and the vendor, in case of nonperformance by the vendee, was not entitled to retain the purchase money as a forfeiture, but could only retain an amount sufficient to cover such loss as it had sustained by reason of the breach.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Walter N. Davis against the Barada-Ghio Real Estate Company. From an order granting a new trial after verdict in favor of plaintiff, he appeals. Affirmed.

George B. Webster, for appellant. Collins & Chappell, for respondent.

GOODE, J. A written contract was executed May 16, 1901, by the Barada-Ghio Real Estate Company, party of the first part, and Lloyd B. Stephenson, party of the second part, for a sale by the first party to the second of a tract of land, a part of which lay inside and a part outside the corporate limits of the city of St. Louis, known as "North's Forest Park Summit." The contract provided for a cash payment of \$1,500 on the execution of the instrument, another payment of \$1,500 in 30 days from that date and the remainder of the purchase money, \$21,000, in 60 days from the same date. The Barada-Ghio Real Estate Company bound itself to convey by "a good and sufficient warranty deed free and clear" all the property, except certain lots already sold, on full payment of the purchase money at the time stated. The contract concluded with this paragraph: "If at the end of 30 days this option is not accepted by said L. B. Stephenson, his legal representatives or assigns, and the second payment of fifteen hundred (\$1,500) dollars made, then the sum, to wit; \$1,500, this day paid, shall be forfeited to said Barada-Ghio Real Estate Company." Stephenson made the first payment on the date the contract was executed, and the second on the 14th of the following June and within 30 days. He then went to Virginia

on a trip and left the transaction in the hands of his agent, Mr. John C. Hall, but testified that he had arranged with the Missouri Trust Company, where he had \$50,000 worth of bonds deposited, to advance the money needed to complete the payment of the price, the trust company to hold his bonds as collateral security for the loan. The testimony shows that the bonds were ample security and the trust company had the money on hand to lend. Stephenson was uncertain whether he made the arrangement with the trust company before he went to Virginia or afterwards, but he was positive that he made it either personally, before leaving St. Louis, or by letter after he left. Mr. Hall and Mr. A. L. Schultz were interested in the sale with Mr. Stephenson. The deal never was consummated, and on September 19, 1902, after the land had been sold under a deed of trust executed in 1892, this action was instituted by Walter N. Davis, as assignee of Stephenson's rights under the contract, to recover damages from the defendant for failing and refusing to perform his agreement. Besides alleging the matters we have stated, the petition avers that on July 14, 1901, plaintiff and his assignors were ready and willing to perform the agreement on their part, in all respects remaining unperformed, and on said date offered to accept a conveyance of said property, and then and there tendered to the defendant the remainder of the consideration agreed to be paid, but the defendant refused to carry out the contract, and refused to convey the property to the plaintiff or his assignors; that defendant could not at that time, nor at the time the suit was instituted, convey a good title to the ground, for the reason that it was incumbered by certain deeds of trust, which are designated, and was afterwards, on January 25, 1902, sold to foreclose one of the deeds of trust, purchased at said sale by Arthur Kocian, and immediately incumbered by him for about \$9,000. The petition further charges that at the date of the breach of the contract by the defendant the land was of the value of \$60,000, and plaintiff was damaged in the sum of \$38,000 by the breach. The contract of sale was assigned by the vendee, Stephenson, to John C. Hall, July 1, 1901, and by Hall to plaintiff, Davis, on July 16, 1901.

The evidence shows that at the time the contract was made the property was incumbered by two deeds of trust executed by John M. North and wife; one to Charles Coffall's trustee, dated January 11, 1892, to secure a note for \$8,000 and certain interest notes; the other to George Hruska's trustee, dated October 17, 1898, to secure a note for \$6,700 and certain interest notes. The evidence before us shows that the property was sold under the first of those deeds of trust January 25, 1902, but does not show whether the purchaser was, as plaintiff alleged, Arthur Kocian, or some one else. At present it is not material who bought the land; but there

might be a contingency in which it would be material that defendant did not lose control of the land by the sale, so that it could not convey as agreed. At the date of the contract of sale to Stephenson there was another apparent incumbrance on the property, consisting of a mortgage and deed of trust executed in 1857. This instrument appears to have produced some dispute between the parties about the state of the title; but it is not referred to in the petition, and hence is unimportant in disposing of the appeal. As we gather, either it had been paid, or was barred by the statute of limitations. The evidence conflicts on the issue of why the transaction failed. The testimony for the plaintiff goes to show that he, or his assignors, were ready and willing to pay the remainder of the purchase money within 60 days, as stipulated, and offered to do so on the tender of a deed conveying a clear title; that the defendant failed and refused to tender such a deed, tendering instead one which left the land subject to the two deeds of trust mentioned in the petition, and refused to clear it of those deeds of trust until the purchase money was paid. The evidence for the defendant goes to show that the plaintiff's assignors, Stephenson and Hall, were unable to raise the balance of the purchase money, and never did raise it or offer to pay it, though payment was frequently demanded by Mr. Hruska as president of the defendant company. Hruska testified to tendering a deed several times, stating, as we understand, that he had paid off the smaller of the two deeds of trust and had it in his pocket, but not satisfied of record. He said he did not tell Mr. Hall, who attended to the affair for Mr. Stephenson, that he had paid it. Hruska admitted the \$3,000 deed of trust had not been satisfied, but said he intended to pay it and did not have to rely on the purchase money to do so, as he could get the money from the St. Louis Union Trust Company. The effect of Hruska's testimony on this point is that Hall raised no objection to concluding the trade on account of the deeds of trust being unpaid, but said he (Hall) was unable to procure the balance of the purchase money. We shall copy a portion of the testimony of the two witnesses on this point.

John C. Hall swore as follows: "I am in the real estate business in St. Louis and have been for 11 years. I am the same John C. Hall mentioned in the assignment from L. B. Stephenson. I think the first payment on this assignment was made by Mr. Schultz taking the check up to the defendant's office and having the contract signed then; but I am not sure of that. I took the second check up and delivered it to the Barada-Ghio office on Tenth and Chestnut streets. This is my writing on the contract where they receipt for it, except the last clause, which, I think, was written by Mr. Hruska. He called his son up, who, he said, held the title, and had him sign the receipt. I don't recollect when

Maj. Stephenson left the city, but it was early in July. He told me when the time was up and the proper deed was made, to go down to the Missouri Trust Company and get the money and close it up. I went there several days before the last day of the contract to see if everything was all right, and spoke to Mr. Frederick about it; he had just been elected secretary, and he didn't seem to know anything at all. I thought there was no use talking to him, so I went back to Mr. Faulhaber, who was treasurer of the company, and seemed to be the principal officer. He said it was all right. I think Mr. Frederick thought it was all right, but he didn't know about it. I mean by its being all right that I could get the money when a proper deed was ready. On the last day of the contract Mr. Hruska came in the office and tendered me a deed, but before that we had the abstract run down by the Missouri Trust Company and there seemed to be a flaw in the title. Mr. Hruska came in and handed me a deed, and said, this is the deed to the land, and asked for his money. I told him something was the matter with the abstract and we could not pay until that was straightened up. I don't think he said anything about the flaw on that day, but I said, 'Have you cleared the property off?' and he said, 'No; there is an \$3,000 deed of trust on it.' I said, 'Why don't you pay that off?' And he said, 'We are going to use your money to do that.' I remember him saying that well, and I think that is all that occurred that day. I did not accept the deed, and I certainly must have given him a reason. I felt that Maj. Stephenson was out of the city, and I wanted to be absolutely sure in paying his money out on this thing that it was all right, and it didn't seem to me it was right. I am familiar with the values of real estate in St. Louis."

Cross-examination: "I certainly did speak to Mr. Hruska about the defect shown in the certificate and that of title. To be sure about it I had gone to August Gehner and had him run it down, and he reported the same defects. Mr. Hruska said, about the \$3,000 deed of trust, 'We will take that up out of your money' or words to that effect. I was not willing that he should pay this off out of the purchase money, because he had not complied with his agreement. Mr. Hruska tendered me a deed, but I could not say that it was on the 14th of July; he tendered it to me once afterwards, several weeks, and I refused it on the same grounds. Hruska urged me to close the deal and I urged him to close it. I always declined, because he didn't do what he agreed to do. I don't think I ever applied to him for an extension of time. I never told him that Stephenson had not provided the money."

Mr. Hruska testified: "In 1901 I was president of the Barada-Ghio Real Estate Company, and am still. After the payment of the second sum, of \$1,500 on this contract, and

before the 14th day of July, 1901, Mr. Hall asked for further time for the last payment, and said he could not get the money; that the Missouri Trust Company had promised it, but made an excuse that they didn't have sufficient money on hand to advance it; that was the last payment that was due. Neither Mr. Hall, nor Mr. Stephenson, nor Mr. Davis, ever offered to pay the balance of the purchase price, although I requested it more than once. I met Hall on the street and asked him about it, and he said: 'Well, I am not able to get that money. If I can't arrange it very soon I will surrender the contract to you.' I tendered Mr. Hall a deed to this property from George Hruska, who held the title at that time. This is the deed that I offered [producing Exhibit B]. It is dated July 15, 1901. At that time Mr. Hall said that he couldn't arrange for the money. I told Mr. Hall the deed of trust shown on the abstract was barred by limitation. There was nothing said between me and Mr. Hall about the two North deeds of trust. I didn't have to pay these two deeds of trust out of the purchase money. I had arrangements with the St. Louis Trust Company to advance me any amount of money I wanted, and I told Mr. Hall so. Mr. Hall didn't raise any objection to the deeds of trust not being paid off. The \$8,000 deed of trust was owned by Mr. Dolph. The question did not come up between Hall and me about those deeds of trust. I never thought there was any question about it. Mr. Hall said the reason he didn't close it up was he couldn't get the money. I made more than one tender of the deed to Mr. Hall. I think, the second tender was in September of the same year. I have since talked to Mr. Hall and am willing to give him a deed. I don't want the property. I want to give him the property, and my attitude to-day is the same. I have been ready to perform the contract ever since it was made. I don't want any man's \$3,000 for nothing."

There was testimony bearing on the issue of whether Stephenson had arranged to borrow the purchase money so that it was available for use by Hall when a good title was offered.

The court, at the request of the plaintiff, gave the following instruction: "The court instructs the jury that the burden of proof in this case is on the defendant to show that the plaintiff's assignor, John C. Hall, waived his right to demand from the defendant a warranty deed conveying the real estate mentioned in this evidence, free and clear of all incumbrances, and unless the defendant has satisfied the jury by the preponderance or greater weight of evidence that such right was waived by said Hall, the jury must return a verdict in favor of the plaintiff."

At the request of the defendant the court gave the following instruction: "The court instructs the jury that, although they may believe from the evidence that the deed of trust

from James M. North and wife to Charles Caffall's trustee, dated January 11, 1902, and the deed of trust from Ruth North and husband to George Hruska's trustee, dated October 17, 1898, were, on July 15, 1901, liens upon the real estate described in the contract sued on, they will find their verdict in favor of the defendant; if they further believe and find from the evidence that the plaintiff, or John C. Hall, prior to July 15th, knew of the existence of said deeds of trust, and if they further find that defendant proposed to said Hall to pay off and satisfy said deeds of trust out of the sum of \$22,000, mentioned in the contract sued on, provided they further believe from the evidence that said Hall consented thereto, or did not object thereto."

Of its own motion the court gave the following instructions: "The court instructs the jury that if they find and believe from the evidence: First, that on the 16th of May, 1901, the defendant agreed in writing to sell to L. B. Stephenson all of that certain tract of land, lying partly in the county and partly in the city of St. Louis, known as North's Forest Park Summit, except certain designated lots in block No. 6 thereof, for the sum of \$25,000, payable \$1,500 at that time, \$1,500 in 30 days thereafter and the balance in 60 days thereafter, and to convey the same by good and sufficient warranty deed, free and clear from any incumbrances or liens; second, that said Stephenson thereupon paid to defendant the sum of \$1,500, and thereafter, within 30 days from said 16th day of May, 1901, paid to defendant the further sum of \$1,500; and, third, that on or about the 1st day of July, 1901, said Stephenson assigned all his right and interest in and under said contract, to John C. Hall, and that John C. Hall was, at the expiration of 60 days from May 16, 1901, ready, willing, and able to pay the balance of said purchase price; and, fourth, that the defendant was unwilling, or unable to convey a good title to the said real estate, free and clear from incumbrances, or liens; and, fifth, that thereafter said Hall transferred all his right and interest in and under said contract to plaintiff—then the verdict should be for the plaintiff. If you find from the evidence that on July 15, 1901, or at any time prior thereto, John C. Hall, acting for himself, or his assignor, Stephenson, had the title to the property in question examined, and after such examination, said Hall objected to the title because of the deed of trust thereon of 1857, and at said time Hall knew that the \$8,000 and the \$6,700 deeds of trust were then on the property, and also knew that the defendant was ready, able, and willing to pay off and discharge said \$8,000 and \$6,700 deeds of trust; and if you further find at said time Hall made no objection to the title, except on account of the 1857 deed of trust, and if you further find as a fact from the evidence, that the defendant was able, willing, and ready to pay off said \$8,000 and \$6,700 deeds of trust, provided said Hall was ready,

able, and willing to pay the balance of the purchase price, your verdict should be for the defendant, if as a matter of fact you find from the evidence that said Hall was not ready, willing, and able to pay said balance of the purchase price. The court instructs the jury that the only outstanding incumbrance on the property in controversy on July 15, 1901, were the two deeds of trust read in evidence, the one for \$8,000 and the other for \$6,700. The court instructs you that there is no evidence in this case that the deed of trust of 1857, mentioned in evidence, was an incumbrance on the land, and said 1857 deed of trust, did not constitute any defect in the title. The plaintiff and his assignor, Hall, had the right to refuse to pay the balance of the purchase price, unless the defendant was ready, willing, and able to pay off and discharge the \$8,000 and the \$6,700 deeds of trust, certified copies of which are in evidence before you. If you believe from the evidence that defendant was ready, able, and willing to discharge and pay off said deeds of trust at the time defendant tendered the deed of conveyance to Hall, provided said Hall was then ready to pay the balance due on the purchase price; and if you further find that said Hall was not then ready, or able to pay off the said balance due on the purchase price, your verdict should be for the defendant. The court instructs the jury that the question of how much money, if any, was paid by plaintiff to Hall in consideration of the assignment of the contract in controversy, or how much money, or, if any, was paid by Hall to Stephenson in consideration of the assignment of said contract, is not involved in any way in this case. Stephenson had the right to assign the contract to Hall, and Hall had the right to assign the contract to plaintiff. The assignments mentioned in this instruction in no way affect the right of either party to this suit, under the contract dated May 16, 1901, and read in evidence before you."

There were some other instructions not relevant to the points raised on the appeal. The jury returned a verdict for the plaintiff, assessing his damages at \$3,000. In due time a motion for new trial was filed and afterwards sustained because the trial court thought the verdict was against the weight of the evidence, and that there was error in the first instruction given on his own motion. Plaintiff excepted to the order granting a new trial, and appealed from it.

The conflict in the testimony bearing on certain issues is admitted by counsel for plaintiff, but the position taken is that, notwithstanding this conflict, the verdict was manifestly for the right party, inasmuch as plaintiff was entitled to a direction for a verdict in his favor. In support of this position it is argued that all the facts essential to plaintiff's right to recover were admitted. The essential facts are said to be

the execution of the contract, the two payments by plaintiff on the purchase price, the existence of incumbrances on the property exceeding \$14,000 until long after the 60 days stipulated for performance had expired, and the assignment of Stephenson's rights under the contract to the plaintiff. It is true those facts were admitted; but in our opinion the proposition that they entitled the plaintiff to a verdict is unsound. It was necessary to show further that Stephenson was ready and willing to perform the contract on his part and offered to do so. It is argued for the plaintiff that no offer of the kind was incumbent on Stephenson and those interested with him, for the reason that Stephenson was under no obligation to offer the final payment until the defendant tendered a deed conveying a clear title. That is to say, the defendant was bound to move first in the matter of performance; and as it never tendered a deed which constituted performance of the condition on which Stephenson had agreed to pay, he was never in default, and hence can maintain this action. Stephenson's agreement to pay, and the defendant's agreement to convey a clear title, were concurrent and dependent conditions, and performance or an offer to perform by either party was essential to put the other in default and lay the foundation for an action by the party who had performed for damages or to enforce performance. *Guthrie v. Thompson*, 1 Or. 353; *Low v. Marshall*, 17 Me. 232; *Leaird v. Smith*, 44 N. Y. 618; *Irvin v. Bleakley*, 67 Pa. 24.

It is not the law that a right of action accrued on the contract in favor of Stephenson from the mere fact that the defendant tendered no sufficient deed, if Stephenson never offered to pay the purchase money. How did the defendant default under those circumstances? In a case like this the law requires the party seeking relief, whether vendor or vendee, to show he did his duty. If the Barada-Ghio Real Estate Company had sued Stephenson, it would have been required to prove it offered to convey a clear title. *Huffman v. Hummer*, 18 N. J. Eq. 88. The plaintiff was equally bound to prove Stephenson had offered to pay the purchase money on receipt or tender of a deed conveying a clear title. Cases *supra*. Now Hall's testimony conduced to show such an offer was made on behalf of Stephenson; but Hruska's testimony was to the contrary. In our opinion Stephenson was entitled to demand a clear title, and the defendant had no right to insist on full payment before it discharged the incumbrances. *Webster v. Trust Co.*, 145 N. Y. 275, 89 N. E. 964. But either party might waive the right enjoyed as to these details of performance. (Id.) Stephenson, or his agent, Hall, was not bound to insist on the title being clear before payment was made; and if, as Hruska swore, Hall raised no objection to paying the money on that score, but was willing to pay, if he could procure it, and let the incum-

brances be lifted afterwards, he did waive the point. Neither was Hruska bound to insist on a tender of cash by Hall; but might content himself with an offer to pay without a tender of the money. And if, as Hall swore, Hruska raised no objection to the offer to pay on the score that the money was not tendered, but insisted on Stephenson's supposed duty to pay before the deeds of trust were lifted, Hall's offer of payment, if he had funds available to make the offer good on receipt of a clear title, was a sufficient performance. Therefore it will be seen that the questions of a tender of cash by Stephenson or a clear title by defendant do not control the case; for there is no unity of evidence to the effect that either party insisted on a tender. Hall swore he insisted on a tender of a clear title which Hruska refused until the money was paid; whereas Hruska swore, that Hall, instead of challenging the state of the title, declared his inability to raise the money. It follows that one essential fact in the case had to be determined on contradictory evidence; therefore the court's action in setting aside the verdict as against the weight of the evidence, cannot be reviewed by us.

The learned trial judge thought he erred in the first instruction given on his own motion, because the jury were not required to find Stephenson tendered payment. What we have said above will indicate our opinion on this point. If Stephenson was willing and able to pay the purchase money, and offered to do so, and Hruska raised no objection to the offer because the cash was not proffered, the offer itself was performance by Stephenson. *Parker v. Perkins*, 8 Cush. 318; *Irvin v. Gregory*, 13 Gray, 215; *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180; *Id.*, 26 Conn. 110; *Smoot v. Rea*, 19 Md. 398. The case of *Pursley v. Good*, 94 Mo. App. 382, 68 S. W. 218, is unlike this one; for there was no evidence in it going to show either that Good, who asserted a default by Pursley, had tendered a conveyance to Pursley, or otherwise offered to perform, so as to put the latter in default, or that Pursley had said or done anything tending to show he waived any legal right he held against Good. The contract between Stephenson and defendant provided for no forfeiture, except of the first payment on the contingency that the second one was not made when due. Time was of the essence of the agreement as to the first two payments; and, those having been made promptly, it strikes us that the contract remained open afterwards for performance by both parties. Its optional feature was eliminated by the second payment, and it then stood as a binding obligation of sale and purchase. Now the provision regarding forfeiture for default in meeting the second payment, argues for the interpretation that time was not of the essence of the stipulation for further performance, and that no forfeiture for delay therein was intended. If this is

correct, then after the contract had lost its optional character, defendant was not entitled to keep the payments in case of a breach by Stephenson, but only to be made whole for the damages sustained by the breach. It had no right to retain the payments, on the theory that they were forfeited, but might have had the right to retain them to cover its loss on account of a breach; that is to say, if the loss was as great in amount as the payments received. It does not clearly appear from Hruska's testimony that defendant ever regarded the agreement as having been either breached or abandoned by Stephenson or his assignees. It strikes us that the posture of affairs between the parties was such that Stephenson, or the defendant, might have demanded performance at any time, and that if the defendant allowed the property to pass from its control by sale, so that no title could be conveyed pursuant to the agreement with Stephenson, it would have no right to retain the purchase money as a forfeiture. Some of Hruska's statements give the impression that the property is yet in the defendant's control and can be conveyed if desired. If this is so the defendant, if blameless, might enforce performance or get a decree cutting off the right of plaintiff and his assignors. These points have not been discussed, nor are we undertaking to decide them. In truth this is not an action to recover the money paid, on the ground of an abandonment of the contract by defendant or its inability to perform, but is an action on the contract for a refusal to perform. What we say is that we are unable at present to perceive any theory on which the defendant, if not itself able to carry out the agreement, has the right to forfeit the purchase money, or to hold more of it against an appropriate action than is sufficient to reimburse defendant for any loss it may have sustained by a breach of the contract by Stephenson.

The judgment is affirmed, and the cause remanded. All concur.

EVERS v. WIGGINS FERRY CO.

(St. Louis Court of Appeals. Missouri. Dec. 12, 1905.)

1. SHIPPING—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

A passenger on a boat, who is directed by the collector of fares to go upon the hurricane deck, and accordingly goes there and finds a great many other passengers on the deck, and is not ordered to go below, and fails to hear any order to go below given to passengers generally, is rightfully upon the hurricane deck, although it is not constructed or designed for the accommodation of passengers.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 551.]

2. SAME—NEGLIGENCE OF CARRIER—EVIDENCE—OCCURRENCE OF ACCIDENT.

The breaking of the hurricane deck of a boat, resulting in injury to a passenger who is rightfully upon such deck, is prima facie evi-

dence of negligence in the carrier, but is not conclusive evidence, and may be overthrown or explained by evidence showing the exercise of proper care by the carrier.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 548; vol. 37, Cent. Dig. Negligence, § 218; vol. 9, Cent. Dig. Carriers, §§ 1283-1294.]

3. CARRIERS—PASSENGERS—DEGREE OF CARE REQUIRED.

A common carrier of passengers is required, so far as it is capable by human care and foresight, to carry its passengers safely, and is responsible for all injury resulting to them from the slightest negligence on its part, but it is not, either in respect to the equipment it provides for the carriage of passengers or as to its management of that equipment when carrying them, an insurer of their safety.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1085, 1087, 1101.]

4. SHIPPING—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

A passenger is not negligent in remaining on the hurricane deck after the captain of the boat has given general orders to the passengers on that deck to go below, where he does not hear such orders, and has no information that they have been given.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 551.]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Harry Evers, by his next friend, against the Wiggins Ferry Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Thos. E. Ralston, for appellant. Lee Meriwether, for respondent.

BLAND, P. J. The plaintiff is a youth between 13 and 14 years of age, and sues by his next friend. The defendant is a corporation engaged in running a line of ferry boats across the Mississippi river, between St. Louis, Mo., and East St. Louis, Ill., carrying both passengers and freight. On May 1, 1903, and for some days prior thereto, the United States gunboat Nashville was anchored in the river between St. Louis and East St. Louis. Defendant issued circulars inviting people to take passage on its ferry boat for the purpose of viewing the gunboat Nashville. May 1, 1903, was on Sunday. A considerable number of people, including the plaintiff, paid their fares at the St. Louis wharf and took passage on the defendant's ferryboat Church, and were carried to East St. Louis. The plaintiff and other passengers aboard did not go ashore on arrival of the Church at the East St. Louis wharf, but paid their fares for the return trip. When the Church left the East St. Louis wharf there were 30 or 35 passengers on the hurricane deck. This number was increased to from 75 to 100 by the time the boat reached the middle of the river, and as it passed the gunboat Nashville they rushed across the hurricane deck to the side next the gunboat to get a better view. Their concentrated weight caused a portion of the hurricane deck (a space about 9 feet wide

and 35 feet long) to break through, precipitating the plaintiff and other passengers to the deck below. As a result of the fall plaintiff received a compound fracture of one of his legs. He sued for this injury and recovered a judgment for \$2,750, from which defendant appealed to this court.

The evidence shows that the ferry boat Church had three decks, designated as lower, boiler, and hurricane decks, inclosed by railings. Benches were placed around the lower deck for the purpose of accommodating passengers with seats. The boiler deck was also provided with seats for the accommodation of passengers and had a cabin for their use. The upper deck or roof had no provision whatever for seating passengers, and had only an ornamental railing about six inches high around it. It was supported by 2x2 oak stanchions, and upon it was the pilot house. The stairway leading from the boiler deck to the hurricane deck was narrow and very steep, and is described as being "like a ladder"; the steps having no backing. The opening at the top of this stairway was closed by two flat doors. These doors, however, were required to be kept open when passengers were aboard by a United States statute read in evidence. Plaintiff testified that he was on the boiler deck, at the top of the stairway, when he paid his fare for the return trip to St. Louis; that he paid his fare to a collector, who came down from the hurricane deck, and who told him at the time he took the fare to go up to the roof; that he then went to the roof, saw other passengers there, walked around for a few minutes, and then went over to the side which fell in; that no one ordered him to go below, nor did he hear such an order given by any one. A number of witnesses for the plaintiff testified that they were on the hurricane deck, paid their fare there, and remained there until the deck fell in; and that they heard no one give an order to those on the hurricane deck to go below. Among the passengers on the hurricane deck, the evidence shows, were a number of women and children. Some of these women testified that they were not asked to go below; that they paid their fare on the hurricane deck, and heard no order given by any one for the passengers to go below. On the part of the defendant, the evidence is that the pilot of the boat, while it was tied up at the East St. Louis wharf, persuaded all but 30 or 35 of the people then on the hurricane deck to go below; that those who remained refused to go; that, when he had persuaded as many as he could to go below, he closed the doors over the stairway, and then he and a bystander stood on them for a few minutes to hold them down to keep passengers from coming up; that a moment before the boat pulled out he placed a whisky barrel two-thirds full of water on the doors over the stairway, and then went into the pilot house, where his duties called him. Wit-

ness further testified that, as soon as the boat started on the return trip, parties from below pushed against the doors at the head of the stairway, overturned the barrel of water, broke the doors from their hinges, and then rushed upon the roof; that about that time the captain of the boat came up and repeatedly ordered the people to go below, saying that the hurricane deck was "no place for passengers," but that only a few paid any heed to the order. The captain testified that he gave the order and repeated it two or three times in a tone of voice loud enough to be heard by all on the hurricane deck. His evidence and that of the pilot is corroborated by a number of passengers who were on the hurricane deck. Defendant's evidence also is that no fares were collected on board the boat at all, and that no one but the captain and pilot had authority over the passengers or authority to direct them where to sit or stand on the boat.

1. Defendant offered a demurrer to the evidence, which the court refused. This ruling is assigned as error. The evidence for defendant shows that the hurricane deck was not constructed or fixed up for the purpose of receiving passengers thereon, and it is neither alleged nor shown by the evidence that passengers were habitually carried on the hurricane deck, with the knowledge and consent of the officers of the boat. But the plaintiff's evidence is that he was told by defendant's collector (a man apparently clothed with authority) to go upon the roof, and that he went there in obedience to the order, and, when he reached there, found a great many other passengers on the roof. It is also shown by his evidence that no officer of the boat ordered or warned him to go below, and, if such an order was given, generally, to passengers on the hurricane deck, he did not hear it. On this evidence it cannot be held that plaintiff was wrongfully upon the hurricane deck, notwithstanding the fact it was not constructed or designed for the accommodation of passengers. As to the plaintiff, under the facts as shown by his evidence, the hurricane deck was the place specially set apart by defendant for his accommodation, and hence he was in a place where he had a right to be. In these circumstances, the breaking of the roof, resulting in injury to plaintiff, is, as to him, *prima facie* evidence of negligence on the part of the defendant. *Scott v. London & St. Catherine Docks Co.*, 3 Hurl. & C. 596, 601; *Hill v. Scott*, 38 Mo. App., loc. cit. 374; *Seiter v. Bischoff*, 63 Mo. App., loc. cit. 160; *Ward v. Steffen*, 88 Mo. App., loc. cit. 576; *Raney v. Lachance*, 96 Mo. App., loc. cit. 484, 70 S. W. 376; *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737. See, also, note to *Barnowski v. Helson*, 15 L. R. A. 33.

2. The court gave the following instructions for the plaintiff: "(1) The jury are instructed that it was the defendant's duty to build that part of its boat designed and used

for the carrying of passengers sufficiently strong to carry its passengers without breaking, or giving way, under the weight of passengers carried. If, therefore, you find from the evidence that plaintiff was a passenger on defendant's boat at time of the accident, and that while a passenger on said boat a deck or roof thereof, which was used for carrying passengers, suddenly gave way and precipitated plaintiff down to a lower deck, causing the injuries complained of, the falling of said deck or roof, if you find from the evidence that it fell because of the weight of passengers thereon, is conclusive evidence that it was not built with that degree of care or strength which it was defendant's duty to exercise, and in that event your verdict should be for the plaintiff, unless you believe from the evidence that the plaintiff himself was guilty of negligence contributing to the injuries complained of in going upon or remaining upon said deck or roof.

(2) The jury are instructed that, if they find from the evidence that plaintiff was a passenger, lawfully on board defendant's boat at the time of the accident mentioned in evidence, and received injuries therefrom, and that said accident consisted in the falling down and giving way of one of the decks of defendant's boat, and that plaintiff's injuries arose from the said falling down and giving way of the deck of defendant's said boat, then the burden of proof is shifted upon defendant to show to the satisfaction of the jury that the said falling down of said deck was through no fault, negligence, or carelessness of defendant; and, unless so shown, the jury should find for the plaintiff, unless you further find that plaintiff was guilty of negligence in going upon or remaining upon the hurricane deck, which negligence contributed to the injuries complained of. (3) The jury are instructed that, even though you find from the evidence that some of the passengers were warned not to go upon the top, or hurricane deck, plaintiff cannot be charged with negligence in going upon said deck, unless he heard or was aware of said warnings, or unless the condition of said top deck, at the time plaintiff went thereon, was such as to be apparent to a reasonably careful observer, was unsafe, or was not meant for the use of passengers. And in considering whether plaintiff should have known that said top deck was unsafe, or not meant for passengers, you may consider all the physical facts regarding the approach to said deck."

Instruction No. 1 is erroneous, in that it makes defendant an absolute insurer of the strength and safety of its boat. A common carrier of passengers is, to use the oft repeated ruling of the appellate courts of this state, required, "so far as it is capable by human care and foresight, to carry them safely, and it is responsible for all injuries resulting to its passengers from even the slightest negligence on its part." *Clark v. Rail-*

way, 127 Mo., loc. cit. 208, 29 S. W. 1015; Hite v. Railway, 130 Mo., loc. cit. 139, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555; Combs v. Sullivan County, 106 Mo., loc. cit. 233, 16 S. W. 916; O'Connell v. Railway, 106 Mo. 482, 17 S. W. 494; Sullivan v. Railroad, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167; Olsen v. Railway, 152 Mo., loc. cit. 432, 54 S. W. 470; Mathew v. Railroad (Mo. App.) 78 S. W. 271. But a common carrier is not an insurer of passengers. Leslie v. Railway, 88 Mo. 50; O'Connell v. Railway, supra; Willmott v. Railway, 106 Mo. 535, 17 S. W. 490. The same rules of law apply in respect to the equipment a carrier provides for the carriage of passengers as to its management of that equipment when carrying them. Furnish v. Railway, 102 Mo. 488, 18 S. W. 1044, 22 Am. St. Rep. 781; Cobb v. Railway, 149 Mo. 135, 50 S. W. 810. The instruction is also erroneous for the reason it told the jury that the falling of the roof was conclusive evidence that it was not built with that degree of care and strength which it was defendant's duty to exercise. The rule of evidence in such circumstances, announced by Lord Erle in Scott v. London & St. Catherine Docks Co., supra, is as follows: "There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." From the fact that the roof of the boat fell, the law presumes negligence, if the plaintiff was rightfully upon it; but this presumption is not a conclusive one. It may be overthrown or explained away by evidence showing that the defendant exercised proper care. The instruction deprived defendant of the right of such explanation, and cut up by the roots all of its evidence tending to exculpate it from blame. The instruction is also in conflict with instruction No. 2, given for plaintiff. In instruction No. 2 the jury were properly instructed that the falling of the hurricane deck was prima facie evidence of defendant's negligence, and shifted the burden of proof on defendant to show that it had exercised proper care.

3. Instruction No. 3, given for plaintiff, conflicts with No. 4a, given for defendant. Instruction No. 4a instructed, in effect, that, if the captain of the boat gave orders to the passengers on the hurricane deck to go below, in a sufficiently loud tone of voice to be heard by the plaintiff, and in time for him to have left said deck before it fell, plaintiff could not recover. We think plaintiff's third instruction correctly stated the law, and that No. 4a, given for defendant, is erroneous. It puts the plaintiff in the wrong by remaining on the hurricane deck after the captain gave verbal orders to go below, although the plain-

tiff did not hear the order and had no information that it had been given. Plaintiff cannot be thus convicted of constructive negligence.

For the reasons herein stated, the judgment is reversed, and the cause remanded. All concur.

H. GAUS & SONS MFG. CO. v. CHICAGO LUMBER & COAL CO.

(St. Louis Court of Appeals. Missouri. Dec. 12, 1905.)

1. SALES—CONTRACTS—OFFER AND ACCEPTANCE.

Where plaintiff ordered certain lumber of defendant, who returned an acceptance qualified by a number of variances in respect to the grading of the lumber, the time and mode of payment and shipping, and making the contract contingent on strikes, accidents, etc., plaintiff could show its acceptance of defendant's offer containing such variances by its conduct in accepting deliveries of lumber furnished thereunder.

2. JUSTICES OF THE PEACE—ACTIONS—PLEADING.

Where a suit for breach of a contract of sale was commenced in a justice court where formal pleadings are not required, it was not necessary that plaintiff should allege an acceptance of defendant's offer by conduct in order to entitle it to introduce parol proof of such acceptance.

3. SALES—CONTRACT—BREACH—FINDINGS.

Where plaintiff ordered certain lumber from defendant, the order providing "sample cars to decide this order," and defendant's acceptance was subject to certain conditions, after which two cars were shipped which were rejected, plaintiff was not entitled to recover for defendant's failure to ship the amount ordered, in the absence of a finding that a contract had been actually made between the parties.

4. SAME—RESCISSION.

Where lumber was ordered, "sample cars to decide this order," and after certain of the cars first shipped had been rejected, defendant wrote plaintiff that it was out of the question for defendant to meet plaintiff's requirements and therefore thought it best to consider the order canceled, and requested plaintiff to supply its wants from some other source, a finding that such letter did not amount to a rescission of the contract, was erroneous.

Appeal from St. Louis Circuit Court; Horatio D. Wood, Judge.

Action by the H. Gaus & Sons Manufacturing Company against the Chicago Lumber & Coal Company. From a judgment in favor of plaintiff, defendant appeals. Judgment on first count of petition reversed, and judgment on second count affirmed.

W. H. Saunders, for appellant. Harlan, Jeffries & Wagner and Franklin Miller, for respondent.

BLAND, P. J. The suit was commenced before a justice of the peace, in the city of St. Louis. From a judgment rendered by the justice, an appeal was taken to the circuit court. On a trial anew in the circuit court, the issues were submitted to the judge, sitting as a jury, who, after hearing the

evidence, made special findings of the facts and found the issues for the plaintiff.

The petition or statement on which the cause was tried in both courts is as follows (omitting caption): "Plaintiff for cause of action states that both it and defendant are corporations duly authorized to do business and sue and be sued in the state of Missouri. That on December 5, 1900, plaintiff made its proposal in writing to defendant whereby it offered to purchase of defendant two hundred and fifty thousand (250,000) feet of 1-inch No. 2 yellow pine boards, the same to be 6, 8, and 12-inch widths, it being provided that the 6-inch widths should not exceed fifteen (15 per cent.) per cent. at the price of \$11.15 per thousand feet f. o. b. cars Wiggins Ferry Company, North Market street, city of St. Louis; which said proposal is hereto attached and marked 'Exhibit A'; that defendant accepted said proposal on the 6th day of December, 1900, by its written acceptance of that date which said acceptance is hereto filed and marked 'Exhibit B.' That in pursuance of said contract defendant made shipments and did furnish to plaintiff about thirty-five thousand one hundred sixteen (35,116) feet of said lumber, but the said defendant wholly disregarding its duty refused to make further deliveries though frequently requested to do so by the plaintiff; that after the execution of said contract the price of the kind of lumber mentioned in said contract advanced and plaintiff was compelled to supply its wants to go into the market and buy said lumber at the advanced price, and that by reason thereof and the breach of said contract on the part of defendant plaintiff has been damaged in the sum of three hundred seventy-five and $\frac{96}{100}$ (\$375.96) dollars. For another and further cause of action plaintiff states that there has been an open, running account between it and defendant since January, 1901, and that by reason of said account, the defendant is indebted to plaintiff in the sum of \$8.80, a copy of which said account is hereto attached and marked 'Exhibit C,' and made a part of this petition. Wherefore plaintiff prays judgment against defendant in the sum of three hundred eighty-four and $\frac{76}{100}$ (\$384.76) dollars with interest thereon and costs."

Exhibits A and B referred to in the petition are as follows:

Exhibit A.

"Dec. 5th, 1900.

"Chicago Lumber & Coal Co., City—Gentlemen: Please enter our order for 200 to 250 thousand feet of 1" No. 2 yellow pine boards, 6, 8, 10, 12" widths, the 6" not to run over 15 per cent. same to be shipped in as you may find it convenient, say one or two cars per week, at price \$11.50 f. o. b. cars, Wiggins Ferry Company, N. Market street. Stock to be in the rough. Sample cars to decide this order. Yours very truly,
"J. H. A. Hy. Gaus & Sons Mfg. Co."

Exhibit B.

"St. Louis, Mo., Dec. 6, 1900.

"Our Order, D. 76.

"Your Order 22 to Our Mr. Bright.

"From Hy. Gaus & Sons Mfg. Co.
"Ship to North Market St., via Wiggins Ferry, St. Louis, Mo.

"General Conditions.—All agreements are contingent upon strikes, accidents, delays of carriers and other delays unavoidable or beyond our control; it is also understood that this order is taken subject to and will be shipped according to grades and classifications of the Southern Lumber Manufacturers' Association, adopted January 18, 1899, and settlement on any other basis will not be entertained.

"Terms.—60 days net. Discount of 2 per cent. cash will be allowed if remittances are received by us within 15 days from date of invoice.

"All Discounts to apply on net invoice after freight has been deducted.

"Exchange.—All bills are payable in St. Louis, Chicago, or New York exchange, and collection charges on local checks or drafts will be charged back to drawer. Claims must be reported within five days from receipt of car to be considered.

"In making delivered prices we simply guarantee the cost of goods at your place, but are in no way responsible for their safe delivery.

Pieces	Size	Length	Amount of Feet	Description	Price
250,000 ft.	1x6	8, 10 & 12"	10 to 20 ft.	No. 2 boards rough	\$11.50

Not to be over 15 per cent. of 6 inch.

"Ship at the rate of two or three cars per week.

"This order is accepted for prompt shipment. Inability to secure suitable cars will be the only cause for delay.

"Chicago Lumber & Coal Co.

"Per V. A. Longaker.

"Note.—The above is a copy of our entry of your order. Please compare carefully and advise us of any error or discrepancy existing."

Exhibit C is a running account, showing a balance of \$8.80 due, and one of the items being: "To 1,731 ft. of No. 2 Y. P. brds. returned, \$11.50, \$19.91." It was admitted on the trial that plaintiff was entitled to judgment on the second count of the petition.

1. At the threshold of the trial of the case, defendant objected to the introduction of any evidence on the ground that Exhibits A and B did not make out a contract. Considered separate and apart from the petition, these exhibits show that no contract, in fact, was made. Exhibit A is an order for from 200,000 to 250,000 feet of 1-inch No. 2 yellow pine lumber of various dimensions. Exhibit B is an acceptance of the order, qualified by a number of variances in respect to the grading and classification of the lumber, time

and mode of payments and shipping, and makes the contract contingent upon strikes, accidents, etc. There are other variances from the order. It is the well-settled law that to make a concluded contract the acceptance of an offer must be unequivocal, unconditional, and without the least variance. *Bruner v. Wheaton*, 48 Mo. 363; *Strange v. Crowley*, 91 Mo., loc. cit. 296, 2 S. W. 421; *Taylor v. Von Schraeder*, 107 Mo. 206, 16 S. W. 675; *Egger v. Nesbitt*, 122 Mo. 667, 27 S. W. 385, 43 Am. St. Rep. 596; *Scott v. Davis*, 141 Mo., loc. cit. 225, 42 S. W. 714; *Arnold v. Cason*, 95 Mo. App. 426, 69 S. W. 34; *Robertson v. Tapley*, 48 Mo. App. 239; *Stotesburg v. Massengale*, 13 Mo. App. 221. But the petition alleges that in pursuance of the contract, the defendant furnished 31,161 feet of the lumber and that plaintiff thereafter repeatedly requested the defendant to make further deliveries. The allegation of these facts show that the plaintiff, by its conduct, accepted the terms of the contract as contained in Exhibit B. That it might thus signify its acceptance is clearly the law. *Robinson v. City of St. Joseph*, 97 Mo. App., loc. cit. 508, 71 S. W. 465; *Arnold v. Cason*, supra; 1 Beach on Contracts, § 34. The acceptance by conduct is not alleged in the petition. Had the suit been commenced in the circuit court, we think, it should have been alleged to entitle the plaintiff to offer verbal proof of acceptance, but as the suit was begun before a justice of the peace, where no formal pleadings are required, and as there are allegations in the petition showing, inferentially, that plaintiff, by its conduct, did accept the terms of the contract as set forth in Exhibit B, we think the court did not err in overruling defendant's objection to the introduction of any evidence.

2. The plaintiff is a manufacturer of boxes. The defendant is a manufacturer of yellow pine lumber. Plaintiff ordered the lumber to use in its business. The evidence shows that defendant, on January 23, 1901, shipped two cars of lumber, one containing 11,381 feet, the other 10,298 feet, and on January 25th shipped two other cars, one containing 9,909 feet, and the other 12,756 feet, and on February 4th shipped one car containing 12,232 feet. All of these cars were delivered in plaintiff's yard, four of them arriving on January 29th, the other one a few days later. Plaintiff was dissatisfied with the quality of the lumber and rejected, absolutely, the two cars shipped on January 23d, and also rejected 7,309 feet of one of the cars shipped on January 25th and 3,774 feet of the other, and 1,704 feet of the car shipped on February 4th, and notified the defendant of its action. Defendant then had the lumber inspected by three inspectors, who graded all the lumber as No. 2 common. After this was done and after considerable negotiation, plaintiff finally accepted all the lumber contained in the three cars last shipped, except 1,731 feet. This 1,731 feet of lumber and that contained in the two rejected cars was sold by defend-

ant as No. 2 common to parties, in St. Louis and East St. Louis, who graded the lumber as No. 2 common. Defendant made no more shipments to plaintiff.

On April 12th plaintiff wrote defendant as follows:

"April 11, 1901.

"Chicago Lumber & Coal Co., City—Gentlemen: Your Mr. Bright was here to-day and stated that the remainder of the two car loads of boards would be removed, also that you would send us a credit memorandum for the stock taken out of the three cars, and that you did not think you could furnish the remainder of the order. Now, we wish to state that we insist on you doing so, and as long as you send us No. 2 boards there will be no complaint; furthermore, please use your utmost efforts to give us some of these boards as soon as possible. Yours truly,

"J. H. A.

Hy. Gaus & Sons Mfg. Co."

To this letter defendant replied as follows:

"April 13, 1901.

"Hy. Gaus & Sons, St. Louis, Mo.—Gentlemen: Your favor of the eleventh at hand and noted. Our Mr. Bright reported to us the conversation had with you in regard to stock, and we cannot but feel that it would be useless for us to ship you more material, as with stock in the present condition it is impossible for us to guarantee Bright No. 2 common, in fact, No. 2 common is piled in the weather and is likely to be stained and weather beaten. The three parties whom we had examine the stock you refused to accept as No. 2 common, declared it to be No. 2, and it was sold as such. We judge from this that you require something special in No. 2 common, and it is out of the question for us to meet your requirements. We therefore think best to consider the order cancelled, and request you to supply your wants from some other source. If it was within the range of possibility for us to give you stock that would meet with your requirements, we would be only too willing to do so. We have held mills up from shipping any further material until we got this question at issue between us settled. Yours very truly, Chicago Lumber & Coal Co., V. A. Longaker."

Plaintiff's evidence is that after the letter of April 13th, its officers took the matter up with Mr. Longaker over the telephone and Longaker stated he would take the matter up with the mill but failed to do so; that after consulting its attorney, in a conversation between Mr. Gaus and Mr. Bright (salesman for defendant) Bright asked if plaintiff would abide by inspection rules of the Southern Lumber Manufacturers' Association. Gaus said he would on condition that defendant would start to ship and Bright said Gaus should write the defendant and Gaus then had the following letter written:

"April 26th, 1901.

"Chicago Lumber & Coal Company, City. Gentlemen: As per the request of your Mr.

Bright, we beg to say that whenever any question arises relative to the grade of a carload of No. 2 boards, the decision of the Association Inspector shall be final in deciding the dispute, which will be satisfactory to us. We would also ask you to make a special effort to get up one or two cars of the No. 2 boards at once. For goodness sake, get the remainder of the two cars off of our lot, as we have cars laying on the track to put on this ground that your lumber is occupying, and oblige, Yours truly,

"J. H. A. Hy. Gaus & Sons Mfg. Co."

Plaintiff also offered evidence tending to show that to supply its wants it was compelled to go into the market, after defendant refused to ship any more lumber, and buy the same grade of lumber at a greater price than defendant contracted to furnish it.

N. W. McLeod and other experienced dealers in lumber, in respect to the custom of the yellow pine lumber trade, testified as follows: "The custom is that where a buyer and seller make a contract for a certain number of feet of lumber, and the buyer wants to have a clause inserted that he will place this order in case it is satisfactory, sample car order, as it is termed, in case the lumber does not come up to the expectations of the buyer, the buyer has the right to cancel the balance of the order; and if the grading of the lumber is not satisfactory to the seller, he has the right to cancel. The right lies with both parties."

The following rules of the association were read in evidence:

No. 60: "No. 2 common boards, dressed one or two sides, and No. 2 common shiplap, may contain any number of sound knots, none of which are over $4\frac{1}{2}$ inches in diameter, or over one-third the width of the piece if located at the edge, or their equivalent spike knots, smaller or more defective knots, worm holes, one straight split one-fourth the length of the piece; a knot-hole $1\frac{1}{2}$ inches in diameter, or its equivalent in small knot-holes or rotten streaks, will be allowed, provided the piece is otherwise as good as No. 1 common, but must be free from through rotten streaks, through heart shakes over one-half the length of the piece, and wane over two inches wide exceeding one-half the length of the piece."

Latter part of Rule 73: "All rough lumber, if thicker than specified thickness for dry or green stock, may be dressed to such standard thickness, and when so dressed shall be considered as rough stock. When like grade on both faces is required, special contract must be made."

"No. 74: Rough common boards and fencing must be well manufactured and should not be less than $\frac{3}{8}$ inch thick when dry." "No. 76. Rough dimension, if thicker than specified thickness for dry or green stock, may be dressed to such standard thickness and when so dressed shall be considered as rough stock."

Defendant's evidence tends to show that the five cars were shipped as sample cars and that all the lumber shipped graded No. 2 common, under the rules of the Southern Lumber Manufacturers' Association. On the other hand, plaintiff's evidence tends to show that the lumber contained in the two rejected cars was only fit for kindling wood.

The finding of the facts so far as necessary to set them out in this opinion is as follows:

"The defendant undertook and agreed to ship 250,000 feet of the kind of lumber described in the order at the price of \$11.50 per 1,000 feet f. o. b. cars Wiggins Ferry, to be shipped according to grades and classifications of the Southern Lumber Manufacturers' Association, sample cars to decide order. Under this contract the defendant shipped to plaintiff by invoice, dated January 23, 1901, car No. 3182, 11,381 feet, at \$11.50, amounting to \$130.88. Also on invoice of the same date, per car No. 10,929, it shipped 10,298 feet, at \$11.50, amounting to \$118.43. On January 25th, it shipped car No. 7410, containing 9909 feet of lumber at \$11.50, amounting to \$125.45. And by invoice of the same date it shipped car No. 15,229, containing 12,756 feet, at \$11.50, amounting to \$146.69. By invoice dated February 4th, it shipped car No. 20,172, containing 13,232 feet, at \$11.50, amounting to \$152.17. These five cars comprised all the lumber shipped by the defendant under the order. The first two cars shipped under date of January 23d, to wit, cars Nos. 3182 and 10,929, were rejected by the plaintiff as not containing the kind of lumber called for by the contract, and the defendant received the lumber contained in these cars and disposed of it to other parties. The other three cars which were received here in this city prior to February 15th, with the exception of 1,731 feet, amounting to \$19.91, were accepted by the plaintiff as complying with the order. Under the contract the plaintiff paid in advance the freight upon the five cars. This freight, with the \$19.91, credit for 1,731 feet rejected, amounted to the sum of \$433.11. Giving the defendant credit for the three cars of lumber accepted, to wit, car 7410, \$125.45, car 15,229, \$146.69, and car 20,172, \$152.17, there is a balance due the plaintiff from the defendant of \$8.80, which is the amount sued for in the second count of the petition. Concerning this amount, it was stipulated and agreed between the parties that the defendant owes the plaintiff \$8.80, and on the 15th day of January, 1902, the defendant tendered in legal tender to the plaintiff \$8.80 and \$13.75 costs, being the amount of costs accrued up to said date, making a total of \$22.55. And it was further agreed that said sum need not be paid into court, as the tender was refused, and that said tender should be regarded as a full legal and valid tender.

"Considerable testimony was introduced by the defendant as to meaning of the words 'sample cars to decide order,' taken in con-

section with the custom of the trade, and testimony was introduced tending to show that where these words were used in a contract, by a universal custom of the trade, the buyer, if the cars do not come up to the specifications of the contract, may cancel it; and that the seller, if the buyer rejects the sample cars, also has a right to cancel the contract. But whatever may be the meaning of this custom in the trade, the evidence does not show that the defendant, the seller in this case, relied upon this custom in rescinding the contract. The two cars shipped as per invoice of January 23d, presumably as sample cars, were entirely rejected by the plaintiff, but no rescission of the contract was predicated upon this rejection. Nor does the evidence show, in point of fact, that any sample cars whatever were shipped to the plaintiff. As to the first two cars, the defendant endeavored to induce the plaintiff to accept them, and upon its refusal to accept them the lumber was sold to other parties. Instead of canceling the contract, by a letter dated February 20th, defendant wrote: 'We understand from our A Dep't that you have made complaint on the various shipments we have made you. Will you kindly furnish us a written statement of what shipments have been rejected and what proposition of settlement you have to make us. * * * Yours very truly, Chicago Lumber & Coal Co.' On April 13th the defendant wrote the plaintiff the letter quoted. This letter does not appear to be a rescission of the contract, but is more in the nature of an objection to the strictness of the inspection of the lumber shipped by the plaintiff. It is true that the letter concludes: 'We have held mills up from shipping any further material until we get this question at issue between us settled.'

"After the difficulty which the parties had growing out of the shipment of the five cars on March 9, 1901, the plaintiff wrote to the defendant the following letter: 'Gentlemen: We would like to know if you haven't got some of the 6 to 12-inch No. 2 boards started up for us. You will oblige us by getting us a few cars, at any rate.' The plaintiff continually insisted upon the delivery of the balance of the order, and on or about April 28th there was a meeting of the parties. Mr. Bright, the sales agent, was present, as also were Messrs. Gaus and Ahrens. At this interview Mr. Bright said that the defendant was too particular; and Mr. Ahrens answered that he did not think so. According to the testimony, Mr. Bright then asked if the plaintiff would be satisfied with the inspection of the inspectors of the Southern Lumber Manufacturers' Association, if there was any question about any future cars. Mr. Ahrens, representing the plaintiff, said to him, 'Why, certainly we would.' And Mr. Bright then said, 'On these conditions we will start to ship,' and further stated, 'to make it satisfactory to both sides, you (meaning plaintiff)

write us a letter.' Mr. Ahrens testified that in accordance with this suggestion he wrote him a letter the same evening. (The letter quoted on 92 S. W. 123). The two cars referred to in this letter as being in the way of the plaintiff were the two cars which the plaintiff had rejected, and which the defendant sold to other parties.

"Notwithstanding the understanding which was entered into as to future shipments, to wit, that the decision of the inspector of the Southern Lumber Manufacturers' Association should govern, if any difficulty arose as to future shipments, defendant declined to ship any further lumber under the contract, and none was shipped. The three cars which the plaintiff received under this order contained 35,166 feet of lumber, leaving a deficit of 214,834 feet, which the defendant failed and refused to ship to plaintiff, and the plaintiff was obliged to purchase from time to time other lumber of the same kind to make good the deficiency. The prevailing market price in the city of St. Louis of the kind of lumber called for by the contract was from \$13.25 to \$13.50 per 1000 feet, and the court finds that the difference between the contract price and the market price at which the plaintiff purchased at the time the defendant refused to ship any further lumber was \$1.75 per 1000 feet.

"As a conclusion of law the court finds that the plaintiff is entitled to recover upon the first count in its petition the sum of \$375.96, with interest from January 14, 1902, at the rate of 6 per cent. per annum; and upon the second count in its petition it is entitled to recover the sum of \$8.80, with interest from January 14, 1902, at the rate of 6 per cent. per annum, making the aggregate amount of its recovery \$384.76 with interest from January 14, 1902, at the rate of 6 per cent. per annum. In this case the defendant, after asking the court to make a finding of facts, offered 15 instructions based upon the testimony in the case. These instructions are all refused, on the ground of multiplicity. Instructions numbered 1, 2 and 3 offered by plaintiff are refused, and instruction No. 4 is given. Let judgment be entered in favor of plaintiff for the sum of \$384.76, with interest at the rate of 6 per cent. per annum from January 14, 1902, to date (April 6, 1903) amounting to \$28.40, or a total of \$413.16.

"Horatio D. Wood, Circuit Judge."

The order and acceptance referred to in the first paragraph of the finding quoted refers to Exhibits A and B. We think the learned trial judge committed palpable error in his finding of the facts. Exhibits A and B, as we have seen, do not constitute a contract, and the learned judge did not find from the facts in the case that the terms contained in Exhibit B were offered and accepted by plaintiff by any conduct on its part. Whether or not there was a contract entered into between the parties is a question of fact to be

ascertained one way or the other from the acts and conduct of plaintiff after it received Exhibit B. This question has not been answered by the trier of the facts, the only authorized authority under the law to make the answer. The learned trial judge is also in error in finding that the defendant did not rescind the contract by its letter of April 13, 1901. The following clauses in the letter seem to have been entirely overlooked by the learned judge at the time he was making up his finding of the facts, to wit: "The three parties whom we had examine the stock you refused to accept as No. 2 common, declared it to be No. 2, and it was sold as such. We judge from this that you require something special in No. 2 common, and it is out of the question for us to meet your requirements. We therefore think best to consider the order cancelled, and request you to supply your wants from some other source. If it was within the range of possibility for us to give you stock that would meet with your requirements, we would be only too willing to do so."

Here is an express declaration that as plaintiff had rejected two cars (the two found by the judge to have been shipped as sample cars) on the alleged ground that they did not contain No. 2 common lumber when, in fact, as claimed by defendant, the lumber graded No. 2 common, defendant, by reason of plaintiff's rejection of these two cars and its action with respect to the grade of the other three cars, "judged" plaintiff wanted something special in No. 2 common, which the defendant could not furnish, and hence thought it best to cancel the contract and advised the plaintiff to look elsewhere for its lumber. Now, according to the findings of the judge and according to the terms of the contract itself, the sample cars were to determine the contract. According to the finding of the facts by the court, the plaintiff rejected the sample cars, and it is of no significance that three other cars were shipped, for the reason they were shipped and switched into plaintiff's yards before the first shipment of sample cars was inspected and rejected. On the rejection of the two sample cars, defendant might have immediately exercised its right to terminate the contract. Defendant, however, proceeded cautiously and had all the lumber inspected by three expert inspectors before exercising its right. The evidence warrants the finding that after the contract was rescinded, the matter was taken up by plaintiff and defendant, and that defendant's Mr. Bright said if the plaintiff would agree to inspection by the inspectors of the Southern Lumber Manufacturers' Association the defendant would start to shipping and that Gaus had a letter written on the basis of this statement. This evidence and finding shows nothing more than that it was agreed between Gaus and Bright, respectively representing plaintiff and defendant, that the contract should be reinstated

or renewed upon the exact terms of the one theretofore cancelled or, to state it in another form, that a new contract was made upon the same terms and conditions as the original one. The suit was not on the new contract and for this reason this evidence and finding cuts no figure whatever in the case.

For the reason that no fact or facts were found by the learned trial judge from which the court could have found that the contract sued on was ever agreed to by both parties to the suit, the judgment on the first count of the petition is reversed, and the cause as to said count is remanded.

The judgment on the second count is affirmed. All concur.

SCHARFF v. SOUTHERN ILLINOIS CONST. CO.

(St. Louis Court of Appeals. Missouri. Dec. 12, 1905.)

1. NEGLIGENCE—FALLING WALLS—RES IPSA LOQUITUR.

Where the wall of a hotel being constructed by defendants near plaintiff's premises fell and injured plaintiff's dwelling house, the mere falling of the wall was presumptive evidence that it had been negligently constructed.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 218, 225.]

2. SAME—INDEPENDENT CONTRACTORS.

Where defendant contracted to erect a hotel, hired and discharged its employees at will, pursued its own methods, and was not subject to the control of its employer except as to the results of the work, it was an independent contractor and liable for damages resulting to third persons by defective construction, though it was required to conform to the plans, specifications, and supervision of the architect.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 68.]

3. SAME—INSTRUCTIONS—CONSTRUCTION.

In an action for damages to an adjoining property owner by the falling of the wall of a building in process of construction, an instruction that if defendant construction company was building the hotel under contract with the investment company, and negligently constructed the wall or insufficiently braced the same, and as a direct result it fell and damaged plaintiff's property, then they should find for plaintiff, was not objectionable as authorizing the jury to find negligence from sources other than "from the evidence."

4. APPEAL—ADMISSION OF EVIDENCE—REVIEW.

Where incompetent evidence was withdrawn from the jury, the verdict will not be set aside on appeal on account of the error in admitting it in the first instance.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4178.]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Jeannette A. Scharff against the Southern Illinois Construction Company and another. From a judgment for plaintiff, defendant above named appeals. Affirmed.

In the year 1903, plaintiff owned and occupied a residence on West Pine Boulevard, near Kingshighway, in the city of St. Louis.

In the fall and winter of the same year, the defendant, the Southern Illinois Construction Company, under a contract with the other defendant, the Buckingham Investment Company, was engaged in the erection and construction of the Buckingham Hotel, located near plaintiff's residence; the east wall of the hotel being removed but 13 feet from the west wall of plaintiff's house. On December 25th, between 2 and 3 o'clock p. m., during a wind-storm, a portion of the east wall, which was 187 feet 10 inches long, and from 80 to 90 feet in height, fell toward the east and upon and against plaintiff's house, breaking in a portion of the roof, cracking and marring the west wall, breaking windows, and cracking some of the interior decorations. The bricks and mortar from the hotel wall also fell upon plaintiff's yard, breaking and destroying growing trees and shrubbery therein. The suit is to recover the resulting damage. The negligence alleged is careless, negligent, and unskillful construction and erection of the east wall of the hotel, and failure to properly brace the same.

The defendants filed separate answers. The one of the Buckingham Investment Company need not be noticed, as a demurrer to the evidence as to it was sustained by the court, from which ruling no appeal was taken. In substance, the answer of the Southern Illinois Construction Company is, first, a general denial; second, that it was not an independent contractor, but was doing the work under the direction and supervision of the other defendant and in such manner as it directed, and that it was governed and controlled in the performance of the work by the other defendant; and, third, that the wall was caused to fall by "a tornado, cyclone, or violent windstorm," raging in the vicinity of West Pine Boulevard and Kingshighway, in the city of St. Louis, and that the falling of the wall was "the direct result of said tornado, windstorm, and cyclone, and was the act of God."

The evidence shows that the walls of the hotel are what are known as self-supporting walls—that is, they were built up from the foundation, and not upon steel or iron framing; that steel or iron framing was provided for the interior structure of the hotel, and this framing was fastened to the outside or brick walls by tie-beams on each floor of the hotel. The face of the east wall was unbroken—that is, the facing bricks were all laid lengthwise; and plaintiff's evidence tends to show that this face wall was not properly bound, if bound at all, to the back wall, and that portions of the face wall peeled off the back wall, leaving the latter standing, and fell into plaintiff's yard. It is conceded that the two walls should have been bound together. Defendants' evidence conduces to show that they were bound together by metal bonds, shown by appellants to be the safest and most approved method of binding such walls together. The hotel is a seven-story

structure. The interior framing was built up with the outside walls, a story at a time, and plaintiff's evidence tends to show that the concrete floors (the kind put in to make the building fireproof) should have been laid as the building progressed, as they served to brace the brick walls. The evidence shows that all the inside iron and steel framing (except that for the elevators) was in when the wall fell, but that floors had been laid only in the first, second, and third stories. There is no other substantial evidence that defendants failed to properly brace the wall, which the evidence shows had been rapidly constructed in cold weather when the cement does not set as rapidly as in warm or moderate weather, and that the wall was what is commonly called a "green wall." Defendants' evidence is that hot water was used to set the cement mortar in the walls. Plaintiff offered evidence showing the extent of the damage caused to her property by the falling of the wall.

To show that it was not an independent contractor, the Southern Illinois Construction Company relied upon articles 1 and 2 of its contract made with the Buckingham Investment Company. These articles read as follows:

"Article 1. The contractor shall and will provide all the materials and perform all the work necessary for the erection of a certain fireproof building, seven stories and basement, on the northeast corner of Kingshighway and West Pine Boulevard, city, block three thousand eight hundred and eighty-three (3883) of the city of St. Louis, Missouri; size of ground, two hundred and fourteen feet and seven inches (214'7") on West Pine Boulevard; said building to be erected complete according to descriptions as shown on the drawings and revised drawings and described in the specifications and addenda thereto prepared by H. F. Roach, architect, which drawings and specifications and addenda are identified by the signatures of the parties hereto and become hereby a part of this contract.

"Art. 2. It is understood and agreed by and between the parties hereto, that the work included in this contract is to be done under the direction of the said architect, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. It is also understood and agreed by and between the parties hereto that such additional drawings and explanations as may be necessary to detail and illustrate the work to be done, are to be furnished by the said architect, and they agree to conform to and abide by the same so far as they may be consistent with the purpose and intent of the original drawings and specifications referred to in article 1. It is further understood and agreed by the parties hereto that any and all drawings and specifications prepared for the purposes of this contract by the said architect are and re-

main his property, and that all charges for the use of same, and for the use of same and for the services of said architect are to be paid by the said contractee."

The Southern Illinois Construction Company also relied upon the evidence of Harry F. Roach, who testified that he superintended the erection of the building, and saw that it was constructed according to plans and specifications.

C. L. Gray, secretary and manager of the Southern Illinois Construction Company, testified as follows: "Q. With reference to the east wall, on the 25th day of December, 1903, how far had you progressed with the construction of that wall? A. The east wall was entirely completed, unless, perhaps, there was some little brick work above the roof line and the centering for the roof, for the concrete floors or what has been described here to-day as false work for the concrete floors, was in with the exception of two panels; I mean by panel—we call a panel the space that is surrounded by the floor beams—I mean surrounded by the wall on one side, a tie-beam on either of the other sides, and a floor beam on the side parallel with the wall, and the centering was all in with the exception of two panels in the roof of the east wall. Q. You may tell the jury, if you know, what precautions, if any, were taken during the construction of the building to hold the iron and walls and other parts of the building in place? A. The precautions taken were the usual precautions taken in the construction of a building of that character, which consisted of a system of temporary bracing that would go through the entire structure, beginning with the first or ground floor level, and running to the roof, embracing all iron girders, and by bracing the iron work and by the system I have already explained of the tie-beams being built into the several walls, also forming a brace to the walls themselves, so far as it is possible to brace any structure of that character."

The most reliable and satisfactory evidence in regard to the windstorm prevailing at the time the wall fell is that of Edward H. Bowie, who was in charge of the United States Weather Bureau at St. Louis, which evidence is taken from his records kept at the time, and is as follows: "A. * * * The temperature rose from 30 degrees at 7 a. m. to maximum of 42 degrees at 2:30 p. m.; then begun an abrupt fall, the thermometer registering 16 degrees at 7 p. m. and a minimum of 8 degrees at midnight; making a range of 34 degrees, mean temperature 25 degrees, which was 7 degrees below normal. Brisk winds from the west in the morning, becoming high from southwest at midday; from 12 noon to 2:20 p. m. the velocity was high from west; at the latter moment the wind veered to northwest and continued a gale until 7 p. m., after which time the velocity gradually diminished; max-

imum velocity 48 miles per hour from the northwest at 2:35 p. m.; extreme velocity at same time 58 miles per hour. The day had been practically cloudless until 2 p. m., when a bank of stratus clouds appeared in the northwest, presaging the approach of a severe squall which swept over the city during the ensuing hour. Q. You say the greatest velocity was 58 miles an hour, that was during what time? A. That was at 2:35 p. m. Q. How long did the wind have to continue at that rate to make that record? A. A fraction over a minute. Q. Would that indicate the maximum velocity? A. That is the time that it took one mile of wind to pass the instrument. Q. Would that indicate the greatest velocity? A. There may have been squalls during that time which were higher, of course. The wind does not blow steady at any velocity. Q. What do you mean by a squall? A. That is, the wind blows in gusts, you know. A gust may have been considerably higher than that; we have no means of knowing positively that it was. Q. And your instruments would not indicate the velocity of the gust? A. No. Q. Did it indicate the velocity of wind which continued during a certain period? Would that be the lowest velocity of the wind during that period? A. The one that we gave? Q. Yes. A. No, it may have varied on either side. It may have been lower at one time and higher at another. Q. That would be the average? A. That would be the average for that minute; yes, sir."

The defendants objected to the following instruction, given for plaintiff: "(1) If you find from the evidence that defendant Southern Illinois Construction Company was engaged in building the Buckingham Hotel under the contract with the Buckingham Investment Company, and negligently and unskillfully constructed and erected the east wall, or improperly and insufficiently braced same, and as a direct result it fell on December 25, 1903, and damaged plaintiff's property, then you will find for plaintiff."

Defendants also assign as error the refusal of the court to give the following instructions, asked by them: "(1) The court instructs the jury that under the law and the evidence in this case the plaintiff cannot recover against defendant Southern Illinois Construction Company. (2) The court instructs the jury that if they find from the evidence that the building of said hotel structure had been let out by the defendant Buckingham Investment Company to the Southern Illinois Construction Company under the contract, plans, and specifications read in evidence, and if the jury further find from the evidence that the said Southern Illinois Construction Company at and previous to the time of the falling of the said east wall was performing its work under said contract, under the direction and control of the defendant Buckingham Investment Company or its authorized

agent, and if the jury further believe from the evidence that the said Southern Illinois Construction Company did not know or have reason to know that the said east wall of said hotel structure was being constructed carelessly, negligently, and unskillfully, or was being constructed and erected without proper and sufficient bracing, then the jury must find for defendant Southern Illinois Construction Company. (3) The court instructs the jury that if you believe from the evidence that defendant Southern Illinois Construction Company, had, prior to December 25, 1903, entered into a contract to erect and construct for defendant Buckingham Investment Company, a hotel building on the northeast corner of Kingshighway and West Pine Boulevard, in accordance with certain plans and specifications, and under the supervision and directions of one H. F. Roach, acting as architect and superintendent for the Buckingham Investment Company, and if you further find from the evidence that said H. F. Roach did act as superintendent of the work of constructing and erecting the hotel building of the Buckingham Investment Company, and was in the employ of said Buckingham Investment Company, and if you further find and believe from the evidence that said Southern Illinois Construction Company were from said date and up to and including the 25th day of December, 1903, engaged in the construction of said building under said contract, and if you further find from the evidence that said Southern Illinois Construction Company had up to and including said December 25, 1903, erected and constructed said building in accordance with the plans and specifications agreed upon, and under the directions of said H. F. Roach, then you are instructed that plaintiff cannot recover against the Southern Illinois Construction Company."

The jury assessed plaintiff's damages at \$1,250. It is not claimed that the assessment is excessive.

Walter S. London and Abbott & Edwards, for appellant. Lyons & Swarts, for respondent.

BLAND, P. J. (after stating the facts).

1. The mere falling of the wall was presumptive evidence that it had been negligently constructed (*Turner v. Haar*, 114 Mo. 335, 21 S. W. 737); but it is insisted that the appellant was not an independent contractor, and for this reason, if for no other, its demurrer to the respondent's evidence should have been given. In *Larson v. Railway*, 110 Mo. 234, 19 S. W. 416, 16 L. R. A. 330, 33 Am. St. Rep. 439, the defendant contracted in writing for the excavation and masonry necessary for the erection of an engine house. The contract provided that the excavation should be carried "to such general depth as may be indicated by the engineer" of the railway company, which was done. A house slipped into the excava-

tion made as the engineer directed. On this state of facts, in a suit by the owner of the house against the railway company, the court (at page 241 of 110 Mo., and page 417 of 19 S. W., 16 L. R. A. 330, 33 Am. St. Rep. 439), Barclay, J., writing the opinion, said: "It is now an accepted rule that supervision of such work may be retained without interfering with the independent action or liability of contractors who have engaged to perform it or subdivisions of it." It was held that the supervision in question went further, and that the defendant was liable. In *Gayle v. Missouri Car & Foundry Co.*, 177 Mo. loc. cit. 446, 76 S. W. loc. cit. 992, the court said: "The legal test for the determination of this question is stated by Judge Thompson, in his work on Negligence, vol. 2, p. 899, § 22, as follows: 'The general rule is that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful or attended with danger to others, according to the contractor's own methods, and without his being subject to control, except as to the results of his work, will not be answerable for the wrongs of such contractor, his subcontractor, or his servants, committed in the prosecution of such work. An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.' This statement of the law was specifically approved in *Fink v. Mo. Furnace Co.*, 82 Mo. 276 [52 Am. Rep. 376], in which case it was held that the foregoing statement of the law had been recognized and affirmed in *Hillsdorf v. St. Louis*, 45 Mo. 98 [100 Am. Dec. 352]; *Morgan v. Bowman*, 22 Mo. 538; *Clark's Adm'r v. Railroad*, 36 Mo. 218; *Barry v. St. Louis*, 17 Mo. 121. Those cases were reaffirmed in *Long v. Moon*, 107 Mo. 334, 17 S. W. 810, and again in *Crenshaw v. Ullman*, 113 Mo. loc. cit. 639, 20 S. W. 1077." Appellant contracted to erect the hotel. It hired and discharged its employes at will, pursued its own methods, and was not subject to the control of its employer, except as to the results of the work, and we think it was clearly an independent contractor. The above paragraph applies to appellant's refused instructions, which, for the reason herein stated, we think, were properly refused.

2. Appellant argues that instruction No. 1, given for respondent, is erroneous on the ground that after the word "and," connecting the two clauses of the instruction, the jury were not told that they should find "from the evidence" that the appellant negligently, etc.; that, as it reads, the jury were authorized to find negligence from any source outside of the evidence. It was ruled, in *Baker v. Railway*, 52 Mo. App. 602; and *Rogers & Powers v. Warren*, 75 Mo. App. 271, that the omission of the words "from the evidence" in an instruction is not fatal to it, when it is seen

from the reading they are implied. That those words are implied in the second clause of the instruction, we think admits of no doubt. This clause is joined to the first one by the copulative "and," and admits of no other interpretation than that the jury, to find for respondent, were directed to find two facts from the evidence: First, that appellant was engaged in building the hotel under a contract; and, second, that it negligently and unskillfully constructed and erected the east wall, or improperly and insufficiently braced the same.

3. In respect to the windstorm, the court gave the following instruction on behalf of appellant: "(1) The court instructs the jury that if you believe and find from the evidence that the building of the defendant Buckingham Investment Company, was, on the 25th day of December, 1903, being constructed and erected with prudence, diligence, skillfulness, and care by the defendant Southern Illinois Construction Company, under the contract with the Buckingham Investment Company shown in evidence, and that said east wall was properly and sufficiently braced, and if you further find from the evidence that on said December 25, 1903, a portion of the east wall of said building fell as the sole and immediate result of a wind storm of unusual and extraordinary violence, then raging in the place where said building was in process of erection, if you find from the evidence such a windstorm was then raging, then plaintiff cannot recover in this action, and your verdict must be for the defendant." No complaint is made that this instruction did not properly submit the issue of vis major to the jury.

4. A part of two days of the trial was taken up in hearing evidence, over the objection of the appellant, in regard to the quality of the bricks used in the construction of the east wall of the hotel. Their tensile strength had been tested by expert engineers, and they had been chemically analyzed by a competent chemist. The evidence of these experts tended to show that the bricks were of inferior quality; that the material in them was not sufficiently bonded; and that the bricks were porous, and would crumble under a pressure that good bricks would easily resist. The chemical analysis showed that they would fuse at a temperature that would not affect good bricks. On the second day of the trial, proceeding along this line of testimony, the trial court, on a renewal of appellant's objection, speaking to respondent's counsel, said: "As I told you this morning, I think that the ruling of yesterday was an incorrect one. I think that extends to the use of improper mortar, if there was such used, as well as to the use of improper or defective brick, if there was such used. I think your petition charges two grounds of negligence, one negligent construction and erection, and the other negligent bracing or insufficient bracing—negligence in respect of

there being not sufficient bracing; and the words 'construction' and 'erection' must, under the authorities which I have examined since adjournment yesterday, be held to mean the putting together of the materials that were used—putting together the brick and mortar and wood and the other materials that went to make the construction of that wall. The objection to this question, therefore, is sustained." Appellant's counsel contends that, while this ruling excluded the incompetent evidence, yet the evidence was of such a nature that no amount of caution on the part of the court could, by a possibility, remove the impression made by it on the minds of the jury. We appreciate the force of this argument, but think that the proper place to make it was to the trial court on the motion for new trial. That court, on account of having both seen and heard the witnesses and marked the effect, if any, the objectionable evidence had on the minds of the jury, was in a much better position than we are to determine whether or not the incompetent evidence influenced the verdict of the jury. For this reason the rule of practice in civil cases, though different in criminal cases, in this state, is that, where incompetent evidence is withdrawn from the jury, the verdict will not be set aside on account of the error in admitting it in the first instance. *Anderson v. Railway*, 161 Mo. 411, 61 S. W. 874; *O'Mellia v. Railway*, 115 Mo. 205, 21 S. W. 503; *McGinnis v. Loring*, 126 Mo. 404, 28 S. W. 750; *Stephens v. Railway*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. Rep. 336; *Stavinow v. Ins. Co.*, 43 Mo. App. 513; *Nelson v. Railway*, 66 Mo. App. 647.

We approve the instruction given, and, discovering no reversible error in the record, affirm the judgment. All concur.

ROBERTSON v. GEORGE A. FULLER CONST. CO.

(St. Louis Court of Appeals. Missouri. Dec. 12, 1905. Rehearing Denied Jan. 2, 1906.)

1. TRIAL—DEMURDER TO EVIDENCE—EFFECT.

On demurrer to plaintiff's evidence, such evidence must be taken as absolutely true, and every reasonable inference therefrom be drawn in plaintiff's favor.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 355, 356.]

2. MASTER AND SERVANT—NEGLIGENCE—PERSONAL INJURIES—SAFE PLACE TO WORK IN—SUFFICIENCY OF EVIDENCE.

In an action for injuries received by plaintiff through being struck by a falling pile of planks and cast down to a lower floor of a building in which he was employed as a laborer, evidence examined, and held sufficient to sustain plaintiff's allegation that defendant negligently furnished him with an unsafe place in which to work.

3. RELEASE—VALIDITY—FRAUD.

In an action for injuries received by plaintiff while engaged as a laborer in the construction of a building, plaintiff testified that prior to his injury several men had been hurt on the building, and that he understood that the de-

defendant aided them until they were able to work; that, being without money, he sent his wife to defendant to see if it would help him; that the following day defendant's representative gave him \$10.50, asking him to sign a receipt for it; that the paper was not read to him, nor was he advised of its contents, such representative simply saying: "Here, I want you to sign this receipt," putting his finger on the mark where plaintiff was to sign; that it was too dark in the room to see without a light, and that plaintiff did not and could not read the paper, but signed it, believing it to be merely a receipt for part wages until he was able to work. Held sufficient to show that the release was procured by fraud.

4. TRIAL—INSTRUCTIONS—APPLICABILITY TO PLEADINGS.

An instruction that if plaintiff was in defendant's employ as a laborer, and if, while in the discharge of his duty, a pile of flooring fell against him, knocking him to the ground and injuring him, and that if such flooring was caused to fall through being negligently placed on supports, and that if one B. was defendant's foreman, authorized to control the piling of the lumber and the laborers piling the same, as to the manner thereof, and did not use ordinary care in causing the lumber to be placed on the supports, if so improperly placed, and that if, as a direct result thereof, the lumber fell against plaintiff, injuring him, and that plaintiff at the time of and just preceding his injury was exercising ordinary care, he was entitled to recover, was within the allegations of the complaint alleging that plaintiff was directed to go to the side of a pile of lumber, that the same was so carelessly placed as to cause it to fall, that the lumber was raised by a steam engine, the work being done under the supervision of a foreman in defendant's employ, that the planks were deposited with each end on a skid so the chain used in raising them could be removed, that the planks were deposited in a position rendering them likely to fall, and that defendant knew, or by the exercise of ordinary care could have known, of the dangerous condition of such planks, and that such condition was due to the carelessness and negligence of defendant's foreman in charge of the work.

5. RELEASE—FRAUD—INSTRUCTIONS.

Where, in an action for personal injuries, defendant pleaded a release of damages, and plaintiff testified that at the time he executed the same he was in pain and suffering from his injuries, an instruction that if the release was signed by plaintiff when he was in such a mental condition through pain and sickness that he could not and did not comprehend its contents, and that if defendant's agent took advantage of plaintiff's condition to induce him to sign the paper without understanding its contents, intending thereby to defraud plaintiff, the release was no defense to the action, while faulty in not submitting all the facts tending to prove fraud and imposition, was not open to defendant's criticism.

6. APPEAL—QUESTIONS NOT RAISED IN LOWER COURT.

Where, in an action for personal injuries, defendant pleaded a release as a bar to the action, plaintiff in reply alleging that the same was obtained by fraud and offering to pay the consideration therefor, and the question of tender was not alluded to on the trial and was not in the evidence, instructions, or motion for a new trial, the fact of nontender could not be urged by defendant on appeal.

7. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant who was struck by a falling pile of planks and cast down to a lower floor of a building in which he was employed did not assume the risk of the pile of planks falling on him, where no such risk existed until created

by the negligent landing under the direction of the foreman of the particular pile falling against plaintiff, who was not apprised of the danger of such falling until too late to guard against it.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Robert Robertson against the George A. Fuller Construction Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Rassieur & Buder, for appellant. A. G. Morrison, for respondent.

BLAND, P. J. Suit, commenced before a justice of the peace, reached the circuit court in due course, where, on a trial de novo, plaintiff recovered a judgment for \$300, from which defendant appealed to this court.

Plaintiff was employed by defendant as a laborer, and on December 31, 1903, was put to work on the third floor of the Post Office Annex, a large building then in the course of construction on Eighteenth street, in the city of St. Louis. He was directed to carry flooring planks, from 12 to 14 feet long by 2½ inches thick and 5¼ inches wide, from piles back some 40 or 50 feet to where carpenters were engaged in laying the floor. The first and second floors had been laid. The flooring planks were raised to the third story by means of a derrick. From 40 to 50 planks would be caught in a chain sling, then raised by the derrick to the third floor, and there deposited on a skid (described as two flooring planks set up edgewise across the joists). When landed on the skid they were carried by laborers, including the plaintiff, back to the carpenters; the laborers walking back and forth on a broad girder running through the building. In the forenoon of the same day plaintiff was put to work carrying planks, his evidence shows, a hoist of planks was placed so they projected over the end of one of the boards forming the skid. When plaintiff took a plank off this hoist to carry it back to the carpenters, the pile fell over and struck him on the leg, causing him to lose his balance and fall to the second floor, whereby he was injured.

Plaintiff's evidence is that he was working under one Bass, as a boss or foreman, who had charge of the derrick and superintended the hoisting and moving of the planks. Bass was on the third floor, when the hoist was toppled over was released from the sling, and ordered plaintiff and the other laborers present (as soon as the sling was released) to take hold and move the planks. There is nothing in plaintiff's evidence tending to show that he saw or could have seen, by the exercise of ordinary care, that the planks projected so far over the end of the skid as to be in danger of toppling over. He testified that one of the derrick men stooped down and looked under the skid before the sling was released, but that he (plaintiff) could not see how far the planks projected.

On the part of the defendant, the evidence tends to show that Bass was the foreman of the men working the derrick, but had nothing whatever to do with plaintiff, and had no control over him; that plaintiff was put to work carrying planks by Gus Wehking, who was his foreman, and directed where and how he should work. Wehking was not present when the accident occurred, but testified that the planks were hoisted and carried away in the usual way in the construction of such buildings, and that no complaint came to him from any of the men that anything was wrong or dangerous about the work.

Defendant read in evidence the following release: "Whereas, the undersigned was injured on or about the thirty-first day of December, 1903, under circumstances which the undersigned claims renders George A. Fuller Construction Company liable to him for damages; and, whereas, said George A. Fuller Construction Company denies any liability for said injuries; and, whereas, both parties desire to compromise, and have agreed to adjust and settle the matter for the sum of ten and fifty-hundredths dollars: Now, therefore, in consideration of said sum, which it is hereby acknowledged has been to me or in my behalf paid by said George A. Fuller Construction Company, I do hereby compromise said claim and release and forever discharge said George A. Fuller Construction Company, its agents and employees, from any and all liability by reason of said injuries. Witness my hand and seal this fourteenth day of January, 1904, at St. Louis, Mo. Robert Robertson, 112 S. Tenth St. [Seal] Witnesses: Mrs. F. Robertson. L. E. Melick."

In respect to the release, plaintiff testified that, prior to his injury, several men had been hurt on the building, and that he understood that defendant "helped them along" until they were able to work, and, being without money, he sent his wife to the defendant to see if the company would help him; that a man came the next day and gave him \$10.50, and asked him to sign a receipt for it; that the paper was not read to him, nor was he told what its contents were; that all the man said was, "Here, I want you to sign this receipt," and put his finger on the mark where he wanted plaintiff to sign; that it was dark in the room, too dark to see without a light, and he did not and could not read it, but signed it, believing that it was only a receipt, and that the company intended to pay him wages or part wages until he got able to work.

1. Defendant offered a demurrer to the evidence, and complains of the court's refusal to sustain the same. For the purpose of the demurrer, the plaintiff's evidence must be taken as absolutely true, and every reasonable inference therefrom must be drawn in his favor. If this is done, we think his evidence that he was working under Bass and that Bass was present when the hoist of planks which fell was negligently placed on

the skid is sufficient to sustain the allegation that defendant negligently furnished the plaintiff with an unsafe place to work; for, if Bass was in charge, it was undoubtedly his duty to see that the planks were so placed on the skid that they would not fall against the plaintiff and cause him to fall to the floor below. We also think the plaintiff's evidence tends to prove that his signature to the release was procured by imposition and fraud. If to procure the signature of a trusting man to a release of a cause of action, by misrepresenting its contents by telling him it is only a receipt, under circumstances where he could not read, and when he was suffering pain from an injury, and not read or offer to read the document to him, is not procuring his signature by fraud, then we misconceive the meaning of the term.

Defendant contends that the following instruction given for plaintiff is erroneous, for the reason, it is alleged, it is broader than the complaint: "(1) If the jury find from the evidence that plaintiff was in the employ of the defendant on the 31st day of December, 1903, as a laborer, and if the jury further find from the evidence that on said day, while plaintiff was in the discharge of the duty of his employment at the Post Office Annex, a pile of flooring fell against plaintiff, knocking him to the ground and injuring him, and if the jury further believe from the evidence that said flooring was caused to fall and injure plaintiff on account of being negligently and improperly placed on skids or supports; and if the jury further find from the evidence that one Bass was foreman for defendant, and by it authorized to control the piling of said lumber and the laborers doing same, as to the manner of doing said piling, and if the jury further find that Bass did not use ordinary care in causing said pile of flooring to be improperly placed on the supports, if you find it was so placed, and that thereby and as a direct result said flooring fell against plaintiff, throwing him to the ground below and injuring him; and if the jury further find from the evidence that the plaintiff, at the time of and just preceding his injury, was exercising ordinary care, then the plaintiff is entitled to recover, provided the jury further find, under the evidence and instructions, that the plaintiff did not agree to the paper release read in evidence as defined in the other instructions."

The complaint states "that plaintiff was directed to go on a side of this pile of plank where he was compelled to stand on a girder or beam about 14 inches wide with an open space back of him, leading to the ground or floor below; that the planks which he was carrying were about 3 inches thick, 7 inches wide, and about 12 to 16 feet long; that the planks were so carelessly placed as to cause them to fall, which they did while he was standing with one plank in his hand on this beam or girder described above, and, as he was unable to secure himself, he was

thrown down the open space to the floor below, a distance of about 15 feet. Plaintiff further states that the said plank were raised by means of a steam engine, a number being raised at a time, and the work was done under the supervision of a foreman in defendant's employ; they were deposited with each end on a skid, so the chain could be removed; that the plank which were deposited and which slipped and fell against him were left with one end on the other off the skid, in a diagonal position, which rendered them likely to fall; that the defendant knew, or by the exercise of ordinary care could have known, of the dangerous condition of said plank, and that said condition was due to the carelessness and negligence of its foreman in charge of said work."

A comparison between the instruction and the allegations of negligence in the complaint shows that they correspond in all essential points, and that the instruction is within the allegations of the complaint.

The court gave the following other instruction for plaintiff: "(2) If the jury find, from the evidence in this case, that the paper release read in evidence was signed by the plaintiff when he was in such a mental condition through pain and sickness that he could not and did not comprehend or understand its contents; and if the jury further believe from the evidence that defendant's agent took advantage of plaintiff's said condition, if you find it existed, to induce him to sign said paper, and that said agent, owing to plaintiff's said mental condition, induced plaintiff to sign said paper without understanding its contents, intending thereby to defraud the plaintiff, then said paper release is no defense to this action." Defendant says this instruction is erroneous, because it proceeds upon the theory that plaintiff was in such mental condition through sickness that he could not and did not comprehend or understand the contents of the release. Plaintiff testified he was in pain and was suffering from his injuries.

The instruction is too narrow. It does not comprehend all the evidence tending to prove fraud in the obtaining of the release, but it submitted nothing to the jury that was not in evidence. Its fault is that it did not submit all the facts tending to prove fraud and imposition. Of this fault, defendant is in no position to complain. The further criticism is made that the instruction does not require the jury to find that the money obtained was ever returned to defendant or tendered to it. In *Och v. Railway*, 130 Mo., loc. cit. 45, 31 S. W. 966, 86 L. R. A. 442, the court approvingly quoted the following language from *Cleary v. Electric Light Co.* (Sup.) 19 N. Y. Supp. 951: "The rule undoubtedly is that where a party seeks to rescind the contract on the ground of fraud or imposition, he must tender a return of what he has received under it before he can maintain an action at law; and, in an action in equity, he must at least

tender a return by his bill of complaint." That it is the settled rule that one who would shirk the disadvantages of a contract, not void as against public policy, or prohibited by statute, must restore or offer to restore what he has received under the contract, is established by the authorities cited in the *Och* Case, and by prior and subsequent decisions of the appellate courts of this state. An answer was filed in the case, in which the release is pleaded as a bar to the action. Plaintiff filed a reply to this plea, alleging that the release was obtained by fraud and imposition, and offering to pay back the \$10; but the question of tender was nowhere alluded to on the trial. It is not in the evidence, in the instructions, or in the motion for a new trial. It was entirely lost sight of by counsel on the trial. A trial court is entitled to some consideration, and should not be put in the wrong for failing to do that which it was never asked to do, or be convicted of error for failing to rule on a point that was never called to its attention. The fact of nontender was not used on the trial, and cannot now be brought forward to overthrow the judgment. *Estes v. Nell*, 163 Mo. 387, 63 S. W. 724.

We think the plaintiff had a meritorious case. There is no evidence tending to show that he was guilty of contributory negligence, nor did he assume the risk of the pile of planks falling on him. No such risk existed until it was created by the negligent landing of the particular pile of planks that fell against plaintiff, and he was not apprised of the danger of its falling until it fell, too late to guard against it.

No reversible error appearing, the judgment is affirmed. All concur.

MARTIN et al. v. TEASDALE et al.

(St. Louis Court of Appeals. Missouri. Dec. 12, 1905.)

1. MORTGAGES—FORECLOSURE—LIMITATIONS—STATUTES.

Rev. St. 1899, § 4276, providing that no proceeding to foreclose any mortgage executed hereafter to secure any obligation to pay money or property shall be maintained after such obligation has been barred by limitations, applies only to mortgages executed after the adoption of such section as a part of Act Feb. 18, 1891 (Laws 1891, p. 184, § 1).

2. SAME.

Rev. St. 1899, § 4276, limits proceedings to foreclose mortgages to the period within which an action might be brought on the obligation secured, and section 4277 declares that no suit shall be maintained to foreclose any mortgage heretofore executed to secure any such obligation after two years from the passage of the act. *Held*, that section 4277 applied only to mortgages that secured obligations barred at the time the act (Laws 1891, p. 184, §§ 1, 2) took effect, and cut down the period of limitation as to mortgages securing such obligations to two years.

Appeal from St. Louis Circuit Court, Moses N. Sale, Judge.

Action by Meredith Martin, Jr., and others, against Hattie C. Teasdale and others. From a judgment denying relief to Meredith M. Stockton, as executor of Elizabeth L. Martin, deceased, he appeals. Reversed.

The controversy is between Meredith Stockton, executor of the estate of Elizabeth Martin, and Hattie Teasdale (née Martin) and her husband, Wann Teasdale, and arose in an action for partition of certain real estate situated on Fourth and Walnut streets, in the city of St. Louis, brought by Meredith Martin, Jr., et al. and Meredith Stockton, as executor, against Hattie Teasdale and her husband. The plaintiffs, except Stockton, and defendant Hattie Teasdale, in the partition suit, are owners in fee as tenants in common of the lot sought to be partitioned. John G. Martin, who was a common source of their title, on the 19th day of October, 1887, then owning a one-fifth interest in said lot, conveyed his one-fifth interest to Luther Babcock, trustee, in trust to secure to Marshall C. Thorpe his (Martin's) three negotiable promissory notes of even date with the trust deed—one principal note for \$2,000, due one year after date, and two semiannual interest notes of \$70 each, payable, respectively, in 6 and 12 months after date; all bearing interest from maturity at the rate of 7 per cent. per annum. Afterwards Marshall Thorpe, for value, by indorsement, transferred and delivered the notes and the deed of trust to Elizabeth L. Martin, who was the owner and holder thereof at her death. Neither of the notes or the interest thereon were ever paid, nor were they ever presented for allowance or classification against the estate of John G. Martin, the administration of which estate has long since been closed. The notes are now held by Meredith Stockton as executor of the last will of Elizabeth Martin, and the petition in the partition suit alleged that the interest of Hattie Teasdale in the lands sought to be partitioned is subject to the said deed of trust, and prayed the court to determine and declare the rights, title, and interest of all the parties to the suit. The answer of Hattie Teasdale and her husband admitted that Hattie Teasdale was the owner of an undivided one-fourth interest in the real estate sought to be partitioned, denied every other allegation, and pleaded, specially the statute of limitations against the claim of Meredith Stockton, as executor of the last will of Elizabeth Martin, and denied that her interest in the lot was subject to the deed of trust of October 19, 1887. The partition suit was tried before Judge Blevins, of the St. Louis circuit court, who, by an interlocutory decree, found and declared the interest of the several parties to the suit in and to the lands, found that the lands could not be partitioned in kind, and ordered a sale, and also found that the deed of trust of October 19, 1887, was a lien in favor of Stockton, as executor, upon nineteen-twentieths of the undivided one-

fourth interest of defendant Hattie Teasdale. Timely motions for new trial and in arrest were filed and overruled. Subsequently, to wit, on December 20, 1904, a renewed order of sale was made, under which the commissioner made a sale of the property which was approved February, 1905, and a final order of distribution was made, in which the sum of \$3,776.34 was ordered to be paid to Stockton out of the distributive share of Hattie Teasdale. A timely motion for new trial was again filed; the substantial ground alleged being that the notes and deed of trust held by Stockton, as executor, were barred by the statute of limitations. Before this motion was passed upon Judge Blevins was succeeded by Judge Sale. Judge Sale sustained the motion and modified the interlocutory decree and order of distribution, in so far as they affected the title of Hattie Teasdale, by setting aside that portion of the decree and order of distribution which declared that the deed of trust of October 19, 1887, was a valid lien on any of her interest in the lands, and finding that the statute of limitations had long since run against said notes and deed of trust. Exceptions to the ruling were saved, and a timely motion for new trial filed by Stockton, which the court overruled, whereupon Stockton, as executor of Elizabeth Martin, appealed to this court.

Kehr & Tittmann, for appellant. Joynson, Houts, Mariatt & Hawes, for respondents.

BLAND, P. J. (after stating the facts). Prior to 1891 we had this unscientific and incongruous state of the law in respect to the limitation of actions on money obligations and actions to foreclose mortgages given to secure such obligations. By statute, the right to sue on the obligation was barred in 10 years from the date of its maturity, while the right of action to foreclose the mortgage was not barred until 20 years after the maturity of the obligation it was given to secure, unless the mortgagor or his assigns, after the maturity of the debt, had for 10 years held possession of the mortgaged premises adversely to the mortgagee. *Eyermann v. Piron*, 151 Mo., loc. cit. 116, 117, 52 S. W. 229, and cases cited. For the purpose of expunging this incongruity from the law of limitations, the Legislature, in 1891, passed the following act, approved February 18, 1891 (Laws 1891, p. 184), now sections 4276, 4277, Rev. St. 1899, which reads as follows: "Section 1. No suit, action or proceeding under power of sale to foreclose any mortgage or deed of trust, executed hereafter to secure any obligation to pay money or property, shall be had or maintained after such obligation has been barred by the statutes of limitations of this state. Sec. 2. Nor shall any suit be had or maintained to foreclose any such mortgage or deed of trust heretofore executed to secure any such obligation after the expiration of two years after the passage of this act."

The principal note secured by the Martin deed of trust October 19, 1887, matured October 19, 1888, and an action on it was not barred by limitation until October 19, 1898. For this reason, appellant contends that the act of 1891 does not apply to the deed of trust. His contention is that the second section of the act (section 4277, Rev. St. 1899) applies only to mortgages where the right of action on the obligation they were given to secure was barred by the statute of limitations before or at the date of the passage of the act. To the contrary, the respondents contend that the section applies to all mortgages in force at the date of the passage of the act, and that two years of grace were given in which to begin foreclosure proceedings on any existing mortgage, if the obligation secured thereby was barred at the date of the passage of the act, or if it should be barred at any time in the future by limitation. The section has been twice construed by the Kansas City Court of Appeals by Judge Smith, in *Little v. Reid*, 75 Mo. App., loc. cit. 270, and by Judge Ellison, in *Stanton v. Gibbins*, 103 Mo. App. 266, 267, 77 S. W. 95. In *Little v. Reid* the second section of the statute was not before the court for construction. In *Stanton v. Gibbins* the note secured by the mortgage matured April 2, 1885. Suit to foreclose the mortgage was begun July 31, 1902, more than 17 years after the maturity of the note, and more than 2 years after the passage of the act of 1891. Judge Ellison held that the mortgage came under the provisions of section 4277, and that the note being barred, and more than two years having elapsed since the statute took effect, the suit on the mortgage was also barred. At page 267 of 103 Mo. App., page 96 of 77 S. W., the learned judge said: "The object of the statute was to provide that the life of mortgages and deeds of trust thereafter executed should continue as long as the life of the note lasted, but no longer. And that mortgages and deeds of trust executed before the statute should end within two years after the passage of the act, unless, of course, the obligation secured was not yet barred. The statute does not, under either section, end the life of the mortgage or deed of trust at any time before the obligation secured is barred. But in cases where the mortgage was executed prior to the act it would be barred in two years, if, at any time before the two years had run, the obligation had become barred." Literally construed, the last clause of the quotation from Judge Ellison's opinion would confine the application of the statute to mortgages securing obligations barred at the date of the passage of the act of 1891, and those where the debts secured would become barred within two years from the date of the approval of the act. The facts in judgment, however, show that he did not intend to be so understood, for the note secured by the mortgage it was attempted to foreclose did not become barred until April 2, 1895, more

than two years after the passage of the act, yet he held the suit to foreclose the mortgage was barred for the reason the debt was barred and the foreclosure suit was begun more than two years after the approval of the act. The case therefore seems to be authority in support of respondents' contention. In *Kreyling v. O'Reilly*, 97 Mo. App. 384, 71 S. W. 372, this court held the act applicable to a mortgage where the obligation the mortgage was given to secure was barred before the passage of the act. The facts in the case did not call for a further interpretation of the act.

If the second section of the act only applies to mortgages given to secure obligations then barred, then the holder of a mortgage securing an obligation barred on the 17th of February, 1891, would have but two years after February 18th of that year in which to bring suit to foreclose his mortgage, while the holder of a mortgage securing an obligation that would be barred two days later would have twenty years in which to bring his suit to foreclose. If the act applies to both mortgages where the obligations they secure were barred at the date of the passage of the act or that would become barred within two years thereafter, then the holder of a mortgage securing an obligation barred at the date of the passage of the act would have two years in which to sue for foreclosure, while the holder of a mortgage securing an obligation which became barred on February 17, 1893, would have but one day after the obligation was barred to commence his suit for foreclosure. If the act applies to all mortgages executed before the passage of the act, then two years of grace is given in every case in which to bring suit for foreclosure after the obligation is barred, irrespective of the date when it was or became barred. But to arrive at this result, terms must be read into the section that it does not contain. To do this is not permissible. The intent of the Legislature must be interpreted by the terms it used to express its purpose, having in mind the evil sought to be cured and the remedy provided. The first section of the act needs no interpretation. It unmistakably applies to all mortgages to be thereafter executed, and provides for the same period of limitation to mortgages as applies to the obligations they are given to secure. The second section could not apply this rule to existing mortgages where the obligations they were given to secure were already barred without infringing on that section of the Constitution which prohibits the Legislature from passing any law impairing the obligation of contracts.

To avoid the impairment of the obligation of contracts, the Legislature, by the second section of the act, granted what it deemed a reasonable time in which suits for foreclosure on such mortgages might be begun. The limit is two years after the passage of the act. No mention is made of mortgages securing debts matured, or to become matured, and

the act in unqualified terms limits the time to two years in which to commence suits for foreclosure on all existing mortgages. A literal construction of the section would bar suits to foreclose mortgages where the obligations they were given to secure matured more than two years after the passage of the act. Of course, no such result could be brought about by a legislative act, and no such result was intended, and the act does not and cannot apply to such mortgages, nor do we think that it applies to mortgages, securing obligations not barred, but which would be barred within two years after the passage of the act, for the reason, as we have herein pointed out, unequal periods of limitation would apply to mortgages securing obligations already barred and to those securing obligations to be barred in two years. The two years granted by the statute in which to bring suits for foreclosure is a limitation on the right to sue, and suits brought after the lapse of time fixed cannot be maintained. This is a plain and positive provision of the legislative act, and it cannot be construed in any other way. To what mortgages, then, does it apply? What was in the mind of the Legislature at the time of its passage? We will answer this question. It undertook to do away with an existing evil. By the first section it eradicated the evil from all mortgages to be executed in the future, and by the second section it went one step further, and took into account mortgages that secured obligations then barred, and cut down the period of their limitation to two years. It might, and perhaps should, have gone further, and cut down the period of limitation in which to bring suits on all mortgages then in force, but it stopped with mortgages securing barred obligations, and we must stop at the same point. This view is in accord with *Little v. Reid*, supra, which was approvingly cited in *Stanton v. Gibbins*, supra.

The judgment of the circuit court is reversed, and the cause remanded, with directions to order distribution of the fund in controversy in accordance with the interlocutory decree in the partition suit and in accordance with the views herein expressed.

As this opinion is in conflict with the decision of the Kansas City Court of Appeals in *Stanton v. Gibbins*, supra, the cause is certified to the Supreme Court for its decision.

STATE v. DOBBINS.

(Kansas City Court of Appeals. Missouri.
Jan. 8, 1906. Rehearing Denied
Feb. 5, 1906.)

INTOXICATING LIQUORS — LOCAL OPTION ELECTION—NOTICE—PUBLICATION — SUFFICIENCY.

Rev. St. 1899, § 3029, providing that the notice of a local option election shall be by publication in a newspaper in the county "for four consecutive weeks and the last insertion shall be within 10 days next before" the

election, directs that the publication of the notice shall continue consecutively for a period of 28 days, and that the last insertion necessary to make the 28 days must be within 10 days of the election, but does not specify any particular weeks in which the notice shall be given, nor direct that a given number of publications shall be made, and the publication of the notice of an election to be held on September 6th, when published August 4th, 11th, 18th, 25th, and September 1st, or when published August 3d, 10th, 17th, 24th, 31st, is sufficient.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 41.]

Appeal from Circuit Court, Mercer County; P. C. Stepp, Judge.

John Dobbins was convicted of violating the local option law, and he appeals. Affirmed.

Read & Alley, for appellant. Eldon C. Orton and Herbert S. Hadley, for the State.

ELLISON, J. The defendant was tried and convicted in the circuit court of Mercer county for selling intoxicating liquors in less quantity than four gallons. He has prosecuted his appeal to this court.

The particular law he was accused of violating was what is known as the local option law, which, according to the allegation in the information, had been duly adopted in Mercer county. Defendant insists that the election was void, in that legal notice was not given for holding the special election at which that law was supposed to have been adopted, and that is the sole question for decision. The local option statute was enacted in 1887 and has been carried forward into the revision of 1899. The notice required for the election is the same now as originally enacted. It reads as follows: "Notice of such election shall be given by publication in some newspaper published in the county, and such notice shall be published in such newspaper for four consecutive weeks, and the last insertion shall be within 10 days next before such election, and such other notice may be given as the county court or municipal body ordering such election may think proper, in order to give general publicity to the election." Section 8029, Rev. St. 1899. The election in question was held on the 6th day of September, 1887; and the notice for the election was published in two weekly newspapers issued in Mercer county, the Princeton Telegraph and the People's Press. In the Telegraph it was inserted August 4th, August 11th, August 18th, August 25th, and September 1st. In the Press it was inserted August 3d, August 10th, August 17th, August 24th, and August 31st. It was thus inserted five times consecutively in each paper, and the last publication in each was within 10 days of the election.

As we understand defendant's position, it is this: that the first four publications, ending August 24th in the Press and August 25th in the Telegraph, constituted the notice required by the statute; and that the election held on September 6th, not being within 10

days of either the 24th or 25th, was void. That position ignores the fifth insertion in the next week's issue, and assumes that it should not be considered as a part of the notice. As the first four publications did not cover a period of 28 days, it is evident that defendant's construction of the statute is that 28 days' notice is not necessary. If, however, 28 days' notice is necessary to a valid election, then there must be more than four insertions in all weekly newspapers issued, on corresponding days of each week, since four insertions would only cover a period of 21 days. Therefore the first question is, does the statute contemplate a notice of 28 days? We held in the case of *State ex rel. v. Tucker*, 32 Mo. App. 620, that it did; that the notice required was not merely a notice put in a newspaper for four consecutive weekly issues, but that the notice must cover a period of four weeks. That is to say, 28 days. Our view was that the Legislature, in enacting the statute, was not concerned about the number of weeks the notice might have to be inserted in order to cover 28 days; that its solicitude was to secure notice for that length of time; and that the election should not occur farther away than 10 days from the last insertion. The defendant's position is directly in the face of the construction we put upon the statute in that case, which brings up the inquiry whether that construction is sound. The view we there stated has been reiterated by the Courts of Appeals. *Bean v. Barton County Court*, 33 Mo. App. 635; *State v. Kaufman*, 45 Mo. App. 656; *State v. Kampman*, 75 Mo. App. 188; *State v. Martin*, 83 Mo. App. 55. And the case has been several times cited by the Supreme Court with no intimation that it had been wrongly decided (*Munday v. Leeper*, 120 Mo. 418, 25 S. W. 381; *Cruzen v. Stephens*, 123 Mo. 346, 27 S. W. 557, 45 Am. St. Rep. 549). On the contrary, it seems to have been regarded as correct and approved of in an opinion by Judge Burgess in *Young v. Downey*, 150 Mo. 317, 324, 330, 51 S. W. 751.

But it is suggested that later cases in the Supreme Court (*Russell v. Croy*, 164 Mo. 69, 63 S. W. 849, and *Ratcliff v. Magee*, 165 Mo. 461, 65 S. W. 713) announce a construction of similar statutes, which is opposed to the view taken in *State ex rel. v. Tucker*. That is a mistaken idea. On the contrary, those cases affirmatively approve the construction of the statute which we adopted in that case. The case of *Russell v. Croy* involved the construction of a requirement of the Constitution as to the publication of notice of constitutional amendments to be voted upon at a general election, which reads as follows: "The proposed amendments shall be published weekly in some newspaper, if such there be, within each county in the state, for four consecutive weeks next preceding the general election then next ensuing." It is true that that provision has the same words, "for four

consecutive weeks," which are used in the statute involved in this case, and that they were held not to mean 28 days. But, as said by Judge Valliant, their meaning is influenced and controlled by other words of the provision, not found in the statute we are considering. The judge says (at page 91 of 164 Mo., page 851, of 63 S. W.) that "the same words occurring in different statutes of somewhat similar character do not necessarily bear the same interpretation. Their meaning is influenced by the particular context, and sometimes by the object, to be obtained by the statute itself." He then proceeds to show that under a statute considered in *Young v. Downey*, 150 Mo. 317, 51 S. W. 751, reading that, "Such notice shall be published for four weeks in some newspaper in the county in which the proceedings were had," the expression, as thus worded (substantially identical with the one we are now considering), meant a publication covering a period of 28 days. But he interpreted the words involved in *Russell v. Croy*, "shall be published weekly," as limiting, qualifying, or explaining the subsequent words "for four consecutive weeks," and that taken together, the whole expression meant only that the publication should be made once in each of the four weeks next before the election; and so it is stated in *Ratcliff v. Magee*, 165 Mo. 461, 467, 65 S. W. 713. If one person says to another, "Publish this notice once a week for four consecutive weeks," it is manifest that he means to direct that it shall be published once in each of four consecutive weeks, without regard to the period of time such publication would require. But, if the direction was to "publish this notice for four consecutive weeks," a wholly different meaning is apparent, for in such case the publication must continue for four weeks, or 28 days. So we regard it as quite clear that the Supreme Court has approved the construction which we gave the statute in *State ex rel. v. Tucker*, not only by the decision that court made in the case of *Young v. Downey*, but in the subsequent cases to which we have just referred.

As stated at the outset, defendant's position ignores the publication of the notice made in the fifth week. He assumes that that publication was unauthorized, and that the fourth publication completed the notice, and, that being more than 10 days prior to the election, the election was void. It may be suggested that the following portion of Judge Valliant's opinion in *Russell v. Croy* gives countenance to defendant's course of argument, viz.: "The four weeks here called for are not any four weeks the Secretary of State may select prior to the election, but they must be the four weeks next preceding the election. If the Secretary of State had chosen to begin the publications on the 1st day of September and run them into the first week in October, so as to secure, with the varying days of publication among the

newspapers, a full period of 28 days, that would not have answered the requirement of the Constitution, because the four weeks so covered would not have been those next preceding the election. And if he had run the publication so begun through the month of October, and thus covered more than 28 days, or four weeks, still the only period of the publication that would have answered the requirement of the law would have been the four weeks next preceding the election, the rest would have been in legal effect as if it had not been. If the publication should be for four weeks and it began five weeks before the day of the election, it would not have covered the period called for by the Constitution, because it would not have covered the week immediately preceding, and if it had continued five weeks up to the day of the election the only valid publications would be those in the last four weeks." That language in no way applies to the statute in the case before us. The statute in that case specifically named the weeks in which the publication should be made, which were the four weeks which immediately preceded the election. Hence no other four weeks would answer, and no time except the time running during the course of the four weeks preceding the election would be counted as of any effect. But the local option statute does not specify any particular weeks in which the notice shall be published, nor, as we have already shown, does it direct that a given number of publications be made. It merely directs that the publications shall continue consecutively until the period of 28 days shall be covered, and that the last insertion necessary to make the 28 days must be within 10 days of the election.

An additional view of the construction of the statute presented by counsel concedes that 28 days' notice must be given, but insists that such notice consists of four publications; that no other publication than the four are recognized; that 28 days must elapse between the first publication and the election, and the election must be within 10 days of the last one. Put into practical application, that construction would only leave one of four days in which any election could be held, instead of one of 10, as contemplated by the statute. Thus, suppose the first publication to be on the 1st of August, the fourth publication would be on the 22d, but 28 days would not elapse from the first publication until the 29th; and the election, according to this view, could not be held sooner than that day. And it could not be held later than the 1st of September, as that would put it off more than 10 days from the last publication. So the time in which an election could be held would be necessarily limited to four days, viz., 29th of August to 1st of September. But manifestly the statute intended that the election could be held on any of the 10 days next after the last publication. Besides leading into this, as we think,

awkward situation, the view as presented assumes words to be in the statute which are not there. It assumes that the statute reads that the notice shall be published four times, and that there shall be four insertions. In that way a construction is built up that the publication, if it is published four times, may stop short of the 28 days, though the election must not be held until that period has elapsed. But there is no suggestion of that kind in the statute. As we have already stated, the statute is that the notice shall be published, not four times, but for four weeks. To publish any thing for a certain length of time means that the publication must not cease, but must continue until that time has run.

The idea that the statute requires only four publications, or four insertions of the notice, possibly springs from assuming that it should be published in a weekly paper. But the statute does not require the publication in a weekly paper. It may just as properly be published in a daily. If published in the latter, would any one be found to say that the publication should cease before 28 days had ended? It ought, then, to be clear that one length of time should not be required for one kind of publication and a different time for another kind of publication.

It follows from the foregoing that the local option law was legally adopted in Mercer county, and that the conviction of the defendant should be affirmed. The other judges concur.

KIERNAN v. ROBERTSON (ALEXANDER, Garnishee).

(Kansas City Court of Appeals. Missouri. Feb. 5, 1906.)

1. PLEADING—WAIVER OF DEFECTS—PLEADING TO MERITS.

The act of a garnishee in replying to the merits of plaintiff's denial of his answer, without attacking the same by demurrer or motion constitutes a waiver of all defects, except such as are so fundamental in character that they cannot be cured by verdict.

2. SAME—CONCLUSIONS OF PLEADER.

An allegation, in plaintiff's denial of the garnishee's answer, that the garnishee had in his possession and under his control a certain sum of money due defendant, was not subject to the objection of stating a conclusion of law, but was a proper statement of a conclusion of fact.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 12-16.]

3. GARNISHMENT—PERSONS SUBJECT TO GARNISHMENT—ADMINISTRATORS.

Under Rev. St. 1899, § 3435, providing that no administrator shall be summoned as garnishee prior to an order of distribution, or for payment of legacies, or the allowance of a demand found to be due, and administrator is personally subject to garnishment process by a creditor of a distributee after the time has elapsed for the allowance of demands against the estate, and all debts and charges have been paid, and nothing remains to be done but to comply with the order of distribution.

4. EVIDENCE—DEFECTS IN PROOF—CURE BY ADMISSIONS.

In garnishment proceedings against an administrator, plaintiff's failure to prove by the best evidence that an order of distribution had been passed in the administration proceedings, was cured by the garnishee's admission of that fact while testifying as a witness.

Error to Circuit Court, Randolph County; A. H. Waller, Judge.

Action by R. E. Kiernan, Jr., against Ike Robertson, Sr., in which W. H. Alexander was made garnishee. There was a judgment for plaintiff, and the garnishee brings error. Affirmed.

Jno N. Hamilton, for plaintiff in error. Joel-la Ellington and Aubrey R. Hammett, for defendant in error.

JOHNSON, J. Plaintiff, a judgment creditor of defendant Robertson, had execution issued, and caused Alexander to be summoned as garnishee. In due time, interrogatories were filed by plaintiff and answered by the garnishee, who stated that when served with process he was not indebted to the defendant and did not have in his possession nor under his control any money or property belonging to defendant. A denial of this answer was filed by plaintiff, the material allegations of which are, "that on the 17th day of August, 1903, said W. H. Alexander had in his possession and under his control \$57 or thereabout in money coming to and due this defendant, Ike Robertson, Sr., and that when garnishment was served said garnishee had in his possession and under his control said \$57 or thereabout in money. Plaintiff further avers that this garnishment is under a judgment from this court in January, 1903, upon execution for same and costs." The reply of the garnishee was a general denial. Plaintiff recovered judgment, and the garnishee appealed.

The facts in evidence show that the garnishee, at the time of the service of the writ, was the administrator of an estate and had in his possession the sum of \$408.58 for distribution among the distributees, of whom defendant was one. The affairs of the estate had been fully administered; time for filing demands against it had expired; all debts and charges had been paid; final settlement had been filed and approved; and the administrator had applied for and obtained an order of distribution from the probate court, in which he was directed to pay \$57 to defendant as a distributee. The garnishee was served with notice of garnishment immediately after this order was made. The garnishee testified that before the occurrence of these proceedings in the probate court, a Mr. Hamilton, another creditor of defendant, presented to him a written order signed by defendant directing the payment to Hamilton of the amount of defendant's share in the money to be distributed and requested and obtained the acceptance of the order, and

that very soon after the service of garnishment the garnishee paid the \$57 due defendant to Hamilton. In the instructions given, the court told the jury to return a verdict for the garnishee if they believed in the existence of these defensive facts, but the jury rejected them in giving plaintiff the verdict.

The garnishee complains of the action of the trial court in refusing his request for an instruction in the nature of a demurrer to the evidence, and presents several questions for our determination. First, he contends that the denial is fatally deficient in omitting from its allegations facts constitutive of the cause of action pleaded. The garnishee made no attack upon this pleading by demurrer or motion, but replied to the merits, and therefore waived all defects except those so fundamental in character that a verdict could not cure them. The specific objection is that in alleging that the garnishee "had in his possession and under his control \$57 * * * in money coming to and due this defendant," a conclusion of law and not a fact is stated. We do not agree with this. The averment advised the garnishee to prepare to meet an issue of fact—that he held when served with notice a specified sum of money belonging to and due the defendant. It may be conceded that a conclusion is stated, but it is one of fact and not of law. Often it occurs that an elemental fact is dependent for its existence upon other facts and therefore cannot be established by direct proof, but it is none the less a fact, and the averment of it alone satisfies the rules of pleading, which do not require, but condemn, the pleading of purely evidentiary facts. *Russell Grain Co. v. Railroad* (not yet officially reported) 89 S. W. 908. The allegations of the denial are sufficient.

Further, the garnishee contends that the action must fail because the proceeding under the pleadings is against him as an individual, while the proof shows that the only relation he sustained to defendant with respect to the money in question was in his representative capacity as an administrator. Under section 3435, Rev. St. 1899, an executor or administrator of an estate is not subject to garnishment on account of the interest of a distributee prior to the making of an order of distribution, and, so long as the estate is in process of administration, the only relation sustained by the executor or administrator to those interested in its distribution is that of a representative; but after the time has elapsed for the allowance of demands against the estate, and all debts and charges have been paid, and nothing remains to be done but to comply with the order of distribution, the executor or administrator becomes the personal debtor of each distributee for the amount of the share due such distributee, and, if payment thereof is not made, may be sued for its recovery, either upon his bond or in an action against him

alone as an individual. *Clarke v. Sinks*, 144 Mo. 448, 46 S. W. 199; *Pound v. Cassity*, 166 Mo. 419, 66 S. W. 273. As the garnishee when served was in the position of an ordinary debtor, plaintiff was not required to proceed against him as an administrator.

Another point urged by the garnishee is that plaintiff failed to prove by competent evidence the making of an order of distribution. The order itself, of the court record thereof, would have been the best evidence and neither was produced, but the garnishee when testifying as a witness, in effect, admitted that the order had been made when he was served and his defense upon the merits was in part based upon the fact of the existence of the order. Plaintiff's omission to make formal proof was cured by these admissions. The demurrer to the evidence was properly overruled.

We have examined the instructions and find the issues were fairly presented to the jury. No error appearing in the record, the judgment is affirmed. All concur.

DUNLAP v. KELLY.

(Kansas City Court of Appeals. Missouri. Jan. 8, 1906.)

1. BILLS AND NOTES — INDORSEMENTS — PAYMENTS — INTEREST.

Where a note sued on was dated December 10, 1890, and contained indorsements of payments the last of which was on December 11, 1893, which payments exceeded the interest due at that time, it was error to direct a verdict for plaintiff for the principal of the note and interest from December 10, 1893, in the absence of evidence that the payments were all payments of interest for the preceding three years.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 275, 276, 279.]

2. SAME — CONTRACT — CONSTRUCTION.

Where the maker of a note, six months after date promised to pay to the payee \$60 for value received "interest at 8 per cent. per annum," the maker only bound himself to pay interest at 8 per cent. per annum from the date of his default and not from the date of the note.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 275, 276, 279.]

3. TRIAL — INSTRUCTIONS — APPLICABILITY TO PLEADINGS.

Where, in an action on a note, plaintiff cast the interest due up to December 10, 1899, and prayed judgment for interest from that date on the amount thus ascertained to be due, it was error for the court to instruct a verdict for plaintiff with interest from 1893, the date of the last payment indorsed on the note.

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by Ina M. Dunlap against Joseph H. Kelly. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. D. Steele, for appellant. Sangree & Bohling, for respondent.

ELLISON, J. This action is based on a promissory note executed by defendant to

the plaintiff. She recovered judgment in the trial court. The case was before us on another appeal. 105 Mo. App. 1, 78 S. W. 664. The note was made to the plaintiff. She indorsed it to another and he afterwards indorsed it back to her. These indorsements were alleged, but not proven, and on that account we remanded the cause for another trial. At the last trial, the court peremptorily instructed the jury to find for the plaintiff and a verdict for \$113.56 was rendered on February 7, 1905. We regard that there were such irregularities and errors in the trial as require that the cause be again remanded. The note is as follows: "Sedalia, Mo., Dec. 10, 1890. Six months after date, I promise to pay to the order of Ina M. Dunlap, sixty (\$60) dollars, for value received, Int. at 8 per cent. per annum. [Signed] Joseph H. Kelly." There was indorsed on the back thereof the following payments: "March 5th, 1892, \$4.80. Oct. 12, 1892, \$4.80. Dec. 11, 1893, \$4.80." The petition alleges: "That said payments paid the interest on said note up to December 10, 1893; that all of said note, to wit, the sum of \$60 is now due, owing and unpaid with interest thereon from Dec. 10, 1893, at the rate of 8 per cent. per annum, making the balance amount due, December 10, 1899, \$88.80. Wherefore plaintiff asks judgment against the defendant for the sum of \$88.80 with interest thereon at the rate of 8 per cent. per annum from Dec. 11, 1899, and the costs of this suit." The answer was a general denial.

The peremptory instruction referred to is as follows: "The court instructs the jury that under the pleadings and evidence in this case your verdict must be for the plaintiff, for the principal of the note sued on with 8 per cent. simple interest thereon from the 10th day of December, 1893, to date." There was no evidence to support the allegation that the payments were payments of interest for three years up to December 10, 1893. The evidence is silent whether they were payments for interest or on the principal. As a matter of fact, the payments exceed the interest up to December 10, 1893, and the court was not justified in assuming that they were payments of interest and that the whole of the principal was still due on December 10, 1893. Under the rule laid down for computing interest where there have been partial payments (*Call v. Moll*, 89 Mo. App. 386), it makes a difference in the amount due whether the payments are considered interest instead of principal; though such difference is very slight in this case. The instruction assumes that interest should run from date. But it will be noticed that the note does not specify that the interest shall run from that time. It merely reads, "Int. at 8 per cent. per annum."

The time when interest should begin to run on an indebtedness, when it is not specifically stated, is frequently difficult to determine. It may, however, be said of indebtedness

generally that, in the absence of an agreement to the contrary, it does not begin to bear interest until it is due. So, therefore, if a written obligation is silent as to the time when it will begin to draw interest, it will not do so until maturity. *Miller v. Cavanaugh*, 99 Ky. 377, 35 S. W. 920, 59 Am. St. Rep. 463. But, if the writing itself discloses an intention that interest shall begin with the date, it will do so. Thus, a note due three months after date for \$1,500 "with interest at rate of 4 per cent. per annum," means from date. *Dewey v. Bowman*, 8 Cal. 145. To the same effect is *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369, and *Campbell Printing Press & Mfg. Co. v. Jones*, 79 Ala. 475. In such cases, the promise is considered to be to pay the money at the time it is due with interest. In another class of cases, where a note reads, that: "On the 25, of December, 1873, I owe and promise to pay to G. with legal interest the sum of \$192," it draws interest from date. *Gholson v. King*, 79 N. C. 162. So if it reads, "Eight months after date, pay me or my order the sum of £100 for value received, with lawful interest for the same" (*Doman v. Diben*, 1 R. & M. 381), or, if it reads for "£25 payable four months after date, bearing interest" (*Kennerly v. Nash*, 1 Stark. 452), the interest begins from date. Those cases contemplated the legal rate, and they are put upon the ground that it must be presumed the parties meant something by stipulating for interest, and, as the law itself would give interest at the legal rate after maturity, it must be supposed the parties intended something more than that which could have been had without the use of such words, viz., interest from date.

But in the case at bar, if there had been no stipulation for interest at 8 per cent., the note would not have drawn that rate after maturity, it would only have drawn 6 per cent. In the foregoing cases, unless the words as to interest be allowed the force to give interest from date, they would have no office to perform and need not have been used, since the law itself would have given interest from maturity without them. In the case at bar, the words "interest at 8 per cent. per annum" are as much necessary for that rate after the maturity as after the date of the note, for, but for those words, the note would only have drawn 6 per cent. after maturity, that being the legal rate in this state. Section 3705, Rev. St. 1899. So where the stipulation as to interest does not fairly and reasonably disclose that interest is to be drawn from date and such stipulation can be applied to the period after maturity, and without it the same rate would not be given by law, then the note should be construed as drawing interest from maturity. This is the view taken in *Wernwag v. Mothershead*, 3 Blackf. 401, and *Billingsly v. Cahoon*, 7 Ind. 184, as is shown in *Hackenberry v. Shaw*, 11 Ind. 392. A similar question was before

the Supreme Court of this state in *Ayres v. Hayes*, 13 Mo. 252. That was a written contract witnessing the sale of some land, in which it was provided that the land should be paid for "in the following manner, viz., one-half the amount on the 1st day of November next, and the balance on the first of November, 1841, with 8 per cent. interest." It was held, with some reluctance, that interest ran only from maturity. The promise, in that case, being to pay the principal "with 8 per cent. interest," would seem to render the case out of harmony with some of the cases above cited from other states as well as that of *Hard v. Foster*, 98 Mo. 297, 311, 11 S. W. 760, and *Green v. Kennedy*, 6 Mo. App. 577. The case was criticised in *Pittman v. Barret*, 34 Mo. 84, where it was held that a note for a certain sum "with 10 per cent. interest thereon till paid" drew interest from date. As intimated above, we regard a contract to pay a sum of money at a certain time with interest means that the payor is to pay it when due with the interest then accrued, that is, interest from date. But we have not such contract. The contract before us does not promise to pay \$60 in six months with interest, but the promise is that in six months the defendant will pay \$60, "interest at 8 per cent. per annum;" which we interpret to mean that no time is prescribed at which interest will begin and that, therefore, it will only run from time of default.

It appears by the petition, quoted above, that plaintiff strangely enough cast the interest due up to December 10, 1899, and then prayed judgment for interest from that date on the amount thus ascertained to be due. The prayer for interest is from 1899, yet the instruction of the court directs the jury to allow interest from 1893. It was erroneous. *Moore v. Dixon*, 50 Mo. 424. The error doubtless came about by the plaintiff casting interest up to a certain date, adding it to the principal and then asking interest on the total from that date. We think the indorsement or transfer of the note from plaintiff and by the indorsee back to plaintiff was sufficiently proven.

The judgment will be reversed, and the cause remanded. All concur.

CHRISTMAN v. MEIERHOFFER.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1906.)

1. MUNICIPAL CORPORATIONS — STREETS—USE BY ABUTTING OWNERS.

While a property owner has a right to use the street in front of his premises as a place to temporarily dispose of materials and tools for the construction of improvements upon the premises, this right must be exercised in a reasonable manner with due regard for the safety of travelers, and the obstruction must not be maintained longer than is necessary, nor more of the street used than is absolutely required,

and reasonable diligence must be exercised in providing warning signals during darkness.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1445, 1446, 1684–1693.]

2. SAME—DUTY TO PLACE LIGHT ON OBSTRUCTION.

A property owner, piling in the street in front of his property materials for use in constructing a sidewalk, is not relieved of the duty of placing a warning light upon the obstruction by the fact that it was the custom of the city to light the street lights early enough to disclose the presence of the obstruction.

3. SAME—USE OF STREET—OBSTRUCTIONS—INJURIES—CONTRIBUTORY NEGLIGENCE.

A person riding a bicycle along a street which was paved over the entire width, and injured by running into a pile of material intended for use in building a sidewalk, was not guilty of contributory negligence as a matter of law in riding along the side of the roadway instead of in the middle.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1679, 1680, 1754–1756.]

4. SAME—INJURY TO CYCLIST—FAILURE TO CARRY LIGHT.

A bicyclist injured by an obstruction in the street was not guilty of contributory negligence as a matter of law, because not carrying a lamp on his wheel.

5. SAME—ACTION FOR INJURIES—EVIDENCE—ORDINANCE.

A city ordinance, providing that any person may use the streets for the piling of building material and tools, provided permission is obtained from the mayor and a light is maintained at night, includes material to be used in the construction of sidewalk, and so is admissible in evidence in an action for injuries resulting from a collision with a pile of sidewalk material not lighted.

6. SAME.

In an action for injuries from a collision of a bicyclist with a pile of building material in a street, in which it was alleged that defendant was negligent in failing to light the pile at night, the admission in evidence of an ordinance permitting any person to use the streets to pile building material, if permission of the mayor is obtained and the pile is lighted at night, was not erroneous on the ground that it permitted the jury to find against defendant on the assumption that he had not procured the permit from the mayor; it being the duty of defendant to request an instruction limiting the effect of the ordinance to the question of lighting, as to which it was admissible.

Appeal from Circuit Court, Cooper County; William H. Martin, Judge.

Action by Henry Christman against Charles Melerhoffer. From a judgment for plaintiff, defendant appeals. Affirmed.

W. M. Williams, for appellant. C. D. Corum, for respondent.

JOHNSON, J. Action for damages resulting from personal injuries alleged to have been sustained in consequence of the negligence of defendant. Plaintiff recovered judgment in the sum of \$500, and defendant appealed.

On the date of injury, April 9, 1904, defendant was the owner of certain residence property in the city of Boonville situated on the south side of High street, one of the public streets in said city, and was having a gran-

itoid sidewalk laid in front of the premises. Materials for use in this construction, such as stone, sand, cinders, etc., were piled in the macadamized roadway; the several piles being four or five feet from the curb line and extending six or seven feet towards the middle of the street. The entire space between the curb lines was paved and in use by the public. Plaintiff, a clerk in a grocery store, was sent by his employer at about 7:30 o'clock in the evening to deliver a package of butter to a customer, and rode a bicycle in performing his errand. His route took him along High street past defendant's property, and on account of darkness he was proceeding slowly, when he ran into a pile of cinders placed in the street by defendant and was overthrown and seriously injured.

The negligence charged in the petition, upon which the cause of action is founded, is "that the defendant negligently failed to maintain at night at said piles of building material, an artificial light, and negligently failed to take any steps, or use any means whatsoever, to give notice to and warn plaintiff and others passing over and along said street of the existence and location of said piles of building material." Among other defenses, defendant in his answer pleaded contributory negligence, and insists that, under the evidence of plaintiff, his negligence should be assumed as a necessary conclusion of law. Defendant further contends that no negligence on the part of defendant appears from the evidence. Both of these issues of law were fairly presented to the trial court under defendant's request for a peremptory instruction, which the learned judge refused, and have been properly preserved for our consideration.

It appears from the evidence introduced by plaintiff that the streets were not lighted at the time. Electricity was used by the city for that purpose, but the company in charge of the public lighting under contract with the city did not turn on the light until about dark, and sometimes even later. On this particular evening, the sky was overclouded, and, as the streets were not illuminated, it was so dark that plaintiff could see only four or five feet ahead of his wheel as he traveled along High street. He was looking ahead for possible danger, but did not know of the obstructions placed in the street by defendant and on account of the blackness of the cinders did not see the pile. Defendant had not placed any lights or other signals to warn the public of the presence of the material in the street. Plaintiff carried no headlight on his vehicle. The presence of the obstructions in the street, the failure to place signals upon them, the darkness of the night, the absence of public lights, and the condition of the weather are all facts conceded by defendant; but, under the evidence offered by him, it appears that except on rare occasions the streets were lighted before it became quite dark; that defendant

was not at the premises that evening and therefore did not know the street was dark; and that plaintiff had actual knowledge of the presence of the obstructions.

It is not denied that a property owner has the right to use the street in front of his premises as a place to deposit and temporarily keep material and tools for use in the construction of improvements upon the premises. This right springs not from title to any portion of the street, but from necessity. The reasonable use of the street for that purpose is just as legitimate as that for the purposes of travel, and therefore people traveling the street must expect to encounter such obstructions and should be on the lookout for them. *Hesselbach v. City of St. Louis*, 179 Mo., loc. cit. 522, 78 S. W. 1009; *Gerdes v. Foundry Co.*, 124 Mo. 354, 27 S. W. 615; *Elliott on Roads & Streets*, § 693; *Pueschell v. Iron Works*, 79 Mo. App. 462. The right, however, must be exercised in a reasonable manner and with due regard for the safety of travelers. Thus, the obstruction must not be maintained for a longer time than is necessary for the construction of the improvement and reasonable expedition must be employed in the prosecution of the work. No more of the street may be used than is required for the material when piled in an orderly and compact form, and due care demands of the owner the exercise of reasonable diligence in providing warning signals for the protection of the public during periods of darkness. *Raymond v. Keseberg*, 84 Wis. 302, 54 N. W. 612, 19 L. R. A. 643; *King v. City of Cleveland (C. C.)* 28 Fed. 835; *City of Ottumwa v. Parks*, 43 Iowa, 119; *Stuart v. Havens*, 17 Neb. 211, 22 N. W. 419; *Elliott on Roads & Streets*, § 717.

The gist of the complaint is that defendant failed to act with the degree of care imposed by law upon him, because he failed to place lights on the obstructions during a time of darkness. Defendant admits the fact charged, but says he acted with reasonable care because he had the right to presume that the lighting company would perform its duty, and, if it did, the lights in the vicinity of the material would clearly disclose its presence. Defendant cannot thus shift his duty to the shoulders of another. It devolved upon him to use reasonable care to ascertain whether or not the obstructions should be guarded by lights in order to prevent them from becoming a menace to people rightfully upon the street. The likelihood of the whole lighting plant to be put out of service under certain conditions, such as the breaking of machinery and the like, or of individual lamps to become out of order, and thus throw a particular locality into darkness, were facts, known to defendant, that made it incumbent upon him to keep himself informed of existing conditions. His general duty to safeguard the place involved the special duty of acting with reasonable diligence to ascer-

tain if the public lights were in operation and sufficiently disclosed the obstructions to view. The classification of defendant's conduct, therefore, was essentially, under the evidence, a question of fact and not of law.

Passing to the question of contributory negligence, it is suggested that plaintiff was out of his proper course in riding along one side of the paved roadway instead of in the middle. It may be conceded that a city is not required to pave the entire width of a street, and that it is required to maintain in a reasonably safe condition for travel no more than the paved portion thereof; but that principle has no bearing here, for the entire space between the sidewalks was in fact paved, and the public had the right to use any portion of the pavement for travel because of the implied invitation of the city so to use it.

Further, defendant contends that it was negligence in law for plaintiff to ride in the dark without a headlight attached to his vehicle, and the case of *Cook v. Fogarty*, 103 Iowa, 500, 72 N. W. 677, 39 L. R. A. 488, is relied upon to support the contention. That was a case where a cyclist collided in the dark with a moving buggy, and the court observed that "a person who rides a bicycle without a light or signal of warning in a public thoroughfare, where he is liable to meet moving vehicles or pedestrians at a time when objects can be discerned readily at a distance of but a few feet, is guilty of negligence." It will be noticed that, if the principle stated in that opinion is sound, the law imposes a duty upon a cyclist that does not rest upon the driver of a vehicle drawn by horses, and the only reason appearing for this distinction lies in the fact that a moving bicycle is practically noiseless, whilst a carriage or wagon and the animals attached to it give warning of their approach in the noise they make when in motion, and therefore it is argued collisions are more apt to occur in riding a bicycle through the dark without a signal or light than in driving or riding a horse. This view of the law has been criticized in *Elliott on Roads & Streets*, p. 927; but we express no opinion upon it, for the reason that it has no application to a case such as the one before us, where a cyclist collides with an inanimate object in the street, for in that situation warnings have no effect upon the obstruction, and therefore the noiselessness of a bicycle cannot add to the danger of its use, and, in other respects, we cannot dogmatically assume that a bicycle is so much more dangerous than a buggy or wagon as to make the carrying of a headlight an indispensable requisite to the exercise of due care. That, essentially, is a question of fact for the jury to determine. It may be argued with show of reason that the advantages in point of safety in a bicycle, as compared with other vehicles, counterbalance its disadvantages. What it lacks in stability, it may make up

in superior mobility; while it may be overthrown by an obstacle that would be innocuous to a buggy, some obstruction that would block the way of the latter would not impede its narrow course, and it is under quick and complete subjection to the will of the rider, while animals are more or less unresponsive to control. These are some of the arguments advanced by its advocates and, though we do not give them sanction (deeming them to be beyond the pale of judicial knowledge), they are plausible enough to raise an issue of fact to be solved by the triers of fact in determining whether or not, in the circumstances of the particular case, the cyclist should be held culpable for not using a headlight. Plaintiff was riding at a moderate rate of speed and says he was watching his course, and we see no reason for holding him guilty of negligence in law for failing to provide himself with a light that would not apply with equal logic, had he been riding or driving a horse or walking. It was right for the court to submit his conduct to the jury, and the demurrer to the evidence was properly overruled.

Plaintiff introduced in evidence, over the objection of defendant, an ordinance of the city, in part as follows: "Any person or persons may use the squares, streets, alleys or sidewalks in the construction of any new building, or in the removal, repair or alteration of any building, or for the purpose of piling thereon of building material and tools, provided that such person or persons shall first have obtained the written permission of the mayor, or person acting as mayor, to use such squares, streets, alleys or sidewalks for such purposes and shall maintain at such pile at night an artificial light sufficient to warn travelers," etc. It is argued that the ordinance was inadmissible because the words "building material" used therein refer to materials for use in the erection of a building, and the evidence shows the cinders piled in the street were not intended for such purpose, but for use in the construction of a sidewalk, which, it is said, is not a building. Under the general law, the abutting property owner has no right to pile material in the street for any other purpose than for use in the construction of some improvement upon the premises, such as a building, fences, or walks, and the like, and the construction of a sidewalk in front of the premises, being

in part for the betterment of the property as well as for public use, is an improvement falling within the class under consideration. It is evident that it was not intended by the city in this ordinance to restrict the purposes for which material might be deposited in the street by the property owner. Manifestly the right afforded by the general law is recognized, and the purpose of the enactment is the regulation of the exercise of that right to prevent its abuse. Therefore the words "building material," as employed in the ordinance, should be construed liberally. They were intended to cover materials for the construction of any kind of an improvement of the premises. The objection cannot be sustained on this ground. Nor can we agree with defendant that, in admitting the ordinance in evidence, the jury was permitted to find a verdict against defendant upon the assumption that defendant did not procure a permit from the mayor to pile the material in the street. That fact was not referred to in the evidence, nor in any instruction given or asked. If the ordinance was admissible on account of any of its provisions, it would have been error for the court to refuse to receive it in evidence, because it contained some other provision not material to the issues and which might be misapplied by the jury. In such case, the party who fears a possible misconstruction has the right to have the objectionable provision removed by an instruction from the consideration of the jury. Defendant asked no such instruction, and the point raised here for the first time comes too late. The provision requiring the placing at night of lights upon the piles of material left in the street made the ordinance admissible in evidence as bearing upon the question of negligence, notwithstanding the cause of action pleaded is not founded upon the ordinance. *Hirst v. Real Estate Co.*, 169 Mo. 200, 69 S. W. 368; *Robertson v. Railroad*, 84 Mo. 119; *Judd v. Railroad*, 23 Mo. App. 61.

We find the issues were fully and fairly submitted to the jury in the instructions given, and therefore refrain from making special mention of the questions relating to defendant's refused instructions presented by him.

The record is free from substantial error, and the judgment accordingly is affirmed. All concur.

WILSON v. WILSON.

(Kansas City Court of Appeals. Missouri.
Jan. 8, 1906.)

1. CONTRACTS—CONSTRUCTION—INTENTION OF PARTIES.

In the interpretation of a written contract, the mutual intention of the parties, as collected from the words of the instrument and the facts and circumstances that gave it birth, is the dominating factor.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 730.]

2. SAME—FORM OF CONTRACT.

While the form of a contract should be considered as in some degree expressive of the intention of the parties, yet, when form and substance conflict, the latter controls.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 730.]

3. EXCHANGE OF PROPERTY—CONSTRUCTION OF CONTRACT—MERGER IN DEED.

While, in contracts for the sale of land, the execution and acceptance of a deed is usually the final conclusive evidence of the contract of the parties, and extinguishes all prior verbal or written agreements, yet, where the contract embraces not only the sale of land, but also payment for the land by a stock of goods, and requires the vendee of the land to assist in invoicing the stock and surrender its possession to the vendor before the conveyance of the land, and to thus place himself in the position of a creditor of the vendor to the extent of the excess in value of the goods over the land, the execution and delivery of a deed by the vendor in pursuance of the contract does not extinguish the contract, in the absence of special covenants or agreements in the deed changing or abrogating those of the contract.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 286; vol. 48, Cent. Dig. Vendor and Purchaser, §§ 318, 319.]

4. SAME—MODIFICATION OF CONTRACT.

Where a contract for the exchange of land for a stock of goods required the vendor of the land to furnish a clear abstract of title, "except an incumbrance of \$4,000," a provision of the deed, executed pursuant to the contract, that the sale was made "subject to an incumbrance of \$4,000 and unpaid commission on such loan," did not modify the contract so as to impose upon the grantee the obligation of paying the commission on the loan.

5. SAME—MODIFICATION—CONSIDERATION.

Where a contract for the exchange of land for a stock of goods required the vendor of the land to furnish a clear title, with the exception of a stated incumbrance, a clause of the deed executed pursuant to the contract requiring the grantee to assume payment of an additional incumbrance to that stated would be without consideration.

6. SAME—CONSTRUCTION.

An agent's commission for services in negotiating a loan, the payment of which is secured by a deed of trust distinct from that securing the loan, is not, although it is computed on the basis of an annual charge of 2 per cent. on the amount of the loan, to be construed as representing interest on the loan itself, within the meaning of a clause of a contract for the exchange of the land for a stock of goods, which requires the vendee who assumes the incumbrance incurred by reason of the loan to pay interest on the loan after he is given possession of the land.

Appeal from Circuit Court, Worth County;
W. C. Ellison, Judge.

92 S.W.—10

Action by George B. Wilson against E. L. Wilson. From a judgment for plaintiff, defendant appeals. Affirmed.

Peery & Lyons and Kelson & Kelson, for appellant. Hudson & Du Bois, for respondent.

JOHNSON, J. The cause of action pleaded in the petition is in the nature of assumpsit, and is for the recovery of an alleged unpaid portion of the purchase price of a stock of merchandise sold by plaintiff to defendant. The case was here once before, and is reported in 106 Mo. App. 501, 80 S. W. 711. It was reversed and remanded for reasons that do not now concern us. Following its dispositions under the former appeal, defendant filed an amended answer containing several affirmative defenses, none of which needs be stated, as no question touching the sufficiency of that pleading is before us, and the averments furnish a sufficient foundation to support the evidence offered. A statement of the facts in evidence will disclose the nature of the issues tendered by the pleadings. Plaintiff owned a stock of goods in a town in Worth county and defendant owned a farm of 350 acres in Macon county. The parties met in Bucklin, and, with the assistance of an agent (whose is not made clear, nor is it important), entered into a written contract prepared by the agent, and which is as follows:

"Bucklin, Mo., October 21, 1901.

"This agreement made and entered into this day by and between Emmet L. Wilson, of Albany, Mo., party of the first part, and G. B. Wilson, of Worth, Worth county, Mo., party of the second part. Witnesseth that the party of the first part has this day sold to the party of the second part, his farm of about 315 acres known as the 'Cherry Farm,' in sections 34 and 35 in Walnut Creek township. No. 59, of range 16, Macon county, Mo., and for the consideration of ten thousand five hundred dollars (\$10,500.00) and is to furnish clear abstract of title excepting an incumbrance of \$4,000.00 to be assumed by the said 2nd party. The party of the first part is to take in exchange therefor from the party of the second part, a stock of general merchandise, consisting of dry goods, groceries, boots, shoes, hardware, furniture and such other goods as may now be in stock, situated in large storerooms, size 50 x 80 in Worth, Mo. Said stock to be invoiced at first cost. Said goods bought from Mr. McRenels at the same price bought for. Also the fixtures at the same price taken for when bought by the said second party. Said first party to give possession of farm January 1st, 1902, or sooner if, also to pay interest on debt to that date. The stock of goods to be invoiced, commencing October 31, 1901, or sooner.

"[Signed] E. L. Wilson. [Seal.]
"G. B. Wilson. [Seal.]"

Pursuant to this contract, the goods were inventoried and found to be of the value of \$7,266.77. Under the supposition that the amount of the incumbrance upon the land was \$4,000, the value of defendant's interest therein was fixed by the contract at \$6,500, which was \$766.77 less than the agreed value of the goods. Upon the completion of the valuation of the merchandise, delivery thereof was made by plaintiff to defendant and accepted, and defendant continued the business of a retail merchant to that time conducted by plaintiff. Defendant, at different times, made payments to plaintiff of different sums for application upon the amount due plaintiff on account of the excess in the value of the goods over that of defendant's interest in the land, and thereby extinguished that liability to plaintiff, save as to two items, one of which is the real subject of dispute. The first item relates to the unpaid interest that accrued on the real estate loan January 1, 1902, and which it is conceded defendant, under the contract, was to pay. Defendant testified that this item was included in a settlement made by the parties and paid, but plaintiff testified that no settlement was made and the item was not paid, and the issue of fact thus raised was properly presented to the jury in the instructions given, decided adversely to defendant, and therefore may be dismissed from further consideration. The real controversy between the parties developed from a commission loan of \$366.67, secured by a deed of trust covering the land involved in the trade. The incumbrance upon the land, in fact, consisted of two trust deeds. The first secured a loan of \$3,500 that would not mature until some time in 1907, and bore interest at the rate of 5 per cent. per annum, and the second secured another loan of \$500, and, in addition, a commission loan that represented the compensation of the loan agents for services in the procurement of the first loan of \$3,500. Defendant contends that, as this commission loan in fact represents interest on the first loan at the rate of 2 per cent. per annum during its maturing period, it should be treated as interest, and, as the sum in dispute represents interest on the loan that had not accrued on January 1, 1902, it should be assumed and paid by plaintiff. Defendant conceded that the contract would not sustain him in this position, and sought to overcome this obstacle by pleading and attempting to prove that the contract did not express the real intention of the parties and was signed by him under mistake. This issue, also, was properly sent to the jury as one of fact, determined in favor of plaintiff, and therefore is now out of the case.

With the real facts known to both parties, defendant, some time after he received possession of the goods, tendered a warranty deed to plaintiff conveying the land. Following the description of the property and preceding the habendum clause, the following

provision was inserted: "This deed is made subject to an incumbrance of four thousand dollars and unpaid commission on said loan." Plaintiff for a long time refused to accept this deed on account of the reference made therein to the commission loan, claiming that it was at variance with the agreement expressed in the contract, and an animated dispute ensued, that continued for some months, each party contending that the duty of clearing the land of the lien of the commission loan devolved upon the other, or, to state it in another way, defendant claimed that plaintiff should assume the payment of the commission loan and receive the equity of redemption in the land as a payment of \$6,500 upon the purchase price of the goods, while plaintiff insisted that, if he assumed the payment of that loan, the amount thereof should be deducted from the value of the equity of redemption. Finally, plaintiff, feeling compelled to take what he could get, in order to avoid the risk of greater loss, accepted the deed under protest, and with the assertion that he did not accept it in full satisfaction of the remainder due him upon the purchase price of the goods. Afterwards plaintiff paid the loan. These are the facts in evidence bearing the approval of the verdict rendered and that serve to elucidate the question of law presented for our solution. A statement of other evidence and issues would be extraneous to the case as it now stands. Plaintiff recovered judgment for the full amount prayed.

Defendant's position here, in some respects, is hardly consistent with that occupied by him in the trial court, but in the view we have of the case we will pass by that point and deal with him upon the ground he now chooses. The reasons urged in his argument for a reversal of the judgment may thus be stated: (1) The action is in fact, though not in form, for the recovery of the amount paid by plaintiff in satisfaction of the commission loan, and not for the recovery of a part of the purchase price of the merchandise. (2) The written contract was one for the sale of real estate and by its express terms required plaintiff to pay interest on the loan after January 1, 1902. (3) The interest upon the loan of \$3,500 was fixed at the rate of 7 per cent. per annum, of which 5 per cent. was to belong to the holder of the loan and 2 per cent. as commission to the agents who negotiated it. Therefore the commission loan was interested, and the portion of it that was unearned on January 1, 1902, should by the express terms of the contract be paid by plaintiff. (4) Notwithstanding this construction of the written contract may be rejected, nevertheless, being one for the sale of real estate and executory, the contract was finally executed by the delivery and acceptance of the deed and became extinguished by merger into the latter instrument, which by its express terms imposed upon the plaintiff the burden of paying the commission loan. In our dis-

cussion of these questions, we will consider the controlling principles in the order of their logical sequence.

In the interpretation of every written contract, the dominating factor is the mutual intention of the parties who made it. This is to be collected from the words of the instrument itself and the facts and circumstances that gave it birth. The form of the instrument should be considered as being, in some degree, expressive of the intention, but when form and substance conflict the latter controls. The form of the written contract before us is that of an agreement for the sale of real estate, the distinctive feature of which class of contracts is the imposition upon the vendor of the duty to perform the executory acts necessary to the completion of the sale. As a general rule, the acts to be performed by the vendor relate to the production of documentary evidence to satisfy the mind of the vendee of the validity of the title claimed by the vendor, and after this the execution and delivery of a deed conveying the title. The acceptance of the deed completes the execution of the contract, and, save in some excepted cases, the accepted deed is the final conclusive evidence of the real contract made by the parties, and all prior verbal or written agreements are extinguished by it, not, however, on account of any peculiar sanctity inhering in a deed, but but because it is the last written expression of their agreement made by the parties. But when, as in this case, the executory contract embraces other agreements, undertakings, and obligations in addition to those relating to the conveyance of real estate and imposes upon both parties the duty of performing executory acts, the contract should not be classified with those exclusively pertaining to the conveyance of real estate, and the delivery of a deed made pursuant to the terms of such contract is the execution of but one of several executory acts of equal dignity, and therefore cannot in any way affect the vitality of the original contract, because it does not purport to deal with the entire subject-matter, but only with a part thereof. The deed may contain covenants and agreements that change or abrogate those of the executory contract, but in the absence of such special provision the contract is unaffected by the principle of merger and remains unimpaired.

Turning, now, to the contract before us, we find that the most important subject from the standpoint of value embraced within its scope was the stock of merchandise. Plaintiff was charged with the obligation to assist in the ascertainment of its real value in the manner provided, and then to surrender its possession to defendant. In reality, the contract contemplated that defendant should receive this personal property, that exceeded in value his equity of redemption, before the obligation devolved upon him to convey the real estate. In fact, the contract was one for the exchange of properties with the obligation im-

posed upon plaintiff to fully execute the conditions required of him before reciprocal duty devolved upon defendant. To state it differently, plaintiff was, in effect, required to place himself in the position of a creditor of defendant to the extent of the value of the merchandise delivered before defendant was bound to discharge the purchase price of the goods by the delivery of the title to his equity of redemption at its agreed value and the payment of the remainder in money. It would be a perversion of the doctrine of merger, and require an interpretation thereof not sustained by any of the authorities, to which we have been cited, to hold it applicable in this case. Nor can it be said that by express agreement appearing in the deed the parties modified the original contract to the extent of imposing the obligation upon plaintiff to pay the commission out of his own pocket and at his own loss. The fact that the conveyance was made subject to the commission loan, without more, did not imply either the assumption of the debt by plaintiff or his agreement that its amount should not be deducted from the value placed upon the equity of redemption. The most that can be said for it is that it permitted the lien to continue to run with the land, but it does not follow that plaintiff's assent to such disposition of the lien would carry with it his agreement to abandon the stipulation in the contract that imposed upon defendant the burden of any excess of incumbrance above the sum of \$4,000. This requirement could not be abrogated except by the express agreement of plaintiff based upon a sufficient consideration, neither of which appears. When the deed was tendered, defendant was in the full enjoyment of the fruits of the contract. Plaintiff had done everything required of him, and stood with extended hand waiting for his pay. Defendant, secure in the possession of both land and goods, with everything to gain and nothing to lose, sought to gain advantage from his fortunate position by imposing terms outside the contract. He thereby committed a breach of the contract and put himself in the wrong. The concession that he thinks he wrung from plaintiff under such hard conditions must fall for lack of consideration, if for no other reason. The extent of his obligation became fixed by plaintiff's performance and could not be lessened without a new consideration. When a contract is fully performed by one of the parties, an offer of part performance by the other is no consideration for the waiver of full performance.

The contention that the commission loan should be treated as representing interest on the \$3,500 loan and its payment required of plaintiff under the terms of the contract is likewise devoid of the support of sound reason. It may be true that the amount of the agents' commission was computed on the basis of an annual charge of 2 per cent. on the amount of the loan, but it was none the

less compensation for the services of the agents, and not for the use of money. The execution and delivery of the commission notes to the agents created a liability separate and distinct from that of the loan.

On the former appeal we dealt with the question of the sufficiency of the cause of action asserted in the petition to sustain a recovery under the facts disclosed, and we now reaffirm what was then said upon that subject. Some criticisms are made of the instructions given, but, under the views expressed, it will be apparent that none of them is well founded.

The judgment is affirmed. All concur.

ORENDORFF v. TERMINAL R. ASS'N OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Jan. 2, 1906.)

1. MASTER AND SERVANT — STATUTES — SERVANTS OPERATING RAILROAD — WHAT CONSTITUTES — FELLOW SERVANTS.

An employé of a railroad company, engaged in trucking freight from a warehouse to a freight car, is within the protection of Rev. St. 1899, § 2873, making every railroad corporation liable for all injuries to a servant while engaged in the work of operating the railroad by reason of the negligence of any other servant.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 362-365.]

2. DAMAGES — PERSONAL INJURIES — EXCESSIVE DAMAGES.

Where an injury caused plaintiff to lose less than \$300 worth of wages, but he sustained a permanent impairment of the free use of one leg, and the injury was a permanent source of occasional pain, a verdict for \$1,500 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 377, 378.]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by Lewis Orendorff against the Terminal Railroad Association of St. Louis. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The south side of defendant's warehouse, in the city of St. Louis, is about 1½ blocks in length, and parallel with it are two railroad tracks known as tracks Nos. 1 and 2. A platform is built out near track No. 1, on a level with the floors of cars. Cars to be loaded from the warehouse are placed on these tracks, and the freight is conveyed to them on hand trucks. The platform is connected with cars on track No. 1 by a small steel bridge, and the intervening space between opposite cars on tracks Nos. 1 and 2 is bridged in the same manner. On September 5, 1903, plaintiff, then in the employ of defendant, was assisting in conveying freight from the warehouse to a car on track No. 2. His evidence is that, after taking a large glass from the truck and depositing it in the car on said track, he and two other employés started to walk back to the platform through a car on

track No. 1; that both ends of this car were loaded with boxes even with the door lines and about halfway to the ceiling; that his two companions preceded him and reached the platform, but before he could do so the car was struck by an engine and cars operated by the defendant's employés with such force as to cause the boxes in said car to fall; that they fell upon him and knocked him down, a large, heavy one falling upon his left leg, breaking both bones a few inches above the ankle. The evidence is that it was the uniform practice of the defendant to give warning whenever the cars being loaded were to be disturbed, by bringing in an engine, in time for the laborers to get out of the cars and remove the bridges. Plaintiff testified that he heard no warning before he felt the shock and was knocked down. Several witnesses in his behalf testified that no warning was given. These witnesses and plaintiff further testified that the shock, noise, and concussion caused by the engine striking the car was unusual and very severe. The evidence for defendant shows that the car on which plaintiff was hurt was not loaded to the door lines; that plaintiff was found three or four feet east of the door line, and, when asked what he was doing in that part of the car, said he was trying to hold up the box that fell upon him. Defendant's evidence also shows that warning was given and repeated in a loud tone of voice, by plaintiff's foreman, so near plaintiff that he must have heard it, and that the warning that the engine was coming on track No. 1 was given in ample time to have enabled plaintiff to get out of the car before it was struck by the engine; and also, as was the custom after a warning was given, that the bridges had been withdrawn and were on the platform. The evidence for the defendant further shows that the engine did not strike the car with unusual force and did not cause an unusual shock or jar. Plaintiff's evidence shows that some of the bridges connecting the cars on the two tracks fell in between them, and that the car on track No. 1, in which plaintiff was hurt, was shoved back about half a car length. Plaintiff denied that he made the statement that he was trying to hold up the box that fell upon him, and testified that he was near the door when knocked down, and not toward the east end of the car. The jury found for plaintiff and assessed his damages at \$1,500. After an unavailing motion for new trial, defendant appealed.

McKeighan & Watts and Wm. R. Gentry, for appellant. A. R. Taylor, for respondent.

BLAND, P. J. (after stating the facts). 1. At the close of plaintiff's evidence, and again at the close of all the evidence, defendant offered an instruction in the nature of a demurrer to the evidence. The refusal of the court to grant this instruction is assigned as error. That the plaintiff and the employés

operating the engine were fellow servants is conceded, and plaintiff should have been non-suited unless he was a servant engaged in the operation of defendant's railroad, within the meaning of section 2873, Rev. St. 1899, which provides: "That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury." The above section has been twice before the Supreme Court for construction, in *Callahan v. Railroad*, 170 Mo. 473, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746, and *Sams v. Railroad*, 174 Mo. 53, 78 S. W. 686, 61 L. R. A. 475, and once before the Kansas City Court of Appeals, in *Stubbs v. Railway*, 85 Mo. App. 192. In the *Callahan* Case, the evidence showed that *Callahan* was a section hand engaged in repairing track, and that he was injured by the negligence of his fellow section hands. The court held that he could recover. *Marshall, J.*, after reviewing the cases from other jurisdictions construing similar statutes (at pages 495, 496 of 170 Mo., and pp. 214, 215 of 71 S. W., 60 L. R. A. 249, 94 Am. St. Rep. 746) said: "It thus appears that everywhere, except in Iowa and Minnesota, the adjudications agree that it is not essential that the injury should have been inflicted by reason of the negligence of a fellow servant while actually engaged in running a car, but that the injured employé may recover, if injured by the negligence of a fellow servant while they are engaged in doing any work for the railroad which was directly necessary for the operation of the railroad, and that even so sweeping a statute as that of Indiana was held by the Supreme Court of the United States not to be repugnant to or violative of the federal Constitution. Under the language of our statute it is necessary for the injured employé to show that he was injured 'while engaged in the work of operating such railroad.' Construed either by its own terms or in the light of the cases cited from other jurisdictions, it results in holding that the right to recover is not limited to cases where the injury is inflicted by reason of the negligence of a fellow servant while actually moving a train or engine, but that the law embraces all cases where the injury is inflicted upon an employé while engaged in the work of operating a railroad by reason of the negligence of any fellow servant who is likewise engaged in the work of operating a railroad, and that the term 'operating such railroad' includes all work that is directly necessary for running trains over a track, and that it includes section hands

who are engaged in working upon, repairing, or putting in shape the track, roadbed, bridges, etc., over which the trains must run." In the *Sams* Case a majority of the court held that street railroads were not included in the section. They have since been included by a legislative amendment of the section. *Laws*, 1905, p. 138. In the *Stubbs* Case it was held the statute embraced members of a section gang engaged in removing old rails from a track and putting in new ones. In the case of *Williams v. Railway*, 106 Mo. App. 61, 79 S. W. 1167, cited in briefs of counsel, the plaintiff was injured while at work for a railroad company in the state of Iowa, and hence the case was controlled by the Iowa statute, and the construction given it by the Supreme Court of that state, to the effect that only such servants as are engaged in running trains are embraced in the statute, was followed. The case has no bearing on the one in hand.

Our statute by its very terms embraces all agents and servants of a railroad corporation engaged in the work of operating such railroad. In the operation of a railroad it is as necessary to load and unload freight cars as it is to hitch an engine to them and haul them back and forth over the road, and the work is as directly connected with the operation of the road as is any other service a railroad company is required by law to perform. See *Railroad v. Koehler*, 37 Kan. 463, 15 Pac. 567; *Railroad v. Haley*, 25 Kan. 35; and *Railroad v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675, in all of which it was held that a servant engaged in unloading a car was embraced in the Kansas fellow servant damage act, and that the labor performed was directly connected with the operation of the road. We think there is no doubt that the services plaintiff was performing bring him within the protection of the statute, and conclude that the demurrer to the evidence was properly overruled.

2. Defendant insists that the damages assessed by the jury are excessive, and in his argument refers to the small amount of wages (less than \$300) plaintiff lost on account of the injury and the insignificant sum he paid out in and about his cure. This argument leaves out of view that portion of plaintiff's evidence which shows that the broken bone incapacitates plaintiff from climbing a ladder or from walking rapidly, and that the injury, being so near the ankle joint, causes, and will continue to cause, him more or less pain at times. This evidence shows a permanent impairment of the free and full use of the left leg and a permanent source of occasional pain. In our opinion, instead of being excessive, \$1,500 is a very conservative, in fact a barely adequate, compensation for such an injury.

The judgment is affirmed. All concur.

**INDIANA POWDER CO. v. ST. LOUIS, K.
C. & C. R. CO.**

(St. Louis Court of Appeals. Missouri. Jan. 2, 1906.)

RAILROADS—CONTRACTORS—LIENS—STATUTES.

Where plaintiff sold powder to a contractor with which to quarry rock from the contractor's own land to be broken and delivered to defendant railroad company on its cars at a certain price per cubic yard, and the purpose for which and the place where the rock was to be used, if at all, by the railroad company, was not stated in the contract, complainant was not entitled to a lien on the railroad for the value of the powder so furnished under Rev. St. 1899, § 4239, giving a lien to all persons who furnish material to any railroad, etc.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 489.]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by the Indiana Powder Company against the St. Louis, Kansas City & Colorado Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

On May 29, 1903, the defendant, the Shutt Improvement Company, a corporation, made a contract in writing with the defendant railroad company, whereby the Shutt Improvement Company agreed to furnish the railroad company 200,000 cubic yards of crushed rock on the line of defendant's road in St. Louis county, and if the railroad should elect, to crush 200,000 more cubic yards, on its line of road in Osage county, and load the same on defendant's cars, for which the railroad company agreed to pay 50 cents per cubic yard, and to grant it certain free transportation over its road. The Shutt Improvement Company installed a crushing plant at Mona, in St. Louis county, and one at Eldon, in Osage county, both on the line of defendant's road, and proceeded to quarry rock from its own premises and crushed and loaded it on cars furnished by the railroad company. The rock crushed at Mona was used by the railroad company as ballast on that portion of its roadbed, running through St. Louis and Franklin counties, which had been constructed and in operation for about three years. The crushed rock delivered at Eldon was used as ballast on recently constructed roadbed in that neighborhood. The plaintiff, in one contract, sold to the improvement company \$3,790.35 worth of powder and dynamite, delivered in carload lots, as ordered by said company. At the time the suit was commenced there was a balance of \$1,054.35 due on the account. After the suit was brought, but before trial, the improvement company paid \$200 on the account. All the powder and dynamite furnished by plaintiff was used by the improvement company for blasting out rock to be crushed at Mona and Eldon. On July 4, 1904, plaintiff filed, in the office of the clerk of the circuit court of St. Louis county, a complete statement of its account with the Shutt Improvement Company and its declaration, support-

ed by affidavit, that it claimed a lien upon the railroad for the balance due on the account. Due and timely notice was given the defendant railroad company of the filing of the lien account. The suit is to foreclose this lien and for a personal judgment against the Shutt Improvement Company. The petition and the declaration for a lien both state that the lien account was for material furnished by plaintiff for use in the construction of the road under a contract with the Shutt Improvement Company, "which was the original contractor with said St. Louis, Kansas City & Colorado Railroad Company for the doing of the work and labor and furnishing the materials for the construction of the road, including the materials furnished by it the Indiana Company." At the close of the evidence the defendant railroad company moved the court to declare as a matter of law that the plaintiff was not entitled to a lien upon the road, and that the issues should be found in favor of the railroad company. The court refused the motion and rendered a personal judgment (the issues having been submitted to it) against the Shutt Improvement Company, and a judgment foreclosing plaintiff's lien against the railroad company. The defendant railroad company appealed.

W. F. Evans and A. H. Bolte, for appellant.
Kinealy & Kinealy, for respondent.

BLAND, P. J. (after stating the facts).
1. The Shutt Improvement Company had no contract to either construct or improve the railroad or any part of it. Its contract was to crush its own material (rock) and load it into the railroad company's cars at 50 cents per cubic yard. The purpose for which, and the place where the rock was to be used, is nowhere stated in the contract between the railroad company and the Shutt Improvement Company; nor were the officers or agents of the improvement company informed whether the railroad company intended to use the crushed rock to ballast its own road, to sell it to some other road, or to sell it in the market; therefore, there is an utter failure of proof in the allegation of the petition and in the declaration of lien, that the Shutt Improvement Company was an original contractor for the construction of the road. Its contract was to furnish crushed rock aboard the railroad company's cars, not to crush rock and distribute it as ballast upon the railroad track. It contracted to furnish material that might or might not be used in the construction or repair of the road. But as the material was actually used as ballast on the railroad track, plaintiff claims it is entitled to a lien under the second clause of the railroad lien law, which gives a lien to "all persons who shall furnish ties, fuel, bridges, or material" to any railroad, etc. Rev. St. 1899, § 4239. Under this clause of the statute a lien is given whether the ma-

terial is furnished in the construction of a new road or in the improvement of an old roadbed, and whether the material is delivered to the railroad company direct or to an original or subcontractor, and attaches whether or not the material is actually used in the construction or improvement of the roadbed. *Andrews v. St. Louis Tunnel R. Co.*, 16 Mo. App. 299; *Rapauno Chemical Co. v. Railway*, 59 Mo. App. 6; *Cross v. Railway*, 77 Mo. 318; *Central Trust Co. v. Railway (C.)* 54 Fed. 598-663.

In *Rapauno Chemical Co. v. Railway*, supra, it was held that the plaintiff, who sold powder to the contractor for the construction of a road, was entitled to a lien for the powder furnished; the powder having been used in blasting out rock in the work of constructing the roadbed, and also held, in effect, that powder could not be classed along with picks, shovels, wheelbarrows, etc., as constituting a part of the contractor's plant for doing the work. In *Sweem v. Railway*, 85 Mo. App. 87, the defendant company owned a lot of burnt clay in a pit near its tracks which it wished to use as ballast on its tracks. It built a switch into the pit, and made a contract with one Pugh to load the burnt clay on its cars, at his own expense. Pugh hired men to load the clay into the defendant's cars, and it was hauled away by the railroad company and used as ballast on its track. Pugh failed to pay the laborers and his superintendent. It was held that both the laborers and the superintendent were entitled to a lien upon the road, the laborers for their work and the superintendent for his services. The lien in this case was bottomed on the first paragraph or clause of the railroad lien law (Rev. St. 1890, § 4239), and the labor was directly applied to the improvement of the roadbed, as much so as if the laborers had shoveled the burnt clay from the loaded cars onto the track. In *St. Louis, I. M. & S. Ry. Co. v. Love (Ark.)* 36 S. W. 395, under a statute of Arkansas, providing that every person who furnishes any material, machinery, fixtures, or other things toward the construction or equipment of any railroad shall have a lien, did not include teams furnished the contractor, but only such things and materials as entered into and formed a part of the railroad, and not merely material, teams, and supplies furnished the contractor as a part of the equipment and plant to aid him in the performance of his contract. The court observes, however: "We do not overlook the line of authorities where some articles, such as powder furnished for blasting, are held to be materials used in construction, for which a lien is given."

The powder furnished by the plaintiff was not used or intended to be used in the construction or improvement of the roadbed, by the railroad company or the Shutt Improvement Company, but was intended to be used and was used by the latter in its quarries for

the purpose of blasting rock to be crushed and loaded into the railroad company's cars in fulfillment of the improvement company's contract. There is therefore no privity or connection between the plaintiff and the railroad company, and for this reason the company was under no obligation to protect the plaintiff's account against the Shutt Improvement Company for the powder. In respect to the railroad company, it seems to us, the relation between it and the plaintiff is not different from what would be the relation of A. to a railroad company if he should chop and hew ties in the woods for B., which ties B. would take up and deliver to the railroad company in fulfillment of his contract with it to deliver ties. To appropriate an argument from the brief of able counsel: "If the plaintiff has a lien against the railroad for powder furnished to blast the Shutt Improvement Company's stone, then on the same principle the hardware company which furnished the crowbars and drills would be entitled to a lien, and the laborers who did the drilling and run the machinery crushing the stone would likewise be entitled to a lien. Indeed, if the principle is correct, it might be applied to the oil that lubricated the crushing machinery for the Shutt Improvement Company, or to the machinery itself, or to the coal and water that made the steam to run the machinery. Indeed, why should this be the limit? The men who actually furnished the saltpeter, and the men who compounded and manufactured the powder, etc., furnished by plaintiff to the Shutt Improvement Company, might likewise claim a lien, if they could show that their saltpeter went into the blasting powder which was used by the quarry men to quarry stone to be manufactured into crushed stone ballast, which the railroad company bought and paid for at a fixed price; all because the railroad company used it on its roadbed."

We think it would be an unreasonable stretch of the statute to hold that plaintiff comes within its provisions. The judgment against the railroad company is reversed.

STATE ex rel. MEADOR et al. v. WILLIAMS, Judge, et al.

(St. Louis Court of Appeals. Missouri. Jan. 2, 1906.)

1. CRIMINAL LAW—FORMER JEOPARDY.

Where, after the jury had been sworn to try defendants under a valid indictment for gambling and four witnesses had been examined, the prosecuting attorney by leave of court withdrew the cause because of the absence of a material witness for the state, and an order was entered continuing the case over defendants' objection, they were thereby put in jeopardy and were entitled to their discharge.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 289, 338.]

2. PROHIBITION—SCOPE OF WRIT—ERRORS OF LAW.

Where the trial court had jurisdiction to try relators for gambling, they were not en-

titled to a writ of prohibition to prevent the court from placing them on trial a second time after they had been once put in jeopardy, though the court's action in doing so was plainly erroneous; relators' remedy being by appeal.

Prohibition by the state, on relation of Job Meador and others, against Joseph J. Williams and others. Writ denied.

O. L. Munger and V. V. Ing, for relators.

GOODE, J. An order was issued by one of the judges of this court directed to the Honorable Joseph J. Williams, judge of the Twenty-First judicial circuit of the state, and Almon Ing, prosecuting attorney of Wayne county, commanding the respondents to appear before this court in term time, to wit, December 12, 1905, at 10:30 a. m., and show cause why a writ of prohibition should not issue, restraining further proceedings against relators in a criminal case pending in the circuit court of said county. It appears from the allegations of the petition for the writ that at the February term, 1905, of the Wayne circuit court, relators had been indicted for gambling with dice, and at the August term ensuing were arraigned on said charge and pleaded not guilty. The cause came on for trial, and both the state and relators announced ready. Thereupon a jury of 12 good and lawful men from the body of the county was impaneled, qualified, and sworn to try the issues and render a true verdict according to the law and the evidence. Afterwards the trial proceeded before the jury until the prosecuting attorney of the county, representing the state of Missouri, had put on the stand and examined four witnesses. At the conclusion of the testimony of these witnesses the prosecuting attorney by leave of court stopped the trial and withdrew the submission of the cause from the consideration of the jury. This action was taken because of the absence of a witness for the state, on whose testimony the indictment had been found and who had failed to attend the trial, although subpoenaed. The cessation of the trial and the withdrawal of the submission of the cause from the jury were not made necessary either by the sickness or other disability of any juror, or of the judge of the court, and were done against the objection and over the protest of the defendants, who saved an exception at the time. Afterwards, during the same term of the court, and on the 14th day of August, relators filed in said circuit court a motion for their discharge from further proceedings under the indictment against them, on the ground that they had been put in jeopardy by a trial in which they might have been legally convicted and punished. On the 21st day of August the prosecuting attorney filed an application for continuance of the cause to the next regular term of the court because of the absence of the aforesaid witness. This application the court sustained, and continu-

ed the cause until the February term, 1906, to which ruling the relators, as defendants in said criminal case, excepted.

The purpose of this proceeding is to prohibit the circuit court of Wayne county and the prosecuting attorney from going further in the prosecution of relators on the charge of gambling. The petition filed here fails to state what ruling was made on the motion of relators for their discharge; but a duly certified copy of the record of the proceedings in the gambling case which is attached to the petition herein in support of its averments shows the motion was overruled. The transcript shows, too, that all of the allegations in the petition are true, as above recited. Beyond doubt relators were entitled to be discharged on their motion. They were put in jeopardy when the jury was impaneled and sworn, as the indictment was good and the circuit court had jurisdiction of the offense. *State v. Snyder*, 98 Mo. 555, 12 S. W. 369; *State v. Wiseback*, 139 Mo. 214, 40 S. W. 946; *Ex parte Snyder*, 29 Mo. App. 256; *Cooley on Const. Lim.* (7th Ed.) 467. The elementary work just cited states the law on the point in question as follows: "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; and a jury is said to be thus charged, when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution, and he cannot be deprived of this bar by a nolle prosequi entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause." The doctrine of that text is supported by numerous citations and has been directly approved by the courts of this state. *Ex parte Snyder* and *State v. Snyder*, supra. Any judgment or conviction which may be entered against defendants on the indictment on which they were formerly brought to trial would not be permitted to stand and none ought to be entered. Relators should be discharged as soon as the circuit court convenes. Nevertheless it is our opinion that prohibition will not lie to restrain further proceedings against them. As said above, the circuit court of Wayne county has jurisdiction of the particular cause and jurisdiction of its subject-matter. To proceed further against defendants would be exercising its jurisdiction in a palpably erroneous way, it is true; but, except in very rare instances, a writ of prohibition will not be granted to prevent the commission of error by an inferior court, no matter how flagrant it will be or how grossly opposed to the well-settled principles of law. The exceptions to this rule are allowed when no other remedy exists competent to cope with the exigencies of the case, as where a defendant was sen-

tenced to be hung for an offense not capital and no right of appeal or writ of error existed. *State v. Ridgell*, 2 Bailey (S. C.) 560; *Ex parte Brown*, Id. 323. In the opinion in the case first cited, certain extraordinary instances in which the English courts prevented by prohibition the commission of gross errors by the lower courts are cited. The Supreme Court of South Carolina in a subsequent case refused to prohibit the execution of a defendant sentenced to death for an offense not capital because, since the decision in *State v. Ridgell*, a statute had been enacted giving the right of appeal from such a conviction.

The decisions of the Supreme Court of this state have been liberal in allowing the writ of prohibition, but in its opinions marking out the limits within which the remedy lies the court has declared it is appropriate only when the lower court is without jurisdiction or is assuming to act in excess of its jurisdiction. *Morris v. Lenox*, 8 Mo. 252; *State ex rel. v. Court of Appeals*, 97 Mo. 276, 10 S. W. 874; *State v. Railway Co.*, 100 Mo. 59, 13 S. W. 396; *State ex rel. McCaffery v. Aloe*, 132 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *State v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596; *State v. Talty*, 166 Mo. 529, 66 S. W. 361. In some instances when the writ was awarded, it is a close question if the lower court was not within its jurisdiction and merely on the eve of committing an irremediable error. *State ex rel. v. Wear*, 145 Mo. 230, 46 S. W. 1099; *State v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961. But the principle that prohibition only lies to restrain action by a court beyond its jurisdiction has always been recognized as sound. The former jeopardy of these relators is a good plea in bar to the further prosecution of the case against them, and indeed, as said, they were entitled to their discharge on the motion filed. If a new conviction ensues, they have a remedy by appeal or writ of error; though doubtless they might be subjected to some injustice before their case could be heard by a court of last resort. But that result is incident to every erroneous judgment. The rule is that the remedy for error in overruling a plea of former adjudication is by appeal, and not by prohibition. *State ex rel. v. Withrow*, 108 Mo. 1, 18 S. W. 41; *State ex rel. v. Lubke*, 29 Mo. App. 555. And it has been decided that, if a tribunal of inferior jurisdiction denies the defendant in a prosecution under a city ordinance the right of trial by jury, prohibition will not issue to prevent such tribunal from proceeding in the cause; for the refusal of the jury is an error which can be corrected on appeal, and not an act in excess of jurisdiction, so as to be controlled by prohibition. *Delaney v. Police Court*, 167 Mo. 967-679, 67 S. W. 589. See, also, *Powellson v. Lockwood*, 82 Cal. 613, 23 Pac. 143. In other cases, it was decided that, though a

defendant had been put on trial and acquitted by a jury, prohibition would not issue to prevent his being tried a second time when the inferior court possessed jurisdiction of the cause. *U. S. v. Maney* (C. C.) 61 Fed. 140; *State ex rel. v. Evans*, 88 Wis. 255, 60 N. W. 433; *State v. Braun*, 31 Wis. 600.

We conclude that the writ should be denied, though some of the Missouri cases raise a doubt in our minds regarding the matter. We think the act sought to be restrained is not in excess of the circuit court's jurisdiction, but, if done, it would be an extremely erroneous denial of the relator's legal rights.

BLAND, P. J., and NORTONI, J., concur.

STATE ex rel. JUMP, Pros. Atty., v.
LOUISIANA, B. G. & A. GRAV-
EL ROAD CO. et al.

(St. Louis Court of Appeals. Missouri. Jan. 2, 1906.)

1. COURTS—DECISIONS OF SUPREME COURT AS BINDING ON COURT OF APPEALS.

Under Rev. St. 1899, § 1657, providing that where an appeal is taken to the wrong court it shall be transferred and the case shall be proceeded with in the court to which it is transferred as if the same had gone there directly from the trial court, where an appeal was taken to the Supreme Court and by it transferred to the Court of Appeals on the ground of want of jurisdiction of the Supreme Court, an opinion by two members of the Supreme Court as to the merits of the action was not binding on the appellate court within the amendment to the Constitution adopted November, 1884 (Const. art. 6, § 6), which provides that "the last previous rulings of the Supreme Court on any question of law or equity shall in all cases be controlling authority in such Courts of Appeals."

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 325, 326, 335.]

2. SAME.

A decree, holding that a gravel road company had no right to collect tolls and that an injunction and not quo warranto was the proper remedy, was appealed to the Supreme Court, where the case was determined on its merits and the injunction was upheld, although the question as to whether injunction or quo warranto was the proper remedy was not discussed in the Supreme Court, as appears from the briefs and opinion. *Held*, that the effect of entertaining jurisdiction and administering relief is an authoritative adjudication on such question within the amendment to the Constitution adopted November, 1884 (Const. art. 6, § 6), providing that "the last previous rulings of the Supreme Court on any question of law or equity shall in all cases be controlling authority in such Courts of Appeals."

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 325.]

3. INJUNCTION—EXISTENCE OF OTHER REMEDY—QUO WARRANTO.

Rev. St. 1899, § 3649, providing that the remedy by written injunction shall exist in all cases to prevent the doing of any legal wrong whenever an adequate remedy cannot be afforded "by an action for damages," though more particularly applicable to cases where individuals are seeking relief for some private injury, is nevertheless properly considered in determining the right to injunction where quo

warranto is a proper, though inadequate, remedy.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 15.]

4. SAME — ADEQUACY OF REMEDY BY QUO WARRANTO.

Where a gravel road company was unlawfully exacting tolls from persons using a public highway, a proceeding by quo warranto would have been of the tedious nature in which the relief sought could only have been adjudged upon a final determination of the cause, whereas a proceeding by injunction to restrain such unlawful act would afford immediate and adequate relief, and therefore an injunction was properly granted.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 15.]

5. SAME—MULTIPLICITY OF SUITS.

Where a gravel road company was engaged in the daily practice of unlawfully exacting tolls from persons using a public highway, a right of action arose in favor of the persons required to pay the same, which could be adjusted between the parties only by a multiplicity of suits at law, and therefore an injunction restraining such acts was authorized.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 18.]

6. HIGHWAYS—OBSTRUCTIONS—INJUNCTION.

The unauthorized exaction of tolls on a public highway is a public nuisance, the continuance of which will be restrained by injunction at the suit of the state on the relation of the prosecuting attorney of the county.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 430, 431.]

7. TURNPIKES AND TOLL ROADS — CORPORATIONS—DURATION.

Act Feb. 27, 1851 (Laws 1850-51, p. 403), providing for the incorporation of the Louisiana & Middletown Plank Macadamized Road Company, and providing that such company "may have continued succession," and Act March 20, 1872 (Laws 1871-72, p. 227), amendatory thereto, containing the same provision, did not confer on such company perpetual corporate rights and franchises, but the duration of existence was governed by Rev. St. 1845, c. 34, art. 1, § 1, and Rev. St. 1865, c. 62, respectively, providing that, when no limitation was prescribed, succession should continue for 20 years only.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 104.]

8. SAME — TERMINATION OF CHARTER OR FRANCHISE—TRANSFER OF RIGHTS.

On the expiration of the charter rights of a toll road company, the road vested in the public, and the subsequent conveyance of the rights and franchises of the corporation gave the grantee no right to exact tolls.

9. SAME — USE OF HIGHWAY — CONSENT OF COUNTY COURT.

Under Rev. St. 1880, § 2697; Rev. St. 1899, § 1227, providing that the directors of a gravel road company shall proceed to survey and locate their road "and may with the consent of the county court of the proper county locate it over and upon any state or county road or highway," it is necessary for a gravel road company to apply for and obtain the consent of the county court to locate their proposed road over an old gravel road which has reverted to the county, and without obtaining such authority the corporation has no authority to take possession of the road and collect tolls.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Turnpikes and Toll Roads, § 42-46.]

10. SAME — SUFFICIENCY OF CONSENT — CONSTRUCTION OF ELECTRIC RAILWAY.

Authority granted by a county court to construct an electric railway over and along the right of way of an old gravel road, "pro-

vided the same shall be in all respects so constructed and operated as to obstruct and interfere as little as possible with the use of the present road as now constructed, subject to the rights and interests of the person or corporation who now or hereafter may own and operate said gravel or macadamized road," conferred no right to operate the gravel road and collect tolls therefor, nor did it recognize any rights of the old gravel road company whose franchise had expired.

11. SAME—ACTIONS TO RESTRAIN COLLECTION OF TOLLS.

In an action to restrain a corporation from operating a gravel road and collecting tolls, the petition alleged that the road was a public highway unincumbered by tolls, that the public had the right to the free use thereof, and that the defendants' acts in collecting tolls were unlawful. Held, that the petition was sufficient, although it did not affirmatively charge that defendants were occupying the road without an order of the county court; that matter being a defense to be pleaded by defendants.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by the state of Missouri, on the relation of John W. Jump, prosecuting attorney of Pike county, against the Louisiana, Bowling Green & Ashley Gravel Road Company and others. From a judgment for plaintiff, defendants appealed to the Supreme Court, and that court (86 S. W. 170) certified the case to the Court of Appeals for final determination. Affirmed.

This case was certified to this court by the Supreme Court. It is an injunction proceeding instituted by the prosecuting attorney of Pike county and the state ex relatione to restrain the defendants from maintaining a public nuisance; i. e., collecting tolls on a certain public road in said county. The petition is as follows: "Plaintiff respectfully states to the court that the relator herein, John W. Jump, is prosecuting attorney within and for the county of Pike, in the state of Missouri; that the Louisiana, Bowling Green & Ashley Gravel Road Company is a corporation organized under the provisions of article four (4) of chapter forty-two (42) of the Revised Statutes of Missouri of 1899 [manifestly Rev. St. 1889]. That said corporation is located and has its office and place of business at the city of Louisiana, in said county. That the said Charles S. Broadhead, Ollie C. Bryson, and William J. Dougherty are directors of said corporation, and the said Charles S. Broadhead is the president and chief executive officer thereof, and the said Ollie C. Bryson is the secretary of the board of directors of said company. That said Charles S. Broadhead resides in the city of St. Louis in said state, and the said Ollie C. Bryson resides in and keeps his office as such secretary in said city of Louisiana, county of Pike aforesaid. That on or about the ——— day of ———, A. D. 1852, there was organized under the provisions of an act of the General Assembly of the state of Missouri, entitled 'An act to incorporate the Louisiana and Middletown Plank or Macadamized Road Company,' approved February

27th, A. D. 1851, a corporation by the name and style of the 'Louisiana & Middletown Plank or Macadamized Road Company.' That said last-named corporation built and constructed a plank road from the then town, now city of Louisiana to the then town, now city of Bowling Green and subsequently, during the year —, caused said road to be macadamized and covered with gravel, and thereafter, during the year 1868, said last-named corporation built and constructed a macadamized road from said town of Bowling Green to the town of Ashley in said county; the same being an extension and part of the said road so constructed from Louisiana to Bowling Green. That said roads were built and constructed over lands of Mary M. McElwee, * * * and others. [Here the location of the said road from Louisiana to Ashley is particularly described.] That said road was constructed in part on the roadbed of a public road leading from said town of Louisiana to Bowling Green, and from the latter named place to the town of Ashley. That said corporation as required by the said act caused a survey of its route as above set forth to be made, and the same was duly filed, and recorded in the office of the recorder of deeds of said county of Pike on the 17th day of August, A. D. 1852. That under the provisions of an act of the General Assembly of the state of Missouri, entitled 'An act to amend an act entitled "An act to incorporate the Louisiana and Middletown Plank or Macadamized Road Company,"' approved February 27th, 1851, and to reduce into one the several acts amendatory thereof, approved the 20th day of March, A. D. 1872, the organization of said company as theretofore made under the superintendence of the persons named in said act so approved on the 27th day of February, A. D. 1851, is declared to be legal and valid, but the name of said corporation in and by said act is changed to that of the Louisiana & Middletown Gravel or Macadamized Road Company. That under the provisions of the said acts of said General Assembly the said corporation and company was authorized to use and appropriate the public highways free of charge, and said company did so use such roads. That the existence of said Louisiana & Middletown Plank or Macadamized Road Company was limited to the period of 20 years, and therefore terminated on the 27th day of February, A. D. 1871, and, if revived by the said act so approved on the 20th day of March, A. D. 1872, its life and existence was extended and continued for a period of 20 years thereafter, and therefore terminated on the 20th day of March, 1892. That upon the expiration of the charter rights of said company the said roadbed so laid out and constructed reverted to and became vested in the public as an easement, and thereupon the public became entitled to use the same divested of tolls and to travel over the same without hindrance or molestation. That

thereafter, to wit, on or about the — day of —, A. D. 1893, the said defendants took possession of the said roadbed and the toll-houses which had been erected along said road, and unlawfully demanded and collected tolls from persons passing over said road, and ever since so taking possession of said road up to the present time have demanded and collected and are still demanding and collecting tolls of persons passing over said road. That the defendants have failed to construct, keep up, and maintain said road as required by law, in this: that that part of the road which lies between the towns of Louisiana and Bowling Green passes over and through certain large streams of water, among them a certain creek called Noix creek and four other streams tributary thereto through which streams large bodies of water constantly flow, and that often the waters thereof are so deep and flow so rapidly as that the said streams are nonfordable and cannot be crossed by persons traveling on said road with the ordinary teams and in vehicles used by the traveling public and by persons residing in localities contiguous to said road and who are compelled almost daily to drive over the same, and that the defendants have hitherto failed and neglected to erect, construct, and maintain bridges over and across said streams at the several places where said road crosses the same. That much of the time during the winter and spring of each and every year said road becomes impassable for such teams and vehicles as are used on the same as aforesaid by reason of the failure of the defendants to keep a sufficient quantity of gravel stone or other like substance thereon so as to form a hard solid bed, and that said road is even worse for travel than an ordinary country road commonly called a dirt road. Plaintiff further states that by the aforesaid unlawful acts on the part of said defendants in so demanding and collecting said tolls and the other matters and things herein complained of, large numbers of the citizens of the state of Missouri and especially of said county of Pike sustain great damage for which they cannot be compensated in or by action for damages, and if any such remedy exist it would require a multiplicity of suits to protect and enforce the rights of said citizens; and that said citizens have for the injury and loss thus sustained no adequate remedy except by injunction prosecution in the name of the state as hereinbefore set forth. Plaintiff therefore prays the court to enjoin and restrain the said defendants from collecting tolls on said road and from in any way interfering with the use of said road by the public, and for such other and further orders as to the court may seem just and proper."

The answer contained a general denial, and affirmatively alleged that, after the expiration of the charter of the old gravel road companies, the county court of Pike county, by order of record, granted a fran-

chise to the defendant, J. O. Broadhead, and his associates, when organized as a corporation, to build, maintain, and operate an electric railroad on the right of way of said Louisiana & Middletown Gravel or Macadamized Road Company, and that it was provided by said order of the county court that the rights and privileges conferred therein should in all respects be used and operated in such a manner as to obstruct or interfere as little as possible with the use of said gravel road mentioned in plaintiff's petition, and subject to all the rights and interests of the persons or corporation which at that time or thereafter might own and operate said gravel or macadamized road; that such order of the county court created an estoppel as against the county and against the plaintiff in the present suit, and that therefore the plaintiff ought not to be permitted to maintain this action. And further, that the defendants have expended large sums of money in good faith in repairing and keeping up said road with the knowledge and acquiescence of said court and the public in general, and that therefore an estoppel arises against the plaintiff in this proceeding which should preclude their recovery.

To sustain the issues on the part of the plaintiff, there was read in evidence, first, an act of the Legislature incorporating the Louisiana & Middletown Plank and Macadamized Road Company, approved February 27, 1851 (Laws Mo. 1850-51, p. 403), and second, an act of the Legislature reincorporating the above-named company and entitled, "An act to amend an act entitled 'An act to incorporate the Louisiana and Middletown Plank and Macadamized Road Company,'" approved February 27, 1851, and to reduce into one the several acts amendatory thereof, approved March 20, 1872. Laws Mo. 1871-72, p. 227. By the last-named act, the organization of such company as theretofore had under the original act is declared to be legal and valid, and the name of said company is changed to that of the Louisiana & Middletown Gravel or Macadamized Road Company. Judge Thomas J. C. Fagg testified that he had lived in Pike county, Mo., for over 60 years; that the gravel or macadamized road from the town of Louisiana through Bowling Green to Ashley in Pike county was built by the Louisiana & Middletown Plank or Macadamized Road Company between the years 1852 and 1860, i. e., that portion of the road from Louisiana to Bowling Green was then built, and later the portion of said road from Bowling Green to Ashley was constructed, between the years 1860 and 1870. It was at first a plank road; afterwards stone and gravel, and this is the only plank or gravel or stone road built from Louisiana to Bowling Green and Ashley in said county. Gov. Robert A. Campbell testified that he was familiar with the affairs of Pike county from 1851 up to the present time, and that the plank road

from Louisiana to Bowling Green was constructed by said original company in 1852 or 1853. It was at first a plank road to the foot of the hill about one mile from Bowling Green; the remainder being stone and gravel. This plank and stone and gravel road occupied the old dirt road between Louisiana and Bowling Green. The road was extended to Ashley about 1870, and was constructed of stone and gravel. After a few years, stone and gravel were substituted for the plank on the original road. The portion between Bowling Green and Ashley passed over and was located in part on the prior public road. The road is the same that was built and operated by the old company, and tolls were collected on the old road. The records, profiles, and maps in the office of the recorder of deeds of Pike county showing the location and distances, etc., pertaining to the road, were introduced; also the records and proceedings of said county court showing the condemnation of lands for the right of way for said road. It was shown that tollgates and tollhouses were erected on said road, and that tolls were collected therefrom by both of said companies. There was also read in evidence on the part of plaintiff, an act of the Legislature, approved March 12, 1859, entitled "An act in regard to road companies in the county of Pike," (Laws Mo. 1858-59, p. 395), which said act of the Legislature authorized a proceeding against such companies for certain delinquencies therein mentioned. It was shown that by virtue thereof the rights, franchises, and property of the then existing company were sold under a judgment of the circuit court authorized by such act of 1859, and, by competent mesne conveyance, all of its rights, property, and franchises passed to the Commercial Bank of Louisiana and John M. True, and that such bank and True entered into possession of and controlled said road and collected tolls thereon for several years thereafter. It was shown that the present defendants took possession of said road about the year 1893, and continued to collect tolls thereon up to the time of the institution of this proceeding. Senator David A. Ball gave testimony to the effect that the road over which the defendants were collecting such toll is the same and identical road as that maintained by the prior companies under their charter. There was also some evidence introduced on the part of plaintiff tending to show that the road had been permitted to continue in bad repair under the present management.

At the conclusion of the testimony on behalf of the plaintiff, defendant requested the court to instruct that, under the law and the evidence, the finding should be for the defendants. This the court declined to do. At the inception of the trial, defendant also entered a general objection to the introduction of any evidence under the petition, on

the ground that the petition failed to state facts sufficient to constitute a cause of action. On the part of defendants it was shown that on February 21, 1893, the Commercial Bank and John M. True conveyed, by competent deed, to James O. Broadhead, Wm. J. Dougherty, and O. C. Bryson, in consideration of \$8,000, the "roadbed, right of way, tollhouses and tollgates owned and possessed by the said parties of the first part, and used by them in connection with the occupation and use of said road as the same is now constructed and operated from the city of Louisiana to the town of Ashley through the town of Bowling Green in the county of Pike, together with all franchises, rights, and privileges belonging in any wise and appertaining to said road"; that on March 6, 1893, the county court of Pike county, by order of record, granted to said Broadhead, Dougherty, and Bryson, as follows: "It is hereby ordered and adjudged that the following rights and privileges and franchises be and the same are hereby granted to them and to their associates when organized as a corporation to construct, use, and operate within the limits of the right of way as now owned or as the same may at any time hereafter be extended by the Louisiana & Middletown Gravel or Macadamized Road Company, a line of railway upon which cars may be run and propelled by electricity or other motive power as they may select, provided that the same shall be in all respects so constructed and operated as to obstruct and interfere as little as possible with the use of the present road as now constructed, and subject to the rights and interests of the person or corporation who now or hereafter may own and operate said gravel or macadamized road." It was then shown that the present defendant, the Louisiana, Bowling Green & Ashley Gravel Road Company, was incorporated April 21, 1893, for the purpose of constructing and operating a gravel road along the line of the old gravel road between the city of Louisiana and Ashley by way of Bowling Green in Pike county. The incorporators and stockholders of the last-named company are as follows: James O. Broadhead, 69 shares; O. C. Bryson, 4 shares; Wm. J. Dougherty, 4 shares; Charles S. Broadhead, 1 share; David A. Ball, 1 share, and Thomas J. C. Fagg, 1 share. And it was further shown that James O. Broadhead, Wm. J. Dougherty, and O. C. Bryson, on June 1, 1893, conveyed the road in question to this new corporation, the Louisiana, Bowling Green & Ashley Gravel Road Company, one of the defendants herein; that since said defendants have taken charge of said road, they have expended some means thereon and placed the same in good repair, constructed bridges, etc., and collected tolls until a short time prior to the trial of this cause, when they ceased so

to do, by consent of parties, until the present proceeding should be determined.

The circuit court found the issues arising by virtue of the alleged failure of the defendant company to keep the road in repair, in favor of defendants, and also adjudged that nothing contained in the judgment should be construed to interfere with the rights of the defendants to maintain, construct, and operate the electric or other railroad as mentioned in the order of the county court in evidence upon the gravel road. On the other matters, the finding was for the plaintiff. The judgment recited the organization of the original company, the location and construction of the road, and the consolidated act of 1872, holding that the charter granted to the original company and confirmed to the company by the consolidating act of 1872 expired on March 20, 1892, and that, upon its said expiration, the said road and all of the charter rights and franchises of the said company reverted to and became vested in the public, divested of the burden of tolls and all control and interference of said company; that after the expiration of said charter, and after said road and rights and franchises therein became vested in the public, the defendants herein entered upon and took possession of the same and continued to receive and collect tolls until August, 1892; and therefore adjudged the said collection of tolls by the defendant on the road so disburthened therefrom was wrongful, and perpetually enjoined the defendants from further collection thereof. Defendant perfected its appeal from said judgment to the Supreme Court. That court held that it had no jurisdiction of the cause, and therefore certified the same to this court for final determination.

Section 1234, art. 5, c. 12, Rev. St. 1899, dealing with such road companies, provides that "It shall be the duty * * * at all times to maintain a smooth and permanent road, so as to form a hard and even surface, and maintain and keep in good repair all necessary bridges, culverts, ditches and dykes, and upon failure to do so, neither they nor their agents shall charge or exact any toll from any person or persons traveling over or on such road." It seems that the allegations pertaining to the defendant's failure to maintain the road were predicated upon this section of the statute. This appears from the derelictions in this behalf therein complained of, as they are failure and "neglect to erect, construct, and maintain bridges over and across said streams at the several places where said road crosses the same;" also "failure of the defendants to keep a sufficient quantity of gravel, stone, or other like substance thereon so as to form a hard, solid, roadbed." It does not sufficiently appear from the allegation that the pleader intended to bring the case within the first clause of section 1236 of the same

article, which authorizes a quo warranto proceeding to forfeit the corporate powers and privileges of the company when the road is "suffered to be out of repair so as to be impassable for the space of two months," for the reason that no allegation is contained therein that the road has been suffered to be out of repair so as to be impassable for the space of two months. Nor does it sufficiently appear from the allegation that the pleader intended to predicate the allegation on the second and last clause of that section, which provides that "if such company shall suffer the road to be out of repair for an unreasonable time," they shall have no right to collect tolls, etc., for the reason that no allegation is found therein to the effect that the road was suffered to be out of repair, to the injury, hindrance, or delay of travelers for an unreasonable time, nor is the allegation equivalent thereto. In other words, none of the earmarks of this section are found in the pleading, whereas the pleading does predicate upon the failure to "maintain bridges" and "hard, solid bed," which are especially mentioned in section 1234, *supra*, as obligations resting upon the company, for default of which the right to collect tolls is forfeited. Be this as it may, however, the circuit court found the issue on this branch of the case for the defendants, and it does not appear here for review, as plaintiff acquiesced in such finding by failing to appeal therefrom. Inasmuch as this proceeding is by injunction, however, the question is noticed here solely in order to determine for ourselves whether or not that portion of the pleadings predicated the cause upon section 1236, *supra*, which authorizes a quo warranto to invoke its provisions, and thus possibly throw some ray of light upon the proper form of procedure pertaining to the whole case. In view of this finding by the trial court, there remains for our consideration only so much of the case as exists without this feature. The views of the court on the principles of law applicable to the facts stated will be expressed in the opinion.

Pearson & Pearson and Ball & Sparrow, for appellants. E. W. Major and J. D. Hostetter, for respondent.

NORTON, J. (after stating the facts). 1. As said before, this case was appealed from the circuit to the Supreme Court. That court, upon an examination of the record, found itself to be without jurisdiction to proceed, and therefore certified the same to this court for determination. In doing so, one of the learned judges of that court expressed certain views on the case in the form of a written opinion, which was concurred in by one of his learned associates; the remaining two members of the division, however, declining to concur in the views therein expressed, and concurred only in so far as it was necessary to hold that the court had no

jurisdiction of the cause and to make an order transferring the same to this court. That opinion, as reported, is to be found in *State ex rel. John W. Jump, etc., v. Louisiana, Bowling Green & Ashley Gravel Road Company*, 187 Mo. 439, 86 S. W. 170, and therein the learned judge advanced the views that the issues tendered by the plaintiff in this case were: "First, that the charter of the original company had expired; and second, that the defendant company had failed to keep the road in repair. The first issue could only be determined in a quo warranto proceeding. The second issue was evidently based upon section 1236 of article 5, c. 12, Rev. St. 1899, which provides that if any gravel road company shall suffer the road to be out of repair, so as to be impassable for the space of two months, such company owning such road shall be liable to forfeit its corporate powers or privileges, and such forfeiture may be enforced by information in the nature of quo warranto at the relation of any person desiring to prosecute the same; and if said company shall suffer said road to be out of repair, to the injury, hindrance, or delay of travelers, for an unreasonable time, they shall have no right to collect tolls thereon until the same is again repaired. Thus a common-law quo warranto is the proper remedy to determine the first issue, and a statutory quo warranto is the proper remedy to determine the second issue tendered by the petition in this case."

It is a cause of much regret among the members of this court that we are unable to accept those views and to hold, inasmuch as the very great respect we entertain for the learned judge who so held renders it not only a painful, but a difficult task as well, to announce views not wholly concurrent therewith. In the proper and conscientious exercise of the constitutional office of the court, it is incumbent and imperative on us, however, to adjudicate such matters as are submitted for investigation, ascertainment, and decision and to which the jurisdiction of the court attaches, in accordance with the law on the subject as it reveals itself to our senses on careful, candid, and conscientious research and reflection, restrained only by the constitutional mandate to be found in section 6, art. 6, of the amendment to the Constitution of Missouri, adopted November, 1884, which provides that "the last previous rulings of the Supreme Court on any question of law or equity shall in all cases be controlling authority in such courts of appeals." Under this constitutional provision, had the views expressed in the opinion referred to been concurred in by a majority of the members of that court in a case properly within its jurisdiction, or rather, in a case in which the court assumed to proceed as having jurisdiction, then its binding force and effect should not and would not be questioned here, as we would be precluded thereby from adjudicating contrary thereto. But as the case now

stands, we are confronted with those views not having the force and effect of a decision of that court. The jurisdiction of that court attaches in so far only as it was necessary to make an order transferring the case to this court, and no further. Section 1657, Rev. St. 1899.

The legal phase of the situation presents no difficulty. It is obvious that it is the duty of this court to determine the case at bar on the principles of law as in due diligence and good conscience we ascertain them to be, and when those principles or any phases of them are adjudicated by the constitutional Supreme Court of Missouri; i. e., concurred in by a majority of the judges, to obediently follow the last previous ruling of such court. But the situation is not free from embarrassment. We, here, earnestly endeavoring to discharge the constitutional functions of the court and summoning our best efforts and conscience to a faithful discharge of that duty, are called upon now to either follow this extrajudicial utterance of two of the learned judges of the superior court of the state or disagree therewith and decline so to do. To follow it might be opposed to our conscientious convictions on the subject, and, it not having authority under the Constitution of a decision of the Supreme Court, our duty would point clearly the way to decide the questions involved upon our understanding of the law. On the other hand, to disagree with those views expressed and decline to follow them might be interpreted as a lack of proper respect on our part, as well as a departure from what may seem proper decorum or judicial propriety. This, however, we desire here and now to disaffirm and to say that, with entire respect for the great learning and ability of the learned judge who expressed the views mentioned, as well as his learned associate who concurred therein, and with the very fullest measure of esteem for our judicial superiors, we are unable to accept the views in toto as advanced, and shall proceed to dispose of the case under consideration in accordance with our conception of judicial duty.

2. The case of *State ex rel. v. Hannibal & Ralls Gravel Road Company*, 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457, is the last previous expression of our Supreme Court on the question here involved. That case was practically on all fours with this. In many respects it was identical. The history of the controversy was that the proceeding was first instituted by quo warranto in the name of the state on the relation of the prosecuting attorney of Ralls county to forfeit the charter of said defendant and especially oust it of the franchises of collecting tolls on the old road. That case was tried in the circuit court, which held that the defendant had no right to collect tolls on said old road, but that injunction, and not quo warranto, was the proper remedy. The plaintiff in that case appealed to this court, which affirmed

the judgment of the lower court. 37 Mo. App. 505. Thereupon an injunction suit, such as the present, was instituted, praying that the defendant be restrained from collecting tolls on the old roadbed. The finding and decree were in favor of the plaintiff, and the defendant was enjoined as prayed. The case reached the Supreme Court, where it was determined by the court on the merits. The very able opinion of the court was prepared by Judge Gantt. It is true, the question as to whether injunction or quo warranto was the proper remedy was not discussed in the Supreme Court, as appears from the briefs and opinion. It appears, however, from the fact that the court entertained jurisdiction and proceeded to administer the relief prayed for, that the court treated the matter as having been presented in the proper form. It seems, therefore, that the question of form of procedure is settled. The force and effect of such action by that court in entertaining jurisdiction and administering relief sought in a cause was considered by the court in banc, and it was adjudged that "this entertainment of such cause for such a prescribed purpose was nothing less than a tacit avowal of the right and propriety of doing so, since otherwise the writ would indubitably have been quashed." *State ex rel. v. Fleming*, 147 Mo. 12, 44 S. W. 760. We must therefore hold that the case of *State ex rel. v. Gravel Road Company*, supra, is an authoritative adjudication on the question involved; that the case is a precedent in point, and that it is a duty imposed upon this court by the Constitution of the state to be governed and controlled thereby in administering the principles of law applicable to the case at bar.

But it is said that both the Supreme Court, in *State ex rel. v. Gravel Road Company*, supra, and this court, in the same case, 37 Mo. App. 505, were in error; the Supreme Court in entertaining the injunction proceeding, and this court in denying the writ of quo warranto, and that, in this case, the common-law quo warranto and not injunction is the proper proceeding on the first issue asserted to have been tendered by the petition. It is true, as said by Judge Marshall, that quo warranto is the proper legal proceeding to determine the rights to an office or franchises or to oust defendant therefrom if his title is found to be defective. 23 Am. & Eng. Ency. Law (2d Ed.) 596. And it is the law that a corporation may be ousted by quo warranto from the enjoyment and exercise of powers not conferred by law, but unlawfully assumed by it, and this may be done without affecting the corporation in regard to its proper franchises. But where the unlawful acts of a corporation are grounds for forfeiture, it is proper to oust the corporation of all of its franchises by quo warranto. 23 Amer. & Eng. Ency. Law (2d Ed.) 640; *State ex rel. v. Equitable Loan, etc., Co.*, 142 Mo. 341, 41 S. W. 916. It is

likewise true, and, under the adjudications in this state, as well as generally, the rule is well settled to the effect that if quo warranto be prayed to oust a corporation on the grounds that it is not a corporation or has no legal existence as such, it must be prayed against those persons who are assuming to act as such corporation, and not against the corporation itself, for the very good reason that if the proceeding be against the corporation as such, then the act of proceeding against it as a corporate entity is an act of affirmance on the part of the relator that it is a corporation in fact, when, by the pleadings, he asserts and alleges that it is not such. The two positions are thus seen to be inconsistent; therefore the rule that when the proceeding is to dissolve an institution operating as a corporation, for the reason it is not such, the parties themselves who thus usurp the powers are to be made defendants, for by making the particular persons defendants it is an act in disaffirmance of the corporation. But this rule does not obtain in a case where the corporation, as such, has a legitimate existence and the quo warranto is not to divest it of its charter on the ground that it is not a corporation, but seeks a judgment on the grounds that it is exercising powers and liberties which are not included in its charter; or, in other words, when it is not affirmed to be a usurper of corporate powers in the first instance, but it has such corporate existence and has usurped powers and liberties which it has not, by virtue of its otherwise legitimate existence and operation. In such case the complaint is against a live and going entity on the grounds of assumption of powers and liberties not warranted by its charter, and the writ should be directed, not against the persons, but should go against the entity itself in order to reach the root of the evil, for it is the corporation, and not the individuals, that is complained against. *State ex rel. v. Fleming*, 147 Mo. 9, 44 S. W. 758; *State ex rel. v. Gravel Road Co.*, 37 Mo. App. 505; *People v. City of Spring Valley*, 129 Ill. 169, 21 N. E. 843; *People v. Rensselaer, etc., Ry. Co.*, 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; *State v. McReynolds*, 61 Mo. 202; 2 *Spelling, Extra. Relief*, §§ 1811, 1812, 1843, 1844, 1852; 23 *Amer. & Eng. Ency. Law* (2d Ed.) 623.

It seems, therefore, that if the respondent had desired merely to oust the existing corporation from exercising the particular franchises of the old corporation, which were being unlawfully assumed by the new company in collecting tolls upon the road, that quo warranto would lie for that purpose. Authorities *supra*. The right to erect gates and collect tolls upon roads, bridges, canals, channels, and other highways, is a franchise, triable by quo warranto, well recognized by the authorities. 23 *Amer. & Eng. Ency. Law* (2d Ed.) 643, and numerous cases cited therein. Inasmuch, however, as this proceeding, when directed against a corporation, can only

operate upon corporate franchises, quo warranto will not lie in the absence of a statute merely to test the legality of the acts of the corporation, not amounting to the usurpation of franchises, such as the legality of its title to or possession of property. 23 *Amer. & Eng. Ency. Law* (2d Ed.) 641; *State ex rel. v. Railroad*, 50 Ohio St. 230, 33 N. E. 1051; *State ex rel. v. Hannibal, etc., Road Co.*, 37 Mo. App. 504. And it seems that it was upon this theory the opinion in the case *supra*, *State ex rel. v. Hannibal, etc., Road Co.*, 37 Mo. App. 504, is based. The court held that, inasmuch as the record disclosed that the defendant therein was shown to be a duly organized and existing corporation, with the power to own or construct a gravel road along a designated line, to erect toll gates thereon, and demand and exact a reasonable toll from the persons traveling over such road, and that it was further shown to be in actual possession of such a road along such designated line, that this was the end of the inquiry in quo warranto, emphasizing the doctrine that in such proceeding the nature and character of the defendant's title to the road could not be inquired into and its charter forfeited because it had acquired no title to the road, which evidently was viewed by the court as the real question sought to be presented for decision, and, as such question called for an adjudication as to whether or not the road and franchises in question passed to the defendant by a certain conveyance, the court answered: "Property rights cannot be interfered with or determined in such proceeding"—citing *Morawetz, Corp.* § 1033; *Boone, Corp.* § 167; *State ex rel. v. Hannibal, etc., Road Co.*, 37 Mo. App. 504.

The proposition of law there asserted is correct beyond question, as evidenced by the authorities *supra*. It is evident from the decision in that case, however, that the court overlooked the fact that even though the new company, incorporated after the old company had passed out of existence, by virtue of its charter expiration, was chartered under the general law to construct and own a gravel road along the designated road which was that of the old road, then vested in the public because of the demise of the old company by limitation of its charter, and even though such new company was authorized by its charter to exact tolls for the use of the road, that this charter could not and did not confer upon it the franchise to occupy said old road and exact tolls thereon until it had taken one additional step, and that is, procured the consent of the county court to such occupancy under the statute—then section 855, Rev. St. 1879, and section 2697, Rev. St. 1889, now section 1227, Rev. St. 1899, and until it had procured this consent it was usurping and wrongfully exercising a franchise in occupying the old road and collecting the tolls, for its charter conferred no right upon it to do so until it had first obtained the consent of the county court. (*State ex rel. v. Gravel Road Co.*, 138 Mo.

346, 39 S. W. 910, 36 L. R. A. 457), and the right to exercise such franchise could certainly have been tried and determined without trying the title to the road. It is to be noted that in that case Judge Thompson dissented and Judge Rombauer concurred reluctantly, expressing doubt as to its soundness, and commenting: "The trial court, whose judgment is presumptively correct, is in such case entitled to the benefit of the doubt." We are frank to say, however, that inasmuch as the right to collect tolls is a franchise triable upon quo warranto, and that the defendant in that case was clearly exercising privileges which it had not acquired, even though chartered for that purpose, having failed to perform on its part the necessary precedent conditions to obtain the right to collect tolls, it seems that quo warranto against the company, even though it affirmed and admitted a legitimate and corporate existence, was the proper remedy to oust it from the exercise of the franchise, and to this extent we agree with the opinion of the learned judge of the Supreme Court hereinabove referred to.

4. Assuming, then, that quo warranto may have been a proper remedy in this case, the question then suggests itself: Is quo warranto to oust the present defendant corporation from exercising the franchise of collecting tolls in the highway an adequate remedy at law in the sense that a court of equity would thereby be precluded from interposing by process of injunction, so that, therefore, this proceeding for the extraordinary relief sought ought not to be maintained? In this behalf, it might be said (and so eminent authority as Mr. Spelling could be cited, where, in treating of the subject that equity will not interfere when there is an adequate remedy at law, it is said: "The rule extends to cases in which a remedy has been provided in the form of information by quo warranto; the latter remedy being pro forma criminal." 1 Spelling, *Inj. & Extra. Relief* (2d Ed.) § 24. And supported, too, by Chancellor Kent in *Attorney General v. Utica Ins. Co.*, 2 Johns. (N. Y.) Ch. 571. The answer is that the competent legislative authority of this state has so modified the rule above stated that it is applicable only where there is an adequate remedy for the invasion of a right which may be compensated in damages. The Supreme Court of Pennsylvania has said: "The remedy at law referred to is not one which would accomplish the same result as a mandatory injunction, such as the right of quo warranto, or indictment for maintaining a nuisance. It means merely an action at law to recover damages for any injury sustained." *Commonwealth ex rel. v. Bala, etc.*, Co. 153 Pa. 47, 25 Atl. 1105; 16 Amer. & Eng. Ency. (2d Ed.) 353, 354. Our statutory provision is to be found in section 3649, Rev. St. 1899, as follows: "The remedy by writ of injunction or prohibition, shall exist in all cases * * * to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court,

an adequate remedy cannot be afforded by an action for damages."

It is unnecessary to comment that damages could not be awarded in quo warranto. This statute may be considered as more particularly applicable in a case where an individual or private parties are seeking relief for some private injury, as it contemplates the right of recovery in damages being a necessary element of the remedy at law which would preclude injunction, and such a proceeding is out of the ordinary when the state is complaining. Be that as it may, however, it evidences the policy of the jurisprudence of this jurisdiction on the question as manifested by legislative enactment, and seems to be in accord with the announcement of the doctrine of the Supreme Court of Pennsylvania above quoted. *Turner v. Stewart*, 78 Mo. 480, a case wherein the owners of a steamboat were in the constant habit of discharging freight at a private wharf against the protest of the owner of the wharf, thereby seriously interfering with his business of sawing, receiving, and delivering ties, and they threatened to continue this practice, the court said that the wharf owner might maintain injunction. This was clearly a case in trespass, where damages might have been awarded in an action at law therefor. The court predicated the decision on the theory that the plaintiff would be compelled to sue "for every time the defendants landed, and the burden of carrying on such a multiplicity of suits would make his remedy about as grievous as the injury," and therefore held that the suit at law, would not be an adequate remedy. See, also, *State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310; *Towne v. Bowers*, 81 Mo. 491; *Jones v. Williams*, 189 Mo. 1, 39 S. W. 486, 40 S. W. 853, 37 L. R. A. 682, 61 Am. St. Rep. 436. The Supreme Court of the United States, in *City of Georgetown v. Alexandria Canal Co.*, 12 Pet. 91-98, 9 L. Ed. 1012, in treating this subject in reference to a public nuisance, said: "Besides this remedy at law, it is now settled that a court of equity may take jurisdiction in cases of public nuisances by information filed by the Attorney General. * * * The jurisdiction has been finally sustained upon the principle that equity can give more adequate and complete relief than can be obtained at law." See, also, *In re Debs*, 158 U. S. 565, 15 Sup. Ct. 900, 39 L. Ed. 1092; *Atty. Gen. v. Jamaica Pond, etc.*, Co., 133 Mass. 361; *Columbian Athletic Club v. State ex rel. McMahan*, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. Rep. 407, and authorities cited in the several cases.

It seems that the principle recognized by the courts in making this seeming exception to the rule that equity will not interfere by injunction where an adequate remedy at law exists is such that it is not an exception to the rule at all, but, on the contrary, is treated as one requiring the remedy to be full, adequate, and complete, and, in such case,

where there may be a remedy at law, but it is not full, comprehensive, adequate, and complete, so as to be an adequate remedy, a court of chancery will intervene by injunction, on the ground that it can afford a more complete and adequate remedy than a court of law can furnish, bound and tied down as our courts of law are, to certain forms of remedies and procedure, which they are not capable of molding and adapting to the necessities of the particular case. This seems to be the controlling principle recognized by our Supreme Court in *Turner v. Stewart*, 78 Mo. 480, *supra*, the steamboat landing case referred to, for it is obvious that it was one of trespass, and that a remedy at law for damages existed which brought it within the pale of the statute noted above. Notwithstanding this fact, however, the court proceeded to administer the relief prayed for in the face of the existing remedy at law for damages, on the theory that such remedy was not adequate. The principle recognized clearly was that the remedy by injunction could give more adequate and complete relief than could be obtained at law. 16 Am. & Eng. Ency. Law (2d Ed.) 352-355. Therefore, it has been said by the Supreme Court of Massachusetts in *Attorney General v. Jamaica Pond, etc., Co.*, 133 Mass. 363: "Cases are numerous in which it has been held that the Attorney General may maintain an information in equity to restrain a corporation, exercising the right of eminent domain, under a power delegated to it by the Legislature, from any abuse or perversion of the powers which might create a public nuisance or injuriously affect or endanger public interests." Citing *Agar v. Regents Canal Co.*, Coop. Temp. Eldon, 77; *Atty. Gen. v. Great Northern Railroad Co.* 1 Dr. & Sm. 154; *Atty. Gen. v. Mid-Kent Railroad Co.*, L. R. 3 Ch. 100; *Atty. Gen. v. Leads Corp.*, L. R. 5 Ch. 583; *Atty. Gen. v. Great Eastern Railroad Co.*, 11 Ch. D. 449; *Atty. Gen. v. Great Northern Railroad Co.*, 4 De G. & Sm. 75; *Atty. Gen. v. Cohoes Co.*, 6 Paige (N. Y.) 133, 29 Am. Dec. 755.

We are persuaded, on the principle that equity could afford a more ample and complete remedy in the case at bar, that this proceeding by injunction is proper, and is not precluded by the existence of the remedy by quo warranto. If the collection of the tolls was a nuisance, maintained in the public highway, then it was the right of the public to have such nuisance abated or restrained forthwith, and it was the duty of the state in its sovereign capacity to institute such proceeding in that behalf as would render to its citizen immediate reinstatement of a free and unincumbered highway. A proceeding by quo warranto would have been of a tedious nature, where the relief sought could only be adjudged upon a final determination of the cause, whereas a proceeding by injunction would afford immediate and adequate relief, inasmuch as the restrain-

ing order of the court could be had forthwith, and the otherwise constant and recurring nuisance be thereby abated during the pendency of the suit; the ultimate result being the same in either proceeding. And indeed, the daily practice of unlawfully exacting tolls from those persons using the road was a standing and continuing infringement of their rights, which could be immediately relieved only by the extraordinary process of injunction, and upon each successive exaction of toll a right of action arose in favor of the person who was required to pay the same against those persons so unlawfully exacting it, which could be adjusted between the parties only by a multiplicity of suits at law. The general policy of the law, and the inclination of the courts to contribute to whatever is conducive to the peace and repose of society in preventing a multiplicity of suits, argues forcibly in favor of not only the power, but the duty as well of a court of conscience to interpose its salutary relief in such circumstances, even though the right to proceed by quo warranto existed as well. Be this as it may, however, as said before, the case of *State ex rel. v. Gravel Road Co.*, *supra*, decided by our Supreme Court, is authority sufficient for us to sustain this proceeding. See, also, *People ex rel. v. Newburgh, etc., Plank Road Co.*, 86 N. Y. 1. And we would entertain it under that authority and the constitutional mandate, even though we were of opinion that it ought not be so entertained. We have noticed the question of the power of the court of equity to interfere in a case of this nature by injunction, solely on the ground of principle, in view of the fact that it was not discussed in that case. Entertaining views hereinbefore expressed, it becomes our duty to examine and dispose of the merits of the controversy as found in the record before us.

5. It will be observed that, after much matter of inducement, the gravamen of the petition is reached, and thereby it is alleged "that upon the expiration of the charter rights of such company [March 20, 1892] the said roadbed so laid out and constructed reverted and became vested in the public as an easement, and thereupon the public became entitled to use the same, divested of tolls, and to travel over the same without hindrance or molestation; that thereafter, to wit, on or about — day of —, A. D. 1893, the said defendants took possession of said roadbed and the tollhouses which had been erected along said road, and unlawfully demanded and collected toll from persons passing over said road, and ever since so taking possession of said road, up to the present time, have demanded and collected and are still demanding and collecting tolls of persons passing over said road." Here we find a positive and pointed allegation to the effect that the road, a right to which was vested in the public absolutely free and disburthened of all tolls or other incumbrance

to its free use and occupation by the public, was taken into possession by the defendants and tolls exacted from the public for the user, which belonged to it as a matter of common right. It is fundamental that every citizen has the right to the legitimate use of the public highway free of charge, and any obstruction not authorized by law which denies or abridges or incumbers this right of all of the people is a public nuisance. 1 Wood on Nuisances (3d Ed.) § 248; also section 71; 21 Am. & Eng. Ency. Law (2d Ed.) 683, 684; Cummings v. City of St. Louis, 90 Mo. 259, 2 S. W. 130. And it has been expressly decided in this state that the unauthorized exaction of tolls on the public highway is such a public nuisance. State ex rel. v. Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457.

6. Injunction is a proper remedy to restrain the commission or continuance of a nuisance. The jurisdiction is said to be founded upon the ability of equity to prevent irreparable mischief and vexatious litigation, and to furnish a more complete remedy than can be had at law. 27 Amer. & Eng. Ency. Law (2d Ed.) § 703; 1 High on Injunctions (3d Ed.) § 739; 2 Wood on Nuisances (3d Ed.) § 777; State ex rel. v. Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457; McKinney v. Northcutt (Mo. App.) 89 S. W. 351; and authorities, supra. And in a case such as this, where the nuisance is of a public nature, it is proper for the prosecuting attorney of the county to institute the suit ex relatione. State ex rel. v. Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457; 21 Amer. & Eng. Ency. Law (2d Ed.) § 708; 2 Wood on Nuisances (2d Ed.) § 819; Bliss on Code Plead. (3d Ed.) § 31; 2 High on Injunction (3d Ed.) § 1554, and authorities, supra.

7. From the act of the Legislature approved February 27, 1851 (Laws Mo. 1850-51, p. 403), introduced in evidence, under which the original gravel road company was organized, it appears that there was a failure to provide any specific duration of the charter franchises thereof, but said act did provide that the company "may have continued succession." The consolidated act of March 20, 1872 (Laws Mo. 1871-72, p. 227), which was read in evidence, also failed to make any specific provision as to the duration of the charter rights, but provided that the corporation "by that name and style, may have continued succession." Section 1, art. 1, c. 34, Rev. St. 1845, which was in force at the time when the act of 1851 became a law, provides that every corporation shall have succession by its corporate name for the period of 20 years. Rev. St. Mo. 1865, c. 62, in force at the date of the consolidated act of 1872, provided, among other things, that when no limitation was prescribed by the charter of the corporation, succession should continue for 20 years only. It is quite evident that the original company, as well as

the present defendant, who attempted to purchase the property rights and franchises of the old companies, construed the words "continued possession", contained in the acts of both 1851 and 1872, supra, to confer upon the companies perpetual corporate rights and franchises, and the case of Fairchild v. Masonic Ass'n, 71 Mo. 526, supported this construction. No doubt it was on this construction that defendants attempted to purchase the rights and property of the old companies from the bank and J. M. True, who had acquired title thereto by mesne conveyances in virtue of the judgment sale under the act of March 12, 1859. This construction, however, is not tenable under more recent decisions of our Supreme Court. In State ex rel. v. Payne, 129 Mo. 468, 31 S. W. 797, 33 L. R. A. 576, the court most carefully reviewed the question and disapproved the prior ruling in Fairchild v. Masonic Ass'n, supra, and held that the terms "perpetual succession" meant only the capacity of succession for a period limited in the charter or a period fixed by the general statutes in force at the time, which was 20 years. Statute, supra. The same doctrine was announced and recognized in State ex rel. v. Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457, and, of course, the same rule would obtain as to the words "continued succession," employed in the Acts of 1851 and 1872, and in the latter case it was also held that such rights should be measured from the date of the Acts of the Assembly in reincorporating the company there involved, which, in this case, would mean that the 20-year period should be measured from March 20, 1872, the date of the passage of the consolidated act, supra. Therefore the trial court was correct in holding that the charter rights and franchises of the old companies expired March 20, 1892, by virtue of the 20-year limit and the general statutes referred to, supra. From this it follows that the conveyance of date February 21, 1893, whereby the bank and J. M. True attempted to convey such rights to Broadhead and his associates, was of no force in so far as it attempted to convey the roadbed and franchises, for the reason that these had vested in the public at the expiration of the charter rights of the old company on March 20, 1892. State ex rel. v. Gravel Road Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457. And the subsequent conveyance from Broadhead and his associates to the new company was of no force to convey the roadbed and the franchises of the old company, and it therefore appears that these appellants had no right to exact tolls on the road unless the charter of the new company conferred such right. This charter conferred the rights to build and own a gravel road, but it did not and could not authorize them to take possession of the old road. They could only acquire this right from the county court under the statute supra.

8. Mr. Broadhead and his associates, after having obtained the conveyance mentioned, applied to the county court and obtained the permission for themselves or a corporation to be thereafter organized (contained in the statement, *supra*) to construct an electric railway over and along the right of way of the old gravel road. This electric road was never constructed, nor was a company for that purpose ever organized, so far as the record discloses. Afterwards, however, Broadhead and his associates did organize the defendant corporation under the provisions of the General Statutes of 1889, now article 5, c. 12, Rev. St. 1899, for the purpose of constructing, owning, and controlling a gravel road along the line of the old gravel road between Louisiana and Ashley, via Bowling Green, and by deed conveyed to the new company whatever rights they had obtained from the bank and True under the deed heretofore mentioned, which, as before stated, was of no force, so far as the roadbed and franchises were concerned. Having organized the new company for the purposes mentioned, inasmuch as the old road had reverted to the county March 20, 1892, on the expiration of the charter of the old company, the next step incumbent on the new company and its promoters was to apply for and obtain the consent of the county court to locate their proposed road over or upon the state or county road or highway, as was provided by the then section 2697, Rev. St. 1889, now section 1227, Rev. St. 1899, art. 5, c. 12, *supra*, for "thereupon," it is said by said section, "such state or county road or highway or such portion thereof as may be occupied and appropriated by such company, shall become the property of such company for the purpose of making and maintaining said road and the gates and tollhouses thereon." This they failed to do, but nevertheless entered upon and took possession of the old road, and proceeded to exercise the franchise of collecting tolls without first obtaining the consent of the competent authority therefor. This rendered the act of collecting tolls an unlawful interference with the free use of the highway by the public, which constituted a public nuisance. *State ex rel. v. Gravel Road Co.*, 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457.

The appellants, however, argue that the consent of the county court to Mr. Broadhead and his associates and to the corporation to be organized by them to construct the road mentioned was, first, a sufficient grant of right to operate the gravel road in question. This position cannot be maintained, on reason or authority, and will, therefore, not be discussed. Second, it is argued that inasmuch as the county court, in the order authorizing the partial occupation of the gravel road by the proposed railroad, employed the following words: "provided that the same shall be in all respects

so constructed and operated as to obstruct and interfere as little as possible with the use of the present road as now constructed, subject to the rights and interests of the person or corporation who now or hereafter may own and operate said gravel or macadamized road," that this was a recognition of the right of these appellants to the road and a disaffirmance by the county of rights therein. The wording of this order was, no doubt, predicated upon the then prevalent notion that the words "continued succession" contained in the Acts of 1851 and 1852, *supra*, together with the decision of the Supreme Court in *Fairchild v. Masonic Ass'n*, *supra*, conferred upon the successive companies perpetual succession and rights in the road and franchises. Whatever the notion was, the grant contained in the order of the county court was to build a railroad in the highway, and the county court was enforcing its proper function in throwing around that grant proper safeguards to preserve the road as a public highway for the use of the public. The universal rule is that in construing public grants, their language should be construed strictly in favor of the public, who is the grantor, and against the grantee. Nothing passes by implication except that which is necessary to the enjoyment of that which is expressly granted. 4 Thompson, *Private Corp.* § 5345. This rule proceeds upon the theory that those who are praying the grant or franchise usually know what they want, and manage to obtain it in the most liberal language that the grantor may be induced to employ in conferring the right. Applying this rule, then, to these facts, it appears that the grantees were seeking a grant to construct a railroad and obtained it, and that, while conferring this grant, the county court had principally in mind and intended to confer the right prayed for and no more, and at the same time exercise their high duty of protecting the public right to the use of the highway, and it was ordered that, whoever might have a right to the road, the right of the public must be protected and the road impaired as slightly as possible in exercising the rights granted. Viewing the matter from this standpoint, we are not impressed with the argument that the county court recognized the rights of these appellants to collect tolls so as to estop the public in this proceeding. But it is argued that the appellants expended moneys upon the road and therefore the county is estopped. Nothing appears in the record tending to show that the appellants expended moneys upon the faith of this order of the county court, or that they were encouraged to forfeit any right or assume any burden on account of such order. The order pertained to a different and distinct subject-matter entirely, and the rights here involved were not those under consideration, and, in view of the rule announced, *supra*, the court

cannot treat them by construction as being considered and thereby estop the county. The fact is, appellant collected the tolls, and, while so doing, maintained the road. We can see no action on the part of the authorities of Pike county which would operate as an estoppel in this case, and therefore this defense is ruled against appellants.

9. It is finally insisted that the petition failed to state a cause of action, for the reason that it did not affirmatively charge that appellants were occupying the road without an order of the county court. We are not impressed with this contention. The petition alleges a public highway, unincumbered by tolls, the right of free use by the public, and the unlawful nuisance. This was sufficient. The only defense that could be made was a permissive leave and license from the county court under the statute, supra, and the burden was on appellant to plead and prove it. *City of St. Louis v. Howard*, 119 Mo. 47, 24 S. W. 772; 1 Amer. & Eng. Ency. Law (2d Ed.) 841.

Our conclusion is that the case was well and carefully tried, and the learned trial judge committed no error in decreeing perpetual injunction.

The judgment will therefore be affirmed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

SHAW v. GOLDMAN et al.

(St. Louis Court of Appeals. Missouri. Jan. 2, 1906.)

1. NEGLIGENCE—ELEMENTS.

To establish actionable negligence, the existence of a duty on the part of the party complained of to protect plaintiff from the injury in question, the failure of the defendant to perform such duty, and injury to plaintiff resulting from such failure, must be shown.

2. SAME — DANGEROUS PREMISES — STORES — WARNING.

The proprietor of a place open to the public for trade is bound to exercise ordinary care to keep the premises in a reasonably safe condition for the use of customers invited thereon, or to warn the customer of any danger known to the proprietor and unknown to the customer.

3. SAME—LICENSEES.

Plaintiff, having been in defendant's store on two separate occasions within 30 days prior to his injury, and having on each occasion passed with the clerk by means of a safe way to the rear of one of the storerooms to the office of the shipping clerk, on the day of his injury was directed by the clerk to "go back there and see the shipping clerk," the clerk being then engaged with other customers, and plaintiff, instead of following the route with which he was familiar, attempted to go by a shorter route through a part of the building not open to the public and fell down an open elevator shaft and was injured. Held, that plaintiff in following such route was a mere licensee as to whom defendant owed no duty, and was therefore not entitled to recover.

Appeal from St. Louis Circuit Court; Horatio D. Wood, Judge.

Action by Samuel Shaw against Morris Goldman and others. From a judgment for plaintiff, defendants appeal. Reversed.

See 81 S. W. 1223.

Defendants are engaged in the business of buying and selling furniture at Nos. 1102, 1104, 1106, Olive street, in the city of St. Louis. The ground floor of the building is divided into three rooms, each of which is about 20 feet wide and 100 feet deep. Communication between them is through an archway in the partition walls. No. 1102, or the east room, is divided east and west into two rooms by a boarded partition. The front room is about 70 feet deep and is used as a show-room. The back room is a storage and packing room. This back room, through which an elevator shaft extends, is connected with the front room by a small wicket door. Near this door is the elevator shaft, 8 by 6 feet, which extends down to the bottom of the cellar, a distance of 7 or 8 feet. This shaft was unguarded on December 16, 1901, on which date plaintiff visited defendants' store on business. He alleges (substantially) in his petition that he was directed by one of defendants' salesmen to go from the front room of No. 1102 through the wicket door to reach another part of the building, and that he was unaware of the existence of the elevator shaft, and, on account of the darkness, did not discover it when he entered the room, and without fault or negligence on his part he fell into the shaft and was injured. The answer was a general denial, and, further, that plaintiff's injuries, if any, were caused by his own negligence in entering the room through the wicket door, and in failing to heed a warning given him not to enter, and in failing to use ordinary care to discover the shaft after he had entered the room. The evidence shows that a few weeks previous to December 16, 1901, plaintiff bought an iron folding bed of M. J. Harris, one of defendants' salesmen. He directed that the bed should not be delivered until defendants were notified. He subsequently called at the store and directed the bed to be delivered, which was done, but on inspection he discovered that it was faulty, and on December 16th returned to the store and saw Harris about the bed. On his first visit plaintiff purchased the bed of Harris, and was taken by him back to the shipping clerk to make a payment on the same. The office of the shipping clerk was located in a room cut off the south end of No. 1106. To reach this office, Harris and plaintiff went through the front part of No. 1106 and entered the shipping clerk's room through a door in the partition near the west wall of the building. On the occasion of his second visit, he, accompanied by Harris, went a second time to see the shipping clerk. This time, as well as before, they entered his office through the same door in room No. 1106. On December 16th plaintiff returned to the store and

called Harris' attention to the defect in the bed. Harris told plaintiff to come into No. 1102 and look at a bed that was similar to the one he had bought. They both went into this room and plaintiff pointed out the defect in the bed that had been delivered to him. Plaintiff's testimony is that Harris then said to him, "Go back and see the shipping clerk," and pointed to the partition. Plaintiff testified that, when Harris told him to go to see the shipping clerk, he (plaintiff) went in the direction of the door leading into the elevator shaft and passed Harris on his way, who was a couple of feet from him; that he went through that door, and his intention was to go through that room and on into the office of the shipping clerk; that he had noticed, when in the shipping clerk's office on a former occasion, that a door opened from that room into this elevator room; that he saw no sign over the wicket door warning him to keep out; that, having never been in the room, he did not know there was an elevator shaft in it; that it was dark in there, and after stepping into the room he stepped into the shaft and fell to the bottom and was injured. Harris testified that after showing the plaintiff the bed in No. 1102 he said, "We will have to see the shipping clerk to have this matter rectified," and said to plaintiff, "Follow me," or "Come with me and we will see the shipping clerk," and that he then passed through the archway into No. 1106, supposing plaintiff was following him. About the time he entered No. 1106 a customer called his attention from the plaintiff for a minute, and when he turned to see if plaintiff was coming he was out of sight, and he did not see or hear any more of him until he had fallen into the shaft. Harris is corroborated by one of the Goldman brothers and by a lady customer, who swore she heard Harris tell plaintiff to follow him, and also heard one of the Goldman brothers tell plaintiff to come on, that Harris was waiting for him. The accident occurred in the daytime. The plaintiff testified that the day was dark and foggy and the elevator room was dark. On the part of defendant, the uncontradicted evidence shows that the elevator room was used as a storage and packing room, and that customers were never taken or admitted into that room, and that there was a sign in large, plain letters over the wicket door, upon which these words were printed: "Positively no admittance. Keep out." Four or five of defendants' employes testified that at the time plaintiff fell into the elevator shaft there were four incandescent electric lights burning in the room, and it was "as light as day." The door admitting ingress to the elevator room from the shipping clerk's office was a double iron or fire door. At the conclusion of plaintiff's evidence the court refused an instruction to find for the defendants, and exception was saved. The verdict and judgment were for plaintiff. Defendants appealed.

S. N. & S. C. Taylor, for appellants. John J. O'Connor, for respondent.

NORTONI, J. (after stating the facts).

1. The statute (section 6435, Rev. St. 1899), is in no way involved in this case, but, on the contrary, the petition predicates on common-law negligence. It is fundamental that in every case involving actionable negligence there are of necessity three constituent elements to its existence: First. The existence of a duty on the part of the person complained against to protect the complainant from the injury of which he complains. Second. The failure of the defendant to perform that duty. Third. Injury to the plaintiff resultant from such failure of the defendant. Where these elements are brought together, they unitedly constitute actionable negligence. It is obvious that the absence of an affirmative showing of any one of these essential elements renders the complaint bad or the evidence insufficient. *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; *Trask v. Shotwell*, 41 Minn. 66, 42 N. W. 699; *Barney v. Railway Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847; *Yarnell v. Railway Co.*, 118 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Troth v. Norcross*, 111 Mo. 630, 20 S. W. 297; *Helzer v. Kingsland, etc., Co.*, 110 Mo. 605, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482; *Gurley v. Railway Co.*, 104 Mo. 211, 16 S. W. 11; *Hallihan v. Railway Co.*, 71 Mo. 118; 21 Amer. & Eng. Ency. Law (2d Ed.) 460, 461, 470. The law raises a duty or obligation in many instances against one person and in favor of another, and it is well settled in numerous adjudicated cases that where premises are in the occupancy and under the control of a party and used by him as a place for the transaction of business, and persons are either expressly or impliedly invited thereto to trade, the proprietor owes to those entering therein or thereupon in response to such invitation the duty of ordinary care to keep said premises in a condition reasonably safe for the use of such parties so invited in the transaction of their business; and, if the premises are not in such reasonably safe condition, it is the duty of the proprietor to warn the customer of such unsafe condition if he knows of it and it is unknown to the customer. *O'Donnell v. Patton*, 117 Mo. 13-19, 22 S. W. 903; *Kean v. Schoening*, 103 Mo. App. 77, 77 S. W. 335; *Welch v. McAllister*, 15 Mo. App. 492; *Carraway v. Long*, 7 Mo. App. 595; *Carleton v. Iron & Steel Works*, 99 Mass. 216; *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Sweeny v. Railway Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; 1 Thompson Comm. on Neg. 985; *Ray on Negligence of Implied Duties*, 18, 19; 21 Amer. & Eng. Ency. Law (2d Ed.) 471; *Beach on Cont. Neg.* (3d Ed.) § 51.
2. The respondent being upon the premises as a customer in response to an invitation

to him and the general public to enter therein for the purpose of trade, the petition counts upon this implied obligation of the appellant to maintain their premises in a reasonably safe condition, so that he might, by the exercise of ordinary care on his part, transact his business in safety and free from hurt, and proceeds upon the theory, further, that in event there were pitfalls or places of danger therein which were known to appellants and unknown to the respondent it was the duty of appellants as well to inform the respondent of such danger. There is no question but that this doctrine of the law is proper and sound. It is founded upon reason and justice as well, for it is palpable that a person inviting or alluring another into his place of business for the purpose of trade ought in good morals be required to furnish such person a reasonably safe and secure place to transact his business in safety by exercising due care upon his part, or be required to respond for whatever injury may befall the person thus relying upon such invitation and enters therein for the purposes mentioned. But this salutary rule of law extends no further than the reason for its existence. It predicates upon the invitation, express or implied, to transact business in the business place and usual and customary ways to and from and appurtenant thereto. *Schmidt v. Bauer* (Cal.) 22 Pac. 256, 5 L. R. A. 580; *Zoebisch v. Tarbell*, 10 Allen (Mass.) 385, 87 Am. Dec. 660. And to extend its application beyond the usual business place and such usual ways appurtenant, and into the private apartments, quarters, or ware-rooms of the proprietor, which are not intended for the transaction of business with the public, there must be a showing of something more than the usual implied invitation of the shopkeeper to the general public to enter therein for the purposes mentioned, for the very sufficient reason that such places in and about business establishments are of necessity private in their nature and in which the customer has no place nor right, save and except on express invitation. Had the injury of which complaint is made befallen respondent while in the usual and customary place for the transaction of business and while he was exercising due care on his part, there could be no controversy here over the right to recover reasonable compensation therefor in an action predicated as this one is, on the negligent failure of the appellants to perform their duty to furnish him a safe and secure place to trade. He, having gone beyond the limits of the storeroom into which he came as a customer on the implied invitation, went beyond the limits of the invitation extended as well, and therefore there was no such obligation as above mentioned resting upon appellants in his favor unless he was ordered or invited by express act or conduct by some one in authority or possessed of sufficient apparent authority thereabout, and the burden is on the respondent to

show such further express invitation or order.

3. It is well settled, on both reason and authority as well, that the owner of real property is entitled to the exclusive right to the same, and a person, either natural or artificial, may exercise such dominion over and make such use of his possessions as to him seems proper and fit, provided he does not suffer nuisance thereon, nor willfully or wantonly injure another in person or property, unless he owes some duty in some way to such other person, and as a necessary correlative of this fundamental proposition it is abundantly established that one who enters upon the premises by permission only, without invitation, enticement, or allurement held out to him by the occupier or owner or some representative thereof, enters there, at the very best, by mere permission, becoming a licensee only and enjoys the license at his own risk, or, as it has been well said, he enjoys the license with its concomitant perils and takes upon himself whatever risk from pitfalls or other obstructions that may attend such merely permissive entry, and in such case no duty is imposed by law upon the owner or occupier to keep the premises in a suitable condition for those who go there solely for their own convenience or pleasure or to satisfy their curiosity. *Barney v. Railway Co.*, 126 Mo. 372-389, 28 S. W. 1069, 28 L. R. A. 847; *Moore v. Railway Co.*, 84 Mo. 481; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Galveston Oil Co. v. Morton*, 70 Tex. 401, 7 S. W. 756, 8 Am. St. Rep. 611; *Evansville, etc., Railway Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Faris v. Hoberg*, 134 Ind. 272-276, 33 N. E. 1028, 39 Am. St. Rep. 261; *Bedell v. Berkey*, 76 Mich. 435, 43 N. W. 308, 15 Am. St. Rep. 370; *Armstrong v. Medbury*, 67 Mich. 252, 34 N. W. 566, 11 Am. St. Rep. 585; *Flanagan v. Atl., etc., Co.*, 37 App. Div. 476, 56 N. Y. Supp. 18; *Thompson on Neg.* (1880) 330. And therefore it has been frequently held that even though one comes upon the premises lawfully, as by invitation to trade or to labor, and enters other portions thereof to which he was neither invited nor ordered, for the purpose of his own convenience, pleasure, or curiosity, he thereby becomes a licensee while occupying such portions of the premises to which he was neither invited nor ordered, and takes upon himself the risk of so doing, and in such case there is no duty incumbent upon the proprietor or the occupier of the premises to provide him a reasonably safe place, within the meaning of the rule hereinbefore indicated. *Flanagan v. Atl., etc., Co.*, 37 App. Div. 476, 56 N. Y. Supp. 18; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *Zoebisch v. Tarbell*, 10 Allen (Mass.) 385, 87 Am. Dec. 660; *Schmidt v. Bauer* (Cal.) 22 Pac. 256, 5 L. R. A. 580; *Parker v. Portland Pub. Co.*, 69 Me. 173, 31 Am. Rep. 262; 21 Amer. & Eng. Ency. Law (2d

Ed.) 427; 1 Thompson, Comm. on Neg. 988. In *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120 (at page 131 of 48 Vt., 21 Am. Rep. 120) the very able and learned Judge Redfield said: "But if one departs substantially from the provided way of access, or, becoming the guest or patron in a place of business, and on his own motion, goes in the dark into places of danger, and is injured, he voluntarily takes the peril and the risk upon himself."

4. It is only where the customer is invited or induced by the proprietor or other person in authority into such portions of the premises not intended for the customer that the law raises the obligation on the part of the proprietor or occupier to furnish the customer a reasonably safe place therein for the purpose of the invitation, and this obligation or duty resting upon the proprietor springs from the same source as that before considered—i. e., it finds its origin in this invitation or inducement to enter, which carries with it a resultant guaranty on the part of the proprietor that the place is safe and secure for the purpose—and if, under such circumstances, the customer is injured because of this failure of the proprietor to discharge his duty in that behalf, then liability attaches for such injury, as in a case where a clerk of the proprietor invited a customer into a dark and unprovided part of the store, and she there fell into an open cistern, it was held to be a proper question for the jury and the recovery was sustained. *Freer v. Cameron*, 4 Rich. Law (S. C.) 228, 55 Am. Dec. 663. And in *Welch v. McAllister*, 15 Mo. App. 492, a husband and wife called upon a pork packer from whom they usually purchased meats and desired to buy a shoulder. The foreman in charge pointed out certain meats, and then accompanied both into the rear of the establishment, walking immediately in front of the wife, who stepped into a pitfall and was injured. This court held, and very properly we think under the circumstances, "that neither the husband or wife is to be regarded as having been a trespasser, a mere volunteer, or a bare licensee in the portion of the building where the open hatchway was situate," and the recovery was sustained. See, also, 1 Thompson on Neg. §§ 988, 989. Our attention has not been called to any case by the learned counsel where it was held that, in the absence of an affirmative showing of express invitation or order or conduct equivalent thereto, such as the proprietor or other person in authority leading the way or accompanying the injured party into such private apartments, a recovery has been had, or where it has been asserted by any court or text writer that under such circumstances any duty was owing by the proprietor or occupant to the complainant, and after diligent research in a vain attempt to sustain this judgment we have been unable to discover a single precedent supporting the doc-

trine contended for by respondent. On the contrary, the authorities, with marked unanimity, concur to the effect that under such circumstances the complainant is a licensee and exercises the license with its concomitant perils and at his own risk.

5. It is argued, however, that inasmuch as the respondent gave evidence as follows: "Mr. Harris said to me, 'Go back there and see the shipping clerk,' and pointed to the partition, and I started, walked right past him to where the partition was," etc.—that this was an order or invitation to respondent to go into said dangerous place, and that therefore it was a proper case for the jury to say whether or not he had either been ordered or invited therein. It is to be noted that Mr. Harris was only about two feet away from the respondent when he started and passed him, so Mr. Harris did not see him about to enter the door of the partition. Then, too, there were other persons in the room investigating and purchasing goods. Had respondent been a stranger to the store, however, the argument might have more force than can be attached to it when measured along with other admissions from him on the witness stand. He testified that he had been in the store on two separate occasions within the last 80 days previous to this occurrence; on each occasion his call was pertaining to this same transaction, and each time his wants were attended to by the same Mr. Harris; that the store consisted of three rooms, partitioned each from the other, and connected with an archway near the center of said partitions; that he and Mr. Harris were then in the room farthest east—that is, No. 1102—that he knew the shipping clerk's office was in the rear of the room farthest west—that is, room No. 1106—and upon his first visit he had been accompanied to the shipping clerk's office by Mr. Harris, on which occasion he paid \$10 on the bed; that he and Mr. Harris entered the shipping clerk's room from the door on the west side thereof inside of the west room, No. 1106; that two weeks later, on the occasion of his second visit, also in company with the same Mr. Harris, he had called a second time upon the shipping clerk in the rear of room No. 1106 and entered the same door from the same room; so we see that Mr. Harris had, on two occasions, conducted him safely thereto, and thus pointed him to a safe and secure route, and evidently the route used by the firm and its employés. Respondent had no right to presume that there was another route thereto, inasmuch as he had twice been directed and accompanied along the route mentioned. He knew the location of and a proper and safe route to the shipping clerk's office. On the occasion in question, as said, he was in the second room east of No. 1106, and when Mr. Harris said, "Go back there and see the shipping clerk," pointing toward the partition, which was located in the general direction of the clerk's office,

he of course, was speaking with reference to respondent's then acquired knowledge of the situation of the office and the way to reach it, which knowledge both parties knew the respondent possessed, and in no sense could this expression be tortured, turned, or twisted in the light of these circumstances either into an order or an invitation to the respondent to go into the dark and dangerous room not intended for others than employees who were familiar therewith, for certainly the law will require the respondent in this case, as in every other, to use and be governed by some degree of intelligence (when he is a man possessing such, as respondent is), and will ascertain and measure the rights of the parties with regard thereto. If the respondent chose to explore for a shorter route to the office of the shipping clerk, the location of and route to which he had been fully acquainted with by appellants, he became a mere licensee in that portion of the building where he was unfortunately precipitated into the elevator shaft, and entered there at his own risk.

For the reason that the respondent was a mere licensee at the time and place of his injury, and that there was therefore no duty resting upon the appellants to furnish him a reasonably safe and secure place, and no consequent negligence in default thereof, the judgment will be reversed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

SCOTT v. ADAMS EXPRESS CO. et al.
(St. Louis Court of Appeals. Missouri. Jan. 2, 1906.)

APPEAL — RECORD — FILING BILL OF EXCEPTIONS.

Where no bill of exceptions appears to have been filed in the trial court, there is nothing for review on appeal except the record proper.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2427.]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Flora G. Scott against the Adams Express Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Hober W. Adams, for appellant. Percy Werner, for respondents.

BLAND, P. J. The suit is in replevin. The plaintiff furnished a delivery bond, which the sheriff approved, and the property in controversy was taken from defendant and delivered to plaintiff. Pending the proceedings the defendant moved the court to require the plaintiff to give an additional delivery bond. The motion was sustained, and plaintiff was required to file an additional bond within 10 days. She failed to comply with the order of the court by filing the additional bond,

and her suit was dismissed and judgment rendered, requiring the sheriff to retake the property replevied and deliver it to the defendant. Plaintiff appealed from this order and judgment.

There is nothing in the record or in the abstracts of the record filed in this court to show that a bill of exceptions was ever filed in the trial court, therefore there is nothing before us for review but the record proper (*Mirrieles v. Railway*, 183 Mo., loc. cit. 490, 63 S. W. 718; *Bank v. McMullen*, 85 Mo. App. 142; *Finch v. Trust Co.*, 92 Mo. App. 263); and, as no error appears upon the face of the record proper, the judgment must be affirmed.

The judgment is affirmed. All concur.

GUMM v. JONES et al.

(Kansas City Court of Appeals. Missouri.
Jan. 8, 1906.)

ANIMALS—HOG LAW—REPEAL.

Rev. St. 1879, c. 159, providing for restraining swine from running at large was repealed by act March 27, 1883 (Laws 1883, p. 26), providing for the restraining of domestic animals from running at large, to wit, animals of the species of horse, mule, ass, cattle, swine, sheep, or goats; the later act being intended to cover the entire subject of restraining domestic animals thereby superseding the former law.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 148; vol. 44, Cent. Dig. Statutes, §§ 230-240.]

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by J. W. Gumm against H. Jones and others. From a judgment in favor of defendant on appeal from a justice of the peace, plaintiff appeals. Reversed.

Shannon & Shannon, for appellant. Howard Gray, for respondents.

BROADDUS, P. J. The plaintiff commenced this action before a justice of the peace to recover the value of two hogs detained by defendants under the law restraining animals from running at large. The case was appealed to the circuit court, where defendants prevailed, and plaintiff appealed.

The only question presented for consideration is: Was the law restraining swine from running at large in force in Jasper county? At the time the special election was held to determine whether swine should be restrained from running at large, the act approved March 27, 1883 (Laws 1883, p. 26), was in force. On August 16, 1883, a petition was presented to the county court of Jasper County, signed by 100 persons styling themselves as "freeholders" praying the court to make an order for a special election to be held for the purpose of restraining swine from running at large in the county. Whereupon, the court ordered that such special election be held in the county for the purpose, according to the provisions of chapter 159, Rev. St. 1879. The election was held in pursuance of

said order, and on the 29th day of September following, the court found and declared that the proposition had been carried. The plaintiff contends that, as chapter 159, under which said special election was held, was not then in force, the result was nugatory. The act of 1883 does not purport to be an amendment to the law found in the revision of 1879, but the substitution of a new act. The latter law only provided for restraining swine from running at large; whereas the former is an act "to restrain domestic animals from running at large," viz., animals "of the species of horse, mule, ass, cattle, swine, sheep, or goats." There is no repugnance between the two.

In *State v. Roller*, 77 Mo. 120, it is held that: "A statute revising the whole subject-matter of former statute and evidently intended as a substitute for it, although it contains no express words to that effect, repeals the former." And in *State v. Hickman*, 84 Mo., loc. cit. 79, it is said: "The general rule certainly is that an act purporting to revise and amend another act and embracing its subject-matter, whether old provisions are retained, excluded or modified, and whether or not new provisions are incorporated, does, by necessary implication, if not in express terms, effect the repeal of the old law, unless a different purpose is manifested." See, also, *Meriwether v. Love*, 167 Mo. 514, 87 S. W. 250; *Berkshire v. Mo. Pac. Ry. Co.*, 28 Mo. App. 225. But the precise question before us was decided by this court in *Crumley v. Kansas City, C. & S. Ry. Co.*, 32 Mo. App. 505, where it was held that the law of 1883 repealed that of 1879; and that the adoption of the hog law under the former, after the latter went into effect in Cass county, left that county as it was before the adoption of the law. As the law restraining animals, including hogs, from running at large, in force at the time of the special election, was not adopted, there is no law so restraining them in the county of Jasper.

It is needless to notice other questions raised by appellant.

Reversed and remanded. All concur.

ARBUTHNOT et al. v. ECLIPSE LAND & MIN. CO. et al.

(Kansas City Court of Appeals. Missouri. Jan. 8, 1906.)

MINES AND MINERALS—LEASES—SUBLETTING—TERM—STATUTES.

Rev. St. 1899, § 8766, provides that, when any person owning real estate or leasehold interest therein for mining purposes shall permit any persons other than their agents or employees to mine thereon, a printed statement of the terms on which the lands are to be mined shall be kept posted, etc., for the information of persons digging on the land, and section 8767 declares that in case the owner or lessee failed to comply with the previous section a person permitted to mine or open a shaft on the land shall have the exclusive right to mine such shaft, etc., and a right of way over the land

for purposes of such mining for a term of three years from the date of his permit. Held that, where a lessee of certain mineral land orally permitted plaintiff's assignors to mine on the land without posting mining rules and regulations, the rights acquired by plaintiff's assignors which they were authorized to assign were limited to a period of three years.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 172.]

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by C. W. Arbuthnot and another against the Eclipse Land & Mining Company and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Robert A. Mooneyham and H. W. Currey, for appellants. Thomas & Hackney, for respondents.

BROADBUDS, P. J. The court sustained a demurrer to plaintiffs' petition, and they appealed.

The petition is substantially as follows: In February, 1901, the defendant the Eclipse Land & Mining Company held a mining lease for the unexpired term of eight years on certain real estate in the county of Jasper, and without putting up mining rules and regulations, as required by the statute, gave verbal permission to W. B. Smith and Orlando Williams to mine on a part of said premises; and it was also verbally agreed that they and their assigns should have the right to mine on the land during the terms of said company's lease. Afterwards, on May 2, 1901, said company posted rules and regulations, which, however, did not specify the time during which the mining right should continue; but it was agreed verbally, at the time when said Smith and Williams signed the register of the rules, that their right to mine should continue during the unexpired term of said company's lease. Afterwards Smith and Williams transferred certain of their interest to the firm of Lichliter & Co., by the terms of which the latter were to pay the Eclipse Company a certain royalty and also to pay Smith and Williams a royalty. Under the arrangement Smith and Williams and Lichliter & Co. operated the mines, and the latter paid royalty to the Eclipse Company and to Smith and Williams until May 2, 1904, at which time the said Eclipse Company and the Loyal Mining Company, which became interested in the lease, refused to recognize the right of Smith and Williams and Lichliter & Co. to further mine on the land. It was further alleged that a copy of the lease from Smith and Williams to Lichliter & Co. was delivered to the Eclipse Company, which approved and retained the same and acted on it until the said 2d day of May, 1904. The plaintiffs' suit is to recover damages from the said last-named date.

It is contended by plaintiffs that the contract between Smith and Williams and the Eclipse Company was a mere license and created no interest in the realty; therefore it

was not obnoxious to the statute of frauds, requiring all contracts creating any interest in land to be in writing. It was held, in *Boone et al. v. Stover et al.*, 66 Mo. 430, that: "An instrument in writing, under seal, granting permission to mine on a certain lot, so long as the grantees do regular mining work on the lot, is a license, and a grant of an incorporeal hereditament." And: "That such an instrument is not a lease, for the reason that it does not pass such an estate in possession in the land as would entitle the grantee to maintain ejectment." And the law is similarly stated in 29 A. & E. Ency. of Law, p. 883; *Browne on Statute of Frauds*, §§ 21 to 32, inclusive; *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124; *Worthen v. Garbo*, 182 Mass. 243, 65 N. E. 67. But it seems to us that the character of the verbal contract in controversy, its force and effect, whether it be a lease or a license, or whether it creates a corporeal or an incorporeal hereditament at common law, is immaterial, because sections 8766, 8767, Rev. St. 1899, provide that it shall remain in force for a term of only three years. In a recent decision of this court it is held that: "Where a lessee of mining land plats it and posts rules omitting to name the time for the continuance of miner's rights to operate as required by the statute, then the license continues for a period of three years, and no longer. * * *" *Ashcraft v. Englewood Mining Co.*, 106 Mo. App. 627, 81 S. W. 469. And such is the holding in *Robinson v. Troup Mining Co.*, 55 Mo. App. 662. And the said Smith and Williams could convey no greater estate than they held themselves to Lichliter & Co.

The statute in question settles every disputed question raised by plaintiffs on their appeal. The Legislature evidently had in mind the multiplicity of questions that would inevitably arise in the business of mining without some definite rules regulating the matter; and, for the purpose of defining the duties of owners, lessees, and miners of land, it enacted the mining statute. And, as the statute in question is clear and positive in its terms, there can be no good reason assigned why its legitimate effect should be frittered away under the pretense of conforming to common-law rules.

As plaintiffs' right to mine on the land had expired by reason of the statute in question, the action of the court in sustaining the demurrer is affirmed. All concur.

KNOEPKER v. REDEL.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1906.)

1. LANDLORD AND TENANT—FRAUD OF LANDLORD IN PROCURING LEASE.

A lease is void for fraud, where the lessor, knowing that the lessee cannot read, professes to read from it an agreement he knew was not there, and thereby deceives the lessee, so that the antecedent verbal agreement is the only contract between the parties.

2. SAME—PROVISION AS TO RENT—INUNDATION OF LAND.

A lease, at \$5 per acre, of 100 acres of land which the parties knew was liable to overflow, and parts of which they knew were higher than others, so that there might be a partial destruction of crops from inundation, provided that, if the land overflowed, the rent was to be considered paid, but if there was still time the land was to be replanted on shares; the landlord furnishing the seed and the lessee putting it in. Held that, in case of part only of the crop being destroyed or substantially injured, there was to be a deduction from the cash rental at the rate of \$5 per acre for the land on which the crop was so destroyed or injured, and that it was not necessary for the entire crop to be destroyed for such provision to have effect.

3. SAME—PROVISION AGAINST SUBLETTING—REMEDY FOR BREACH.

Under a lease prohibiting subletting without the written consent of the landlord, but providing no penalty for violation of the provision, its breach gives the landlord merely a right of action for any damages, or a right to enjoin continuance thereof.

4. SAME—WAIVER.

A provision in a lease against subletting without the written consent of the landlord will be held waived; the lessor, before the subletting, being informed by the lessee of his intention to sublet, and having made no objection, but apparently acquiesced therein.

5. APPEAL—HARMLESS ERROR.

Indefiniteness in the instructions as to the measure of damages gives plaintiff no right to reversal; the verdict having given him all he was entitled to under the evidence.

Appeal from Circuit Court, Platte County; A. D. Burnes, Judge.

Action by J. H. Knoepker against Emil Redel. From the judgment, plaintiff appeals. Affirmed.

Flournoy & Flournoy, for appellant. Sidney F. Berry and A. D. Gresham, for respondent.

JOHNSON, J. Action by a landlord against his tenant to recover rent due and unpaid. In October, 1903, the parties signed a written lease, under the terms of which plaintiff leased a farm of 100 acres in Platte county for the term of one year, beginning March 1, 1904, for which defendant agreed to pay as rental the sum of \$500. Defendant paid \$200 of the rent when the lease was signed, and executed and delivered to plaintiff his promissory note for the remainder of \$300, to become due September 1, 1904. In the petition, plaintiff pleads the contract of lease, defendant's possession thereunder, the execution and delivery of the note, its nonpayment at maturity; and prays judgment for the amount due thereon. In his answer, defendant, in effect, admits the execution of the lease, and note, but avers they do not express the real contract made by the parties, and were procured by plaintiff under false and fraudulent representations. No attack is made upon the sufficiency of the allegations of the answer, nor does any room for one appear, and therefore a statement of the facts in evidence, upon which defendant relies to defeat the written contract, will serve

to present the issues made by the pleadings. The rented land lies in the valley of the Missouri river and has been inundated at times when the water flowing in that river has been of extraordinary volume, but is of sufficient elevation to escape invasion from ordinary high water. It is under cultivation; corn being the crop usually grown upon it. The parties met in Independence, where plaintiff lives, and a conversation followed relative to the renting of the land for the year beginning with the following March, and a verbal agreement was made. From this point on the facts are in controversy, and those detailed by defendant will be stated first. Defendant is a German, who can neither read nor write the English language, and this fact was communicated by him to plaintiff before the written lease was prepared. The parties agreed upon a rental of \$5 per acre, or \$500 for the farm. Defendant expressed the fear that the land might be overflowed and the crop thereon destroyed, to which plaintiff replied: "Why, it can't overflow. If it does overflow, your rent is paid; and you don't owe me a dollar if that crop overflows." This appeared to satisfy defendant, and then the subject of making a written contract was taken up. Defendant wished to have some third person prepare it, but plaintiff said he would do that, and added: "Well, if you are afraid of me, I will go and get a water lease." He started to leave, then turned to defendant and asked: "Can't you read?" Defendant answered, "No." Plaintiff said: "Well, if the crops overflow, you have got to put it in again if the water goes down in time." Defendant responded that he would if plaintiff would furnish the seed and take a third of his crop in payment of the rent. Plaintiff then went over to the courthouse, and in a few moments returned, and said: "I have got two water leases, one for you and one for me, and the law is plainly printed on them about the bottom land subject to overflow. The law of the state of Missouri is plainly printed on them." Plaintiff then wrote upon the printed forms, after which he read one of them to defendant, who did not understand it, and inquired, "How does this contract run?" Plaintiff then, pretending to read from the instrument, said in effect: "If it overflowed from the Missouri river, the rent was paid, but I was to put in the crop again, him to furnish the seed, and me to put it in for corn rent." Relying upon the assurance thus given by plaintiff, the lease and note were signed by defendant and \$200 in money paid upon the rent. The lease actually written was in the usual form, and contained no agreement of the character mentioned, but defendant did not learn of the deception practiced upon him until late in the spring of the following year. He entered into the possession of the farm at the appointed time, and planted all of it, excepting a few acres in corn. During the spring the greater portion of the land was overflowed four times by water from the

river; the last being near the 1st of July. The crop on all but 35 acres was completely destroyed, and the remainder injured. The yield of the entire farm did not exceed about 1,300 bushels, which were attached by plaintiff in this action and sold for \$875. Plaintiff, complying with defendant's request, visited the farm in June, and, after making an inspection, was asked by defendant, "What arrangement he would make to put the ground in again, and he said, 'It was none of his business.' I said, 'Well, it is; ain't we got a contract if the ground overflows—the rent was paid and you was to take a share of the crop?' He said, 'No.' I said, 'There is too,' and then he up and said it was a damned lie." Plaintiff did not furnish any seed for replanting.

Plaintiff's version of the transaction appears in this extract from his testimony: "I wrote the lease on a printed form. * * * I do not know whether I read to Mr. Redel the copy I kept or the one I gave him. We talked about the matter at the time the lease was signed. * * * I told him the land had overflowed in 1903, and I had lost a portion of the crop but once in 15 years. I did not agree or represent to defendant that, if the river overflowed the land, I would give him a rebate on the rent. I did not read to the defendant or purport to read to him out of the lease that, if the river overflowed the land, he would not have to pay the rent, that the note would not be due and the \$200 cash he had paid would be given back to him, and that he was to put in the corn the second time, I to furnish the seed and take corn rent. I did not tell defendant that the lease was what was called a water lease, and that, under the terms of the lease, the laws of Missouri would not allow me to collect one dollar rent in case the land was overflowed and the crops lost." As to the damages caused by high water, the witnesses introduced by plaintiff are practically in accord with defendant. They say that the highest water occurred about July 1st, and that 75 or 80 acres were then under water. They all agree that the crop on at least half the acreage was totally destroyed, and that on the remainder, with the exception of 20 or 25 acres, more or less injured. There is no difference among the witnesses relative to the amount of corn produced or its value. In the instructions given the issue of fraud was submitted, the jury returned a verdict for defendant, and plaintiff, after unsuccessfully moving for a new trial, appealed.

Plaintiff insists the court committed error in refusing his request for a peremptory instruction. In resolving the questions involved in this contention, we must accept as true the evidence introduced by defendant, and reject that of his adversary in conflict with it. Looking at the case from this standpoint, we are without hesitation in declaring that the written contract was procured by plaintiff fraudulently; does not express the real agree-

ment made by the parties, and therefore is wholly void and of no effect. The facts that plaintiff, knowing that defendant could not read, professed to read from the instrument an agreement that he knew was not there, and thereby accomplished his purpose to deceive defendant, are enough to destroy the instrument, and to present the antecedent verbal agreement as the only contract made by the parties. But plaintiff says that, with the written contract eliminated, defendant cannot prevail, because, under defendant's own statement of the agreement, a total destruction of the crop by the overflow of the river was required in order to release defendant from liability under the note, and defendant admits that 20 or 25 acres of the crop were not touched by the invasion of water, and 10 or 15 acres of the remainder but partially damaged. It is true, the agreement, as stated by defendant, does not expressly provide for the contingency of a partial destruction of the crop from this cause, but the controlling question is: What was the evident purpose and intention of the parties as disclosed by the terms of the agreement in the light of the circumstances under which it was made? Plaintiff argues that the position of defendant logically leads to the conclusion that if all of the crop, save the small fraction of an acre, had remained untouched by the river, the defense to the note now asserted could as well be maintained as it may be under the facts before us, and rightly declares that such conclusion should not be entertained, but it is equally as preposterous to say that if all of the crop had been ruined, except the fraction of an acre, defendant would nevertheless be liable under the agreement to pay full cash rent. The facts and circumstances surrounding the transaction greatly aid in the ascertainment of the real intention of the parties. Both knew the land was subject to visitation by high water, that some parts of it were more elevated than others, and, consequently, that the crop might suffer from a partial inundation of the land. Defendant exhibited great anxiety to protect himself against loss from overflow, and the rent was fixed at so much per acre.

A reasonable interpretation of the contract forces us to the conclusion that the parties mutually intended to deduct from the amount of the agreed cash rental the rental value at \$5 per acre of the acreage upon which the crop would be destroyed or substantially injured by water from the river, and to replant and cultivate the land so injured upon crop shares. Any other construction would necessarily lead to extreme and whimsical conclusions, and practically emasculate the agreement, which the facts and circumstances certainly show the parties intended should apply in the event of a substantial injury to the crops from an invasion of the river. The written lease, in terms, prohibited defendant from subletting the premises or any part

thereof without the written assent of the landlord, but failed to provide a forfeiture or other penalty for the violation of this provision. We have discarded this instrument, but, as it was read over to defendant and no complaint has been made by him against the insertion therein of this agreement, it is fair to assume that it was included in the contract actually made. Defendant, without obtaining the written assent of the landlord, underlet 45 acres of the land to one man, and 30 acres to another, under agreements for the payment of crop rental, and with the understanding that, if the crops were destroyed by flood, defendant "would take back the land."

Several points are made by plaintiff relative to the effect upon the relation between the parties of defendant's alleged breach of contract in subletting portions of the farm, all of which will be disposed of in the ensuing discussion. In omitting to provide a penalty, such provision is to be regarded as a mere agreement or covenant as distinguished from a condition, and therefore its breach by the tenant would not give the landlord the right to re-enter or to enforce a forfeiture of the tenancy, but would leave him to his action at law to recover the damages, if any, sustained by him, or, under proper conditions, would afford him ground for equitable relief to prevent the continuance of the breach. Wood on Landlord and Tenant, § 81. And, further, notwithstanding the requirement that the assent of the landlord to a subletting under the terms of the agreement must be in writing, parties who make contracts may, by subsequent agreement, unmake or alter them, or, by his subsequent conduct, a party for whose benefit a provision is made may be held to have waived it. Polk v. Assur. Co. (not yet officially reported) 90 S. W. 397. Plaintiff was informed, before the subletting, of defendant's purpose to engage the services of under tenants, and made no objection, but apparently acquiesced in the arrangement. He must be deemed to have given his consent to the underletting, and is in no position to insist upon the forfeiture of any of defendant's rights under the contract, nor would he be in such position had the agreement against subletting provided a forfeiture as the penalty of a breach thereof.

But it is urged that defendant, by subletting, placed himself in a position that prevented him from complying with his agreement to replant corn destroyed by flood, and, further, that it would be unjust to permit him to occupy a position from which, under certain conditions (not before us here), he could have received full rent from his under tenants and then claimed benefits from the damage done to their crops. Defendant's agreement with his undertenants left him free to perform his contract with plaintiff. They were to pay him corn rent, and, in the event of a flood from the river, were either to replant or surrender the land to defendant. In either case defendant could have replanted

the land and rendered to the landlord his third of the crop grown; and, as to the second point, as the defendant's subtenants were to pay defendant rent in kind, and not in cash, it is impossible to conceive a situation under which defendant could have profited in the manner feared by plaintiff. If the undertenants' crops were washed away, defendant could collect no rent. Damage to them damaged him in the proportion of his interest in them. As between him and plaintiff, the undertenants were, in fact, his servants, aiding him in the tillage of the land, and their presence in the case is without effect upon the rights of the parties. The demurrer to the evidence was properly overruled.

Finally, plaintiff contends that the judgment should be reversed and the cause remanded because plaintiff's instructions are "too vague and uncertain as to the measure of damages, and gave the jury no basis upon which to estimate the amount of rent that might be due appellant." The instructions are subject to this criticism, but, under the conceded facts, the error must be held to be harmless. Plaintiff received, and the verdict permitted him to retain, the payment of \$200 made by defendant when the contract was entered into. His own witnesses admit that the crop was seriously damaged on all but 20 or 25 acres of the land, and that it was totally destroyed on at least half of the acreage. Under the views expressed, plaintiff was entitled to an allowance of \$5 per acre as rental for the uninjured portion of the land. After adding to this the value of his interest in the corn grown upon the partially damaged acres, the total could not possibly exceed the sum of \$200, the amount the jury awarded him as rent for the whole farm.

We find no substantial error in the record, and the judgment is affirmed. All concur.

STATE v. PRICE.

(Kansas City Court of Appeals. Missouri.
Jan. 8, 1906.)

1. DISORDERLY HOUSE—EVIDENCE—REPUTATION OF INMATES.

In a prosecution for keeping a disorderly house, evidence of the reputation of accused and other female inmates of the house was admissible, as bearing on the character of the place, though defendant did not put her character in issue.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Disorderly House, § 23.]

2. SAME—WEIGHT.

The fact that women inhabit or frequent a house, and are visited there by different men in a manner not recognized by social usage, is very persuasive evidence that the place is used for purposes of prostitution, and intended to be so used by the person in charge.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Disorderly House, §§ 23-26.]

3. SAME—INSTRUCTIONS.

Where, in a prosecution for keeping a bawdyhouse, the court charged that a bawdyhouse was a house of ill fame kept for the resort and commerce of lewd people of both sexes, an in-

struction that if the jury believed that accused kept a common bawdyhouse and "did willfully and knowingly keep or suffer to remain in and about her house lewd women, or men, for the purpose of prostitution, or permit them to come together and meet or remain there for the purpose of having illicit sexual intercourse," etc., she was guilty, was not prejudicially erroneous in that the use of the disjunctive, "or," authorized a conviction in case accused suffered either lewd women or men to remain in her house without requiring that the house was permitted to be used for immoral purposes.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Disorderly House, § 31.]

Appeal from Circuit Court, Ray County: J. W. Alexander, Judge.

Maud Price was convicted of keeping a bawdyhouse, and she appeals. Affirmed.

J. L. Farris, Jr., and M. G. Roberts, for appellant. Albert P. Hamilton and George W. Crowley, for the State.

JOHNSON, J. Defendant was charged with the offense of keeping a bawdyhouse and upon trial convicted.

The evidence introduced by the state strongly supported the charge and justified its submission to the jury. Defendant offered no evidence. The state, over the objection of defendant, was permitted to show the reputation of defendant and the other female inmates of the house kept by her for chastity, and also that of the men who visited the place. It is objected that, as defendant did not put her character in issue, the state could not, and, therefore, evidence of her reputation in the community offered by the prosecution should have been excluded. The point is not well taken. If defendant's unchaste acts were the subject of the offense, the evidence would not be admissible for other purposes than that of impeachment, for the fact of her ill repute would have no tendency to prove specific acts of sexual misconduct, but the offense here charged is that of keeping a resort for the commission of acts of prostitution. The character of the place is an elemental fact that may be established by direct evidence or by other facts and circumstances, from which it results as a necessary conclusion. The fact that women inhabit or frequent a house and are visited there by different men in a manner not recognized by social usage makes the bad fame of inmates and visitors an evidentiary fact, which, when established, is very persuasive evidence that the place is used for the purposes of prostitution, and intended to be so used by the person in charge. *State v. Barnard*, 64 Mo. 260; *State v. Dudley*, 56 Mo. App. 450; *Wigmore on Evidence*, § 78. The necessary predicative facts appear in the record before us and under the rule announced, evidence of defendant's general reputation for sexual immorality was admissible.

Defendant complains of the first instruction given on behalf of the state. It is as follows: "If the jury find and believe from

all the facts and circumstances in evidence beyond a reasonable doubt that Maud Price at any time within one year prior to the 19th day of October, 1904, the date of the finding of the indictment in this case, at Ray county, Mo., did set up, keep, or maintain a common bawdyhouse, commonly called a house of ill fame, and *did willfully and knowingly keep or suffer to remain in and about her house, lewd women, or men, for the purpose of prostitution*, or permit them to come together, and meet or remain there for the purpose of having illicit sexual intercourse with each other, then you should find the defendant guilty, and assess her punishment at a fine of not less than \$200, nor more than \$1,000." The direction criticised is contained in the italicized words. It is argued that by the employment of the disjunctive "or" instead of the conjunctive "and," the jury, in effect, was told to pronounce defendant guilty if they found that she suffered either lewd women or men to remain in her house without requiring the additional finding that the house was permitted to be used as the meeting place for immoral purposes of lewd people of both sexes. The use of the conjunctive would have been preferable, but, considering the instruction as a whole, the interpretation placed upon it by defendant is strained and hypercritical, especially so under the definition found in the state's third instruction: "That a bawdyhouse is a house of ill fame kept for the resort and commerce of lewd people of both sexes." It is very clear that the jury was directed to find that the place was maintained by defendant for the illicit intercourse of lewd people of both sexes. The furnishing of the meeting place and opportunity for the commission of sexual offenses and the presence there of lewd men and women are all the facts that need be shown to stigmatize the place as a bawdyhouse. The perpetration of acts of sexual misconduct may be presumed from the existence of such conditions.

The instructions given fairly present the law of the case. No error was committed in the refusal of defendant's fourth and seventh instructions. The first of these dealt with an abstraction in no manner material to the issues joined and, for that reason, should not have been given; and the other singled out and commented upon a fact in proof, and, indeed, distorted it out of all semblance to that appearing in the uncontradicted testimony of the witnesses.

No error is found in the record, and the judgment is affirmed. All concur.

SCOTT v. BURFEIND et al.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1908.)

WITNESSES — ACTION AGAINST EXECUTOR —
TRANSACTIONS WITH DECEDENT.

A married woman sued an executor to reform and enforce a note payable to plaintiff's

husband, and signed by him and defendant's testator. Plaintiff alleged that the husband's name as payee was inserted by mistake, and that the husband signed as surety and not as co-maker. *Held*, that the husband, though joined as a defendant, was really jointly interested with plaintiff, so that plaintiff was not a competent witness in her own behalf, under Rev. St. 1899, § 4652, providing that where an executor or administrator is a party to a suit the other party cannot testify in his own favor, unless the contract in issue was originally made by a person who is living and competent to testify.

Appeal from Circuit Court, Saline County;
Samuel Davis, Judge.

Action by Cora V. Scott against Leo Burfeind and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Alf F. Rector, for appellant. Robert M. Reynolds and Wayne Hayman, for respondents.

JOHNSON, J. This is an action to reform a promissory note and to recover judgment for the sum due thereon. During the progress of the trial, plaintiff was compelled by an adverse ruling of the court to take a nonsuit and after unsuccessfully moving to have it set aside brought the case here on appeal.

The note sued on is as follows: "Sweet Springs, Mo., April 14, 1891. \$160.00. Five months after date, we or either promise to pay to the order of Charles P. Scott one hundred and sixty dollars, at Chemical Bank for value received, negotiable and payable without defalcation or discount, and with interest from date if not paid at maturity at the rate of 10 per cent. per annum and if the interest be not paid annually, to become as principal and bear the same rate of interest. G. W. Harper. Charles P. Scott."

Plaintiff is the wife of Charles P. Scott and alleges in her petition that she loaned the money, for which the note was given, to Harper out of her own funds; that the name Scott was inserted as payee by mistake; that on August 20, 1898, Harper paid her \$20 upon the indebtedness and that her husband signed the note as surety for Scott. Harper died in 1903 and Leo Burfeind was appointed and qualified as executor of his estate. Both the estate and Scott are made defendants. The executor filed answer in due time, in which he pleaded payment and other defenses not necessary to mention. It is sufficient to say that all of the allegations of the petition were put in issue by the answer. Scott filed no answer or plea. At the trial, Mrs. Scott, the plaintiff, was permitted to testify as a witness, over the objection of the executor that she was disqualified by reason of the death of Harper. She stated that she loaned the money to Harper, who was the half-brother of Scott; that Harper wrote the note and plaintiff did not notice the mistake made in the name of the payee and her attention was not called to it until about five months after the transaction;

that she took no steps to have the error corrected; that Harper paid her \$20 on the note in 1898 and that, after the death of Harper, her husband with her knowledge and consent, presented the note to the probate court as the owner thereof and asked for its allowance as a demand against the estate. Plaintiff, after this, employed counsel, and on his advice, had the claim withdrawn from the probate court and brought this suit. She is quite positive that the only relation sustained by her husband in the transaction was that of surety for Harper. Scott was present at the trial, but was not called to the witness stand. At the conclusion of plaintiff's evidence, the executor moved to strike out her testimony on the ground of her disqualification as a witness under the facts disclosed; the motion was sustained and plaintiff took a nonsuit.

It is very evident that plaintiff had a twofold object in view in the bringing and prosecution of this action, namely, to establish and enforce a liability against the estate of Harper and to relieve her husband of his liability as an apparent joint maker of the note by showing that, in fact, he signed it as surety. It thus appears that, notwithstanding Scott, in being joined as defendant, was on the face of the record placed in opposition to plaintiff, in fact and in intent, his interest was identical with hers and hostile to that of the estate, for with the note reformed and an adjudication that Scott was a surety and not a principal, the ultimate liability for the entire debt would fall on the estate. Plaintiff would collect her debt in full and her husband would escape from paying any part of it. Considering the confidential relation existing between plaintiff and her husband; his previous effort in his own right to collect the note from the estate; his failure to make any defense to this action; and the certain benefit that would eventually result to him should the action succeed; we think the learned trial judge was right in holding that husband and wife were in accord in purpose and interest and that the executor was the only party defendant who really occupied a position adverse to that of plaintiff.

Section 4652, Rev. St. 1899, has been before the Supreme and Appellate Courts frequently and has been variously interpreted. It would serve no useful purpose to review the numerous cases and we will content ourselves with stating the rules of construction that appear to have received approval in the more recent ones. The statute should be liberally construed and, in its application, the main purpose to be served is to prevent the living party to a contract from obtaining an unfair advantage over the estate of the deceased opposite party, but, when it appears that the death of a party does not necessarily place his estate at a disadvantage with the other party, there is no reason for disqualifying the

living party and the statute should not be applied. Thus, it was said in *Fulkerson v. Thornton*, 68 Mo. 468: "The reason of the statutory prohibition is the prevention of one person testifying where death has sealed the lips of his adversary; a reason which cannot possibly apply where there are other persons still alive who were co-contractors with the decedent, cognizant of all the facts as well as he was, able, therefore, to testify in opposition to the testimony of the witness objected to as being incompetent because of the death of one of the co-contractors. As the reason for the rule does not exist, no more does the rule."

Following the logic of this reasoning, the conclusion is inevitable that, when the sole co-contractor with the decedent is, in fact, interested with the opposite party to the contract in fixing a liability upon the estate of the decedent, the parties to the action do not stand upon an equality and the prohibition of the statute should be enforced, for, in such situation, the defendant estate has no living party to the contract to whom to turn with any degree of confidence for evidence "in opposition to the testimony of the witness objected to." It labors under the same or even greater disadvantage than would have confronted it had the decedent been the sole contractor with the opposite party, and to compel it, either to go without the testimony of the decedent's co-contractor, or to rely upon his fairness as a witness when his interest is hostile to that of the estate, would certainly be placing the estate at a practical, if not theoretical, disadvantage. Therefore, in such case, the "reason of the rule"—the real touchstone—is all in favor of the prohibition and, applying it here, we must sustain the ruling of the learned trial judge. Cases in this state in point are as follows: *Coughlin v. Haussler*, 50 Mo. 126; *Banking House v. Rood*, 132 Mo. 261, 33 S. W. 816; *Ess v. Griffith*, 139 Mo. 326, 40 S. W. 960; *Orr v. Rode*, 101 Mo. 393, 13 S. W. 1066; *Bank v. Payne*, 111 Mo. 296, 20 S. W. 41, 33 Am. St. Rep. 520; *Henry v. Buddecke*, 81 Mo. App. 360; *Williams v. Perkins*, 83 Mo. 379; *Amonett v. Montague*, 75 Mo. 43; *Nugent v. Curran*, 77 Mo. 323; *Stone v. Hunt*, 114 Mo. 66, 21 S. W. 454; *Hoeffner v. Grand Lodge*, 41 Mo. App. 359.

The judgment is affirmed. All concur.

McMANUS v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1906.)

1. CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—QUESTION FOR JURY.

In an action against a street railroad company for injuries to a passenger who jumped from a moving car because of fear that the motorman would not stop before reaching an obstruction on the track, evidence held to require submission to the jury of the issue of defendant's negligence, even though it should

be conceded that the apparent obstruction was so located that it would not, in fact, have injured the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1852, 1402.]

2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action against a street railroad company for injuries to a passenger who jumped from a moving car because of fear that the motorman would not stop before striking an obstruction on the track, the petition alleged that the obstruction was in plain view of the motorman; an instruction allowing a recovery without proof of this was not reversible error in view of uncontradicted evidence that the motorman knew of the obstruction.

3. SAME—ASSUMING UNCONTRADICTED FACTS.

The assumption in instructions of facts proved by uncontradicted evidence is not ground for reversal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4221.]

4. TRIAL—INSTRUCTIONS PARTIALLY ERRONEOUS.

It is proper to refuse an instruction partly correct and partly erroneous.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 660.]

5. CARRIERS—INJURY TO PASSENGER—JUMPING TO AVOID COLLISION.

Where a passenger was injured by jumping from a moving street car to avoid an apparently impending collision with an obstruction on the track, it is immaterial whether the obstruction was in "plain" view or not, or whether the action of other passengers increased her alarm.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1852.]

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Jessie E. McManus against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John H. Lucas, for appellant. Walsh & Morrison, for respondent.

ELLISON, J. The plaintiff was a passenger on one of defendant's street cars in Kansas City. She charges that she received personal injuries in consequence of the negligence of defendant's servants, who were in charge of the car. She recovered judgment in the trial court.

The defendant challenges the plaintiff's case as being not sufficiently made out to take the opinion of a jury. We must, therefore, as to that point, consider what was shown by the evidence in plaintiff's behalf. It appears that there is on defendant's line, consisting of a double track, as a part thereof, what is called an "Incline," or steep grade, composed, in part, of a viaduct; and that it is by means of this that defendant's cars are carried from the bluff to what is known as the west bottoms in Kansas City; that, on the morning of November 4, 1903, there was a wreck caused by collision of two of defendant's cars on this incline, towards the lower or west end thereof, and that this collision occurred on the south track, a few minutes before the car, upon which plaintiff was riding, arrived from the east at the top of the

incline on the north track; that the wreck could be seen through a fog, which had settled upon that part of the city, though it was not distinguishable, specifically, as a wreck of cars. Plaintiff saw it as "a dark body that seemed to her as a wreck." At this time, people along the street began to cry out to defendant's gripman to stop the car, that there was "a wreck down there." The gripman gave no heed to the warning and made no effort to stop until he had run one-half block further. The passengers became alarmed and panic-stricken, and began jumping off the car, when the plaintiff also became alarmed. She thought there was a collision and that, to use her own language, "I thought if I went down there I would be killed, and so I jumped." When she saw the dark body down the incline, she saw "people running and screaming." The gripman finally stopped the car within 25 or 30 feet of the wreck. There was evidence tending to show that he could have stopped it within a space of 50 feet. There was much other testimony, but what we have stated is amply sufficient to justify the court in refusing defendant's demurrer to the evidence. *Kleiber v. People's Ry. Co.*, 107 Mo. 240, 17 S. W. 946, 14 L. R. A. 613; *Bischoff v. People's Ry. Co.*, 121 Mo. 224, 25 S. W. 908; *Ephland v. Railway Co.*, 57 Mo. App. 147. And this is true, though in point of fact the wreck was not so much on the north track as to have endangered the car, on which plaintiff was, had it not stopped. In the case last cited, the danger or peril, in which Ephland thought himself, when he jumped from a moving train was not real, yet having been alarmed and thrown in to a panic by the negligent conduct of the railway brakeman in the caboose exclaiming, "For God's sake, jump!" it was held the company was liable. That view was approved by the Supreme Court in considering the same act in *McPeak v. Ry. Co.*, 128 Mo. 651, 652, 80 S. W. 170, and *Ephland v. Railway Co.*, 137 Mo. 187, 37 S. W. 820, 38 S. W. 923, 35 L. R. A. 107, 59 Am. St. Rep. 498. In the case under consideration, it was not so much the cry of people in the street to the gripman that there was a wreck ahead, which alarmed plaintiff, as it was that (as the evidence tends to show) he did not stop, nor attempt to stop the car. Therefore the alarm in this case, as in the Ephland Case, arose by reason of the servant's negligence.

But serious objection is made to plaintiff's first instruction in that it purports to cover the whole case and direct a verdict and yet omits to submit material issues, which were necessary to find for plaintiff under her petition. The instruction is not fairly subject to the objections stated. It is charged in the petition that the wreck was in plain view of the plaintiff and of the defendant's servants, and yet that such servants failed to stop the car. The instruction does omit any hypothesis of that allegation. But the un-

contradicted evidence (and that, too, from each party) is that the gripman knew the wreck was ahead of him, although he stated that he could not see it on account of the fog. The meaning of the petition is to charge knowledge of the wreck on the servants. It is of no practical importance whether he saw it, or was informed of it. Plaintiff stated that she could see it (that is, a dark object, that the people giving the alarm said it was a wreck) and from her statement, the gripman necessarily saw it. He, however, stated that he did not. But he testified that he heard of the wreck. That is, he heard of it from the people in the street, who were endeavoring to have him stop the car and avoid what they supposed would be a collision. The evidence in behalf of each party showed, without contradiction, that there was a wreck further down the incline, that people along the street were running and crying the alarm to the gripman, that the passengers were seized with terror and began to leap from the car, and that all but one had jumped before the car stopped. These facts appearing in the case without dispute made of the omission complained of nonreversible error.

Much the same may be said of the objection as it relates to the issue of plaintiff's having seen the wreck. It is not disputed that she heard of it, and that the alarm followed. So the only fault to be found in the instruction is in its assuming matters, which, with more propriety, might, perhaps, have been submitted to the jury. But all such matters were placed beyond controversy by uncontroverted facts. The instruction covered, in a hypothetical way, all matters, which were, in reality, in dispute between the parties. The negligence of defendant's servants in failing to stop the car; the apparent peril of plaintiff; the reasonableness of plaintiff's action in her situation were all properly submitted. There was no dispute as to the wreck; nor that the gripman knew it, nor that an alarm was given, nor that plaintiff and the other passengers became panic stricken and leaped from the car. It is, therefore, no cause for reversal that these things were not included as issues in plaintiff's instruction.

The court did not err in rejecting the refused instructions offered by defendant. No. 3 contained much that might have been properly given, but it was so intermingled with that, which was erroneous, that it could not be adopted by the court. It required that the danger should be found to have been apparent to other passengers than plaintiff. It improperly defined the duty of defendant's servants as to the care they should exercise, and, in this respect, was inconsistent with instructions for plaintiff. And the same may be said of instruction No. 6. What we have already said disposes of refused instructions Nos. 4 and 5. It was of no consequence whether the wreck was "in plain view." Instruction No. 7, refused, seems to be drawn

upon the idea that, if plaintiff became alarmed by the action of persons on the street and other passengers on the car, that defendant would not be liable. There is no evidence that she became alarmed from that alone. For it is evident the onward movement of the car towards the point of danger is what made her think she "would be killed." If the action of the persons giving the alarm and the other passengers added to plaintiff's alarm, it does not excuse the negligence of defendant's servants. *Ephland v. Ry. Co.*, supra; *McPeak v. Ry. Co.*, supra.

What we have written sufficiently disposes of any objection as to a variance between the petition and the proof, as well as to a failure of proof. A careful examination of the record satisfies us that we are without authority to interfere, and hence we affirm the judgment. All concur.

CITY OF CARTHAGE ex rel. COOK et al. v. WEESNER.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1908.)

1. JUDGMENT — PERSONS CONCLUDED ASSIGNEES.

Holders of special tax bills, who assigned them as security to a bank and obtained them by reassignment after a judgment against the bank canceling the bills, were bound by the judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1195, 1206.]

2. SAME—PLEDGE OF COLLATERAL.

Where tax bills were assigned as collateral to a bank, which was to collect them and threatened suit for that purpose, a judgment against the bank canceling the bills was binding on the assignors.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1195, 1206, 1221.]

Appeal from Circuit Court, Jasper County;
J. D. Perkins, Judge.

Action by the city of Carthage, on the relation of W. W. Cook and others, against William Weesner. From a judgment for defendant, relators appeal. Affirmed.

McReynolds & Halliburton, for appellants.
H. J. Green, for respondent.

ELLISON, J. The relators instituted this action on two special tax bills against property owned by defendant in the city of Carthage. The judgment in the trial court was for the defendant. The bills in the suit were canceled by the judgment of a court of competent jurisdiction in a suit in equity brought by this defendant against the Central National Bank of Carthage, 106 Mo. App. 668, 80 S. W. 819. That judgment was pleaded as res adjudicata in this case. The plea was sustained. It appears that the tax bills were originally issued to relators for building a sewer in Carthage and that they assigned them as collateral security for borrowed money to the Central National Bank, by writing their names on the back thereof and delivering

them. After the bills were declared void by the judgment aforesaid, they were delivered back to these relators and afterwards they instituted the present action, as stated.

The law is that privies to the parties to an action are bound by the judgment rendered therein, as completely as the parties themselves. Those who claim property under one, who was a party to a judgment affecting his right to, or in, such property, are privies and bound by such judgment. *Cooley v. Warren*, 53 Mo. 166, 169; *Litchfield v. Goodnow's Adm'r*, 123 U. S. 549, 8 Sup. Ct. 210, 31 L. Ed. 199; *Barton v. Martin*, 60 Mo. App. 351. Privy may exist from "relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. When this exists, the party to the second action is barred by an adjudication upon the right made in the first action." *Stamp v. Franklin*, 144 N. Y. 607, 611, 39 N. E. 634. Manifestly, when plaintiff put the title to the bills in the bank and then after the judgment against the bank received them back, he took them as a holder in succession under the bank for all purposes of application of the rule of res adjudicata. But again, plaintiffs stated, by way of testimony which they gave in their own behalf, that they not only assigned the bills as collateral, but that the bank was to collect them, and that it was threatening to enforce collection by suit. Where an action is brought in the name of one person at the instance of another, the judgment will conclude the latter. *Cheney v. Patton*, 144 Ill. 378, 34 N. E. 416. And this is assuredly so when the cause of action has been assigned to him who brings the suit. *Garretson v. Ferrall*, 92 Iowa, 728, 61 N. W. 251. It is true that the action brought was instituted against the bank instead of by that institution; but that can make no difference; the authority to sue would imply the authority to defend. The foregoing view is in harmony with the law and practice long established in this state, that a promissory note may be assigned merely for collection, and that the assignee may sue in his own name. If defeated on the merits in such action, it would scarcely be pretended that res adjudicata could not be successfully interposed in a subsequent action brought by the assignor.

We are satisfied the trial court took the correct view of the case, and hence affirm the judgment. All concur.

BRITIAN v. FENDER.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1906.)

1. APPEAL—DEFENSE NOT RAISED IN TRIAL COURT.

Where a judgment was rendered on a claim against a decedent's estate, it will be sustained on appeal as against an objection made there for the first time that the nature of the claim was insufficiently stated, unless the

statement of the claim is so defective that it could not be cured by verdict.

2. EXECUTORS AND ADMINISTRATORS—CLAIMS—REQUISITES—STATUTES.

Rev. St. 1899, § 188, provides that demands against a decedent's estate must be in writing and must state the amount and nature of the claim, with a copy of the instrument or writing, or account on which the account is grounded. *Held*, that such requisites are jurisdictional and must be substantially complied with.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 811.]

3. SAME—WRITTEN INSTRUMENTS.

Deceased was surety on a note for plaintiff, and on one occasion plaintiff handed him one half of the amount of the note with a request that it be applied as a partial payment. Deceased stated that he needed the money for his own use and suggested a renewal of the note, which was done, after which plaintiff was compelled to pay the entire note. On another occasion plaintiff was to borrow money from another with deceased as surety, and, the money having been left for plaintiff with deceased, the latter failed to pay it over to plaintiff. *Held*, that plaintiff's cause of action against decedent's estate by virtue of such transactions was in assumpsit for money had and received and not on the notes, and hence he was not required by Rev. St. 1899, § 188, to set out the notes in question in a statement of the claim.

4. SAME—SUFFICIENCY.

A statement of claim under such circumstances, averring that decedent's estate was indebted to claimant, as of November 20, 1902, to \$200 paid to deceased to be credited on the note of claimant and deceased, at a certain bank, which deceased failed to do, and on another date, "to money on Frady note," sufficiently showed the nature of the claim sued on as required by Rev. St. 1899, § 188.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 811.]

5. EVIDENCE—BOOK ENTRIES.

Where, on a claim against a decedent's estate, there was evidence that a book entry charging an amount against deceased was exhibited to and approved by him, the entry was admissible in evidence whether it be regarded as one appearing in a book of original entry or as a mere memorandum, not of itself competent evidence of the fact it purported to record.

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Action by J. A. Britian against H. M. Fender, as administrator of the estate of A. J. Fender, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

C. H. Skinker and Rechow & Pufahl, for appellant. F. T. Stockard and Johnson & Sea, for respondent.

JOHNSON, J. This suit is founded upon a demand against the estate of a deceased person. It was begun in the probate court of Polk county, and the demand presented is as follows:

The estate of A. J. Fender, Deceased, to
J. A. Britian, Dr.

Nov. 20, 1902. To \$250.00 paid to A. C. Fender to be credited on Britian and Fender note at the Polk County Bank, which he failed to do.....	\$250 00
Dec. 25, 1902. To money on Frady note.....	112 50

Other items are included, but the two mentioned are the only ones now in dispute. No point is made that the demand was not exhibited to the administrator and court in the manner provided by Rev. St. 1899, § 188, except in one particular—that it failed to state the nature of the claims with proper definiteness. No objection, however, was made to it on this score, either in the probate court or in the circuit court, where it was taken on appeal, until after verdict in favor of plaintiff. Defendant then, in his motion in arrest of judgment, raised the question of the sufficiency of the demand to state a cause of action.

The evidence introduced by plaintiff discloses this state of facts. Before his death, which occurred April 3, 1903, Fender was a merchant in the town of Brighton and plaintiff the proprietor of a flouring mill. They had various dealings with each other and, at times, Fender assisted plaintiff in borrowing money for use in the business of the latter. Both items in dispute grew out of transactions of this character. As to the first mentioned, it appears that plaintiff had borrowed \$500 from a bank and given his note therefor, with Fender as surety. A few days before the note fell due, plaintiff handed Fender \$250 in money with the request that it be applied by Fender in partial payment of the note. This fact is testified to by one of plaintiff's sons, who was present, and who states in substance that, when plaintiff handed the money to Fender, the latter remarked that he needed that amount for his own use, and suggested that the note be renewed for the sum of \$500, and, when again due, he (Fender) would pay half of it. Plaintiff assented to this and the note was renewed. It had not been paid when Fender died, and plaintiff was compelled by the bank to pay it all. The second item originated in this manner. Plaintiff borrowed \$100 for use in his business from a Mr. Frady, for which he gave his note, signed by Fender as surety. When Frady agreed to loan the money, plaintiff told him that the note would be left at Fender's store and requested him to call there for it, and to leave the money with Fender. This, Frady did, and left the \$100 with Fender, who died without accounting to plaintiff for it. Plaintiff was compelled to pay the note held by Frady. Plaintiff recovered judgment in the sum of \$354.65, which included \$250 on the first item, \$100 on the second, and \$4.65 on others not in controversy.

The facts detailed are supported by enough evidence to raise an issue of fact for the determination of the jury, and were properly submitted in the instructions given by the court, and the judgment must be sustained unless we find that the demand is so vitally defective in its statement of the nature of the claims that it could not be cured by verdict. Under section 200, Rev. St. 1899, formal pleadings are not required in the prosecu-

tion before the probate court of demands against the estates of deceased persons, but, in exhibiting his demand, compliance with the following requirements is imposed upon the claimant by the provisions of section 188. The demand must be in writing and must state the amount and nature of the claim with a copy of the instrument of writing or account, upon which the claim is founded. These requisites are all jurisdictional, and, if the claimant fails to perform any of them, neither the probate court in the first instance, nor the successive courts to which an appeal may be prosecuted, obtains jurisdiction over the cause. But, to confer jurisdiction, no more is required of the claimant than the identification of his claim, in the exhibition thereof, to the extent that the administrator may be apprised of its amount and origin and thus be enabled to investigate it intelligently, and that a recovery upon it may operate as a bar to any other action based upon the same cause. With these purposes accomplished, the court acquires jurisdiction over the demand, and notwithstanding it may be meager, and to some extent indefinite, in statement, if the administrator is satisfied to go to trial upon the merits without first moving to have it made more definite and certain, he waives all such defects, and will not be heard to object to them, especially after verdict.

Turning, now, to the items in the account before us, we cannot adopt the argument of defendant that the first was founded upon the bank note and the second upon the Frady note, and, therefore, copies of both of these notes should have been given in the demand exhibited. Both items are grounded in assumpsit for money had and received, and neither is evidenced by any instrument in writing. This also disposes of the objection that the instructions given for plaintiff submitted a different cause of action than that pleaded in the demand. Nor can we agree with the defendant that the statement of the first item fails to disclose its nature. To the contrary, we find it quite definite in this and all other essential respects. It is impossible to conceive that the administrator could have been misinformed or misled by the statement that on November 20, 1902, plaintiff paid Fender \$250 to be credited on their joint note at the Polk County Bank, "which he failed to do," and plaintiff hardly could have made the statement more definite without pleading purely evidentiary facts.

The second item is not stated so clearly, but we find it contains enough to inform the administrator of the nature of the claim and to prevent any future recovery against the estate on account of the money, which Frady paid to Fender for the use of plaintiff. The statement: "Dec. 25, 1902. To money on Frady note"—is, in effect, the assertion that Fender on that date received money belonging to plaintiff on account of that note. By it, the attention of the administrator was

focused upon that particular transaction so that by investigation he might fully acquaint himself with its facts. He does not claim to have been misled in any manner, but, after trying the case upon its merits and having his defensive facts considered by judge and jury upon the theory, in which he acquiesced, that the issues were fairly presented in the demand, he advanced the belated complaint that the statement was too indefinite to apprise him of the nature of the claim. If he felt the need of further specification, he should have presented a motion therefor before joining issue on the merits. His position now is untenable.

The court admitted in evidence, over the objection of defendant, an entry appearing in an account book charging Fender with the amount of the first item. The book was one of original entry kept by plaintiff at his mill and in connection with that business. It was properly identified, but defendant contends the entry was incompetent as evidence of the fact shown, because the transaction referred to was not one relating to the mill business, and, therefore, was improperly entered in the books of that business. The evidence shows the entry was concerned with that particular business of plaintiff, but, if we found otherwise, we, nevertheless, would hold it admissible under the testimony of plaintiff's son, who stated: "Q. I will ask you, if, at any time after that entry was made, if Asa Fender was ever down there at the mill looking around and saw that entry and what he said about it. A. Yes, sir; he was down there. He owed 30 or 60 cents for some meal that Ed White got, and he was looking over the book to see if there was anything more. The book was not all posted up. I run my finger down, and when I came to that, he said, 'That is all right; that is different business.' He then went out." Whether the entry should be treated as one properly appearing in a book of original entry or as a mere memorandum, not of itself competent evidence of the fact it purported to record, its exhibition to the person charged and his approval of it invested it with probative value.

The judgment is affirmed. All concur.

SOTHAM v. WEBER.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1906.)

FRAUDS, STATUTE OF—SALES—GOODS—DELIVERY AND RECEIPT.

Defendant, a retail meat dealer, agreed to purchase an exhibition steer for three cents a pound more than the highest price paid for any beef bullock, which should be sold at the December stock exhibition, which amount was subsequently ascertained to be \$2,392.92, and that plaintiff should be allowed to keep the steer, exhibit him at the exhibition alive and dead as a beef carcass, the premiums, if any, to belong to plaintiff. Defendant tacked a card on the stall to the effect that he had bought the beef and showed the animal to his friends, but

the steer was kept in plaintiff's possession until the exhibition, when it was turned over to the exposition company for slaughter. *Held*, that as between the parties such facts were insufficient to show a delivery and receipt of the steer by defendant sufficient to satisfy the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 174-179; vol. 43, Cent. Dig. Sales, §§ 372-385.]

Appeal from Circuit Court, Jackson County; Shannon C. Douglass, Judge.

Action by T. F. B. Sotham against Anton Weber. From a judgment for plaintiff, defendant appeals. Reversed.

G. B. Silverman, for appellant. Ward, Hadley & Neel, for respondent.

ELLISON, J. This is an action for the price of a certain beef steer alleged to have been sold and delivered by the plaintiff to the defendant at Kansas City on the 18th day of October, 1900. The judgment in the trial court was for the plaintiff. The defense which we are to consider, is the statute of frauds (section 3419, Rev. St. 1899) reading as follows: "No contract for the sale of goods, wares and merchandise for the price of thirty dollars or upward, shall be allowed to be good, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing be made of the bargain, and signed by the parties to be charged with such contract, or their agents lawfully authorized." The price, at which the steer was alleged to have been sold, was \$1.53 per pound and he weighed fifteen hundred and sixty-four pounds, thus making the price \$2,392.92, and it was for that sum plaintiff obtained judgment. The contract was verbal and no earnest money was paid, so we have only to ascertain whether defendant accepted and also actually received the steer.

As the case is to be disposed of on defendant's demurrer to the evidence, we will consider it as developed by the evidence in plaintiff's behalf. Plaintiff testified: That he was the owner of the steer called "Old Times" from a calf up to October 18, 1900. That he was a prize steer and that he exhibited him at expositions and live stock shows in Missouri, Illinois, Minnesota and other places, where he had taken various premiums. That, on October 18, 1900, he sold the steer at Kansas City to defendant, who owned and managed a large retail meat market in that city. The plaintiff gave his deposition before the trial and several of his statements at the trial of the detail of the sale and its terms were not consistent with those made in the deposition; but taking the testimony as given by him at the trial, we find that he resided on a farm in Livingston county, Mo. where he dealt in Hereford cattle and that he brought the steer in controversy to Kansas City in October, 1900, to exhibit at the cattle

show at that place, with one of his employes in immediate charge of him. That he had theretofore "entered him" for exhibit at the stock exposition, sometimes called "Fat Cattle Show," at Chicago, Ill., which was to be held in December following. That defendant saw the steer while at Kansas City in a stall where plaintiff kept him and desired to purchase him. Plaintiff at first refused to sell, telling defendant that he had entered the animal for exhibition at the Chicago show in December and that in consequence he could not sell. That defendant was extremely anxious to buy, as he thought the sale of beef from the carcass of so noted an animal, which had been such a notorious prize winner, would be an advertisement and add much to his prestige as the keeper of a high class meat market, and he therefore suggested to plaintiff that he thought they could remove plaintiff's objections satisfactorily. It was then agreed that defendant was to pay three cents per pound more than the highest price paid for any beef bullock, which should be sold at the Chicago exhibition in the following December. That plaintiff should be allowed to keep the steer, take him back to his farm, feed and care for him, and take him to Chicago to the exposition for exhibit alive on foot, and dead as a beef carcass; the premiums, if any, to be plaintiff's. From his testimony, it also appeared that defendant tacked a card on the stall where plaintiff kept the steer with the words, "this beef bought for A. Weber, 1115 Walnut street, Kansas City, Mo.," and that, perhaps more than once during the exposition, defendant led the animal out of the stall and showed him to friends as being purchased by him; but that the animal was kept in the stall and remained in charge of plaintiff's employe until he took him back to his farm. He then testified that an animal was sold at auction at the Chicago exposition for \$1.50 per pound, thus making the price to defendant \$1.53, under the terms of the sale, as stated.

Plaintiff's only contention in avoidance of his act, in keeping the possession of the steer for several weeks after the alleged completed sale at Kansas City, is on the idea of a bailment, that is to say, that he became after the sale the defendant's bailee. It is quite true that it frequently happens that personal property at time of sale is in possession of a third person, as a livery man, agister, warehouseman, and the like, and yet the purchaser may actually receive the property, so as to satisfy the statute, and then permit it to be retained by the party in possession as his bailee. And so there is no legal impediment to the vendor himself becoming the purchaser's bailee, where the receipt of the property by the purchaser has been clearly shown. Tiedeman on Sales, § 69. But in all such cases (as well as all others) the receipt of the property must have been absolute, and his dominion over it must be absolute. The bailment, to be consistent with the intent and

meaning of the statute, must be a voluntary bailment made from the free choice of the purchaser. It must be an act in the free exercise of that complete dominion, which he obtains by the receipt. There was no such element in the alleged bailment in this case. For, by the contract, plaintiff imposed upon defendant, at the very least, a limited and qualified dominion; and we have the agreement itself, whereby defendant is said to have received the steer, limiting his control and depriving him of possession. A purchaser must first have actually received unfettered dominion and control, in order to meet the requirement of the statute, before he can make a bailment back to the vendor. If you may hamper his receipt with one condition, you may with any number. The words, accept and actually receive, "are understood to mean a final and absolute appropriation by the purchaser." Story on Sales, § 276. In order to take the contract from under the operation of the statute, the acts of the parties must be "of such character as to unequivocally place the property within the power and under the exclusive dominion of the buyer." *Marsh v. Rouse*, 44 N. Y. 643, 647; *Hinchman v. Lincoln*, 124 U. S. 38, 8 Sup. Ct. 369, 31 L. Ed. 337. The Supreme Court of this state recognized this rule in the case of *Kirby v. Johnson*, 22 Mo. 354, where a contract for a sale of cattle in the pasture of the vendor, the vendee getting the vendor to keep and feed them at the vendee's expense until he sent for them, and if any died to be the loss of the vendee, was held to be invalid under the statute. And it was also recognized in *Harvey v. Butchers' Ass'n*, 39 Mo. 217. "The acts of the parties must be, in such a case, wholly unequivocal; and if the vendor retains possession of the subject matter of sale, it must be under circumstances which expressly show that he holds it as agent of the other party, and has abandoned all claim to it of any kind." Story on Sales, § 278. In the case under consideration, the plaintiff not only did not abandon all claim to the steer, but he testified that the contract of sale was expressly conditioned that he should keep him for show at expositions, and that he should be slaughtered, and that he should exhibit the carcass for premiums. So, it is manifest that the contract of sale, upon which plaintiff relies to sustain his case, contains provisions which leave him without legal right.

But the plaintiff's testimony shows that, in reality, defendant had no dominion whatever over the animal in controversy, limited or unlimited. Cutting out the mere assertion and conclusion of the plaintiff that he sold and delivered the steer at Kansas City, and taking what he actually did (for it is his acts and not his words which must control. 1 *Mechem on Sales*, § 383), we find that, in point of fact, he, himself (instead of defendant), retained complete and entire dominion over

the steer and never for a moment surrendered it, not only at Kansas City, but up to the time that, under the rules of the exposition company at Chicago, he turned it over to that company for slaughter. It is quite apparent that there was no thought in the mind of either party that the steer was to be delivered or received at Kansas City. Defendant, as plaintiff testified, wanted the animal partly as an advertisement, and he thus pointed it out as having been purchased by him and had his card of advertisement put on the stall. But plaintiff's possession was never in the least disturbed at Kansas City, nor was it to be. The words of the plaintiff in his deposition were, "Mr. Weber agreeing to receive the steer at Chicago." His explanation of this made at the trial was, as just stated, nothing more than a statement of his opinion or conclusion that a sale and delivery took place at Kansas City.

There are distinctions, which should not be overlooked, between a delivery of property sufficient to pass the title to the vendee, as against creditors, under the statute of fraudulent conveyances, and a delivery sufficient to show a receipt and acceptance under the statute of frauds. It is not all modes of legal delivery which will satisfy the statute of frauds. It is stated in Benjamin on Sales, p. 169, that delivery is the act of the seller, and acceptance and receipt the act of the buyer. So, while it may be truthfully said that receipt implies delivery, it is not always true that delivery implies receipt. A distinction is noted in Story on Sales, § 279, between a delivery sufficient where the sale is otherwise legal under the statute of frauds, as if in writing or earnest money has been paid, and where the sale depends for its legality upon the act of the vendee in receiving and accepting the property.

In view of the foregoing, we cannot see any possible ground upon which the judgment can be sustained, and it is accordingly reversed. All concur.

RIEGER v. FABER et al.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1906.)

1. MORTGAGES — TRUST DEEDS — SALE — REDEMPTION BOND.

Under Rev. St. 1899, §§ 4343, 4344, providing that where land is sold by a trustee in a trust deed, and purchased by the beneficiary, the grantor may have the privilege of redeeming at any time within a year by giving a bond securing the payment of the interest on the debt, and the payment of all damages and waste occasioned or permitted, the act of a beneficiary in taking possession immediately after the sale, and receiving the rents of the land, does not defeat or render nugatory a redemption bond.

2. ESTOPPEL — ASSERTING INVALIDITY OF REDEMPTION BOND.

Rev. St. 1899, §§ 4343, 4344, provide that the grantor in a deed of trust may after sale and purchase by the beneficiary redeem at any time within a year by filing a bond securing

the payment of interest, etc. After sale under a deed of trust the grantor filed the statutory bond and sued to enjoin the beneficiary from taking possession of the property. The beneficiary denied that the bond was valid, and procured the dissolution of the injunction. *Held*, that he was thereby precluded from afterward asserting the validity of the bond and maintaining an action thereon.

Appeal from Circuit Court, Jackson County; Shannon C. Douglass, Judge.

Action by J. H. Rieger against J. H. L. Faber and others. From a judgment for plaintiff, defendants appeal. Reversed.

B. P. Finley, for appellants. James C. Rieger and Frank P. Seabee, for respondent.

ELLISON, J. This action was instituted on a certain statutory redemption bond executed by defendants to the plaintiff. The trial court gave what amounted to a peremptory instruction to find for plaintiff in the sum of \$550, and the defendants come here for relief from the judgment rendered on the verdict thus directed.

The bond was executed under the provision of sections 7079 and 7080, Rev. St. 1889 (now sections 4343 and 4344, Rev. St. 1899), whereby a grantor, in deeds of trust given on land to secure the payment of a debt when such lands were sold by the trustee and purchased by the beneficiary in the deed, is given the privilege of redeeming the land at any time within one year by giving a bond, with sureties, securing the payment of the interest on the debt accruing the year after the sale and the payment of all damages and waste occasioned, or permitted, by the person whose property is thus sold. It appears that the defendant Faber gave to the plaintiff a deed of trust on certain lots and buildings thereon to secure the payment of a note for \$6,500 and interest. That default was made in the payment in the fall of 1896 and the trustee was requested to sell the property, which, after advertisement, he did, on the 15th of December, 1896, the plaintiff being a purchaser. Defendant, on that day, executed the redemption bond in suit. Notwithstanding this, the trustee executed a deed to the premises to the plaintiff. Defendant's bond was conditioned for the payment of interest accruing within the year ending December 15, 1897, and any damage or waste to the property within that time. It appears that the bond was endorsed as approved by the judge of the circuit court, and does not appear to have been approved by the court until about one year thereafter. Shortly afterwards, on December 30, 1896, defendant brought his bill in equity, whereby he sought to have the sale of his property set aside on account of what was alleged to be a defective notice of sale, and on account of having given the redemption bond. Defendant likewise asked in said bill that plaintiff be enjoined from collecting rents, or interfering with the tenants of said houses, and restrained from any further acts of pos-

session. He filed, therewith, his proper injunction bond conditioned to pay this plaintiff all sums of money adjudged against him if the injunction was dissolved. This plaintiff filed his answer to said bill in equity, in which he admitted that he was claiming possession of the property under his trustee deed; and denied that this defendant had executed the bond in suit. It further appears that this plaintiff filed his affidavit in said equity proceeding shortly after it was instituted, in which he made oath that he went to the tenants of the property, exhibited his deed to them and they attorned to him, and he then went into possession of the property. It further appears that, thereafter, defendant's bill in equity was dismissed, and the injunction dissolved on February 18, 1899, and that on April 24, 1899, plaintiff filed his motion to assess damages on the injunction bond on account of loss of rent of the property "after the 15th day of December, 1897." On this motion, the court assessed the sum of \$450 against this defendant and his sureties.

Without the aid of the statute, the debtor may redeem his property at any time after default and before foreclosure by sale, but not afterwards. The statute merely extends the right to redeem after the sale for a period of one year, if the debtor will give bond securing the interest of that year and payment of any damages or waste. It is well-understood law that a mortgagee or trustee in a deed of trust, after default by the debtor, is entitled to the possession of the property, and he may, without foreclosure, maintain ejectment for it, if he wants possession, or he may take possession peaceably. *Johnson v. Houston*, 47 Mo. 227; *Reddick v. Gressman*, 49 Mo. 389; *Dickerson v. Bridges*, 147 Mo. 235, 244, 48 S. W. 825. He may thus satisfy his debts from the rents and profits of the estate. He can be made to account for the rents and profits toward the liquidation of the debt, and when satisfied, the mortgage or deed of trust is of no further force. The statute, in question, being a mere extension of time for redemption, does not absolve the debtor of all consequences of his default, nor deprive the creditor of any right except that of suspending his claim to absolute title until there has been a failure by the debtor to redeem within the year after sale. So the creditor, notwithstanding the execution of the redemption bond, still has the right to the possession, which he gets by reason of the default, and he may peaceably take such possession if he wants it, not by reason of his purchase at the foreclosure sale, but by reason of the default. But, if he takes possession, he must, of course, account for the rents and profits for the year of redemption, notwithstanding his purchase, for the reason that the right of redemption still exists. We, therefore, conclude that plaintiff's taking possession of the property immediately after the sale and taking to him-

self the profits thereof, as alleged, did not, ipso facto, defeat or render nugatory the redemption bond. It had its effect on the bond only as it might reduce or satisfy the obligation therein, in the process of liquidating the entire debt.

We recognize the law as stated by the Supreme Court in *Life Ins. Co. v. Rogers*, 155 Mo. 312, 55 S. W. 1019, and *Sheridan v. Nation*, 159 Mo. 27, 59 S. W. 972, that the debtor should have a reasonable time in which to give his bond of redemption and the impropriety of the creditor seeking to obtain possession of the property without the debtor's consent while the bond is being secured. But, if the creditor does go into possession and thereby secures the profits of the estate, he does not thereby nullify the bond. Though, if such possession was taken without the consent and against the will of the debtor, he, doubtless, could assert the remedy, which is given by the statute, of forcible entry and detainer. But, in this case, no effort of that kind was made.

But a point is made by defendant, which goes to the whole of the case as presented in the record. When defendant brought the bill in equity, herein referred to, and secured the injunction on the ground that he had given the redemption bond, this plaintiff, as defendant in that suit, answered and repudiated the bond. He denied there was a valid bond. He now seeks to change position and has for the foundation of the present action the thing repudiated in the other. He prevailed in that action. What is there to show to us that his defeat of this defendant, as plaintiff in that action, was not directly caused, or largely influenced, by his denial of the bond? It was shown that no notice of the bond was given on the day of the trustee's sale. It was shown that there were serious objections raised for other reasons to the validity of the bond as a statutory bond; objections of such consequence that plaintiff now seeks to bolster its validity by the contention that, if not a good statutory bond, it is valid as at common law. Why, then, may it not be that plaintiff prevailed in that action on the ground, which he now repudiates? But, in addition to this, plaintiff's conduct from the beginning discloses a repudiation of the bond. He denied there was any right to redeem, and he contested, for nearly two years, a case in which the validity of the bond was asserted by his opponent and denied by him. "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of a party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U. S. 689, 690, 691, 15 Sup. Ct. 555, 39 L. Ed. 578; *Railroad Co. v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693;

Daniels v. Tearney, 102 U. S. 415, 421, 26 L. Ed. 187. The application of the rule against inconsistent positions generally occurs where they are taken in the same case as in *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422, but it is not always so, as appears in the cases just cited. The former conduct of this plaintiff, so at cross-purposes with his present contention, though relating to another suit, was a contest with this defendant and concerned the subject-matter of the present controversy. There is no reason why the broad and just principles of estoppel should not apply and thereby defeat the present action. Plaintiff should not be permitted to defeat the defendant in one action on the ground that the bond was bad and then defeat him in another on the ground that it was good.

It is no answer to this position to say that the plaintiff did not include the year of redemption in his motion for an assessment of damages on the injunction bond. It appears that he did not, but the reason, if there was one, does not appear. At any rate, that fact does not affect the view we have stated. It could not have affected the question of plaintiff's repudiation of the bond for the reason that it occurred after the trial of the main cause.

The peremptory instruction offered by defendant should have been given. The judgment is reversed. All concur.

STATE ex inf. HADLEY, Atty. Gen., v. DELMAR JOCKEY CLUB.

(Supreme Court of Missouri. Dec. 22, 1905.)

1. QUO WARRANTO—DEMURRER TO INFORMATION—EFFECT.

A demurrer to an information, in the nature of a quo warranto, to oust a corporation from the exercise of its franchises, admits every material allegation in the information, other than mere conclusions of the pleader.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quo Warranto, § 57.]

2. SAME—MISUSE OF CORPORATE FRANCHISE—CRIMINAL ACTS.

A corporation may be proceeded against by quo warranto for misuse or perversion of its franchise, notwithstanding its officers and agents may at the same time be amenable to the criminal law for the offense committed by them in the perversion of such franchise; the proceeding against the corporation being no bar to that against the officers and vice versa.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quo Warranto, § 4.]

3. SAME—TRIAL OF AGENTS.

Where the agents of a corporation are guilty of a criminal offense in the prosecution of the corporation's business, the trial and conviction of such agents is not a condition precedent to a trial of a quo warranto proceeding to oust the corporation from the use of its franchises because of such offense.

4. CORPORATIONS—FRANCHISES—MISUSE—FORFEITURE.

Where a corporation was formed to encourage agriculture, to establish and maintain suitable fair grounds and a race track with

necessary buildings, erections, and improvements, to give on such grounds public exhibitions of agricultural products and stock, and of speed or races between horses, to charge a public admission fee to the race track, and to engage in pool-selling, book-making, and the registration of bets on races, etc., but the only use made of its franchise was to maintain a race track for the purpose of gambling, there was a substantial failure to fulfill the purpose of its organization rendering it subject to a forfeiture of its franchises.

5. EVIDENCE—JUDICIAL NOTICE.

The Supreme Court will not take judicial notice of the fact that a racing association has created and paid over annually a certain fund for the making of agricultural exhibitions at the state fair, when no such exhibitions were held by such association.

6. GAMING—POOL SELLING—OBJECTION BY STATE—ESTOPPEL.

Acts 1895, p. 8, § 40, appropriating \$8,715 received into the state treasury from pool-selling and book-making, constituted a legislative recognition of the validity of Rev. St. 1899, § 7419, authorizing book-making, and therefore estopped the state to demand the forfeiture of the franchise of a corporation, because it engaged in such business as it was authorized to do by its charter.

7. CORPORATIONS—POWERS—POOL SELLING—BETS WITH MINORS.

Under Rev. St. 1899, § 2193, prohibiting the sale of pools to, and registering bets with, minors, and declaring that any person doing so shall be punishable as for a misdemeanor, a corporation authorized to sell pools and register bets on horse races had no power to sell such pools to, and book bets with, minors.

8. INFANTS—PROTECTION OF MORALS—GAMING—OFFENSES.

Under Rev. St. 1899, § 2193, prohibiting the selling of pools to, and booking bets with, minors, and punishing any person doing so as for a misdemeanor, it is immaterial that the officers of a corporation selling pools to, and booking bets with, minors had no knowledge that their customers were in fact minors.

9. STATUTES—TITLE—SUBJECTS.

Act March 21, 1905 (Laws 1905, p. 181), entitled "an act prohibiting book-making and pool-selling and prescribing a penalty therefor," is not in violation of Const. art. 4, § 28, prohibiting such acts from containing more than one subject, in that "book-making" and "pool-selling" are not germane, but in discord with each other.

In Banc. Information in the nature of quo warranto by Herbert S. Hadley, Attorney General, against the Delmar Jockey Club. Demurrer to the information sustained on the first ground, and overruled as to the others, with leave to plead over.

The Attorney General and John Kennish, for the State. Chester H. Krum and Bond & Bond, for respondent.

BURGESS, J. This is an original proceeding begun in this court by the Attorney General by filing herein, ex officio, an information in the nature of a quo warranto against the defendant corporation, the purpose of which is to oust it of its franchises and corporate privileges, to have the same declared forfeited, and all of the property, real and personal, of said defendant, forfeited, to the state.

The information filed by the Attorney General, leaving off the formal parts, is as follows:

"Comes now Herbert S. Hadley, Attorney General of the state of Missouri, who in this behalf prosecutes for the state, and informs the court that the Delmar Jockey Club was organized as a corporation under the provisions of article 1 and article 9 of chapter 12 of the Revised Statutes of the state of Missouri for 1899, and the acts amendatory thereof, on or about the 18th day of January, 1901; that the capital stock of said corporation, as stated in the articles of association thereof, was one hundred thousand dollars (\$100,000.00) divided into one thousand (1,000) shares of the par value of one hundred dollars (\$100.00) each, and the purposes for which said corporation was formed, as alleged in said articles of association, were as follows: 'The purposes for which this corporation is formed are to encourage and promote agriculture and the improvement of stock, particularly running, trotting, and pacing horses, by giving exhibition of agricultural products and exhibitions of contests of speed and races between horses, for premiums, purses, and other awards and otherwise; to establish and maintain suitable fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections, and improvements, and to give or conduct on said grounds and race track, public exhibitions of agricultural products and stock, and of speed, or races, between horses, for premiums, purses, or other awards made up from fees or otherwise, and to charge the public for admission thereto, and to said grounds and track; to engage in pool selling, book making, and registering bets on exhibitions of speed or races at the said race track and premises, as provided by law, and to let the right to others to do the same; to conduct restaurants, cafés, and other stands, for the sale of food and other refreshments to persons on said premises; and to do and perform all other acts necessary for fully accomplishing the purposes hereinbefore specifically enumerated.'

"Your informant further states that, since the organization of said Delmar Jockey Club, it has become the owner of, and is now, and at all times hereinafter mentioned was, the occupant of and in charge of a certain tract of land, known as the 'Delmar Race Track,' lying partly in the city of St. Louis and partly in the county of St. Louis, upon which said land there was located a race track, and besides other buildings, erections, and improvements, a certain shed or building, known as the 'betting ring' or 'shed,' for the purpose of having conducted therein pool-selling, book-making, recording and registering of bets upon contests of speed or powers of endurance between certain horses, upon said race track, and of which said shed or building said re-

spondent, through its officers, agents, and representatives, is now, and at all times hereinafter mentioned was, the occupant of and in charge of.

"Your informant further states that said respondent, ever since its organization, has continuously, notoriously, and willfully, within this state and at the county and city of St. Louis aforesaid, offended against and violated the laws of this state, and has grossly perverted, abused, and misused its corporate authority, franchises, and privileges, and has unlawfully assumed and usurped franchises and privileges not granted to it by the laws of the state of Missouri, and especially in the following particulars, to wit: That from the 18th day of January, 1901, up to the 16th day of June, 1905, said respondent, through its officers, agents, and employes, conducted within the building, known as the betting ring or shed, hereinbefore mentioned, on the Delmar race track, the business of book-making and pool-selling, registration of bets, and the acceptance of bets, and that, during said period, said respondent, acting through its officers, agents, and employes in charge of its said business, continuously, notoriously, and willfully violated the laws of this state, in that it sold pools and accepted and registered bets from minors upon the result of contests of speed or power of endurance, known as horse races between horses, run on the track of said respondent. That since said 16th day of June, 1905, the said respondent, acting through the officers, agents, employes, and representatives in charge of the business of said respondent, has further continuously, notoriously, and willfully offended against and violated the laws of this state, in this, to wit: It has continuously kept and occupied within this state its said shed or building, known as the betting ring or shed, above described, located upon said Delmar race track, with certain books, instruments, or devices for the purpose of recording or registering bets and wagers upon the result of trials or contests of speed or power of endurance of horses, which were made and took place upon said race track of said respondent; and it has, through its officers, agents, employes, and representatives in charge of the conduct of its business, continuously recorded and registered bets and wagers upon the result of trials or contests of speed and power of endurance between certain horses, which were made and took place upon said race track of said respondent. The said respondent, acting through its officers, agents, employes, and representatives in charge of its said business, and being the owner, occupant, and person in charge of said shed or building, known as the betting ring or shed, as above described, has continuously upon said Delmar race track knowingly permitted said shed or building to be used and occupied for the purpose of recording and registering bets and wagers

upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track. And said respondent, acting through its officers, agents, employés, and representatives in charge of the conduct of its said business, has continuously kept, exhibited, used, and employed in said building, and continuously and knowingly permitted to be kept, exhibited, used, and employed in said building, known as the betting ring or shed, upon said Delmar race track, certain devices and apparatus for the purpose of recording bets and wagers upon the result of trials or contests of speed and power of endurance between horses, which were made and took place upon said Delmar race track.

"Your informant further states that said respondent has never given any exhibition of agricultural products for the purpose of encouraging and promoting agriculture, or for any other purpose; that it has never given any exhibition of contests of speed and races between horses for the purpose of improving the stock of trotting and pacing horses; that it has never established or maintained any fair grounds in the city or county of St. Louis, or any other place. And your informant further states that the trials or contests of speed and power of endurance between horses, which were at all the times herein mentioned made and took place upon said Delmar race track, were conducted under the direction, management, and control of said respondent, acting through its officers, agents, employés, and representatives in charge of its said business; and that said trials or contests of speed and power of endurance between said horses were conducted by said respondent at the times herein alleged for the purpose of enabling the said respondent to do the things and acts hereinbefore alleged to have been done by said respondent, in violation of the laws of this state. That said acts and things done by said respondent, as aforesaid, constituted all of the business transacted or things done by said respondent, under and by virtue of the franchise and authority conferred upon said respondent as a body corporate under the charter granted to said respondent by the state of Missouri. That by reason of the facts herein stated said respondent has willfully, continuously, and unlawfully misused and abused the franchises, privileges, and authority conferred upon it by the laws of the state of Missouri, as aforesaid; and that the commission by said respondent of the acts as herein stated, in violation of the laws of the state of Missouri, have been of great harm and injury to the public and a perversion and misuser of the franchises granted to it by the state of Missouri, and a usurpation of franchises and privileges not granted to said respondent by the state of Missouri—all to the great injury of the general public and the state of Missouri:

"Wherefore, Herbert S. Hadley, Attorney General of the state of Missouri, who prosecutes in this behalf for the state of Missouri, prays the consideration of the court here in the premises that process of law may issue against said respondent, and that said respondent may be ousted of all its franchises and corporate privileges, and that the same may be declared forfeited, and that all of the property, real and personal, of said respondent, be declared forfeited unto the state."

Defendant filed demurrer to said information, as follows:

"The respondent now comes and says that the information filed herein is insufficient in law, and that it ought not to be required to answer the same. And the respondent further says that the said information is so insufficient in this:

"(1) That the portion, which relates to acts of book-making, pool-selling, and registration of bets described as the business carried on by the respondent from January 18, 1901, to June 16, 1905, does not state violations of law, because such acts were lawful; there being no averment that the defendant was not licensed to do such acts.

"(2) That portion which alleges that the respondent during such period 'sold pools and accepted and registered bets from minors,' does not state violations of law, because it is not alleged that the respondent knew that the persons whose bets were registered were minors, and there is no averment that the respondent was licensed to sell pools or register bets.

"(3) That portion which relates to acts of book-making and registering bets and acts of permission to others to make books or register bets, and to keeping and using devices for recording bets, after June 16, 1905, does not state violations of law, because a corporation cannot commit a felony, or felonies, and the offense of book-making, pool-selling, or registering bets and the like is denounced a felony by the statutes of this state.

"(4) That the information does not state any facts upon which a judgment of ouster could lawfully be based, for the obvious reason that to violate a criminal statute is not the usurpation or misuser of a franchise, there being a marked difference between franchises and felonies or misdemeanors, and quo warranto will not lie to compel the observance of a criminal statute, or to punish its violation.

"(5) The information neither alleges nor charges that the stockholders of the defendant corporation directed or authorized its alleged officers to violate the criminal laws of the state or to commit the felonies charged in said information.

"(6) The information neither alleges nor charges that any of the officers or agents of said corporation have been prosecuted under indictment or upon verified information for the felonies charged therein, and have been

after trial found guilty thereof, but seeks to have this honorable court convict certain persons of the felonies charged in said information without the intervention of constitutional methods, and in a manner unknown 'to the law of the land.'

"(7) That said information shows on its face that it seeks to deprive the stockholders of said corporation of their property without due process of law, and without due conviction of any of the agents and officers of said corporation of the felonies imputed to it in said information.

"(8) Because said information seeks to have this court adjudge specific persons to be guilty of felonies, without the aid of a prior indictment or verified information charging such offenses, and without trial by jury, as guaranteed in the Constitution of the state.

"(9) That the act of the General Assembly, entitled 'An act prohibiting book-making and pool-selling and prescribing a penalty therefor,' approved March 21, 1905 [Laws 1905, p. 131], is void, because it violates section 28 of article 4 of the Constitution, in that it contains two subjects, to wit, the prohibition of book-making and the prohibition of pool-selling, which are two distinct subject-matter, which have no relation to each other, and are not germane.

"Wherefore the defendant prays judgment," etc.

After the demurrer was filed, the state filed a motion for judgment upon the pleadings. But such motion was unnecessary, since judgment, as a matter of course, must be for the state, if the demurrer be not sustained, and the defendant does not plead over; and nothing more will therefore be said regarding it.

The defendant's demurrer to the information, in effect, admits every material allegation in the information contained, but it does not admit mere legal conclusions, if any, stated in the information. This being the effect of the demurrer, it follows that all the acts charged in the information to have been committed by defendant in violation of law, after the 16th day of June, 1905, being material, stand admitted. But defendant contends that as such acts are declared by statute to be felonies, and that as a corporation cannot commit felony, the violation of its charter in this respect therefore constitutes no ground for forfeiting its charter. That a corporation cannot have a felonious intent, and cannot therefore be prosecuted for a felony, is clear. It is equally clear, however, that an officer of a corporation, and in charge of its affairs, may, as such officer, do that which the statute declares to be a felony in like manner as he may do that which the statute declares to be a misdemeanor. There is no difference in principle. *Bank of Vincennes v. State*, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; 5 Thompson's Commentaries on the Law of Corporations, §§ 6621, 6622.

It is unnecessary to cite authorities to show that no felony can be committed with-

out a felonious intent, for this is well-settled law. Upon this question, however, the defendant cites the case of the *Commonwealth v. New Bedford Bridge Company*, 2 Gray, 389, which is deserving of more than a passing notice. In that case the defendant bridge company was prosecuted by indictment for maintaining a nuisance. The court said: "The indictment in the present case is for a nuisance. The defendants contend that it cannot be maintained against them, on the ground that a corporation, although liable to indictment for nonfeasance, or an omission to perform a legal duty or obligation, is not amenable in this form of prosecution for a misfeasance, or the doing of any act unlawful in itself and injurious to the rights of others. There are dicta in some of the early cases which sanction this broad doctrine, and it has thence been copied into text-writers, and adopted to its full extent in a few modern decisions. But, if it ever had any foundation, it had its origin at a time when corporations were few in number, and limited in their powers, and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it, and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible; in their legal duties and responsibilities, to individuals. To a certain extent, the rule contended for is founded in good sense and sound principle. Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony, of perjury or offenses against the person; but, beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible, because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses. *Angell & Ames on Corp.* §§ 394-396; *Maund v. Monmouthshire Canal*, 4 Man. & Gr. 452, 5 Scott, N. R. 457; *The Queen v. Birmingham & Gloucester Railway*, 8 Ad. & El. N. R. 223; *The Queen*

v. Great North of England Railway, 9 Ad. & El. N. R. 315, 2 Cox. C. C. 70; Eastern Counties Railway v. Broom, 6 Exchequer Reports, 314; State v. Morris & Essex Railroad, 23 N. J. Law, 360."

It is apparent that this decision is not an authority for the contention that a corporation is not subject to an action of quo warranto to oust it of the franchises conferred upon it, for a misuse or perversion of them, or that a corporation is exempt from the consequences of unlawful and wrongful acts committed by its agents in pursuance of authority derived from its charter. The information charges that respondent, "acting through its officers, agents, employés, and representatives in charge of its business," engaged in the acts of misuser charged against it in the information. It will thus be seen that the unlawful act charged is not against the officers, agents, employés, and representatives of the corporation, but against the corporation itself. There can be no doubt that a corporation may be proceeded against by quo warranto for a misuse or perversion of the franchise conferred upon it by the state, notwithstanding its officers and agents may at the same time be amenable to the criminal law for offense committed by them in the perversion of such franchise. If a corporation, through its servants and agents, may be guilty of such abuses of its franchise as will subject it to ouster by quo warranto, we can conceive of no reason why such servants and agents, if the acts and abuses committed by them be in violation of the criminal statutes, may not at the same time be prosecuted by indictment or information. The one is not a bar to the other proceeding. Nor are we prepared to give assent to the contention that the defendant corporation could not be held to answer for such wrongful acts until its agents, guilty of the criminal offense, be tried and convicted.

It is argued by defendant that forfeiture will not lie for an illegal act committed by a corporation. It is true that not for every illegal act will the charter of a corporation be forfeited; but the charter of the defendant is a contract with the state that it will use the franchises therein granted, that it will not misuse or pervert other franchises, and that it will not engage in the doing or carrying on of any business which is unlawful or immoral. But it is claimed for defendant that the only violation of law by it which would justify an action in quo warranto would be a violation "of the organic law," from which the corporation derived its existence. In support of this position, we are cited to the case of *Illinois Trust & Savings Bank v. Doud*, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481. It was held in that case that no corporation is required to exercise all the powers conferred upon it as a condition to the exercise of any of them, unless such requirement is expressly made in some statute under which it obtains some of its powers and privileges, or

its powers are inseparably connected with each other; and that it is only for the violation of an express provision of the law under which a corporation derives its powers and privileges, or for such a misuse or nonuse of the latter as results in a substantial failure to fulfill the design and purpose of its organization, that a forfeiture of its franchise will be decreed. And defendant contends that, as the statute under which it obtained its powers and privileges does not expressly require that it establish and maintain fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections, and improvements, and give or conduct on said grounds and race track public exhibitions of agricultural products and stock, a forfeiture of its charter should not be declared, unless the misuse or nonuse of its franchises results in a substantial failure to fulfill the design and purpose of its organization. It is expressly provided in the charter of the defendant that "the purposes for which this corporation is formed are to encourage and promote agriculture; * * * to establish and maintain suitable fair grounds and a race track in the city and county of St. Louis, with necessary buildings, erections and improvements, and to give or conduct on said grounds and race track public exhibitions of agricultural products and stock, and of speed, or races, between horses, for premiums, prizes or other awards, made up from fees or otherwise, and to charge the public for admission thereto and to said grounds and race track." It is alleged in the petition, and stands admitted by the demurrer, that defendant failed to comply with its charter in the respect indicated, and there is no escaping the conclusion that its nonuse of those franchises resulted in a substantial failure to fulfill the design and purpose of its organization, for which a forfeiture of all of its franchises should be decreed, unless such forfeiture has in some way been waived by the state. In *State v. New Orleans Gaslight & Banking Co.*, 2 Rob. (La.) 529, it is said: "It may be proper to state that it is now well settled that an act of incorporation may be forfeited for a misuse of the powers intrusted to it. It is a tacit condition of a grant of incorporation that the grantees shall act up to the end and design for which they were incorporated. If they do not, the rights and privileges granted may be withdrawn." 5 Thompson on Corp. § 6609; *Territt v. Taylor*, 9 Cranch. 43, 8 L. Ed. 650; *State ex rel. v. Lincoln Trust Co.*, 144 Mo. 562, 46 S. W. 593.

It is further contended by defendant that it was not the intention of the Legislature, upon any principle of rational construction, to make it a condition of the corporate life of racing associations that they should not only provide the funds for the state fair at Sedalla, but also, at the same time, conduct private fairs within their own local racing grounds; that this was not the intention of

the Legislature in the permissive grant, which was fully subverted by the money contributed to the state fair at Sedalia, and that it is only the nonuser of some business franchise which affects the public, which the courts would consider upon an information alleging such nonuser as a ground for forfeiture; that in the case at bar the public was more benefited by the contribution of money to the support of the fair at Sedalia, on behalf of the people of the entire state, and in exhibition of the products of the state there, than if a local exhibition of the products of St. Louis county had been given by the respondent corporation. In reply, we may be permitted to say that it is not our province to say that the public was in no way concerned about local exhibitions in St. Louis county of agricultural products and stock. At any rate, we are unwilling to declare that the public was not interested in such exhibitions. For many years such exhibitions have been held annually by corporations, all over the state, their object and purpose being the improvement of horticultural and agricultural products, as well as of stock, which would seem to indicate that the public is interested in such exhibitions, and that the public has been seriously injured by the non-user of this franchise. We are unable to concur in the position that this court will take judicial notice of the fact, even if true, that the defendant has every year created and paid over the fund for the making such exhibitions at the state fair at Sedalia, when in fact no such exhibitions have been held by defendant.

Defendant also contends that the acts of book-making, pool-selling, and the registration of bets, alleged to have been committed by defendant between January 18, 1901, and June 16, 1905, were lawful, because it was permitted by its charter to engage in such business, and it is not alleged in the information that it was not licensed to do these acts; another contention being that the acts charged against defendant in the registration of bets and the selling of pools to minors were in no wise improper, because it is not pleaded that defendant was a licensed book-maker. The argument with respect to that portion of the petition which relates to general acts of book-making, between January 18, 1901, and June 16, 1905, is that it does not show violation of the law, because non constat the defendant was a licensed book-maker. Section 7419, Rev. St. 1899. The state contends that defendant's charter should be forfeited for book-making and pool-selling between January 18, 1901, and June 16, 1905, because that provision of its charter which authorized it to engage in such acts was invalid, for the reason that it was not authorized by the organic law; but the laws of this state, and especially section 40, p. 8, Acts 1895, recites that "there is hereby appropriated out of the state treasury, chargeable to the 'state fair fund,' the sum of eight thousand seven hundred and

fifteen dollars, received into the state treasury during the years 1903 and 1904, from pool-selling and book-making," as provided by article 2, c. 105, Rev. St. Mo. 1899—thus recognizing the validity of the law from whence defendant derived its power to engage in book-making and pool-selling—and, the state having received and appropriated money from this source, it will not now be permitted to say that the law under which it was obtained was invalid and of no effect. It is alleged in the information, and admitted by the demurrer, that during the time indicated defendant sold pools to, and registered bets with, minors, which was a violation of law; it having no authority so to do. To make and sell pools and book bets to minors is expressly prohibited by statute, and any person doing so may be punished as for a misdemeanor. Section 2193, Rev. St. 1899. So that defendant was without authority from any source to sell pools to or register bets with minors, and in doing so it was exercising a power which it did not possess, the tendency of which was immoral and to encourage minors in dissipation and vicious habits. Defendant now contends that the portion of the petition which relates to such sales does not state violations of law, because it is not alleged that the respondent knew at the time that such persons were in fact minors. The statute is an absolute inhibition against selling pools or book bets to minors, and it was entirely unnecessary that the petition should allege that such sales were made to minors, knowing such persons to be minors. It was the defendant's duty to know when sales were made that they were not made in violation of law. The acts for which a forfeiture of defendant's charter is asked are acts done by the corporation through its officers, agents, employees, and representatives in charge of its business, and not any act done by unauthorized persons. A corporation can act only through its agents and servants, and it is responsible to the state for the acts of such agents and servants in the carrying on of the business of the corporation. *State ex inf. v. Fire Ins. Co.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363; *State ex inf. v. Armour Packing Co.*, 173 Mo. 356, 73 S. W. 645, 61 L. R. A. 464, 96 Am. St. Rep. 515.

A final contention is that the act of the Legislature of 1905, entitled "An act prohibiting book-making and pool-selling and prescribing a penalty thereto," approved March 21, 1905, is void because it violates section 28, art. 4, of the Constitution, in that it contains two subjects, the prohibition of book-making and of pool-selling, which are not germane, but incongruous and in discord with each other. The section referred to reads as follows: "No bill * * * shall contain more than one subject, which shall be clearly expressed in its title." Whatever may be the correct definitions of the terms "book-making" and "pool-selling," wherever

either is used, it is always understood to have reference to horse racing of some character, and the one is therefore germane to the other. When this is the case, the act is not unconstitutional. In *State ex rel. v. Miller*, 100 Mo. 445, 13 S. W. 678, it is said: "Its demands are that matters which are incongruous, disconnected, and without any natural relation to each other must not be joined in one bill, and the title must be a fair index of the subject-matter of the bill. A very strict and literal interpretation would lead to many separate acts relating to the same general subject, and thus produce an evil quite as great as the mischief intended to be remedied. Hence a liberal interpretation and application must be allowed. In *Ewing v. Hoblitzelle*, 85 Mo. 64, the following rule, taken from *Sedgwick*, was approved: 'Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and, if it is sufficiently expressed in the title, the statute is valid.'" In *State v. Morgan*, 112 Mo. 202, 20 S. W. 456, the court says: "All that the Constitution requires is that the subjects embraced in the act shall be fairly and naturally germane to that recited in the title. *State v. Bennett*, 102 Mo. 357, 14 S. W. 865, 10 L. R. A. 717. There can be no doubt but all the provisions of section 1561 are naturally related and germane to one subject. In an act to punish cheats, frauds, etc., naturally belongs a provision as to what shall be a sufficient statement of the offense in the indictment." The same rule has been announced in numerous decisions of this court since, and it may be regarded as well-settled law. Moreover, this court will not declare a law to be unconstitutional unless it be of the opinion that it is so beyond a reasonable doubt, and it holds no such opinion in this case.

Our conclusion is that the defendant's demurrer, as to the first ground, should be sustained, and, as to all the others, overruled; that leave be granted to defendant to plead over within 15 days; and, failing so to do, that judgment be entered ousting the defendant of all its franchises. All concur, except *BRACE, C. J.*, absent.

STATE *ex rel. McNAMEE et al. v. STOBIE*,
Justice of the Peace, et al.

(Supreme Court of Missouri. Feb. 26, 1906.)

1. CRIMINAL LAW—JUSTICES OF THE PEACE—WARRANTS—ISSUANCE—REQUISITES.

Rev. St. 1899, § 2750, provides that complaints subscribed and sworn to by any person to testify against the accused may be filed with any justice of the peace, and, if the justice is satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant,

and have the accused arrested and held until the prosecuting attorney shall have time to file an information. *Held* that, where a complaint was filed against members of the metropolitan police force of the city of St. Louis, having no place of permanent residence or property in the county, before a justice of St. Louis county for an act committed within such county, it was not necessary to the immediate issuance of a warrant for their arrest that the justice should be satisfied that they were about to escape.

2. SAME—DOCKET ENTRIES.

A justice of the peace is not required to execute any writing evidencing the necessity arising for the issuance of a warrant authorized by Rev. St. 1899, § 2750, either by entry in his docket, by indorsement on the warrant, or otherwise.

3. COURTS—JURISDICTION—DEFINITION.

Jurisdiction is authority to hear and determine a cause.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1.]

4. PROHIBITION—ACTS OF COURTS OR JUDGES—WANT OR EXCESS OF JURISDICTION.

In order to entitle a litigant to a writ of prohibition, it must appear that, in the proceeding sought to be prohibited, either the court or judge is assuming to exercise and apply judicial power not granted by law, or, in a proceeding properly within its jurisdiction, that the court assumes to apply judicial force in excess of its power and authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, §§ 37-56.]

5. SAME—DEFECTS IN PETITION OR COMPLAINT.

Where a court has jurisdiction of the class of cases to which the proceeding sought to be prohibited belongs, and acquires jurisdiction of the subject-matter, the mere fact that the petition or complaint by which the proceeding was inaugurated is defective is not ground for a writ of prohibition.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 38.]

6. SAME.

A writ of prohibition cannot be issued to supply the place of an appeal, writ of error, or certiorari.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, §§ 4-19.]

7. MUNICIPAL CORPORATIONS—CHARTERS—POLICE OFFICERS—POWERS.

The police system of the city of St. Louis being a subject of state legislation, and the General Assembly having created such system, as well as the offices connected with it, and having defined the powers and duties of the officers, it was not within the power of the framers of the scheme and charter of St. Louis to vest such officers with powers inconsistent with the general laws of the state creating such police system.

8. SAME—AUTHORITY OF POLICE OUTSIDE OF CITY—STATUTES.

Sess. Acts 1860-61, p. 446, created a police system for the city of St. Louis, section 5 (page 448) of which provided that the police board should at all times of the day and night, within the boundaries of the city of St. Louis, preserve the public peace, etc., and that any person whom they had reason to believe, "within the city," intended to commit any breach beyond the city limits, and any person charged with the commission of crime "in the city," and against whom criminal process shall have issued, might be arrested on the same in any part of the state by the police force created by such act. Acts 1867, p. 178, § 3, provided that the board of police commissioners of the city should appoint and equip a certain number of

policemen for duty in the outskirts and open portions of the city, and "elsewhere in the city and county of St. Louis." Thereafter, St. Louis city charter was enacted, section 14 of which declared that the metropolitan police of the city of St. Louis should have the same power and jurisdiction in the county of St. Louis as constituted by the scheme, "as now provided by law"; provided that certain policemen might be equipped for duty in the county (Rev. St. 1899, p. 2467). Thereafter the act of 1861, as amended by Acts 1867 and supplemental acts, was repealed by Acts 1899, p. 53, section 5 of which was substantially a reenactment of section 5 of the act of 1861, and authorized the police boards to appoint and equip policemen deemed necessary for duty in the parks, outskirts, and such other portions of the city as the board might deem necessary. *Held*, that members of the police force of the city of St. Louis had no jurisdiction to arrest offenders outside the city limits for offenses committed in St. Louis county.

9. PROHIBITION—GROUNDS.

Where members of the metropolitan police force of the city of St. Louis had no jurisdiction to arrest offenders outside the city for violating the gaming laws of the state, in St. Louis county, the fact that members of such police force, forcibly entering the grounds of a racing association in such county outside the city limits for the purpose of effecting such arrest, had authority to so act in their capacity as private citizens, was no ground for the issuance of a writ of prohibition prohibiting a justice of the peace from assuming jurisdiction of a prosecution of such policemen for forcibly entering the racing association's inclosure.

10. SAME—PURPOSE OF PROSECUTION.

Where certain policemen were arrested for forcibly entering the close of a racing association outside the limits of their jurisdiction, for the purpose of arresting certain gamblers, the fact that the criminal charge against such policemen was solely for the purpose of hindering, impeding, and obstructing them in the performance of their duty as policemen and as officers and citizens of the state, and to protect from arrest the persons engaged at the race track in violating the law, was no ground for the issuance of prohibition to restrain the further prosecution of the proceedings against such officers.

Marshall and Valliant, JJ., dissenting.

In Banc. Application for writ of prohibition, on relation of George T. McNamee and others, against Frank Stobie, justice of the peace of Central township, St. Louis county, and others. Writ denied.

This is an original proceeding in this court. It is a petition or application by relators addressed to this court asking for the issuance of a writ of prohibition. The petition was filed by the relators on July 28, 1905, and the grounds for relief and the particular relief sought are thus plainly stated:

"Come now the relators herein, George T. McNamee, Patrick McKenna, Con Meehan, Patrick Kirk, Henry Meyer, Sydney Sears, John Kavanaugh, John McCarthy, Timothy Danaher, George Williams, Thomas Kelly, Frank McKenna, Gratiot Cabbanne, R. L. Killian, Hugh McFarland, James Burke, George Greely, Charles Madsen, and James Hunt, and give the court to understand and be informed that said relators are now, and were at all times hereinafter mentioned, citi-

zens of the state of Missouri and residents of the city of St. Louis therein; that said relator George T. McNamee is now, and was at all of said times, a captain, the relator Patrick McKenna, a lieutenant, and each of the other relators a member of the metropolitan police force of the city of St. Louis, duly appointed, commissioned, and qualified as such, and are now officers of the state of Missouri; that respondent Frank Stobie was then, and still is, an acting justice of the peace of Central township of St. Louis county, in the state of Missouri, and Fred Lenz, constable of said township. Relators further give the court to understand and be informed:

"That Hon. Joseph W. Folk, Governor of the state of Missouri, by virtue of the authority vested in him by the Constitution and laws of the state of Missouri, on the 21st day of July, 1905, issued and delivered to Hon. A. C. Stewart, president of the board of police commissioners of said city of St. Louis, a communication in words and figures as follows, to wit: 'Office of the Governor, State of Missouri, City of Jefferson, July 21, 1905. Hon. A. C. Stewart, President Board of Police Commissioners, St. Louis, Mo.—Dear Sir: Information having come to me that a state of lawlessness exists in St. Louis county; that men backed by millions of wealth and political influence are openly committing felonies by registering bets on horse races; that dramshop keepers in flagrant defiance of the statutes keep their places open on Sunday; that men are openly held up and robbed in the orgies and the general debauchery following the violations of this law; that gamblers ply their trade uninterrupted and scoff at the authority of the state; that the laws of the state are nullified and the statutes of the state trampled in the dust, and the honor of the state assailed without interference or hindrance; and that the local officials either cannot or will not uphold the laws there: Whereas, such conditions cannot be tolerated in Missouri; and, whereas, it is the sworn duty of the executive to execute the laws of the state; and, whereas, the metropolitan police force of the city of St. Louis is by the scheme separating the city and county, which was voted upon by the people of the whole county in accordance with the Constitution, given the same jurisdiction in the county as in the city; and, whereas, the Governor, as the supreme conservator of the peace throughout the state, has the right to call on the metropolitan police force, as a part of the military arm of the state, to preserve peace and order and suppress outlawry: Now, therefore, in order to maintain the peace and dignity of the state and to preserve the majesty of the laws of the state, you are hereby directed to instruct the chief of police of the city of St. Louis to detail fifty officers or more for duty in St. Louis county, with orders to proceed, with all convenient speed, to Delmar race track in said county

of St. Louis, and there arrest any and all persons feloniously registering bets, and to seize and hold as evidence all money, papers, and paraphernalia connected with said felonies. When so arrested, the felons will be taken by the officers before some justice of the peace of the county and warrants sworn out for them, with the officers as witnesses, in the usual way. The arrests must continue from day to day so long as the felonies are committed. The officers should be further instructed to see that the dramshop laws and the gambling laws are observed, and to close all dramshops found to be open contrary to the statute in such cases made and provided, and to arrest all persons found to be violating such laws. These outlaws, when so arrested, will be turned over to the sheriff, and warrants sworn out for them before a justice of the peace, in manner and form above set out. Every arrest should be by the officer who himself sees the crime committed, and by no other. Very respectfully, Jos. W. Folk, Governor.'

"That thereupon the Hon. A. C. Stewart, president of said board of police commissioners, issued the following order to Hon. Mathew Kelly, chief of police of said city of St. Louis, under whose orders the relators were acting in all of the matters hereinafter mentioned: 'July 28rd, 1905. Hon. Mathew Kelly, Chief of Police, Four Courts, City—Sir: I herewith hand you a letter from the Governor of the state of Missouri concerning a state of lawlessness said to be existing in St. Louis county and requiring the aid of the police officers to suppress the same. Please give careful attention to the contents of the Governor's letter and comply therewith as promptly as possible. A. C. Stewart, President of Police Board.'

"That thereupon the Hon. Mathew Kelly, chief of police as aforesaid, ordered the relator George T. McNamee, as captain of said police force, to take with him the other relators herein and proceed to Delmar race track and there to carry out the orders contained in the communication from the Governor of the state of Missouri, as hereinbefore set out. The relators further give the court to understand and be informed that the 'Delmar Jockey Club' is a corporation duly created and organized under the laws of the state of Missouri, and was such at the times herein mentioned, and that said corporation was the owner at said times, and still is, of the said Delmar race track; that said race track is partly in the city of St. Louis; that the line between the city and county of St. Louis passes through said track; that said corporation by its articles of association declares that one of the purposes of the said Delmar Jockey Club is to own race tracks and grounds and to engage in pool-selling, book-making, and registering bets on the exhibition of speed and on races at said tracks and premises, and to let the right to others to do the same; that on the 16th day of June, 1905, the

said Delmar Jockey Club was permitted and suffering pools to be sold and bets to be registered upon its race track upon races to be run thereon, and has ever since continued so to do, in direct violation of the act of the General Assembly of this state, entitled 'An act prohibiting book-making and pool-selling and prescribing a penalty therefor,' approved March 21, 1905 [Laws 1905, p. 131]; that said book-making, pool-selling, and registering bets were done on that part of said race track located in St. Louis county, but that the race track and the inclosure thereof extended into the city of St. Louis; that many persons were in the habit of going from the city of St. Louis to the said Delmar race track for the purpose of, and were there engaging in, book-making and selling pools and registering bets upon the races being run upon said track, and were thereby committing felonies under the statutes of this state; that these facts were known to the relator George P. McNamee and the other relators herein.

"And the relators further give the court to understand and be informed that heretofore, to wit, on the 24th day of July, 1905, relators were informed, and had good reason to believe, and did believe, that divers persons were engaged on that part of said Delmar race track located in the county of St. Louis in book-making, and in recording and registering bets and in selling pools within the inclosure, booths, and buildings of said Delmar Jockey Club, said bets being registered and pools sold upon the results of the trial of speed and power of endurance of beasts, which was to take place upon said Delmar race track, and the selling of said pools and the registering of said bets then and there being carried on constituted a felony under the laws of this state; that said registering of bets and pool-selling were done in the presence of some of the relators herein, and the said George T. McNamee, the captain in charge of the policemen at said race track, was informed thereof and was notified that persons within said inclosure were then in the act of violating the criminal laws of the state, and that felonies were being committed within said inclosure; that thereupon he demanded admission into said inclosure for himself and the other relators herein, as officers and citizens of the state of Missouri, for the sole and only purpose of arresting and taking before the proper magistrate, to be disposed of according to law, such persons as might be engaged in the commission of said felonies therein, and that, upon such permission being denied, the relators, acting by and under the orders of the Governor of the state of Missouri hereinbefore set out, let down or unclasped the chain across the entrance of said race track in the county of St. Louis and the state aforesaid, and went into said inclosure, without injuring said property, and for the sole purpose of arresting the persons engaged therein in violating the criminal laws of the state, as they were

ordered and directed to do by the chief executive of said state; that thereafter, to wit, on the 24th day of July, 1905, respondent William Mathews filed an affidavit with the respondent Frank Stobie, as justice of the peace of Central township, in the county and state aforesaid, charging relators with throwing down and opening the gate at the entrance of said race track, and then and there undertook to attempt to institute, before said Stobie, as such justice of the peace, a criminal prosecution, as for a misdemeanor, against the relators and each of them for their action as policemen and officers of the state of Missouri in letting down said chain or unclasping the same in order to enter said inclosure to make the aforesaid arrests; that at the time said affidavit was filed and said criminal proceedings begun before said Stobie, justice of the peace as aforesaid, respondent well knew that said chain was thrown down or unclasped and said premises entered by the relators without injury to the property of the said Delmar Jockey Club, and in the manner and only for the purposes aforesaid; that the acts of the relators constituted no offense under the laws of this state, but, upon the contrary thereof, was done in the performance of their duty as officers and citizens; that said Frank Stobie, as such justice of the peace, had no jurisdiction to entertain or proceed with a criminal prosecution against relators based upon the facts above stated, and that it was in abuse of his judicial power so to do; that nevertheless the said respondent Stobie assumed jurisdiction of said criminal proceedings against the relators, and, although no information was filed with him by the prosecuting attorney of St. Louis County, and notwithstanding he had no reason to believe relators were likely to try to escape or to avoid prosecution, the said Stobie, a justice of the peace, immediately upon the filing of said affidavit, issued and delivered to respondent Lenz, as constable, a warrant, commanding him to arrest relators and each of them and to bring them before him forthwith to answer to the charge contained in said affidavit, and said proceedings are still pending before said Stobie, as justice of the peace, and respondents are threatening to have relators taken into custody under said warrant, and to force them to a trial before said justice.

"And the relators further give the court to understand and be informed that the only object and purpose of said pretended criminal charge before said justice of the peace against the relators, and the sole purpose of the prosecution thereof, are to hinder, impede, and obstruct the relators in the performance of their duty as policemen, and as officers and citizens of the state, and to protect from arrest persons engaged upon said Delmar race track in violating the said act of the General Assembly of the state of Missouri, approved March 21, 1905, to prohibit book-making and pool-selling and to prescribe a penalty therefor, and hereinbefore mentioned, and to

thwart and render of no avail the efforts of the Governor of the state to enforce said law and said proceeding against the relators is an abuse of the judicial power and jurisdiction of said justice of the peace; that it would be a great hardship and expense for all of the relators to suffer arrest upon said charge and appear before said justice and contest the case through the courts; and that, if said respondents are permitted to continue said prosecution, numerous other similar prosecutions are threatened and will be begun and carried on, to the great annoyance, worry, and cost of relators, and an unseemly conflict will arise between the subordinate judicial officers and the executive department of the government.

"Your relators therefore show to this honorable court that, in proceeding against them under the charge made in said affidavit filed with him by said Mathews as prosecutor, the said justice of the peace is acting in excess of his jurisdiction and authority and in grievous abuse of his official power, and in order to protect your relators against the hardships, injustice, and oppression involved in requiring them to defend said pretended criminal charge predicated upon their acts in enforcing the laws of the state, under the directions and by order of the Governor thereof, under the circumstances hereinbefore set forth, and pray that they may have a writ of prohibition directed to the said Frank Stobie, justice of the peace of St. Louis county, Mo., and to the respondents Mathews and Lenz, prohibiting them from taking further action in said proceedings against the relators and prohibiting said justice of the peace from taking further cognizance or jurisdiction thereof, and that this honorable court, in the exercise of its superintending control over the inferior tribunals of the state, prohibit said respondents from interfering with or obstructing the relators in the performance of their duties by said criminal proceedings, and that relators be granted all such relief as may be appropriate and necessary in the premises, to protect them against said unwarranted and illegal proceedings."

The facts as stated in the petition were duly verified by one of the relators, and on the 27th of July, 1905, a preliminary rule in prohibition was granted in vacation of the Supreme Court, returnable to the Supreme Court of Missouri in banc on Tuesday, October 10, 1905. Upon the return day of the writ the respondents interposed a demurrer to the petition of the relators. The grounds of the demurrer are thus stated:

"The respondents demur to the petition of the relators, for the reason that said petition does not state facts sufficient to constitute a cause of action in prohibition, in that: (1) The police force of the city of St. Louis were not given, by the scheme separating the city and county of St. Louis, the same jurisdiction in the county as in the city. (2) The police

force of the city of St. Louis are without jurisdiction in the county of St. Louis, except to enforce a warrant, or warrants for a person, or persons, charged with an offense or offenses committed in the city, a situation which is affirmatively shown to have not existed when the relators invaded the premises of the Delmar Jockey Club. (8) The Governor of Missouri has no right or authority to call on the police force of the city of St. Louis to preserve peace and order and to suppress outlawry in the county of St. Louis. (4) That, even if the Governor had such authority, the assertions of his proclamation to the president of the board of police commissioners set out in the petition, if true, did not constitute or show a state of either lawlessness or outlawry in St. Louis county. (5) That there is no law of Missouri which prohibits the registration of bets upon horse races; the act of the General Assembly entitled 'An act to prohibit book-making and pool-selling, and prescribing a penalty therefor,' approved March 21, 1905, having been enacted in violation of section 28 of article 4 of the Constitution, in that it contains more than one subject, to wit, book-making and pool-selling which are not germane, or akin in character. (6) That the petition affirmatively shows that the relators were guilty of a trespass upon the property of the Delmar Jockey Club, in that they forced an entrance upon the premises of said jockey club, merely to carry out an order or proclamation issued by the Governor of the state, which was without legal force or effect, which conferred no authority upon any of the relators, and which was merely a bombastic effusion recognizable as a warrant for official action under no rule of conduct known to the law. (7) That so far from the respondents, and especially the respondents who are positively a justice of the peace and a constable, being without jurisdiction in the premises, the petition affirmatively shows that each was clearly within the law, that the justice was not usurping judicial power, and that there is no principle of law to which the writ of prohibition can be made applicable in the premises, or upon the facts. (8) That the petition affirmatively shows that the relators were and are possessed of a full and adequate remedy; that the case sought to be made is at best merely one of error which could, or can, be corrected on appeal or writ of error; that, the relators not being residents of the county, as their petition shows, the justice was required by the statute to immediately issue his warrant upon sworn information being made of the commission by them of a criminal offense; that the respondent, who is constable, was in duty bound to execute the writ issued to him by the justice; and that to prohibit the procedure begun, as shown by the petition, is not to prevent an unseemly conflict between subordinate judicial officers and the executive department of the state, but to involve the

administration of the laws in utter confusion, to try by the writ matters cognizable only by the officers designated by the laws, and determine upon prohibition an issue triable only as provided by the statute, there being no room for confusion except in the imagination of the relators, and no conflict except as provided, without warrant of law, by the unprecedented tirade of the executive. Wherefore respondents pray judgment," etc. Upon October 27, 1905, relators, in proper form, filed their motion for judgment upon the pleadings, and this cause was submitted to the court upon the record as herein indicated, and is now before us for consideration.

The Attorney General and W. M. Williams, for relator. Chester H. Krum, H. S. Priest, and Bond & Bond, for respondent.

FOX, J. (after stating the facts). It is manifest from the record in this cause that we are confronted with but one question; that is, upon the facts stated in the petition of relators, are they entitled to the relief sought, and is this court warranted in affording such relief by the issuance of its extraordinary writ of prohibition, as prayed for in the petition?

At the very inception of the consideration of the sufficiency of the allegations in the petition as a basis for the issuance of the writ prayed for, it is well to first ascertain the grounds urged by relators upon which this court can safely predicate its action, should their request for the writ be granted. Learned counsel for relators frankly state that the principles upon which the judgment must ultimately rest are few and simple, and concede and say, in the brief now before us, that: "The subordination of the military to the civil power is not involved. The record does not demand a consideration of the circumstances under which the militia may be properly used to suppress riots, insurrections, or lawlessness." Nor is it urged, either in the oral argument or brief of counsel, as a basis upon which to predicate the issuance of the writ of prohibition prayed for in this cause, that the relators (who were police officers) were in St. Louis county at the place designated in the petition, as a part of the military arm of the state, for the purpose of executing the law, as contemplated by article 5, § 6 of the Constitution of this state. This eliminates those questions from the discussion of this cause, and our attention must be directed to those principles so ably presented by counsel for relators, which must ultimately form the basis of the conclusions reached in this proceeding. Little is said in the petition as to the nature of the charge before the justice of the peace, against the relators. It is alleged that "on the 24th day of July, 1905, respondent William Mathews filed an affidavit with the respondent Frank Stobie, as justice of Central township, in the county and state

aforesaid, charging relators with throwing down and opening the gate at the entrance of said race track, and then and there undertook and attempted to institute, before said Stoble as such justice of the peace, a criminal prosecution, as for a misdemeanor, against the relators and each of them, for their action as policemen and officers of the state of Missouri in letting down said chain or unclasping the same in order to enter said inclosure to make the aforesaid arrests." We do not find a copy of the affidavit of Mathews with the petition, nor has our attention been called to the fact that such copy accompanies the pleadings. It would be much more satisfactory, and more in harmony with the usual and ordinary practice in applications of this character, where this court is requested to issue its extraordinary process, prohibiting a judicial tribunal from further acting or proceeding, either in a criminal or civil proceeding, to accompany the petition with a copy of the files and process issued, which furnish the basis of the assumption of jurisdiction. In the absence of a copy of the complaint of William Mathews, filed with the justice of the peace, which was the basis of the action of the justice in issuing his warrant for the arrest of the relators, the complaint of Mathews must be treated as a complaint against the relators in a criminal prosecution, under the provisions of the laws of this state, of which complaint the justice had jurisdiction. The complaint of Mathews being filed, the justice assumed jurisdiction and issued his warrant, under the provisions of section 2750, Rev. St. 1899, in which it is provided: "That complaints subscribed and sworn to by any person competent to testify against the accused may be filed with any justice of the peace, and if the justice be satisfied that the accused is about to escape, or has no known place or permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information."

It is insisted by relators that, the justice of the peace having "no reason to believe that the relators were likely to try to escape or avoid prosecution," there was no lawful authority or jurisdiction to issue a warrant for the arrest of relators based upon such complaint. The petition of the relators shows upon its face that they were members of the metropolitan police force of the city of St. Louis, and therefore presumptively, at least, not residents of St. Louis county, either temporarily or permanently. It is not essential to the issuance of a warrant by the justice that he should be satisfied that the accused is about to escape and avoid arrest, but, under the second subdivision of the proviso of section 2750, supra, if the relators had no known place of permanent residence or property in the county, this furnished authority equally as satisfactory and clearly as legal

as that under the first subdivision, where the justice must be satisfied that the accused was about to escape. The filing of the complaint by Mathews with the justice of the peace gave the justice jurisdiction of the subject-matter. The petition in this cause nowhere alleged that the relators were the owners of property in the county, or residents thereof, but expressly avers that they were members of the metropolitan police force of the city of St. Louis, which presumably, at least, locates their residence in the city of St. Louis, fully authorized the justice to issue the warrant. The justice of the peace having obtained jurisdiction of the subject-matter, by the filing of the complaint by Mathews, and reasons provided by the statute authorizing the issuance of the warrant being disclosed in the petition, renders it unnecessary to express an opinion as to whether or not this court would be warranted in issuing its extraordinary writ (the justice having acquired jurisdiction of the subject-matter) prohibiting the prosecution of a criminal proceeding begun in pursuance of the provisions of section 2750, on the ground alone that the justice had prematurely issued his warrant, without being satisfied that the accused was about to escape or had no permanent residence or property in the county. We confess it would be a novel proceeding to ascertain the fact that the justice was satisfied or not satisfied with the requisite conditions of the statute, which would authorize him to issue his warrant. Who is to determine when the justice is satisfied? The statute says, "if the justice be satisfied," and if the authority to issue the warrant must be settled by a court, it might be confronted with the proposition that the justice would declare that he was the one, under the express provisions of the statute, to be satisfied, and the court might say to the justice, "You are not satisfied, and had no authority to issue the warrant."

Our attention is directed by counsel for relators to the case of McCaskey v. Garrett, 91 Mo. App. 354. It will be observed, in that case, that the underlying principles which authorize this court to issue its writ of prohibition were not involved, and not even discussed. It was an action for malicious prosecution. The basis of the action was that the defendant had filed a complaint with a justice of the peace charging the plaintiff with a criminal offense, a warrant was issued upon that complaint, nothing further was done, and the plaintiff was discharged. The justice of the peace testified and stated substantially that he had no reason for issuing the warrant, except that the defendant told him that the prosecuting attorney desired it issued. It was ruled in that case that, under the evidence, it was not a case for malicious prosecution without probable cause, but rather one of false imprisonment. It was also held, under the evidence as given by the justice, that the warrant was illegally issued, and finally the court, in conclusion,

discussing the provisions of section 2750, said: "This is a wise and mandatory provision of the law, and in our opinion the necessity arising for the issuing of a warrant for the arrest of a defendant before the filing of the information by the prosecuting attorney ought to be evidenced either by an entry on the justice's docket, or by indorsement on the writ, or by some other writing equally efficacious." It is unnecessary, with the disclosure of the petition in hand, to either express our assent or dissent from the views announced in that case, as to the provisions of section 2750 being mandatory; but will say, if the court means by what it said that the warrant would be illegal, unless the satisfaction to the mind of the justice of the necessity arising for the issuance of the warrant is "evidenced either by an entry on the justice's docket or by indorsement on the writ or by some other writing equally efficacious," we cannot assent to it. The office of justice of the peace is purely a creation of the statute, and the incumbent of such office is only authorized to perform those duties provided by it, and is not required to do anything in respect to the discharge of his duties as such justice, except such as are provided by law. A justice of the peace is not required to make any entry in his docket evidencing the necessity arising for the issuance of the warrant under the provisions of the section heretofore referred to, nor is he required to indorse such evidence upon the writ or to execute any writing evidencing such fact. It follows logically, if the statute does not require those things to be done, that the doing of them, upon an investigation as to the existence of the necessity provided for the issuing of the warrant, would not constitute evidence of the existence of such necessity.

By this proceeding it is sought to prohibit the justice of the peace and the constable to whom the warrant was addressed by the justice, and the complainant, William Mathews, from further proceeding with the criminal charge inaugurated by complainant, and to prevent them from taking any further action in respect to such proceeding. The insistence of relators is so earnest that the preliminary rule issued in this cause should be made absolute, and the questions involved are so ably presented by counsel representing them that it necessitates a brief review of the subject of the writ of prohibition, the office it performs, and the principles upon which it may justly be invoked. This subject has frequently been in judgment before this court, and the announcement of the rules and principles applicable to the issuance of this extraordinary writ have been uniform and harmonious from the case of *Wilson v. Berkstresser et al.*, 45 Mo. 233, down to the recent case of *State ex rel. v. Sale*, 188 Mo. 498, 87 S. W. 967. As the subject now under review deals principally with the question of jurisdiction, it is well to first inquire

what is meant by the term "jurisdiction." In *Am. & Eng. Ency. of Laws* (2d Ed.) vol. 17, 1041, it is said: "Of the various definitions of jurisdiction, perhaps the most satisfactory is as follows: Jurisdiction is authority to hear and determine a cause. Since jurisdiction is the power to hear and determine, it does not, as will be pointed out later, depend either upon the regularity of the exercise of that power or upon the rightfulness of the decisions made."

In *State ex rel. v. Withrow*, 108 Mo. 1, 18 S. W. 41, the writ of prohibition was denied. Gantt, J., speaking for this court, after fully reviewing the proposition involved in that case, correctly and very tersely thus defined jurisdiction: "It is this very right to hear, determine, and decide, whether rightfully or wrongfully, that we denominate jurisdiction." In *Wilson v. Berkstresser et al.*, supra, it was ruled: "If the court, whose action is complained of, acts within its jurisdiction, but simply commits an error, the writ will not lie. It is not to be confounded with a writ of error or of certiorari, and must not be permitted to take their place." In *State ex rel. v. Southern Ry. Co.*, 100 Mo. 59, 13 S. W. 398, Barclay, J., speaking for this court in discussing the subject of a writ of prohibition, thus stated the law: "Whether the particular facts on which the court proceeds are, or are not, sufficient to justify its exercise of jurisdiction, is a question of law, the solution of which either way cannot impair the court's right to apply its judicial power in the premises according to its view of the law and of the facts before it. For instance, where a court has jurisdiction to render judgments, in ordinary civil causes, it would be manifestly improper to issue a writ of prohibition against it on an application alleging that it was about to pronounce such a judgment on a petition which did not state a cause of action, but which the trial court had held sufficient, or because the latter had ruled erroneously that the plaintiff had a legal capacity to maintain the action. A mistaken exercise of a jurisdiction with which the court is, by law, invested does not furnish a sufficient basis for prohibition. Such mistake may be reviewed as other errors; For example, by appeal, but not by a proceeding like this"—Citing *Mastin v. Sloan*, 98 Mo. 252, 11 S. W. 558. In *State ex rel. v. Scarritt*, 128 Mo. 331, 30 S. W. 1026, it was again announced by this court: "The writ of prohibition may be invoked to check the use of judicial power when sought to be exerted beyond the lines which the law has marked as the limits for the operation of the power. It may be applied to prevent action by a court in excess of its legitimate authority in a proceeding whose subject-matter falls within the general cognizance of the court, as well as to stay an assumption of power over causes which by their nature are not confided by the law to the court's considera-

tion. But it should not be issued merely to correct some judicial error in ruling on a subject committed to the judgment of the court against which the writ is sought. Still less may it be applied to anticipate a ruling upon a question properly within the authority of the court to decide. The writ cannot rightly be employed to compel a judicial officer, having full jurisdiction over the parties and a cause, to steer his official course by the judgment of some other judge, or to substitute the opinion of another court for his own dealing with topics committed by the law to his decision"—citing *In re N. Y., etc., Steamship Co.* (1895) 155 U. S. 523, 15 Sup. Ct. 183, 39 L. Ed. 246. In that same case the distinction between want of jurisdiction, and the mere omission to state a cause of action in the case where jurisdiction exists, was plainly marked, and it was finally ruled that the remedy of prohibition cannot be called into play, where the court has jurisdiction, merely on the ground that the complaint or petition is defective, even in some substantial particular.

In *State ex rel. v. Elkin*, 130 Mo. 90, 30 S. W. 833, 31 S. W. 1037, this court, in defining the proposition and office of the writ of prohibition, announced the rule thus: "The writ of prohibition is applicable whenever judicial functions are assumed which do not rightfully belong to the person or court assuming to exercise those functions. The writ is as available to keep a court within the limits of its power in a particular proceeding as it is to prevent the exercise of jurisdiction over a cause not given by the law to its consideration." And in that same case it was clearly pointed out that the cases to which the writ of prohibition was specially designed to reach were those in which the court assumed authority to pass judgment upon a subject not committed by law to the decision of the tribunal so assuming to act. In *Railway Co. v. Wear*, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341, the court, in announcing the rule applicable to the subject now in hand, used this language: "Where a court or judge assumes to exercise a judicial power not granted by law, it matters not (so far as concerns the right of prohibition) whether the exhibition of power occurs in a case which the court is not authorized to entertain at all, or is merely an excessive or unauthorized application of judicial force in a cause otherwise properly cognizable by the court or judge in question. *State ex rel. v. Walls* (1892) 118 Mo. 42, 20 S. W. 833; *In re Holmes* (1894) 1 Q. B. (1895) 174. Prohibition, however, will not ordinarily be granted where the usual modes of review by appeal or writ of error furnish an adequate and efficient remedy for the correction of an injury resulting from the unauthorized exercise of judicial power." In *State ex rel. v. Zachritz*, 186 Mo. 307, 65 S. W. 999, this court was asked to interpose its writ of prohibition. The proceeding sought to be prohib-

ited was one instituted by the Attorney General in the nature of an equitable action to cancel certain licenses issued to relators, and in the meantime restrain it from operating its business under such licenses. The writ was denied, and one of the principal questions involved was as to the right of the Attorney General to maintain the action. Brace, J., speaking for this court, after reviewing all the authorities pertinent to the propositions involved, said: "Moreover, whether the state can maintain the action is a question to be raised and determined in the court where the case is pending. It does not go to the power or jurisdiction of the court, and its decision here could not furnish a basis for prohibition." In support of this clear and terse announcement of the law as applicable to that case, nearly all of the cases heretofore referred to, announcing the rules in respect to the issuance of writs of prohibition, were cited approvingly.

The law upon this subject is nowhere better or more clearly stated than in the case of *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452. Marshall, J., in discussing the question of jurisdiction involved in that proceeding, after an exhaustive review of the subject before him, thus announced his conclusion upon the subject of jurisdiction. He said: "The matter, therefore, compresses itself into the question whether or not a basic subject-matter, over which a court of equity has jurisdiction, was presented to the circuit court for adjudication by the injunction suit; that is, whether a matter was presented which that court has power to deal with, and not whether such a matter was inartificially or defectively presented. In other words, the question is one of jurisdiction and not of pleading, for, if the court had jurisdiction over the subject-matter, it had the power to decide whether the pleadings were or were not properly drawn, and also to decide whether or not the plaintiff was entitled to the relief sought. If a court has the power to act, its jurisdiction is in no wise impaired by the consideration whether it acted in accordance with the law or erroneously. Given the jurisdiction, all else is a mere matter of error, to be corrected on appeal. Or, further illustrated, if the court has jurisdiction over the subject-matter, it has the power to decide whether the petition does or does not state a cause of action, and the mere failure of a petition to state a cause of action, or the defective statement of a good cause of action, in no way affects the jurisdiction of the court"—Citing *State ex rel. v. Scarritt*, 128 Mo., loc. cit. 339, 340, 30 S. W. 1028.

Counsel for relators particularly direct our attention to the recent case of *State ex rel. v. Sale*, 188 Mo. 493, 87 S. W. 967, and *State ex rel. v. Eby*, 170 Mo. 497, 71 S. W. 52. These cases in no way conflict with those heretofore cited, nor do they announce any

different rule as applicable to this subject; but, on the other hand, they follow the unbroken line of expression by this court repeatedly and uniformly announcing the law upon this subject. In the Sale Case the proceeding sought to be prohibited was one to disbar an attorney at law of the city of St. Louis. As was said by the court in that case, the petition in that disbarment proceeding was not addressed to the general jurisdiction over attorneys at law practicing at the bar, but was founded on a particular statute without which the court has no authority to take the particular action therein prescribed, within which alone it cannot render the particular judgment therein directed. Hence it was held that while the court had general jurisdiction over attorneys at law practicing at its bar, yet, this being a proceeding under a particular statute in pursuance of which it could only render a particular judgment and finding from the disclosures in the petition, the court had no authority to render that particular judgment, the extraordinary writ of prohibition was properly awarded. Valliant, J., in speaking for the court upon the question of jurisdiction, correctly and clearly announces the principles applicable to the extraordinary writ of prohibition. He said: "The fact that it would be error for the court to render a certain judgment, which the relator fears it is about to render, is not in itself a sufficient reason for the issuance of such a writ. The presumption is that the court will not render a wrong judgment in a case of which it has jurisdiction, and that it will not render any judgment at all except a judgment of dismissal in a case of which it has no jurisdiction. Ordinarily, therefore, even when the petition in the circuit court states no case within its jurisdiction, until the court takes some action indicating a purpose to entertain jurisdiction, a writ of prohibition will not issue, because the assumption must be indulged that, when the case comes up for action, the circuit court will dispose of it on the ground that it has no jurisdiction. And it is not every case in which the court erroneously decides that it has jurisdiction that calls for a writ of prohibition. The writ of prohibition, in spite of the frequent use to which it has in late years been put, is still an extraordinary writ, and issues only when sound judicial discretion commends it. In that view it is not a writ of right. On the other hand, whilst the main office of the writ is to keep the court to which it is addressed within the bounds of its jurisdiction, yet, in the exercise of the discretion above referred to, the writ is sometimes used to keep a court from doing what it has no lawful authority to do in a case the general nature of which is within its jurisdiction." The same may be said of the Eby Case. In that case the prosecuting attorney filed 1206 informations against the

relator charging violation of the act approved May 14, 1899, creating the office of inspector of beer and malt liquors of the state and providing for the inspection of beer and malt manufactured and sold in this state. Subsequent to a decision by this court holding said beer inspection act valid, there was an act of the General Assembly, approved on April 15, 1901, authorizing the compromise and settlement of all demands for inspection fees for the state, arising prior to March 19, 1901, under the act approved May 14, 1899. Sherwood, J., speaking for the court upon the questions presented in that case, said: "The 'Beer Compromise Act,' being an act of general amnesty, enacted by the Legislature in favor of the class to which relators belong, there was no manner of necessity for relators to plead it in bar of the prosecution in the lower court, since they could not have waived it if they would. And that act being a public law, the respondent judge was bound to take notice of it, and could not ignore it if he would. And yet, notwithstanding the contract made by relators with the state, in pursuance of an express law enacted for the purpose, notwithstanding a solemn contract made, a consideration paid and accepted, and legislative amnesty granted, the respondent judge places himself on this record as intending to try relators on the very charges which the act, on compliance with its terms, says shall be barred. We do not hesitate to say that such intended course of conduct is indubitably beyond the jurisdiction of the trial court, and such fact is made apparent on the face of this proceeding." It is clear that the conclusions announced in the Eby Case in no way invade the underlying principles applicable to the issuance of the writ of prohibition as has been so clearly and uniformly announced by this court in the cases herein cited.

From these cases may be deduced the following principles and rules applicable to the issuance of writs of prohibition: (1) To authorize a party litigant to invoke the aid of a writ of prohibition, it must appear that, in the proceeding sought to be prohibited, either the court or judge in such proceeding was assuming to exercise and apply judicial power not granted by law, or in a proceeding properly within its jurisdiction the court assumes to apply judicial force in excess of its power and authority so to do; (2) that if the court has jurisdiction of the class of cases to which the proceeding sought to be prohibited belongs, and acquires jurisdiction of the subject-matter, the mere fact of defects in the petition or complaint, by which the proceeding was inaugurated, will not authorize the issuance of a writ of prohibition. (3) That the courts will not permit writs of prohibition to usurp the place of appeals, writs of error, or certiorari. It is clear, applying these principles to this proceeding,

that, unless the remaining grounds urged by relators authorize it, they are not entitled to invoke the aid of this extraordinary writ.

This leads us to the consideration of the remaining propositions involved in this proceeding. The vital questions upon which the insistence of relators are predicated, that the preliminary rule in this cause should be made absolute, may thus be briefly stated: (1) That the relators were members of the metropolitan police force of the city of St. Louis, and as such, at the time the unlawful acts are alleged to have been committed by relator, they had the same power in the county of St. Louis as they were authorized to exercise in the city, and therefore vested with authority to make arrests for the commission of criminal offenses in the said county of St. Louis, and that the acts charged to have been done were in pursuance of the discharge of their duties as police officers and within their proper jurisdiction. Hence they were violating no law, and the preliminary rule should be made absolute upon this ground. (2) If they were not authorized to make the arrests in St. Louis county, and do the acts with which they were charged in the complaint in the proceeding before the justice of the peace, as police officers, then they were authorized, under the facts disclosed by the petition, to do such acts as private citizens. (3) That the allegations in the petition are admitted by the interposition of the demurrer filed in this cause, and that it being alleged in the petition that "the only object and purpose of said pretended criminal charge before said justice of the peace against the relators, and the sole purpose of the prosecution thereof, are to hinder, impede, and postpone relators in the performance of their duties as policemen and as officers and citizens of the state, and to protect from arrest persons engaged on said Delmar race track in violating the said act of the General Assembly of the state of Missouri, approved March 21, 1905," is sufficient to warrant this court in issuing its extraordinary writ.

Upon the first proposition, relators contend that, under the proviso of section 14 of the scheme and charter (Rev. St. 1899, p. 2467) adopted in pursuance of the Constitution of 1875 (section 20, art. 9), the metropolitan police of the city of St. Louis were vested with the same power and authority in the county of St. Louis as they were in the city, and that this power so vested is now in force under the laws of this state. After a careful consideration of this proposition, we are unable to give our assent to this contention. Section 14 of the scheme and charter above referred to, after stating that the costs of maintaining the metropolitan police shall be paid by the city of St. Louis, contains this proviso: "Provided, however, that the metropolitan police of the city of St. Louis shall have the same power and jurisdiction in the

county of St. Louis, as constituted by this scheme, as now provided by law: Provided, that upon a petition of the county court of St. Louis county, the board of police commissioners shall appoint and equip not more than twenty policemen, as provided in the act of March 13, 1867, for duty in said county. The cost of equipping and maintaining said police shall be paid by the county as herein established." It is manifest that section 20, art. 9, of the Constitution of 1875, as applicable to the subject of the scheme and charter of the city of St. Louis and St. Louis county, simply contemplated the vesting of power in the people to elect the freeholders to propose a scheme for the enlargement and definition of the boundaries of the city, the reorganization of the government of the county, the adjustment of the relations between the city thus enlarged, and residue of St. Louis county; in other words, the separation of the government of St. Louis city, and county and making them distinct and separate municipalities. The powers of the freeholders elected in pursuance of the provisions of the Constitution were simply to perform the duties and propose a scheme in harmony with the Constitution and laws of this state, accomplishing the work as contemplated by the Constitution which vested them with such power. It is clear that numerous sections of the scheme and charter proposed by the freeholders, contemplated by the Constitution, which were in harmony with the Constitution and laws of this state, were operative and valid, and remained so as long as they were not in conflict with any of the general laws or the Constitution of this state. On the other hand, it is equally clear that, if subsequent to the adoption of such scheme and charter there should arise a conflict between its provisions and any general law subsequently enacted by the General Assembly or the Constitution of the state, the provisions of the scheme and charter so in conflict would become inoperative and of no force or validity. In other words, if there is a conflict between the scheme and charter and the general law or the Constitution, the provisions of the scheme and charter must give way to the provisions of the law and Constitution of this state.

The metropolitan police system now in force, applicable to the city of St. Louis, is a creature of the statute. By an act of the General Assembly approved March 27, 1861 (Laws 1860-61, p. 446), the present system was inaugurated. This act created a board of police commissioners and expressly defined their powers. This act was amended by the General Assembly at its session in 1867, by an act approved March 13, 1867 (Laws 1867, p. 178). The General Assembly, in 1899, by an act approved March 15, 1899 (Laws 1899, p. 51), while continuing in force many of the provisions of the act of 1861 and acts supplementary thereto, substitutes an entirely

new act, and provides by the first section: "That an act entitled 'An act creating a board of police commissioners and authorizing the appointment of a police force for the city of St. Louis,' approved March 27th, 1861, and all acts supplementary to and amendatory thereof be and the same are hereby repealed." This act expressly defines the duties and powers of the board of police commissioners created by it. The validity of this act was assailed in *State ex rel. v. Mason*, 153 Mo. 23, 54 S. W. 524. Responding to that assault made upon this act, this court, speaking through Gantt, J., said: "The fundamental principles underlying the acts of 1861 and 1890, creating boards of police commissioners for the city of St. Louis, are the same, and the constitutionality of such legislation has stood the test of the most critical judicial examination and review. Laws like these, and those of other states providing a metropolitan police system for large cities, are based upon the elementary proposition that the protection of life, liberty, and property, and the preservation of the public peace and order in every part, division, and subdivision of the state, is a governmental duty which devolves upon the state, and not upon its municipalities any farther than the state in its sovereignty may see fit to impose upon or delegate it to the municipalities." As was said in that case, the duty of providing a metropolitan police system for large cities for the protection of life, liberty, and property, and the preservation of the public peace and order in every part, division, and subdivision of the state, is imposed upon the state, and not upon its municipalities, any farther than the state in its sovereignty may see fit to impose upon or delegate it to the municipalities. Hence to ascertain the duties and powers of the officers created under this police system, applicable to the city of St. Louis, created by the state, through its General Assembly, we must look to the original source of such system, where the powers and duties of those who are commanded by the law to put it in operation are expressly defined.

The police system of the city of St. Louis being a subject of state legislation, and the General Assembly having created such system as well as the officers connected with it, and having expressly defined the powers and duties of the officers, it was not within the power of the framers of the scheme and charter, contemplated by the Constitution, to vest such officers with powers inconsistent with, and not in harmony with, the general laws of the state creating such police system. The provisions of section 5, p. 448, Sess. Acts 1860-61, so far as they are applicable to the proposition now in hand, provides that "The duties of the board of police hereby created shall be as follows: They shall at all times of the day and night within the boundaries of the city of St. Louis, as well on water as on land, preserve the public peace, prevent crime, and arrest offenders.

* * * In case they shall have reason to believe that any person within said city intends to commit any breach of the peace, or violation of law or order beyond the city limits, any person charged with the commission of crime in the city of St. Louis, and against whom criminal process shall have issued, may be arrested upon the same in any part of this state by the police force created or authorized by this act." It is apparent that these provisions limit the duty to arrest offenders as well as the power to do so. In the first instance, they are limited in arresting offenders to the boundaries of the city of St. Louis. Secondly, it is pointed out under what circumstances they may arrest persons within the city, where there is reason to believe that such persons found within the city intend to commit any breach of the peace or violation of law or order, beyond the city limits. Thirdly, where the offense is committed in the city of St. Louis, and criminal process has issued against such offender, the arrest may be made upon such process by the police force of such city in any part of the state. Under the provisions of the scheme and charter proposed by the 18 freeholders, by section 2, it is provided: "The city of St. Louis, as described in the preceding section, and the residue of St. Louis county, as said county is now constituted by law, are hereby declared to be distinct and separate municipalities." Confronted with these provisions, it will certainly not be seriously urged that, under the provisions of the act of 1861, the police officers of the city of St. Louis were authorized to make arrests in St. Louis county for offenses committed in that county, or to perform any other duty in their official capacity in said county, not expressly authorized by the act which created the offices, and expressly defined the duties of the incumbents thereof. The express provision in the act defining the duties of the officers must be treated as excluding any authority to perform other functions not embraced in the act. In substance, the statute expressly providing the duties to be performed by the officers, under the law inaugurating the police system in the city of St. Louis, was a command of the lawmaking power to the officers. "This law created the offices you are filling and you must confine yourselves to the performance of the duties expressly designated by it." We can conceive of no case where the familiar maxim, "*Expressio unius, exclusio alterius*," can be more appropriately applied.

The act of 1861 was amended by an act of March 13, 1867, and section 3 of that amendatory act, in reference to the board of police commissioners of the city of St. Louis, provides that "the board, whenever and for so long a time as may be necessary, is further authorized to appoint, mount and equip not more than twenty policemen for duty in the outskirts and open portions of the city and elsewhere in the city and county

of St. Louis." The act of 1861, and the amendatory act of 1867, were in force at the date of the adoption of the scheme and charter by which the county of St. Louis and the city of St. Louis were separated and declared to be separate and independent municipalities. The provisions of section 14 of said scheme and charter, which learned counsel for relators insist is still in force, was simply an effort on the part of the framers of the scheme and charter to harmonize the provisions of the scheme and charter with the existing provisions of the law. This is clearly indicated by the terms employed in the section where it is provided "that the metropolitan police of the city of St. Louis shall have the same power and jurisdiction in the county of St. Louis as constituted by this scheme, as now provided by law." Then follows the provision referring to section 3 of the amendatory act of 1867. It is apparent, from the very terms of section 14, that the framers of the scheme and charter realized that they had nothing to do with the creation of the metropolitan police system of the city of St. Louis, and that, the duties and powers of the officers, provided for by the law creating the system, having been expressly defined by an act of the General Assembly, they were without authority to prescribe the duties and powers of such officers, unless such authority had some existing law upon which to predicate it. It was never contemplated by section 14 of the scheme and charter that the provisions of said section applicable to the provisions of the officers of the St. Louis police should continue in force regardless of the fact that the law which conferred such powers should be repealed, leaving no basis upon which the provisions of said section could stand. The lawmaking power of the state created this system of police for the city of St. Louis, and having defined the duties and the powers of the officers of such system, the right to perform other duties and exercise additional power outside of the limits of the territory for which the system was created, must be predicated, not upon a mere provision of a Scheme and Charter of a municipality, but upon expressions from the source from which the Metropolitan Police system was brought into existence. The correctness of this conclusion is emphasized, and the intention of the Legislature clearly indicated, by the emphatic terms employed in section 1 of the original act of 1861, in which it is stated that "no ordinance heretofore passed, or that may hereafter be passed by the common council of St. Louis shall in any manner conflict or interfere with the powers or the exercise of the powers of the board of police commissioners of the city of St. Louis, as hereinafter created, nor shall the said city or any officer or agent of the corporation of said city or the mayor thereof in any manner impede, obstruct, hinder, or interfere with

the said board of police or any officer, or agent, or servant thereof or thereunder."

The act of 1861, as well as the amendatory act of 1867, and all other supplementary acts, were repealed by the act of 1899, heretofore referred to. This left the provisions of section 14 of the scheme and charter, so far as it was applicable to the exercise of jurisdiction by the officers of the metropolitan police of the city, without any foundation upon which to stand, unless it can be found in some of the provisions of the act of 1899. Section 5 of the act of 1899 (Acts 1899, p. 53) is substantially a re-enactment of section 5 of the original act of 1861, embracing the same limitations, and exceptions to such limitations, as are contained in the act of 1861. The purpose and intent of the Legislature, in the act of 1899, is most clearly disclosed in the provisions of section 18, p. 59, Acts 1899. It provides: "The boards, whenever and for so long a time as may be necessary, is (are) authorized, out of the force hereinbefore provided for, to appoint, mount and equip as many policemen as they may deem necessary for duty in the parks, outskirts and such other portions of the said cities as the board may deem necessary." It will be observed that this section covers substantially the same subject as was embraced in the provisions of section 3 of the amendatory act of 1867, herein quoted, and which was referred to in section 14 of the scheme and charter, heretofore indicated, excepts it fails and omits to embrace any part of the county of St. Louis as was done in the act of 1867. The difference in those sections, though slight, becomes significant, and will be readily noted. Section 3 of the act of 1867 provides that the board should appoint and equip a certain number of policemen for duty in the outskirts and open portions of the city, and elsewhere in the city and county of St. Louis. Section 18 of the act of 1899 also provides for the appointment of policemen for duty in the parks and outskirts, but limits and confines the performance of such duty within the limits of the cities embraced in the act.

We have carefully considered each and every section of the law of 1899, enacted by the General Assembly of this state, creating the metropolitan police system of the city of St. Louis, and we are unable to find any provision upon which the relators can predicate their authority for undertaking to exercise jurisdiction in the county of St. Louis. But, on the other hand, the provisions of the act of 1899 clearly indicate the purpose and intention of the Legislature to divest the officers of the police system of the city of St. Louis of all authority to exercise jurisdiction in the county of St. Louis; that is, all authority in respect to arresting offenders in the county for the commission of offenses committed in said county.

Counsel for relators, in support of their

insistence that the provisions of section 14 of the scheme and charter are continued in force, invoke the familiar rule that repeals by implication are not favored in the law. This rule, technically speaking, applies only to enactments of laws by the same legislative body, and it is extremely unusual for the General Assembly of the state to expressly repeal a charter provision of a municipality. The lawmaking power of the state covers a broader field and proceeds to enact such general laws upon subjects about which it has the right to legislate, and the municipalities must take notice of such legislation, and, whenever their charter provisions conflict with such general laws, it is not essential that the Legislature should repeal such charter provisions or in any way give expression to its disapproval of them; but it is simply the plain duty of the municipalities to see that their charter provisions are in harmony with the Constitution and laws of this state, otherwise they are inoperative and of no force or vitality. It may be said that these two local governments, situated as they are, created the necessity for a law extending the jurisdiction of the police system of the city of St. Louis to the county of St. Louis. This by no means can warrant or furnish a justification to this court, in order to meet a condition complained of, to treat a law as existing, when in fact none exists. While the metropolitan police system was created by the state through its General Assembly, it was created for the city. The city and county of St. Louis, by the express provisions of the scheme and charter, were made separate, distinct, and independent municipalities, and, unless we are to absolutely ignore all the principles of local self-government, which has ever been the pride of this great commonwealth, it must be held, under the law now in force, that, as police officers, relators were without authority to arrest offenders in St. Louis county for offenses committed in such county.

Upon the second proposition, that relators were at the place in St. Louis county where the unlawful acts are charged to have been committed, as citizens, and as such had the right to do what was done, and therefore are not guilty of any violation of the law, it is sufficient to say that these are matters of defense upon the trial of the charge preferred, and this court upon this application for a writ of prohibition is not warranted in determining the guilt or innocence of the relators, and the allegations of that nature furnish no basis for the issuance of the writ.

This brings us to the consideration of the only remaining proposition involved in the record before us. This proposition is embraced in the contention of relators that the allegations in the petition, which is admitted by the demurrer, that "the only object and purpose of said pretended criminal charge before said justice of the peace against the relators, and the sole purpose of the prosecu-

tion thereof, are to hinder, impede, and obstruct the relators in the performance of their duty as policemen, and as officers and citizens of the state, and to protect from arrest persons engaged upon said Delmar race track in violating the said act of the General Assembly of the state of Missouri, approved March 21, 1905," fully warrants this court in issuing its extraordinary writ of prohibition. We are unable to give our assent to this contention of relators. It will be observed that this allegation in the petition, upon which relators base this contention, is "that the only object and purpose of said pretended criminal charge, and the sole purpose of the prosecution thereof, are to hinder, impede, obstruct," etc., followed by the allegations heretofore referred to. We are unable to conceive what the object and purpose of a prosecution has to do with the jurisdiction acquired by the justice. It is immaterial, so far as conferring jurisdiction upon the justice, what the objects and purposes of the prosecution were. William Mathews was the complainant in said cause before the justice, and filed the charge against the relators, and must be treated, so far as the disclosures of the petition are concerned, as the prosecuting witness. Hence the allegations upon which this contention is predicated are directed solely to respondent Mathews. He made the charge, and the petition avers the improper object and purpose in making it. The said allegations apply to the prosecution of the charge, and Mathews is the complainant and prosecuting witness. Hence those allegations are exclusively directed to Mathews. There is an entire absence of any charge in the petition that the justice of the peace acquired and assumed jurisdiction of said cause for the objects and purposes attributed to Mathews in making the charge, and in his prosecution of it, or that the justice had any knowledge of such objects and purposes. The objects and purposes of Mathews, or any one else, in making a charge and prosecuting it against relators for the commission of a misdemeanor, absolutely have nothing to do with the jurisdiction acquired by the justice, and can in no way effect such jurisdiction. Even though the justice entertained the purposes attributed to Mathews, while it would be reprehensible in him as an officer, and would furnish a sufficient reason to the relators to invoke the aid of the provisions of the statute, providing for changes of venue, yet this does not go to the jurisdiction of the justice and furnish a basis for the issuance of the writ of prohibition. If we are to announce the rule that the objects and improper purposes of complaining witnesses in the courts of this state, and the judges of such courts, are to be considered as affecting the jurisdiction of the tribunals in which complaints are lodged and made the basis of issuing the extraordinary writ of prohibition, then we confess that prosecutions in criminal, as well as

civil, cases will be subjected to many delays (at least, until a hearing can be had upon the preliminary rule) by applications for writs of that character, based upon allegations of such objects and purposes of the trial court, and the administration of justice unnecessarily retarded.

We see no reason for granting the relief sought by relators in this proceeding. The fact that they may be entirely innocent of any infraction of the law can furnish no legal reason for the issuance of this writ, nor does the fact that it greatly inconveniences them to make their defense through the courts do so. True judicial history affords ample proof of many innocent, upright, and worthy citizens being arraigned before the courts of this country, charged with much higher grades of crime than are relators; yet the courts had jurisdiction of such charges, and proceeded, in the usual and ordinary way provided by law, to try and determine such charges. Ultimately, sometimes, in the trial court, at other times in the courts of last resort, their innocence is made to appear and they go acquitted; yet we are without precedent for any court under our system of procedure to issue its extraordinary writ prohibiting such formal trial of persons, even though they be innocent of the grave charges preferred against them. The law announced by the courts is not merely for a day, and new principles should never be created or doubtful ones declared to meet the seeming demands and conditions surrounding any particular case. While there may be instances in which the law is inadequate to promptly meet and punish every wrong committed, this, however, does not authorize the courts to remedy such defects by judicial legislation, and, at last, the safety of the people, as well as the protection of their lives, liberty, and property, must depend upon the full recognition by the courts of the country of the fundamental principles of government, as well as of law, and a strict adherence to such principles, and the fearless application of them in the administration of justice. While it may be said that relators are police officers, and should be granted the relief sought by this proceeding, yet it must be remembered that this court, in issuing its extraordinary writ, must be able to point to some of the principles herein indicated applicable to writs of that character, as a basis for its action. Under our system of government, it has ever been the boast of American jurisprudence that "no man is above the law," and we know of no garb that will exempt the individual from obedience to its provisions.

We have thus indicated our views upon the propositions presented in the record, which results in the conclusion that the demurrer presented by respondents, to the petition of relators, should be sustained, and it is so ordered.

BRACE, C. J., and GANTT, BURGESS, and LAMM, JJ., concur. MARSHALL and VALLIANT, JJ., dissent.

MARSHALL, J. (dissenting). This is an original proceeding in prohibition. The 19 relators are members of the metropolitan police force of the city of St. Louis. The respondent Stoble is a justice of the peace of Central township, St. Louis county, and the respondent Fred Lenz is the constable of said township. The respondent Matthews is a private citizen, and, so far as is disclosed by the record, has no more interest in the matters undergoing adjudication than any other citizen possesses. On the 28th of July, 1905, the petition was presented to the writer hereof, and a preliminary rule in prohibition awarded. Upon the return day of the rule the defendants demurred to the petition. The case was then fully argued before this court, in banc, and the matter is now ripe for adjudication, upon the petition and demurrer thereto.

The material allegations of the petition are as follows:

First. That the relators, at the time stated, were citizens of the state of Missouri, residents of the city of St. Louis, members of the metropolitan police force of that city, and that the respondent Stoble was, and is, justice of the peace of Central township in St. Louis county, and the respondent Lenz, the constable of said township. The petition nowhere disclosed that William Matthews, the other respondent, has any interest in the matter other than as a citizen, nor does it anywhere appear that he has been personally aggrieved in any manner whatever.

Second. That Hon. Joseph W. Folk, Governor of the state of Missouri, by virtue of the authority vested in him by the Constitution and laws of Missouri, on the 21st day of July, 1905, issued and delivered to Hon. A. C. Stewart, president of the board of police commissioners of the city of St. Louis, the following communication: "Office of the Governor, State of Missouri, City of Jefferson, July 21st, 1905. Hon. A. C. Stewart, President Board of Police Commissioners, St. Louis, Mo.—Dear Sir: Information having come to me that a state of lawlessness exists in St. Louis county; that men backed by millions of wealth and political influence are openly committing felonies by registering bets on horse races; that dramshop keepers in flagrant defiance of the statutes keep their places open on Sunday; that men are openly held up and robbed in the orgies and the general debauchery following the violations of this law; that gamblers ply their trade uninterrupted and scoff at the authority of the state; that the laws of the state are nullified and the statutes of the state trampled in the dust, and the honor of the state assailed without interference or hindrance; and that the local officials either cannot or will not uphold the laws there:

Whereas, such conditions cannot be tolerated in Missouri; and, whereas, it is the sworn duty of the executive to execute the laws of the state; and, whereas, the metropolitan police force of the city of St. Louis is by the scheme separating the city and county, which was voted upon by the people of the whole county in accordance with the Constitution, given the same jurisdiction in the county as in the city; and, whereas, the Governor, as the supreme conservator of the peace throughout the state, has the right to call on the metropolitan police force as a part of the military arm of the state, to preserve peace and order and suppress outlawry: Now, therefore, in order to maintain the peace and dignity of the state and to preserve the majesty of the laws of the state, you are hereby directed to instruct the chief of police of the city of St. Louis to detail fifty officers or more for duty in St. Louis county with orders to proceed, with all convenient speed, to Delmar race track in said county of St. Louis, and there arrest any and all persons feloniously registering bets, and to seize and hold as evidence all money, papers, and paraphernalia connected with said felonies. When so arrested, the felons will be taken by the officers before some justice of the peace of the county and warrants sworn out for them, with the officers as witnesses, in the usual way. The arrests must continue from day to day as long as the felonies are committed. The officers should be further instructed to see that the dramshop laws and the gambling laws are observed, and to close all dramshops found to be open contrary to the statute in such cases made and provided, and to arrest all persons found to be violating such laws. These outlaws, when so arrested, will be turned over to the sheriff, and warrants sworn out for them before a justice of the peace, in manner and form as above set out. Every arrest should be by the officer who himself sees the crime committed, and by no other. Very respectfully, Joseph W. Folk, Governor."

Third. That thereupon President Stewart issued the following order to Hon. Mathew Kelly, chief of police of the city of St. Louis, under whose orders the relators were acting in all of the matters set forth in the petition, to wit: "July 23rd, 1905. Hon. Mathew Kelly, Chief of Police, Four Courts, City—Sir: I herewith hand you a letter from the Governor of the state of Missouri concerning a state of lawlessness said to be existing in St. Louis county and requiring the aid of the police officers to suppress the same. Please give careful attention to the contents of the Governor's letter and comply therewith as promptly as possible. A. C. Stewart, President of Board of Police."

Fourth. That thereupon said Kelly, as said chief of police, ordered the relator McNamee, as captain of said police force, to take with him the other relators herein, and proceed to the Delmar race track, and there

to carry out the orders contained in the communication from the Governor, aforesaid.

Fifth. That the Delmar Jockey Club is a corporation, organized under the laws of the state of Missouri, and at all the times herein mentioned was, and still is, the owner of the Delmar race track; that said race track is partly in the city of St. Louis, and partly in the county of St. Louis; that the articles of association of said Delmar Jockey Club disclose one of the purposes of the club to be "to own race tracks and grounds, and to engage in pool-selling, book-making, and registering bets on the exhibition of speed and on races at said tracks and premises, and to let the right to others to do the same; that on the 16th day of June, 1905, the said Delmar Jockey Club was permitting and suffering pools to be sold, and bets to be registered upon races to be run thereon, and has ever since continued so to do, in direct violation of the act of the General Assembly of this state, entitled 'An act prohibiting book-making, and pool-selling and prescribing a penalty therefor,' approved March 21, 1905; that said book-making, pool-selling, and registering bets were done on that part of said race track located in St. Louis county, but that the race track and the inclosure thereof extended into the city of St. Louis; that many persons were in the habit of going from the city of St. Louis to the said Delmar race track for the purpose of, and were there engaging in, book-making and selling pools and registering bets upon the races being run upon said track, and were thereby committing felonies under the statutes of this state; that these facts were known to the relator George T. McNamee, and the other relators herein"; that on, to wit, the 24th day of July, 1905, "relators were informed, and had good reason to believe, and did believe, that divers persons were engaged on that part of said Delmar race track located in the county of St. Louis, in book-making, and in recording and registering bets, and in selling pools within the inclosure, booths, and buildings of said Delmar Jockey Club, said bets being registered and pools sold upon the results of the trial of speed and power of endurance of beasts, which was to take place upon the said Delmar race track, and the selling of said pools and registering of said bets then and there being carried on constituted a felony under the laws of this state; that said registering of bets and pool-selling were done in the presence of some of the relators therein, and the said George T. McNamee, the captain in charge of the police force in the said race track, was informed thereof and was notified that persons within said inclosure were then in the act of violating the criminal laws of the state, and that felonies were being committed within said inclosure; that thereupon he demanded admission into said inclosure for himself and the other relators herein, as officers and citizens of the state of Missouri, for the sole and only purpose of ar-

resting and taking before the proper magistrate, to be disposed of according to law, such persons as might be engaged in the commission of said felonies therein, and that, upon such permission being denied, the relators, acting by and under the orders of the Governor of Missouri hereinbefore set out, let down or unclasped the chain across the entrance of said race track in the county of St. Louis and state aforesaid, and went into said inclosure, without injuring said property, and for the sole purpose of arresting the persons engaged therein in violating the criminal laws of the state, as they were ordered and directed to do by the chief executive of the said state; that thereafter, to wit, on the 21st day of July, 1905, respondent William Mathews filed an affidavit with the respondent Frank Stobie, as justice of the peace of Central township in the county and state aforesaid, charging relators with throwing down and opening the gate at the entrance of said race track, and then and there undertook to attempt to institute, before said Stobie, as such justice of the peace, a criminal prosecution, as for a misdemeanor, against the relators, and each of them, for their action as policemen and officers of the state of Missouri, in letting down such chain or unclasping the same in order to enter said inclosure to make the aforesaid arrests; that at the time said affidavit was filed and said criminal proceedings begun before said Stobie, justice of the peace as aforesaid, respondents well knew that said chain was thrown down or unclasped and said premises entered by the relators without injury to the property of said Delmar Jockey Club, and in the manner and only for the purpose aforesaid; that the action of the relators constituted no offense under the laws of the state, but, upon the contrary thereof, was done in the performance of their duties as officers and citizens; that said Frank Stobie, as such justice of the peace, had no jurisdiction to entertain or proceed with a criminal prosecution against relators based upon the facts above stated, and that it was an abuse of his judicial power so to do; that nevertheless the said respondent Stobie assumed jurisdiction of said criminal proceedings against the relators, and, although no information was filed with him by the prosecuting attorney of St. Louis county, and notwithstanding he had no reason to believe relators were likely to try to escape or avoid prosecution, the said Stobie, a justice of the peace, immediately upon the filing of said affidavit, issued and delivered to respondent Lenz, as constable, a warrant commanding him to arrest relators and each of them, and to bring them before him forthwith to answer to the charge contained in said affidavit, and said proceedings are still pending before said Stobie, as justice of the peace, and respondents are threatening to have relators taken into custody under said warrant, and to force them to a trial before said justice.

"And the relators further give the court to understand and be informed that the only object and purpose of said pretended criminal charge before said justice of the peace against the relators, and the sole purpose of the prosecution thereof, are to hinder, impede, and obstruct the relators in the performance of their duty as policemen, and as officers and citizens of the state, and to protect from arrest persons engaged upon said Delmar race track in violating the said act of the General Assembly of the state of Missouri, approved March 21, 1905, to prohibit book-making and pool-selling and to prescribe a penalty therefor, and hereinbefore mentioned, and to thwart and render of no avail the efforts of the Governor of the state to enforce said law, and said proceedings against said relators is an abuse of the judicial power and jurisdiction of said justice of the peace; that it would be a great hardship and expense for all of the relators to suffer arrest upon said charge and appear before said justice and contest the case through the courts; and that, if respondents are permitted to continue said prosecutions, numerous other prosecutions are threatened and will be begun and carried on, to the great annoyance, worry, and cost of relators, and an unseemly conflict will arise between the subordinate judicial officers and the executive department of the government.

"Your relators therefore show to this honorable court that, in proceeding against them under the charge made in said affidavit filed with him by said Mathews as prosecutor, the said justice of the peace is acting in excess of his jurisdiction and authority and in grievous abuse of his official power, and in order to protect your relators against the hardships, injustice, and oppression involved in requiring them to defend against said pretended criminal charge predicated upon their acts in enforcing the laws of the state, under the directions and by the order of the Governor thereof, under the circumstances hereinbefore set forth, pray that they may have a writ of prohibition directed to the said Frank Stobie, justice of the peace of St. Louis county, Mo., and to the respondents Mathews and Lenz, prohibiting them from taking further action in said proceedings against the relators and prohibiting said justice of the peace from taking further cognizance or jurisdiction thereof, and that this honorable court, in the exercise of its superintending control over the inferior tribunals of the state, prohibit said respondents from interfering with or obstructing the relators in the performance of their duties by said criminal proceedings, and that relators be granted all such relief as may be appropriate and necessary in the premises, to protect them against said unwarranted and illegal proceedings."

The respondents demurred to the petition on the following grounds: "(1) The police force of the city of St. Louis were not given,

by the scheme separating the city and county of St. Louis, the same jurisdiction in the county as in the city. (2) The police force of the city of St. Louis are without jurisdiction in the county of St. Louis, except to enforce a warrant, or warrants for a person, or persons, charged with an offense or offenses committed in the city, a situation which is affirmatively shown to have not existed when the relators invaded the premises of the Delmar Jockey Club. (3) The Governor of Missouri has no right or authority to call on the police force of the city of St. Louis to preserve peace and order and to suppress outlawry in the county of St. Louis. (4) That, even if the Governor had such authority, the assertions of his proclamation to the president of the board of police commissioners set out in the petition, if true, did not constitute or show a state of either lawlessness or outlawry in St. Louis county. (5) That there is no law of Missouri which prohibits the registration of bets upon horse races; the act of the General Assembly entitled 'An act to prohibit book-making and pool-selling, and prescribing a penalty therefor,' approved March 21, 1906, having been enacted in violation of section 28, art. 4, of the Constitution, in that it contains more than one subject, to wit, book-making and pool-selling, which are not germane or akin in character. (6) That the petition affirmatively shows that the relators were guilty of a trespass upon the property of the Delmar Jockey Club, in that they forced an entrance upon the premises of said jockey club, merely to carry out an order or proclamation issued by the Governor of the state, which is without legal force or affect, which conferred no authority upon any of the relators, and which was merely a bombastic effusion recognizable as a warrant for official action under no rule of conduct known to the law. (7) That so far from the respondents, and especially the respondents who were respectively a justice of the peace and constable, being without jurisdiction in the premises, the petition affirmatively shows that each was clearly within the law, that the justice was not usurping judicial power, and that there is no principle of law to which the writ of prohibition can be made applicable in the premises, or upon the facts. (8) That the petition affirmatively shows that the relators were and are possessed of a full and adequate remedy; that the case sought to be made is at best merely one of error which could, or can, be corrected on appeal, or writ of error; that, the relators not being residents of the county, as their petition shows, the justice was required by the statute to immediately issue his warrant upon sworn information being made of the commission by them of a criminal offense; that the respondent, who is constable, was in duty bound to execute the writ issued to him by the justice; and that to prohibit the procedure began, as shown by the petition, is

not to prevent an unseemly conflict between subordinate judicial officers and the executive department of the state, but to involve the administration of the laws in utter confusion, to try by the writ matters cognizable only by the officers designated by the laws, and determine upon prohibition an issue triable only as provided by the statute, there being no room for confusion except in the imagination of the relators, and no conflict except as provided, without warrant of law, by the unprecedented tirade of the executive. Wherefore respondents pray judgment," etc.

1. The case stands therefore for adjudication upon the petition and the demurrer thereto.

Under the Code practice in this state, the rule obtains that the pleading should be literally construed. *Foster v. Railroad*, 115 Mo. 165, 21 S. W. 916; *Overton v. Overton*, 131 Mo. 559, 33 S. W. 1. The pleading is to be taken in its plain and obvious meaning, giving such interpretation to it as fairly appears to have been intended. *Law v. Crawford*, 67 Mo. App. 150; *Hood v. Nicholson*, 137 Mo. 400, 38 S. W. 1095. A demurrer admits every material allegation of the petition. *Goodson v. Goodson*, 140 Mo. 206, 41 S. W. 737; *Shields v. Johnson County*, 144 Mo. 76, 47 S. W. 107. A demurrer admits all facts which are well pleaded, and also all facts which are necessarily implied from the direct averments of the pleading. *Weaver v. Harlan*, 48 Mo. App. 319; *Hood v. Nicholson*, supra. A demurrer does not admit mere conclusions of the pleader from facts stated. *Newton v. Newton*, 162 Mo. 173, 61 S. W. 831; *Hand v. St. Louis*, 158 Mo. 204, 59 S. W. 92; *Knapp, Stout & Co. v. St. Louis*, 156 Mo. 343, 56 S. W. 1102; *State ex rel. v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393. Under the Code, pleadings should not be construed most strongly against the pleader. The language of the pleading should be taken in its plain and obvious meaning, and such an interpretation given it as fairly appears to have been intended by its author. *Stillwell v. Hamm*, 97 Mo. 579, 11 S. W. 252; *Sumner v. Rogers*, 90 Mo. 324, 2 S. W. 476. Where a pleading is assailed on demurrer, the court should lean toward, rather than against, the pleader, in obedience to the modern rule of giving him the benefit of every reasonable intendment and presumption. *Hood v. Nicholson*, 137 Mo. 400, 38 S. W. 1095. Section 592, Rev. St. 1899, provides that the petition shall contain "a plain and concise statement of the facts constituting the cause of action without unnecessary repetition." The rule, therefore, deducible from the statutes and decisions of this state is that pleadings must be read liberally, must not be sourly construed, must be taken in the sense fairly intended by the pleader, and when they are attacked by demurrer all the facts which are well pleaded, and all the facts which may fairly be deducible from the facts pleaded, are confessed, and the

courts must lean toward rather than against the pleader.

It is in the light of these rules and principles that the petition in this case must be construed. The facts stated in the petition may be briefly summarized as follows: First. The Delmar Jockey Club is a corporation organized under the laws of this state. One of the purposes set forth in its articles of association is to own race tracks and grounds and to engage in pool-selling, book-making, and registering bets upon the exhibition of speed and on races at said tracks and premises, and to let the right to others so to do. The tracks of said club are located partly in the city of St. Louis and partly in the county of St. Louis. The bets, pool-selling, and book-making are had upon the portion which lies in the county of St. Louis. At the time the club was organized, and from thence until the taking effect of the act of March 21, 1905, the purposes and practices aforesaid of the club were lawful in this state. But on the 21st of March, 1905, the General Assembly of the state of Missouri passed an act making such acts and practices a felony, punishable by imprisonment in the penitentiary for a term not less than two nor more than five years, by imprisonment in the county jail for a term not less than six months, nor more than a year, or by a fine not less than \$500, or by both fine and imprisonment. That act was in full force and effect on the 16th of June, 1905, and is still in effect. Therefore the acts of the Delmar Jockey Club, charged in the petition, were felonies under the laws of this state, and the club had no legal right to practice the same or to permit others so to do. The act is now a law of this state, and has been declared by this court to be a valid, constitutional act. *State ex inf. Attorney General v. Delmar Jockey Club* (not yet officially reported) 92 S. W. 185.

In this condition of affairs, the Governor of this state, on the 21st of July, 1905, issued a proclamation, communication, letter, order, or whatever other name may apply to it (the designation is wholly immaterial), directed to the president of the board of police commissioners of the city of St. Louis, in which he recited that such acts and practices were being had, done, and permitted by the said Delmar Jockey Club, and the laws of the state were being disregarded and nullified, and that the local officials of St. Louis county either cannot or will not uphold the laws there, and that such conditions cannot be tolerated in Missouri; and, acting upon his conception of his sworn duty as the chief executive of the state to execute the laws, he directed the metropolitan police force of the city, in order to maintain the peace and dignity of the state and to preserve the majesty of its laws, to proceed to Delmar race track and arrest all persons feloniously registering bets, and to continue so to do,

from day to day, so long as "the felonies are committed." The president of the board of police commissioners then instructed the chief of police of St. Louis to comply with the Governor's directions, and the chief of police ordered the relators so to do. The petition charged that the relators personally knew, or had reasonable cause to believe, that such offenses were being committed within the premises of the Delmar Jockey Club. The relators proceeded to said premises and demanded admission thereto. The Delmar Jockey Club refused to permit them to enter upon the premises, and thereupon the relators let down and unclasped the chain across the entrance to said race track, and went into the inclosure, without injuring any of the property of the Delmar Jockey Club, or of any one else, for the sole purpose of arresting persons engaged on the premises in violating the laws of the state. Thereupon respondent William Mathews moved thereto, so far as the petition shows, without any personal interest in the matter and without being aggrieved personally by the acts of the relators, and, as the petition charges, for the sole purpose of hindering, impeding, and obstructing the relators in the performance of their duties, and to thwart and render of no avail the efforts of the Governor of the state to enforce the law, and to protect from arrest persons engaged upon said race tracks in violating the act of March 21, 1905, filed an affidavit before the respondent Stoble, as justice of the peace, charging relators with violating section 4573, c. 60, Rev. St. 1899, by throwing down or opening the doors, bars, or gates aforesaid; and, without referring the affidavit to the prosecuting attorney of the county, the justice of the peace issued a warrant for the arrest of the relators, and delivered the same to the respondent Lenz, as constable, and he was, at the time of the issuance of the preliminary rule herein, undertaking to arrest the relators under said warrant, to the end that they should be personally prosecuted as for a misdemeanor; and the petition charges that the respondents were also threatening to institute and prosecute similar proceedings against the relators, as often thereafter as relators undertook to enter upon said premises of the Delmar Jockey Club for the purpose aforesaid.

The respondents criticize the petition on the ground that it does not charge that the acts set out in the communication or order of the Governor were in fact true; that the recital of such facts in the communication of the Governor, which is set out in full in the petition, does not constitute a sufficient statement of facts by the pleader. This criticism is hypercritical and untenable, for these reasons: First, the petition states facts sufficient to constitute a cause of action, even if the communication of the Governor be eliminated therefrom or disregarded; second the petition primarily alleges sub-

stantially the same facts that are set out in the communication of the Governor; third, the evident intention of the pleader, gathered from the whole plea, was to charge the existence of all the facts stated in the communication from the Governor; and fourth, the fair and reasonable inferences of fact from the facts stated in the petition, outside of the communication of the Governor, sufficiently show all the facts which are stated in the communication from the Governor. But, if this be not true, then this case, being of such great public concern and moment, ought not to pass off upon any such narrow ground, but leave should be granted to the relators to amend the petition so as to affirmatively and expressly allege, in unmistakable terms, the existence of the facts stated in the communication of the Governor. Fairly and reasonably construed, however, the petition does state, independently of the communication of the Governor, all the facts or reasonable inferences of facts, which are contained in the communication of the Governor, for if, as the petition charges, the acts and practices and offenses against the law set out in the petition were practiced by the Delmar Jockey Club or permitted by it, then it necessarily follows that the officers of the county either could not or would not enforce the law, and hence the duty of enforcing the law rested somewhere, upon some officer of the state, and the duty rested upon some court to take some step for the enforcement of the law in that county, and for the protection of the lawabiding people of the county, who were unable to protect themselves, and whose officials either would not or could not protect them. The conclusion, therefore, is inevitable that the petition stated a clear violation of the laws of this state, and an inability or unwillingness of the law officers of the locality to enforce the laws.

2. The justice of the peace had no jurisdiction to entertain or attempt to determine the pretended case instituted before him by the respondent Mathews. Respondents claim that the proceeding before the justice of the peace was a criminal proceeding as for a misdemeanor, and that, as a justice of the peace undoubtedly has jurisdiction of that class of cases, prohibition will not lie to prevent his so doing.

Unquestionably justices of the peace have jurisdiction in misdemeanor cases, and the general rule of law is that, when the jurisdiction of a court over the class of cases, to which the particular case belongs, exists, prohibition will not lie. As will be hereinafter pointed out, however, there are well-known exceptions to this rule, which have been recognized by the courts of England, America, and of Missouri. The underlying and fundamental error of the respondent's contention, however, is that the proceeding before the justice of the peace, sought here

to be prohibited, is not a criminal proceeding at all, and is not a misdemeanor or a crime of any kind under the laws of this state; and the justice of the peace had no jurisdiction whatever to entertain a proceeding under section 4573, Rev. St. 1890, at the instance of Mathews, or any other informer, but was only authorized to proceed for a violation of that section at the instance of the party aggrieved or injured, which in this case was the Delmar Jockey Club and not Mathews.

An examination and review of the origin, development, and present condition of the law with reference to such trespasses as are covered by section 4573, and as are alleged in the petition to have been committed by the relators in this case, will clearly and conclusively demonstrate that the acts of the relators, charged in the information or affidavit before the justice of the peace, do not constitute misdemeanors or crimes of any kind under the laws of this state, and will, moreover, demonstrate that the suit is a penal suit and not a criminal suit, and all proceedings for the enforcement thereof are civil proceedings and not criminal proceedings, and, furthermore, that no proceeding or right of proceeding can be had, under the statute, by any person whomsoever, except the party injured, and that no citizen without interest in the property trespassed upon has any right to institute any proceeding of any character for the correction of the civil wrongs prescribed against by that section of the statutes. With amendments hereinafter noted, and which are immaterial in this case, what are now sections 4572, 4573, and 4574 are substantially the same as the original act in relation to trespass, enacted by the territorial Legislature of Missouri on the 30th of January, 1817. Acts 1804-24, p. 524, c. 202. Section 1 of the act of 1817 covered all of section 4573 down to the first proviso thereof, and also embraced substantially all of what is now section 4572. In other words, those two sections of the revision of 1890 were originally embraced in one section of the original act of 1817. Section 2 of the act of 1817 provided: "All penalties contained in the first section of this act, shall be recoverable, with costs of suit, by action of debt, founded on this statute, brought before any justice of the peace of the township where the defendant resides," etc. The original act, by section 2, further provided that, if the sum demanded exceeded \$20, the plaintiff might bring an action of trespass in any court of record having jurisdiction of the same. It further provided that, if the defendant set up title to the land, the justice should require him to enter into a recognizance in a sum sufficient to cover the amount of the penalty or penalties sued for, with costs, to prosecute to effect his claim or title to the land within one year thereafter, or to appear and defend the action to be instituted against him with-

in one year thereafter, and in either case to satisfy the judgment of the court, and, upon giving of such recognizance, the justice was required to proceed no further with the case. Section 4 (page 525) of the act provided that, if the slave of any person committed the trespass, the master should be liable therefor. Section 5 of the act provided that in all actions under the statute it should be lawful for the defendant to plead the general issue and to give any special matter in evidence, giving the plaintiff notice, in writing, at the time he entered the plea of the general issue, of the points of the special matter intended to be given in evidence. Thus it appears that the action was a civil action of debt before a justice of the peace, or of trespass in a circuit court.

The act of 1817 was carried into the revision of 1825 (Acts 1825, p. 781) without change. In the revision of 1835 (Rev. St. 1835, p. 612) section 1 of the original act was divided into two sections, which were substantially what is now section 4572, and literally what is now section 4573, down to the first proviso thereof. In the revision of 1835, section 2 of the original act was made section 3, and was changed so as to provide that: "All penalties contained in the preceding section, may be recovered by an action of trespass or debt, founded upon this statute in any court having jurisdiction of the same." The provisions of the original act, with reference to the proceedings in case the defendant claimed title to the land, were omitted, and in place thereof it was provided that, if upon the trial it appeared that the defendant had probable cause to believe that the land on which the trespass was committed was his own, the plaintiff should recover single damages only. The provision of the original act, making the master liable in case the trespass was committed by his slave, was retained. Sections 1 and 2 of the revision of 1835 were carried into the revision of 1845 without change. Rev. St. 1845, p. 1068, c. 180. Section 3 was amended so as to read as follows: "All penalties contained in the preceding section, may be recovered by an action of trespass or debt, founded on this statute, or by indictment at the option of the party injured, in any court having jurisdiction of the same; when the proceeding is by indictment such penalties shall be paid into the county treasury." In other respects the revision of 1845 contained the same provisions in this regard as the revision of 1835. The law as it then stood came before this court in *Ellis v. Whitlock*, 10 Mo. 781. That was an action of debt. It was objected that trespass and not debt was the proper remedy. The lower court sustained a demurrer to the petition on that ground. That judgment was reversed by this court and it was held that debt or trespass might be maintained, and that the word "section" should be read "sections," as it was in the revision of 1835. Thus the action was treat-

ed in that case, by this court, as a civil action for the recovery of a statutory penalty, and not as a criminal action in any sense.

In the revision of 1855 the first and second sections were the same. The third section was amended so as to read: "All penalties contained in the preceding section may be recovered in a civil action, founded on this statute, or by indictment, at the option of the party injured, in any court having jurisdiction of the same; and when the proceeding is by indictment, such penalty shall be paid into the county treasury." In all other respects the law remained unchanged. Rev. St. 1855, p. 1552, C. 161. In the revision of 1865 (Gen. St. 1865, c. 76) the first, second, third, and fourth sections remained the same. The provision as to trespass by a slave was omitted. The revision then contained sections 5 to 8 inclusive. Section 5 provides that, if any person shall open any shaft, mine, etc., under the surface of land belonging to another, and take away any mineral therefrom, he shall be adjudged guilty of a misdemeanor and be punished accordingly. Section 6 provides: "Every person who shall be guilty of a misdemeanor as prohibited by this chapter, or against whom a judgment shall be obtained under its provisions, who shall fail to pay the amount of the fine or judgment, with costs, shall be committed, by the court before whom the trial is had, until such judgment and costs are paid, or is relieved under the provisions of the law in regard to insolvent debtors." Section 7 provides that in all cases of conviction under this act the person shall be sentenced to imprisonment until the fine and costs are paid, but the court may commute the fine to imprisonment not exceeding 20 days. Section 8 provides that, if any person shall maliciously and wantonly damage or destroy any personal property, etc., the party so offending shall pay to the party injured double the value of the thing damaged, and, upon affidavit that the damage was wantonly or maliciously done, it shall be a good ground for an attachment to issue, as in other cases by attachment. Those four sections are now sections 4576, 4577, 4578, and 4579 of the revision of 1899. Section 5 (now section 4576) is substantially the same as section 1, of the act of February 20, 1857 (Acts 1856-57, p. 81), except that in the original act the fine was fixed at a sum not to exceed \$500.

It is now suggested that these provisions of the revision of 1865 operated to convert the proceedings under the prior sections, being the act of 1817 as amended, as hereinbefore shown, from a civil into a criminal proceeding. It is easy to demonstrate that this is a misapprehension.

First. Section 5 (now section 4576) declares that it shall be a misdemeanor for a person to open any shaft, etc., on the land of another. This is the only part of that chapter which declares any act to be a misdemeanor.

Second. Section 6 simply says that, if a person shall be convicted of a misdemeanor, as prohibited by this chapter, or if a judgment is obtained under the provisions of that chapter, and the defendant shall fail to pay the amount of the fines or judgment, he shall be committed until the same is paid, etc. The only misdemeanor prohibited by that chapter was the misdemeanor specified in section 5 of the act, in reference to the opening of a mine, etc. Therefore the misdemeanor spoken of in section 6, as prohibited by this chapter, could only mean the misdemeanor created by section 5. That such was the intention of the lawmakers is clear from the fact that section 6 refers not only to misdemeanors prohibited by that chapter, but to judgments obtained under the provisions of that chapter, thereby clearly differentiating between misdemeanors and judgments for penalties for the violation of those acts which had been brought down to that time by the several revisions from the original act of 1817. Section 7 of the act provides that, in case of conviction under the act, the person shall be sentenced to imprisonment until the fine and the costs are paid, etc. This could not refer to anything else except a conviction of the misdemeanor under section 5, for it refers to the "fine," and section 5 is the only section of the whole chapter which declares an act prohibited to be a misdemeanor, and section 6, as above shown, differentiates between a fine and a judgment. The general statutes (section 65, c. 201, p. 791, Gen. St. 1865) provided that every person convicted of a misdemeanor, where the punishment was not prescribed otherwise, should be imprisoned in a county jail, not exceeding one year, or be fined not exceeding \$500, or by both fine and imprisonment. Therefore, under section 5 of chapter 76, in the revision of 1865, as the punishment was not prescribed, the person convicted could have been imprisoned for one year, and fined not exceeding \$500, or both. Now it is manifest that, under section 6 or section 7, a person who violated the provisions of section 1 or 2, being the act of 1817 as amended, could not be punished by fine not exceeding \$500, or be imprisoned, or both, because those sections expressly provided that, if he violated section 1, he should pay to the injured party treble the amount of the value of the thing damaged, and under section 2 it was provided that he should pay to the party injured the sum of \$5 and double the amount of the damages the party might sustain. It is manifest, therefore, that the punishments prescribed by sections 1 and 2, which, in section 3 are called penalties, could not be enforced, if the penalties prescribed for a misdemeanor, and contemplated by sections 5, 6, and 7, were to be applied. In other words, to so construe the statute would be to make the acts prohibited punishable in two essentially and diametrically opposite methods.

Third. In the revision of 1865 it was provided by section 5, c. 224, that "the provi-

sions of the general statutes, so far as they are the same as those of existing laws, shall be construed as a continuation of such laws and not as new enactments." Thus we have the legislative declaration that sections 1, 2, 3, and 4, of chapter 76, which were mere continuations of the provisions of the general law in respect to such trespasses, should be construed as a continuation of the provisions of the prior law, and not as new enactments, and that the misdemeanor contemplated by sections 5, 6, and 7, of chapter 76, of the revision of 1865, were confined to the new offense first created by the act of 1857, and carried into the revision of 1865, and made section 5 of that act. No other construction than this can harmonize all of the provisions of that revision. This construction emphasizes and accentuates the construction herein placed upon the law, to wit, that, as to trespasses of the character of that here involved, they are not either expressly or inferentially made misdemeanors by law, but that they are, what they have been ever since 1817, mere civil wrongs.

But even conceding that such is not the true construction or meaning of the law, and conceding that since 1865 the acts here complained of, arising under section 4573, amount to a misdemeanor, and conceding that justices of the peace ordinarily have jurisdiction in misdemeanor cases, nevertheless, section 4574 provides that the penalties prescribed for the doing of the acts here complained of might be recovered by civil actions, by indictment or information, "at the option of the party injured. In other words, the Legislature has given the right to institute a civil action or to initiate an indictment or information, and the right so to do is limited expressly, by the statute, to the person injured. It is no answer to this to say that ordinarily a grand jury has the right to indict without being moved thereto by any one, and that the prosecuting attorney has the right to lodge an information even at his own instance. For the Legislature has seen fit, in respect to this particular class of offenses, to say that no proceeding for righting the wrong done shall be begun by any one except the party injured, and that he has the option to determine whether that proceeding shall be a civil or a criminal proceeding. The whole matter, then, resolves itself into this: Had the Legislature the right to thus make an exception of such cases, so that ordinary rules in reference to indictments or informations for misdemeanors should not apply? No constitutional prohibition against legislation of this character can be found. The Legislature had the same right to limit the right to initiate proceedings whether civil or criminal, in cases of this kind, to the party injured, as it had to confer upon prosecuting attorneys, or informers, or grand juries, the right to initiate proceedings in ordinary cases. The power of the Legislature to enact the law being given, the result inevitably

follows that in this case there was no valid criminal proceeding for a misdemeanor instituted before the justice of the peace, and therefore he acquired no jurisdiction in the premises. The only change made by the revision of 1879 was in reference to the third section, and for the first time it was provided that the penalty prescribed in the original act might be recovered by a civil action founded on the statute, or by indictment or information, at the option of the party injured. The provision in reference to the penalties being paid into the county treasury, if the proceeding was by indictment, was retained. Nothing was said about who should recover the penalties if the proceeding was by information, but it may be assumed that the penalty went to the county. In 1883 the second section was amended by inserting all that now appears in section 4573, in the proviso which relates to fences erected across water courses, and is not material in this inquiry. The law as it was in the revision of 1879, and amended by the act of 1883, was then carried into the revision of 1889, Rev. St. 1889, p. 2004. There was no change in the revision of 1899, Rev. St. 1899, p. 1090.

Thus it appears that there has been no change in the law as it is expressed in section 4573, so far as is material in this case, since the original adoption thereof in 1817. From time to time the manner of enforcing the penalties prescribed by that law have been changed. Originally an action of debt before a justice of the peace, or in trespass before a court of record, were the only remedies, and the action was purely and solely a civil action for the recovery of a penalty and for double damages. Afterwards, in the revision of 1835, an action of trespass or debt for the recovery of the penalty by the party injured was given. Still the action was purely a civil action, and the right of action was given only to the party injured. In the revision of 1845 a remedy by an action of trespass or debt, founded on the statute, or by indictment, at the option of the party injured, was provided, and, in case the proceeding was by indictment, the penalties were to be paid into the county treasury. In 1855 the remedy was by civil action or indictment at the option of the party injured. In the revision of 1865 the remedy was by civil action, indictment, or information, at the option of the party injured. And this has been the language of the law ever since, and is the language of section 4574 of the revision of 1899. Section 4573, therefore, from the beginning, expressly provided that if any person shall voluntarily throw down or open any doors, bars, gates, or fences, etc., "he shall pay to the party injured the sum of \$5, and double the amount of damages he shall sustain by reason of such doors," etc., having been opened, and the right to recover the penalties was thus conferred upon the party injured, and upon him alone, and may be enforced by civil action, or by indictment or information, at the option of the

party injured. Nowhere in the law, from its inception up to this time, can there be found any expression of legislative will that such an act shall be treated or regarded as a criminal act or as a misdemeanor. All the way through the history of legislation, the idea has been preserved that the proceeding is to recover a penalty or forfeiture and damages. The only ground for contention that the act is in any respect or sense a criminal proceeding is that the penalties may be recovered by indictment or information, or by civil action, at the option of the party injured, and those words, added to the original statute, do not change the character of the offense nor make that a criminal, which was theretofore simply a civil, wrong.

There is a vast and well-defined difference between a penal statute and a criminal statute. In *Atcheson v. Everett*, 1 Cowp. 382, Lord Mansfield said: "There is no distinction better known than the distinction between civil and criminal law, or between criminal prosecutions and civil actions. Mr. Justice Blackstone, and all modern and ancient writers upon the subject, distinguish between them. Penal actions were never yet put under the head of criminal law or crimes. The construction of the statute must be extended by equity to make this a criminal case. It is as much a civil action as an action for money had and received. Blackstone defines penal statutes as 'such acts of Parliament whereby a forfeiture is inflicted for transgressing provisions therein enacted. 3 Black. Comm. 160.'" In 16 Enc. of Pl. & Pr. p. 231, a penal statute is thus defined: "A statute properly designated as penal is one which inflicts a forfeiture of money or goods by way of penalty for breach of its provisions, and not by way of fine for a statutory crime or misdemeanor. A penal action is a civil suit brought for the recovery of this statutory forfeiture, when inflicted as punishment for the offense against the public. Penal actions are civil actions, on the one hand, closely related to criminal prosecutions, and, on the other, to actions for private injuries, in which the party aggrieved may, by statute, recover punitive damages." And this is the view taken by this court in *Parish v. Railroad*, 63 Mo. 284. The *Encyclopedia of Pleading and Practice* at page 234, vol. 16, further says: "The comprehensive meaning given to the word 'penal' in common usage, and the indiscriminate use of the words 'penalty,' 'fine,' and 'forfeiture,' make it difficult at times to determine whether a statute should be enforced by a criminal prosecution or a penal action. With reference to penal actions, the word 'penalty' means the forfeiture inflicted by a penal statute; the word 'fine,' a sum of money imposed by a criminal law. The use of these and other technical words or phrases will frequently determine the form of action as respectively civil or criminal." The same author, at page 235, says: "Where the sum given by the statute is called dam-

ages by it, the fact will not prevent its being a penalty to be recovered by a penal action, if such is its real nature." The same author further says, at page 237, that in penal actions a nonsuit may be suffered by the plaintiff as in other civil actions, and also that the defendant is not entitled to be confronted in open court by the witnesses against him, as in criminal prosecutions, but the evidence may be taken by deposition. And further says that: "In some instances a general statute or the penal statute itself designates a form of civil action, which shall or may be pursued." The same author, at page 339, says: "Where the remedy is prescribed by the statute which denounces the offense, no other process or procedure can be made use of to enforce obedience to the statute than that which the statute itself prescribes. The remedy must be sought in the precise mode, and subject to the precise limitations, provided by the act which creates the offense." And this is in harmony with the general rule of law that, where a new offense is created by statute, and the remedy for the enforcement thereof is provided by the statute creating the offense, the remedy as provided is exclusive. *King v. Marriott*, 4 Mod. Rep. 144; *Sutherland on Statutory Construction*, § 208; *Sedgwick's Statutory and Constitutional Law* (2d Ed.) pp. 341, 343; *Endlich on Interpretation of Statutes*, § 465; *Smith on Modern Law of Municipal Corporations*, vol. 1, § 547; *Riddick v. Governor*, 1 Mo. 147; 28 Am. & Eng. Enc. of Law (2d Ed.) 659, 671.

In speaking of the remedies available for the enforcement of penalties and forfeitures prescribed by a statute, Enc. of Pl. & Pr. vol. 16, p. 242, says: "A criminal prosecution by indictment will not lie where the form of penal action which shall be pursued is designated by the statute. If the statute, in addition to giving a form of action, uses general words which show that no proper proceeding is intended to be excluded, an indictment as well as penal action will lie." In *People v. Brown*, 16 Wend. (N. Y.) 561, it was said: "It was admitted that, where an act is not an offense at common law, but is made so by statute, an indictment will not lie, where there is a substantive prohibitory clause, but that it is otherwise where the statute is not prohibitory, and only inflicts a forfeiture for the doing of a specified act, and provides for the remedy." In *State v. Huffschtmidt*, 47 Mo. 73, the defendant was indicted and convicted for selling liquor on Sunday. He appealed on the ground that the offense was not an indictable one. The judgment was reversed by this court; the court saying: "The Attorney General contends, and so the court below held, that a statutory offense, where no remedy or mode of punishment is provided, may be prosecuted by indictment, or any other common-law remedy adapted to the case. This is a sound view, but will not avail the state in this case, from the fact that another remedy is provided." And it

was held that only a civil action was authorized by statute, and that a criminal prosecution would not lie in the state of the statutory law at that time. It was further held: If an act, which is not indictable at common law, is prohibited by statute, and a particular method of proceeding is given by the statute, that method must be pursued, and an indictment will not lie unless expressly provided for by the act; although, if the act is merely prohibited, and no method of proceeding is pointed out, an indictment will lie. In the revision of 1855 the offense with which defendant is charged is made so by the same act which provides for the civil remedy spoken of; and, inasmuch as the section providing for an indictment has been repealed and not re-enacted, the civil remedy is alone left."

It will be observed that the original act of 1817, and subsequent enactments until 1845, gave only a civil right of action to the party injured by the trespass denounced by the law. The reason, therefore, is manifest. The trespass was upon private property, and the injury resulting therefrom was a private and not a public injury. Hence the law provided for a forfeiture of \$5 and the payment of double damages to the party injured, and such is the language of the law up to this time. In 1845 the law was amended so as to permit the penalties denounced by the act to be recovered by a civil action or by indictment, at the option of the party injured. In the revision of 1865 it was further amended so as to permit such penalties to be recovered by information. But the addition of the remedy by indictment or information did not make the offense a criminal one, nor did it change the original character of the offense. The offense is not one which is prohibited. The statute only inflicts a forfeiture for the doing of the act of trespass. Penalties and forfeitures have ever been recoverable by civil actions or by indictment or information, but the form of the remedy does not change the character of the offense, nor does it make that criminal which before the change of the remedy was simply a civil wrong. In every case in which a new offense is created by statute and a penalty prescribed, the lawmakers have expressly declared it to be a misdemeanor, if it was intended to be a crime or public offense, and not merely an invasion of a private right of a citizen. This is illustrated in reference to the action of trespass. The amendment of the trespass act first found in the revision of 1865, now sections 4576 to 4579, revision of 1890, relating to the opening of any shaft, mine, or quarry, expressly declared that the party offending should be adjudged guilty of a misdemeanor. The original act of 1817 contained no such provision, but left the offense a pure invasion of private rights. The general rule of law in such cases is thus stated in 16 Enc. of Pl. & Pr. p. 243: "Where the statute creates a new public offense, an

action at common law will not usually lie at the suit of the party aggrieved, but the penal action is exclusive. It is otherwise, however, if the purpose of the enactment is to confer a private right in addition to inflicting a punishment." In *Taylor v. Lake Shore, etc., Railroad*, 45 Mich. 74, 7 N. W. 728, 40 Am. Rep. 457, Cooley, J., in speaking of the test to be applied in determining whether the party injured may have an action at common law, said: "The nature of the duty, and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their special benefit." Chitty, in his work on Criminal Law, p. 163, says: "Where a statute prohibits an act to be done under a certain penalty, though no mention is made of indictment, the party offending may be indicted and fined to the amount of the penalty; but, where it is merely provided that if any person do a certain act he shall forfeit a sum to be recovered by action of debt, etc., no indictment can be supported. And where a statute creates and points out a particular mode of punishment, as by information, or conviction before a magistrate, this proceeding cannot be maintained; but the specific mode pointed out in the act must be observed." Thus it appears that the statute creates only a civil right in favor of the party injured, and that the proceeding for the recovery of the penalty, and double damages allowed by the act, must be initiated by the party injured, and by no one else, not even the state. And, further, that, whether the action be a civil action or an indictment or information, the sum recovered is a penalty, forfeiture, or damage, and that the party injured has the option, under the statute, to determine the character of the action that shall be instituted. In any case the action is civil and not criminal, and the right of action and the proceedings asserting the right arise solely from the act in question. It follows that the provisions of sections 2748, 2749, and 2750 of article 12, c. 16, of the revision of 1899, conferring jurisdiction upon justices of the peace for misdemeanors, and prescribing that any person may file an information before the justice, have no application to the case of actions arising under section 4573, Rev. St. 1899.

It clearly and conclusively appears from the petition that Mathews was not the party injured in this case. The Delmar Jockey Club owned the premises, and the gate, or chain, which is alleged to have been opened or thrown down by the relators. The right of action, under the statute, is conferred only upon the party injured. Therefore the Delmar Jockey Club, being the party injured, if any one, is alone entitled to maintain any kind of an action for the recovery of the forfeiture, penalties, and damages.

So far as appears, Mathews is a pure stranger to the trespass. The statute does not confer upon him, or any other mere informer, the right to institute such an action. This being true, the justice of the peace acquired no jurisdiction of the suit in question against relators; and this is true, notwithstanding the justice would have jurisdiction if the Delmar Jockey Club had filed the information or instituted the action. The right to maintain the action being vested by the statute solely in the party injured, the justice of the peace was wholly without jurisdiction to issue a warrant at the instance of any one except the party injured. Being a court of limited jurisdiction, and the right of action in such cases being confined to the party injured, the jurisdiction of the justice must affirmatively appear. Instead of so affirmatively appearing, it affirmatively appears that the justice had no jurisdiction.

For the foregoing reasons, the conclusion logically, legally, and necessarily results, under the view of any well-considered case that was ever decided by the courts of England, America, or Missouri, that prohibition is the proper remedy, and that the relators are not reverted to an appeal or writ of error to be relieved against the action attempted to be instituted against them before the respondent justice of the peace.

3. Prohibition. The foregoing considerations logically, legally, and mathematically demonstrate that the preliminary rule in prohibition should be made absolute. But without such considerations there are other considerations equally cogent why the rule should be made absolute in this case. The importance and magnitude of the question involved in this case cannot be overestimated or overstated, and the results following from the decision of the questions here presented are so far-reaching and vital to the peace, good order, and welfare and interest of the state and all the lawabiding people therein, as to demand the most careful, conservative, and thoughtful consideration and adjudication: No more important case was ever presented to this court for determination. The contention is made in this case that the proceeding is a criminal one as for a misdemeanor, and that a justice of the peace has jurisdiction in that class of cases, and hence that the writ of prohibition will not lie to prohibit the justice from proceeding, but that such considerations end the case.

The limits of a single opinion forbid a full discussion of the broad and important questions arising in prohibition cases. The writ of prohibition is a prerogative writ issued out of a superior court and directed to a judge of an inferior court, or to a party to a suit in an inferior court, or to any person whom it may concern, commanding that no further proceedings be had in a particular case. 10 Enc. of the Laws of England, p. 489. The writ is as old as the common law itself.

The oldest authentic instance of the grant of such a writ was against the bishop in the third year of the reign of Edward III. 2 Rolle Abr. 1668, p. 281. Originally in England the writ was most frequently employed against the Ecclesiastical Courts to restrain them from acting without jurisdiction or in excess of jurisdiction, and, while it never issued for the correction of mere errors or irregularities, it was frequently employed in England where the inferior court proceeded contrary to the course of the common law, or in violation of the principles of law, and even the inferior courts of law were prohibited when so acting. The remedy by prohibition was always regarded in England, and still is so regarded in this country, as preventive rather than corrective. It is the counterpart of mandamus. It prevents action, while mandamus commands action. It is a common-law writ and operates upon courts, or others exercising judicial functions, and it is as to courts what an injunction is to individuals. In later days in England, under the judicature act of 1873, it is not uncommon for the writ of prohibition to be accompanied with a writ of injunction. The general rule, both in England and America, is that a writ of prohibition will not lie where the inferior court has jurisdiction of the class of cases to which the particular case belongs. But this by no means exhausts the functions of the writ, or defines the limitations under which it may properly be invoked. The books are full of cases where the writ has been granted in cases where the inferior court has jurisdiction of the class of cases to which the particular case belongs, but in which the inferior court has acted in excess of its jurisdiction, and cases are likewise not wanting in which the writ has been granted where the inferior court, in exercising its jurisdiction, had proceeded outside of the course of the principles of law. Cases may also be found, both in England and in Missouri, where the inferior court has been prohibited from acting in cases which belong to the class of cases over which the inferior court originally had jurisdiction, but where the particular case sought to be prohibited was clearly a sham proceeding, not instituted or prosecuted for public good, but for ulterior and unlawful purposes to hinder or obstruct the proper administration of law. The latter class of cases constitute what may be termed exceptions to the general rule, and the writ has only been granted in extreme instances where such conditions clearly appear.

Lloyd on Prohibition, page 45, says: "Prohibition will lie in a case where the judge of an inferior court transgresses the rules which ought to govern the proceedings of all courts, or is guilty of an irregularity which amounts to an excess of jurisdiction, though the case may otherwise be within his jurisdiction." The author discusses the

subject very interestingly, and cites many cases in support of the doctrine, but time and space forbid further reference to that discussion at this time. Short on Prohibition, pp. 462, 463, 491, and 492, lays down the English rule that, while ordinarily prohibition will not lie where the jurisdiction of the inferior court depends upon contested facts (even though the superior court believes the lower court incorrectly decided, and, if it had correctly decided, would oust the jurisdiction of the inferior court), still it will lie even in such cases where "the high court is of opinion that the judge below has perversely so decided, and has not honestly and fairly exercised his jurisdiction upon the evidence before him," or if "he proceeds on a wrong principle of law in arriving at his determination of the facts," conferring jurisdiction. The author cites various instances of such cases in England. 23 Am. & Eng. Enc. of Law (2d Ed.) p. 199, says: "The writ is not confined to cases where the lower court is absolutely devoid of jurisdiction, but extends to cases where such court, although rightfully entertaining jurisdiction of the subject-matter, has exceeded its legitimate powers." At page 210 the same author lays down the rule that generally prohibition will not lie to oust the lower court of jurisdiction in a particular case, if it belongs to a class of cases of which it has jurisdiction, unless an appeal is a wholly inadequate remedy or not sufficiently speedy. The same author, at page 223, lays down the rule that it will lie in cases of gross abuse of discretion in the lower court in granting equitable remedies. And, at page 225, he says the writ will lie to prevent the illegal granting of an injunction, and, at page 227, that it will lie to prevent the illegal appointment of a receiver.

A few of the instances in Missouri, in which prohibition has been awarded in cases falling within the exception to the general rule, will be sufficient to point the rule. In *State ex rel. Ellis v. Elkin*, 130 Mo. 90, 30 S. W. 333, 31 S. W. 1037, a writ of prohibition was awarded against the county court judge of Montgomery county to stop proceedings in execution of an order of the county court for the removal of the county seat, on the ground that, although an appeal would lie, that remedy was wholly inadequate and not sufficiently speedy for the protection of the public interests involved. In *State ex rel. v. Spencer*, 166 Mo. 271, 65 S. W. 981, a writ of prohibition was awarded in a contested election case to restrain the trial court from ordering a comparison of the ballots with the pollbooks, and thereby disclosing how the voters at an election cast their ballots, on the ground that, notwithstanding the ruling of the trial court might be corrected on appeal, the remedy by appeal was wholly inadequate. In *State ex rel. v. Withrow*, 133 Mo. 500, 34 S. W. 243, 36 S. W. 43, the writ was awarded to prevent the enforcement of a rule adopted by the

circuit court which it had no power to adopt, notwithstanding the ruling of the lower court might have been corrected on appeal. In *State ex rel. McCaffery v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393, it was said: "Prohibition is the proper remedy to prevent a court from assuming a jurisdiction it has not, or exceeding a jurisdiction it has. * * * Prohibition is an extraordinary remedy, and will not lie where the party claiming it has a remedy by ordinary means; but the ordinary means that will defeat the application for this extraordinary writ must be sufficient to afford the relief the case demands." In that case the writ was awarded to prevent the circuit court from entertaining jurisdiction in an injunction suit, the object of which was to prevent newly elected appointees from qualifying and taking possession of an office. In *State ex rel. v. Wood*, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596, the writ was awarded to prevent the circuit court of the city of St. Louis from entertaining jurisdiction in an injunction suit to restrain the state beer inspector from carrying into effect the law of this state with reference to the inspection of beer. In *State ex inf. v. Talty*, 166 Mo. 529, 68 S. W. 361, the writ was awarded against the circuit court, prohibiting it from entertaining jurisdiction in a suit by mandamus to compel the circuit attorney to institute a proceeding in the nature of a writ of quo warranto against a member of the house of delegates of the city of St. Louis. In *State ex rel. v. Fort*, 178 Mo. 518, 77 S. W. 741, the writ was awarded against the circuit court enforcing an order granting a change of venue in a disbarment proceeding. In the following cases the writ was awarded restraining the circuit court from enforcing an illegal order appointing a receiver: *Railroad v. Wear*, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; *State ex rel. v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; *State ex rel. v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961; *State ex rel. v. Withrow*, 183 Mo. 500, 34 S. W. 245, 36 S. W. 43; *State ex rel. v. Dearing*, 184 Mo. 647, 34 S. W. 21. In *Thomas v. Mead*, 36 Mo. 232, the writ was awarded to restrain a circuit judge from enforcing an injunction to prevent the relator from taking possession of the office of clerk of the Supreme Court.

Even more striking instances of exceptions to the general rule are to be found in the decisions in this state. *Fellows v. Goodman*, 49 Mo. 62, was an action for false imprisonment. The plaintiff, with others, was engaged in taking down and removing a house. The defendant had him arrested under a warrant in a criminal proceeding before a justice of the peace. Thereafter the defendant obtained an injunction to restrain the plaintiff from removing the house. After the plaintiff had been detained in custody before the magistrate for some four hours, he was permitted to leave upon promise to return at a future day to which the hearing of

the cause was adjourned. When he so returned at the appointed time, he was told by a constable that the justice was holding court some four miles away. The plaintiff refused to walk that distance, and the defendant's attorney told him that the defendant did not wish to further prosecute him, as they had his hands tied, having sued out an injunction against the removal of the house. The plaintiff then went away, and the justice entered on his docket that he failed to appear. The plaintiff then sued for false imprisonment. In speaking of the criminal case this court said: "It is evident that the whole proceeding before the justice was a sham, that it was instituted to stop the removal of the building until the defendant should be able to prevent it by legal process. It was not a voluntary appearance, for, when the defendant and his companion refused to go before the magistrate, they were surrounded by a large and noisy posse, as the crowd was called, and taken there against their will. The law will not permit criminal process to be abused in this way. The justice who issued it placed himself in a delicate position, and the person who sued it out is liable in damages to those whose liberty he restrained. * * * To this I would only add that an arrest under a sham proceeding, an abuse of the process of the court, a fictitious charge made under the forms of law, mala fide, is a public as well as a private wrong." In *State ex rel. Merlam v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534, a writ of prohibition was awarded against the common pleas court of Cape Girardeau, prohibiting it from enforcing an order appointing a receiver for the St. Louis, Cape Girardeau & Ft. Scott Railway Company. It appeared that some of the creditors of the railroad company had obtained from the judge of the circuit court of Stoddard county an order appointing a receiver for the road, and that, before the receiver qualified and took possession, the company itself applied to the court of common pleas of Cape Girardeau county—a court possessed of power to appoint a receiver to take charge of and operate the railroad for the benefit of all the creditors of the company. This court, speaking through *Brace, J.*, held that, whilst the court of common pleas had jurisdiction to appoint a receiver in a proper case, it had no jurisdiction to appoint a receiver at the instance of the company itself. In the course of the opinion it was aptly said: "It is folly to attempt to disguise the fact that this proceeding was taken before Judge Ross (judge of the court of common pleas) for the express purpose of defeating the legitimate exercise of the jurisdiction of the circuit court of Stoddard county in relator's suit in that court. That of some such purpose he was advised in the beginning appears upon the very face of the petition, and that, after full knowledge that such was the object and effect thereof, he has asserted, and does still assert and maintain.

his right and the jurisdiction of his court over the subject-matter of that suit, so as to impede and hinder the relator in the prosecution of his suit, and the exercise of the jurisdiction of that court therein in his behalf, in a due and orderly manner, is beyond question. * * * By the Constitution this court is vested with 'a general superintending control over all inferior courts' with 'power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same.' Const. art. 6, § 3. The writ of prohibition is a familiar mode of the exercise of this power, and is an appropriate one to restrain the exercise of jurisdiction by a subordinate court over a subject-matter when it has none, and is loudly called for when such jurisdiction is asserted against a court that has jurisdiction and is asserting it, and when the officers of each, acting under its orders, are liable at any moment to come into physical conflict over the possession of the subject-matter in controversy."

The foregoing, and particularly the last cited case, fully demonstrate the existence of exceptions to the general rule of law in reference to prohibition. The facts disclosed by the petition clearly demonstrate that, even if the proceeding before the respondent justice, instituted by the respondent Mathews, be regarded as a criminal proceeding, as for a misdemeanor, nevertheless, that proceeding is a bald and transparent sham, and the petition expressly charges that it was instituted for the sole purpose of thwarting, hindering, and impeding the relators in their efforts to enforce the laws of this state, and that the writ here sought is the only effective and speedy method provided by law to preserve the peace of one of the large communities of the state, and to protect the lawabiding citizens when the law officers and the lower courts of that community were either unable or unwilling to do their duty and enforce the law; and, further, that the danger of a conflict between subordinate police officers and constabulary of the state coming into conflict was not only imminent and impending, but actually threatened. The case at bar therefore falls clearly within the wise and correct view of the law expressed by Judge Brace in *State ex rel. v. Ross*, supra, and imperatively demands, at the hands of this court, the issuance of a writ of prohibition to prevent the respondents from prosecuting the pretended case against the relators. This case falls within the recognized and necessary exception to the general rule in reference to prohibition. Ordinarily the nature of a litigant are of no importance in a lawsuit, though there are exceptions to this rule; but in a case like this, where the good name of the whole state, the welfare of the people of a large community, and the orderly and proper administration of the laws, is sought to be interfered with by the issuance of a sham warrant against the peace officers of the state while in the dis-

charge of their duties, the case is one of first importance, and would constitute, in itself, an exception to the general rules of law in reference to prohibition, even if such exception had not heretofore been recognized and enforced by this court. When the constituted authorities of a community are unable to perform their duties, or are recreant in their duties, and when the laws of this state are openly defied and violated, a condition is presented which imperatively demands extraordinary remedies adequate to meet the exigencies.

For these reasons the preliminary rule in prohibition should be made absolute in this case.

4. The third and fourth grounds of the demurrer deny the right of the Governor to call on the police force of the city of St. Louis to preserve the peace and order and to suppress outlawry in the county of St. Louis, and assert that, even if the Governor had such authority, his assertions in his "proclamation" to the president of the police commissioners, if true, do not constitute or show a state of either lawlessness or outlawry in St. Louis county.

The petition, outside of the communication of the Governor, shows in its every allegation that there were persons in the county of St. Louis engaged in committing open acts, which the laws of this state denounce as felonies, and this, too, in defiance of the local authorities. The petition therefore unquestionably states the existence of felonies in the county of St. Louis at that time. This leaves for consideration the power of the Governor to order the police force of St. Louis into the county of St. Louis to suppress the same.

The metropolitan police force of the city of St. Louis was created by the act of 1861 (Acts 1860-61, p. 446). Section 4 (page 448), of that act conferred upon the Governor of the state the power to appoint four commissioners, who were authorized to appoint, enroll, and employ a permanent police force. Section 5 of the act made it the duty of the board of police to preserve the peace of the public, prevent crime, and arrest offenders, protect the rights of persons and property, guard the public health, preserve order at every public election, enforce all the laws and ordinances of the city of St. Louis, and "in case they shall have reason to believe that any person within the said city intends to commit a breach of the peace, or violation of law or order beyond the city limits, any person charged with the commission of crime in the city of St. Louis, and against whom criminal process shall have issued, may be arrested upon the same in any part of this state by the police force created or authorized by this act"; provided that, before the person arrested shall be removed from the county in which the arrest was made, he should be taken before some judge or justice of the peace of that county and should not be removed from the county unless the removal was approved by such judge or justice of the

peace. The thirteenth section of the act made it the duty of the sheriff of the county of St. Louis, whenever called on for that purpose by the board, to act under their control for the preservation of the public peace and quiet, and, if ordered by them to do so, to summon the posse comitatus and hold or employ such posse subject to their direction. It also gave the board power, whenever it deemed fit, to call out such of the military force organized and existing in the city as they might see fit, in preventing threatening disorder or opposition to the laws, or in suppressing insurrection, riot, or disorder at all times. And, further, whenever the exigency or circumstances, in their judgment, warranted it, it gave the board power to assume control and command of all conservators of the peace of the city of St. Louis, whether sheriff, constable, policemen, or others, and required the peace officers to obey the lawful commands of the board, subject to a penalty nominated in the statute. By section 11 of the act of March 13, 1867 (Acts 1867, p. 179), amendatory of said original act of 1861, it was expressly provided as follows: "The members of the police force of the city of St. Louis, organized and appointed by the police commissioners of said city, are hereby declared to be the officers of the city of St. Louis, under the charter and ordinances thereof, and also to be officers of the state of Missouri, and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state or the ordinances of said city." Section 3 (page 178) of the act of 1867 further provided that: "The board whenever and for so long a time as may be necessary, is further authorized to appoint, mount and equip not more than twenty policemen for duty in the outskirts and open portions of the city and elsewhere in the city and county of St. Louis." Section 12 (page 179) of that act further gave the board power to regulate and license all private watchmen and private policemen in the city of St. Louis, and prohibited any person serving as private watchman or private policeman in the city of St. Louis without first having obtained a license so to do from the board, on pain of punishment for a misdemeanor; and the act of February 17, 1875 (Acts 1875, p. 337), enlarged the provisions last aforesaid so as to include private watchmen, private detectives, and private policemen in the county of St. Louis, as well as in the city of St. Louis. Sections 20 to 25 of article 9 of the Constitution of 1875 provided for the separation of the city and county of St. Louis, and for the election of a board of 13 freeholders to propose a scheme therefor, and for a charter for the city of St. Louis, and further provided that, if the people voted in favor of the adoption of such scheme of separation and charter, "then such scheme shall become the organic law of the county and city, and such charter, the organic law of the city, and, at the end of 60 days there-

after, shall take the place of and supersede the charter of St. Louis and all amendments thereof, and all special laws relating to St. Louis county inconsistent with such scheme." Section 23 provided that such charter and amendments shall always be in harmony with, and subject to, the Constitution and laws of Missouri. And section 25 provided that: "Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of the state." The scheme and charter thus authorized were adopted. Section 14 of the scheme provided as follows: "The metropolitan police force of the city of St. Louis, as now established by law, shall be maintained at the cost of the city of St. Louis; provided, however, that the metropolitan police of the city of St. Louis shall have the same power and jurisdiction in the county of St. Louis, as constituted by this scheme, as now provided by law; provided, that upon a petition of the county court of St. Louis county, the board of police commissioners shall appoint and equip not more than twenty policemen, as provided in the act, approved March 13th, 1867, for duty in said county. The cost of equipping and maintaining said policemen shall be paid by the county as herein established." By the act of February 6, 1864 (Acts 1863-64, p. 475), it was provided, in section 3 (page 476) thereof, that the county of St. Louis shall be charged with one-fourth of the whole expense of the police force of the city of St. Louis for the year 1864 and for each year thereafter, and the county court were required, from time to time, to appropriate money out of the county treasury to meet that proportion of said expense. The validity and constitutionality of that act was challenged in the case of *State ex rel. St. Louis Police Commissioners v. St. Louis County Court*, 34 Mo. 546, and this court, speaking through Bates, J., held the act constitutional and the county liable therefor.

Thus the matter stood until March 15, 1899, when the General Assembly of the state passed an act of that date (Acts 1899, p. 51). The first section of that act repealed in express terms the act of March 27, 1861, and all acts supplementary and amendatory thereof. The act then practically re-enacted the old and original metropolitan police act, making changes therein, substantially only, as to the number of police and the compensation therefor. Section 25 (page 60), of that act is substantially in the language of section 11 (page 179) of the act of 1867, and declared the police force to be city officers and also state officers, and that they should be so taken and deemed in all courts having jurisdiction of offenses against the laws of this state, or the ordinances of the city. Section 26 preserved the old law so far as licensing private watchmen, etc., when the city was concerned. The validity of the act of 1899 came before this court,

in banc, in the case of *State ex rel. v. Mason*, 153 Mo. 23, 54 S. W. 524. Gantt, J., in delivering the opinion of the court, said: "An analysis of the act of 1899 will demonstrate that in the largest part it is identical in its terms with the law of 1861." And then, after citing, analyzing, and comparing the provisions of the two acts, he said: "The fundamental principles underlying the acts of 1861 and 1899, creating boards of police commissioners for the city of St. Louis, are the same, and the constitutionality of such legislation has stood the test of the most critical judicial examination and review." He then pointed out that: "The protection of life, liberty, and property, and the preservation of the public peace and order in every part, division, and subdivision of the state, is a governmental duty which devolves upon the state, and not upon its municipalities, any further than the state in its sovereignty may see fit to impose upon or delegate it to the municipality. The right to establish the peace and order of society is an inherent attribute of government, whatever its form, and is coextensive with the geographical limits thereof, and touching every part of its territory." He then exhaustively discussed the constitutionality of several laws creating such metropolitan police, and showed that the metropolitan police system prevailed in Michigan, Massachusetts, Maryland, Louisiana, Kansas, and Ohio. Starting with the truism that the purpose of a metropolitan police system is for the protection of life, liberty, and property, and the preservation of the public peace and order in every part, division, and subdivision of the state, and that it is a governmental, inherent duty of the state to establish peace and order in every part thereof, coextensive with its geographical limits, it follows that the state has a permanent interest in the preservation of peace and good order in every part thereof, and that it is charged with the duty of preserving the same, independent of and superior to the wishes even of the people of a particular locality of the state; and it also logically follows that, where the people of a locality are unable to protect themselves, by reason of the inefficiency or recreancy of their local officers, or where such local officers cannot or will not properly discharge their duties, the duty aforesaid rests upon the state, and the exigencies of the situation demand immediate and effective action on the part of the state. Local influences and surroundings make it impossible, or extremely difficult, for the local authorities to deal with extraordinary conditions affecting the peace, good government, and order in a locality, and such conditions imperatively demand action on the part of the state. The question then arises, whose duty is it to take action? Action can only be had through the courts by the institution of proceedings in the local courts, and, if the conditions in the locality are such as above described, efficient remedies for existing evils manifestly could not be ob-

tained through the courts, and especially is this true with reference to the enforcement of the criminal laws and the police laws of the state. Under the division of powers in our form of government between the executive, legislative, and judicial departments, it necessarily follows that, in times of such exigencies which demand immediate action, the power necessarily rests with the executive of the state to enforce the police power of the state and to restore order in the locality. If this is not so, then there is no sufficient and adequate and speedy remedy afforded by our system of government, and, if this be true, then it were well that the people of this state were advised of such infirmity in in our institutions, to the end that they may take speedy and effectual means to provide adequate remedies by the organic laws of the state. But it is not conceivable that our institutions are so imbecile and infirm as to be unable to grapple with and master such conditions. Article 5 of our Constitution deals with the executive department of the state. Section 4 of that article declares: "The supreme executive power shall be vested in a chief magistrate who shall be styled 'The Governor of the State of Missouri.'" Section 6 provides: "The Governor shall take care that the laws are distributed and faithfully executed; and he shall be a conservator of the peace throughout the state." Section 7 provides: "The Governor shall be commander in chief of the militia of this state, except when they shall be called into the service of the United States, and may call out the same to execute the laws, suppress insurrection and repel invasion," etc.

It will be observed that nothing is said in this provision of the Constitution about the exercise of the police power of the state or of the power of the Governor with reference thereto. And it is argued that the Governor has only power to see that the laws of the state, as declared by the judgments of the courts, shall be executed, and that he has no power even to call out the militia to execute the laws, except in furtherance of a judgment of a court; and further that, whilst he is a conservator of the peace, he has no more power than any other conservator of the peace in the state. It may be conceded that, primarily, the power is vested in the General Assembly of the state to provide by law the means and agencies for the enforcement of the police powers of the state. The General Assembly of this state has, by the various metropolitan police acts hereinbefore referred to, provided means by that system for the protection of life and property and of the preservation of public peace and order, not only in the city of St. Louis, but in every part, division, and subdivision of the state, coextensive with its geographical limits, as was well said by Gantt, J., in *State ex rel. v. Mason*, supra. Under that act the Governor appoints the board of police commissioners, and those commissioners appoint the

officers. Primarily, therefore, the act confers the right and duty upon the Governor to see that the metropolitan police system do their duty. It is a part of the duty of that system to preserve the public peace in every part of the state, and all of the acts relating to that system, including the act of 1867, and the act of 1899, expressly declare, evidently in furtherance of principles underlying that system, that the officers of that system shall be not only city officers, but shall be state officers, and shall be so taken and deemed by all the courts of this state. The purpose of this enactment is plain. It was the evident and unquestionable purpose of the General Assembly thus to afford the chief executive of this state a sufficient and ever ready force and means for the efficient preservation of the peace and the protection of life and property in every part of the state. The system thus created may be properly designated as the police arm of the chief executive of the state, and is clearly distinguishable from the military arm of the chief executive, composed of the militia of the state. The police system thus created is essentially a state constabulary, subject to the immediate orders of the board of commissioners, who, in turn, are subject to the orders of the Governor, who appointed them, and who is responsible to the people for their stewardship.

There can be no difference between fair-minded men that, in thus creating a state police arm, it was the intention of the lawmakers to give the chief executive the power to discharge his duty as a conservator of the peace. There can also be no reasonable doubt that, under our system of laws, the Governor is the chief conservator of the peace in the state, and especially in times of local disturbances which do not amount to insurrection, but where the local machinery of the law is inadequate or insufficient to restore order and preserve good government. It has well been said that "the office of Governor of the state corresponds, within its particular sphere, to the President of the United States, and the analogy has frequently been noticed by the courts." 14 Am. & Eng. Enc. of Law (2d Ed.) p. 1097. Mr. Southerland, in his notes on United States Constitution (pages 471-475), and cases cited, lays down the rule that the President of the United States has power to call out the militia or to declare martial law within the territorial limits in which it may be necessary, and that he is the exclusive judge of whether the exigency of the occasion demands such action, and his decision is not subject to judicial review. In fact the rule of law is universal that "the executive, in the proper discharge of his duties under the Constitution, is as independent of the courts as he is of the Legislature." Cooley, Const. Lim. (7th Ed.) 162. This principle has been invariably adhered to by this court. State ex rel. v. Stone, 120 Mo. 429, 25 S. W. 376,

23 L. R. A. 194, 41 Am. St. Rep. 705; State ex rel. Bartley v. Governor, 39 Mo. 388. And the same doctrine has been applied to the legislative department. State ex rel. v. Bolte, 151 Mo. 362, 52 S. W. 262, 74 Am. St. Rep. 537. Speaking of the executive department of the government, Judge Story (2 Story, Const. [5th Ed.] § 1411) says: "The Federalist has remarked that there is hardly any part of our system the arrangement of which could have been attended with greater difficulty, and none which has been inveighed against with less candor or criticised with less judgment." The same author, in section 1417, says: "Energy in the executive is a leading character in the definition of a good government. It is essential to the protection of the community against foreign attacks. It is not less essential to the sturdy administration of the laws, to the protection of property against those irregular and high handed combinations which sometimes interrupt the ordinary course of justice, and to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. * * * A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever may be its theory, must, in practice, be a bad government." It has likewise been well said that "the Governor, representing the sovereign executive power of the state, is always virtually present in court to execute its process, whenever the powers of the marshal and ordinary posse may not be sufficient for the purpose, or when the peace and dignity of the state may so require." It is also a well-recognized rule of law that the writ of prohibition will not lie against the Governor of the state in matters pertaining to his executive functions and duties. 6 Am. & Eng. Enc. Law (2d Ed.) p. 1020.

From the foregoing it inevitably follows that the metropolitan police of the city of St. Louis are state officers; that they are police or constabulary officers, especially created to preserve the peace and good order in every part of the state; and that they are subject to the orders of the governor, and were created for the express purpose of affording the Governor an efficient arm for the enforcement of the police powers of the state, and that no other officer in the state, and no other tribunal in the state, has any control over them, or power to call them into action, except the Governor, acting through the board of police commissioners appointed by him. Judge Dillon, in his work on Municipal Corporations (section 60) says police officers are, in fact, state or public officers, and not private or corporation officers.

The communication of the Governor to the president of the board, in this instance, has been inveighed against the defendants, and in oral argument counsel have referred to

it as an unprecedented use of the metropolitan police of St. Louis by the Governor. Counsel have overlooked the fact that the history of this state, of such recent date as not to be written, but as to still remain in the memory of the present generation, shows that the action of the Governor in this instance is not without precedent. In 1873 Governor Silas Woodson ordered the metropolitan police of St. Louis to go to Moberly and St. Charles to quell railroad strikes then existing at those points, and the police effectually did so. In 1876 Governor Phelps ordered the police of St. Louis to go to Johnson, Jackson, Clay, Henry, and Callaway counties in this state for the purpose of apprehending and arresting train robbers and other outlaws, whom the local authorities were unable to apprehend, and the police officers did so. In the great railroad strikes of 1877, the metropolitan police of St. Louis, together with the police reserves called into service by the board of police commissioners, were used by Governor Marmaduke in the city and county of St. Louis to restore order and good government in those localities. In none of these instances, and in fact never before this case, was the power of the Governor thus to use his police arm for preserving the peace questioned by any citizen or any court. The police were then, as they are now, state officers, and as such were subject to the control of the Governor, and to his orders to be used in any part of this state to preserve the peace and good government thereof. If, instead of using the ordinary police power of the state, the Governor had, in this instance, elected to declare a state of affairs to exist in St. Louis county that demanded the calling out of the militia to suppress, there can be no question that no court would have had power to interfere with him in so doing. If he had done so, and if any justice of the peace had issued warrants for the arrest of the officers and soldiers engaged therein, can there be any doubt that such action would have been an illegal action, and that the officers and soldiers would have been justified in refusing to submit to arrest at the hands of the constable? And can there be any difference in principle whether, instead of using his military arm, the Governor chose to use his police arm, the same legal result would follow? In either event, the power of the Governor would be the same. In either event, the condition would be presented of an imminent danger of armed conflict between the agencies employed by the Governor for the preservation of the peace and the constable with his posse armed with a warrant for the arrest of the military or police while so engaged. In either event, a conflict would be presented such as, if not checked through the instrumentality of a writ of prohibition, as was done in this case, might have resulted in bloodshed and would probably have done so, and the good name of

the state of Missouri, of which all of its citizens are so proud, would have been injured in the eyes of the civilized world. Suppose, instead of a corporation organized as the Delmar Jockey Club was for the purpose of conducting races and registering bets thereon, an aggregation of highwaymen, burglars, murderers, or other law breakers had established themselves in a house in St. Louis county, and were engaged daily and nightly in plying their several illegal avocations; and suppose the local authorities had been unable, or for ulterior purposes, unwilling to apprehend them, enforce the laws, and restore the peace of the community; and suppose such a condition had been brought to the notice of the Governor of the state—would any law-abiding citizen of this state, would any lawyer in this state, would any court in this state, have denied to the Governor the right to employ all means, police, constabulary, or militia, within his reach and under his order, to cause the arrest of the persons, and to restore the peace of the community? A Governor who would fail to act by all the means in his power under such circumstances would be justly regarded as a recreant, and his administration pronounced a failure for its imbecility. No court would have issued any writ to stay the hand of the Governor under such circumstances, and it would have been the imperative duty of this court, under the Constitution, to have prohibited any inferior court that undertook to do so. There is no difference in principle between the case supposed and the case at bar.

The state is primarily bound to preserve the peace in every part of the state. The distinguishing feature between a metropolitan and local police is that the latter has no power beyond the territorial limits of the city that creates it, while the former is created by the state, as the constabulary of the state, and is the civil means created by the state for the enforcement of the police laws of the state. Reason and common sense, as well as logic, therefore compels the conclusion that it is within the power of the state to use the means afforded by the state for discharging the state's duty to preserve the peace, in all and every part of the state, unless the act creating the means expressly prohibits such use. The means being provided and the duty imposed, and the use not being expressly prohibited in this instance, it was right and proper for the Governor to employ the means not only in St. Louis, but everywhere else in the state. The necessities of large cities require the constant presence of a police force. Hence the state has permanently located its metropolitan police force in such large cities. Rural communities do not require, or cannot afford to pay for, such a permanent force. When conditions require it, when rural communities need immediate police protection, or when local officers cannot or will not enforce

the law, it is not only proper and right, but absolutely necessary, for the Governor to use the metropolitan police. This has been the construction of the law by all Governors and their legal advisers heretofore, and the construction is persuasive, although not conclusive, of the meaning of the law. *Fears v. Riley*, 148 Mo. 49, 49 S. W. 836. *Spelling*, in his excellent work on *Injunctions and Other Extraordinary Remedies* (2 Ed. § 628) says: "No court has jurisdiction to interfere with the public duties of any of the departments of the government, or to override the policy of the state; and a court of equity is without power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation, so as to prevent such officers from preserving the public peace, such, for instance, as keeping a public street open to public use. Nor will an injunction issue to restrain an interference by the police authorities with the business of a liquor dealer, by arresting him and his employes. If the arrests are illegal, habeas corpus and suits for damages will afford him ample remedy. And an injunction was refused where sought to restrain police authorities within the metropolitan police district from placing policemen in front of a public house, in which guests had been repeatedly subjected to unjust, exorbitant, and illegal charges, and for giving warning to strangers about to enter to be careful. Nor does it alter the case when the police supervision is exercised in an arbitrary and unlawful manner."

Without further elaboration, therefore, it results that the Governor of the state had power to order the state's metropolitan police system in St. Louis to go to St. Louis county, restore the peace, and make the arrests for which they were sought to be held criminally liable by the justice of the peace, and this, too, at the instance of one who, under the statute, is given no authority whatever to institute such a proceeding, and when, so far as the record discloses, the injured party was not complaining, and when, as the petition in this case expressly charges, the purpose of the proceeding before the justice was not in the interest of good government, but was for the unlawful purpose of impeding and obstructing the state's officers while in the discharge of their legitimate duties, and when the inevitable result would have been an armed conflict between the police and the constable and his posse. Under such circumstances it is the duty of this court to prohibit any inferior court from acting in the manner proposed in this case.

5. The demurrer further charges that the police force of the city of St. Louis had no authority or jurisdiction in the county of St. Louis, except to enforce a warrant for the arrest of a person charged with an offense committed in the city.

The powers and organization of the metro-

politan police system of St. Louis are hereinbefore set out. The point of this objection raised by the demurrer is that the act of 1899 took away from the metropolitan police the power conferred upon it by section 14 of the scheme separating the city and county of St. Louis. As hereinbefore pointed out, it is immaterial in this case whether this is true or not, for the act of 1899, as well as the act of 1861, and the act of 1867, expressly made the police officers state officers as well as city officers. But, without this, the point made is not well taken. The act of 1899 expressly repealed the act of 1861 and all acts amendatory thereof, but the Legislature never repealed or expressed any intention to repeal section 14 of the scheme aforesaid. That the Legislature would have had the power to do so cannot now be doubted under the provisions of sections 23 and 25 of article 9 of the Constitution. The question, then, is whether the act of 1899 repealed said section 14 of the scheme by implication.

It is a well-settled rule, especially in this state, that repeals by implication are not favored, and that no prior statute will be deemed repealed by a subsequent statute, unless there is such inconsistency between the two that they cannot stand together. Wherever the two acts can be harmonized, the courts never regard the prior statute as repealed by implication by later statute. There can be no doubt that there is no such inconsistency between section 14 of the scheme and the act of 1899, as to prevent both being treated as existing laws. It has heretofore been pointed out that, at the time the people of the city and county of St. Louis adopted the scheme and charter, the metropolitan police of St. Louis had power to make arrests and to preserve the peace not only in the city of St. Louis, but also in the county of St. Louis. Section 3 of the act of 1867 expressly conferred such power upon the police. It has also been pointed out that, prior to the separation, the county of St. Louis was required to pay one-fourth of the expense of maintaining the metropolitan police. Section 14 of the scheme changed the law as it theretofore existed so as to require the city of St. Louis to pay the whole cost of the metropolitan police, and that section expressly provided that "the metropolitan police of the city of St. Louis shall have the same power and jurisdiction in the county of St. Louis as constituted by this scheme, as now provided by law." It further provided that, upon petition of the county court, the board of police commissioners should appoint and equip not more than 20 policemen for duty in the county, and the county should pay the expense thereof. This last provision evidently contemplated a permanent police force for the county as well as the city. But, read in its entirety, the conclusion is irresistible and absolutely logical that it was the intention of the framers of the scheme to

preserve to the police the same power and jurisdiction in the county of St. Louis that they had before the separation, and before the separation the act of 1867 expressly gave them power in the county of St. Louis. The act of 1899 contains no provision whatever in conflict with the power and jurisdiction thus retained to the police in the county of St. Louis. There is no repugnancy between the act of 1899 and section 14 of the scheme. The two can unquestionably stand together. It must be remembered that the Constitution expressly declared that, when the scheme and charter were adopted by the voters, the scheme should become the organic law of the county, and should supersede all special laws theretofore enacted in reference thereto. This made the scheme certainly as effective as a legislative act. The scheme was not an amendment to the original police act, nor to any act amendatory thereof, and therefore it cannot be construed to be within the meaning of section 1 of the act of 1899, which repealed the act of 1861 and its amendatory acts. The purpose and object of the Legislature, in giving the metropolitan police power and jurisdiction in the county of St. Louis, as well as in the city of St. Louis, manifestly was because it was necessary for the efficient enforcement of the laws in St. Louis, and for the protection of the people of the county against persons who either lived in St. Louis and committed offenses in St. Louis county, or vice versa. The city and county were practically one subdivision of the state at that time. Only an imaginary line divided the two. It would have paralyzed the hand of the police department if it had not had the power of arrest in St. Louis county as well as in St. Louis city, and it would have been manifestly unjust to the people of St. Louis county not to have given the police power to preserve the peace in the county as well as in the city. The people of the county understood and appreciated the importance of these provisions of law, and, in agreeing to the separation of the city from the county, they took the precaution to provide, in section 14 of the scheme, for the preservation of the power and jurisdiction of the police in the county as it theretofore existed, so that the separation into two subdivisions of the state should not deprive the people of the county of the benefit of the state's police located in St. Louis. Under such conditions, it would be an unjust reflection upon the intelligence of the General Assembly of this state to hold that in passing the act of 1899 the members thereof intended to take away from the people of St. Louis county the police protection which the law had previously afforded them. No court, under any rules of construction with reference to repeals by implication, should take away that protection from the people of St. Louis county. The fact that the city of St. Louis now pays the

whole cost of maintaining the police does not in any manner affect the question of the power and jurisdiction of that police system anywhere in the state, for, as hereinbefore pointed out, this court, in *State ex rel. v. Mason*, supra, expressly held that the metropolitan police system has jurisdiction co-extensive with the territorial limits of this state, and that it is the means afforded by the state for the efficient enforcement of the laws of this state for the protection of life, property, and the peace of the citizens of this state.

For these reasons it is too clear to admit of argument that the police had the power they were exercising in St. Louis county at the time the proceedings before the justice of the peace complained of in this case were instituted, and that it was the duty of this court, under the circumstances, to exercise its high prerogative by a writ of prohibition to stay the hand of the justice of the peace and the constable from interfering with, or attempting to arrest, the police while so doing. Under our complex system of government no other adequate or efficient remedy has been suggested or can be conceived for the correction of the evils and wrongs existing at the date of the issuance of the preliminary rule in this case, and no other means has been suggested whereby the unseemly conflict between the power of the constable and the power of the police and the Governor could have been averted and prevented. The various acts relative to the metropolitan police system declare the police officers to be state officers, and expressly vest them with power in St. Louis county, and the act of 1899 will be read in vain for a single word expressive of a legislative intention to curtail the power previously vested. In fact, the act of 1899 was not intended to take away any powers previously conferred, either as to the city of St. Louis, or as to any other portion of the state. The manifest purpose of that act was to provide for an increase in the number and pay of the police, but not to decrease any of its powers or jurisdiction. That act was a curative, enlarging act in the respects noted, and was not intended to destroy any power the police previously had. It is inconceivable that, after the Legislature had, so many times, expressly declared that the police were state officers and should have jurisdiction and power in St. Louis county, and after that force had been so often used by the Governors of this state to restore order and suppress lawlessness in various parts of the state, the Fortieth General Assembly, in 1899, should have intended to curtail the power of the police. If the Legislature had so intended, they would unquestionably have said so in express terms. The prior use of the police by former governors had been acquiesced in and presumably approved of by the people of this state, and, in the absence

of an express provision of statute forbidding further use on similar occasions, no court would be justified in construing the act of 1899 to have the effect to take away previously conferred powers by implication, unless there was such manifest repugnancy between the act of the Legislature and of the scheme aforesaid as that both could not stand together, and such is not the condition here presented.

For these reasons the preliminary rule in prohibition should be made absolute, and the demurrer should be overruled.

VALLIANT, J., concurs herein.

CLARK et al. v. SIREs.

(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

1. DEEDS—TITLE ACQUIRED BY GRANTEE.

Land was conveyed to a grantee for life with remainder to the heirs of her body. She and three children conveyed their interest to a third person. One of the children died childless during the lifetime of the grantee. Another child, who died before the grantee leaving heirs, conveyed his interest as heir of his father who died before the grantee. *Held*, that the third person only acquired the grantee's life estate, and the interest of the two children who survived her.

2. PARTITION — SALE — CONFIRMATION — NECESSITY.

A sale in partition was made in pursuance of the order of sale as altered by the attorney of plaintiff therein. The sheriff's deed was made before the sale was reported to the court. The record did not show that the sheriff's report was approved or that the sale was confirmed. Gen. St. 1865, c. 152, relating to partition was in force at the time the proceedings were had. *Held*, that the deed passed no title.

3. SAME—RECORD SHOWING CONFIRMATION OF SALE—NECESSITY.

The record in partition proceedings had while Gen. St. 1865, c. 152, relating to partition was in force, should show the confirmation of the sale, that being the final judgment from which alone an appeal could be taken, and which when once rendered imported absolute verity, except for fraud or want of jurisdiction.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 354.]

4. SAME—SUFFICIENCY OF RECORD.

A record in partition proceedings, which recited that the sheriff filed his final report in the cause, and that the cause was settled, did not show that the sheriff's sale was confirmed by the court.

Appeal from Circuit Court, Grundy County; J. W. Alexander, Judge.

Action by W. A. Clark and others against Columbus Sires. From a judgment for plaintiffs, defendant appeals. Affirmed.

Harber & Knight and Peery & Lyons, for appellant. Platt Hubbell and George Hubbell, for respondents.

BRACE, P. J. The petition in this case is in two counts. The first is in the ordinary form in ejectment to recover the possession

of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 13, township 62, range 25 in Grundy county; and the second is under section 650, Rev. St. 1899, to quiet the title to the same. The answer was a general denial, and a plea of the statute of limitations. The case was tried before the court without a jury. The judgment was for the plaintiffs for eight-tenths of the land sued for, and a decree quieting the title to the same; and the defendant appeals.

James Austin is the common source of title. By his deed, dated the 10th day of November, 1851, the title to the real estate in question, together with other lands, was vested in Cynthia Clark, wife of Orverly S. Clark, for life, remainder in fee simple to the heirs of her body. Her husband died in August, 1859, and she died on the 22d of September, 1902, and this suit was instituted on the 15th of January, 1903. Thirteen children were born to the said Cynthia, of whom six died before their mother. Three, Missouri Ann, Elizabeth, and Joseph H., childless; and three, Ellen, Nicholas S., and James G., each leaving children who survived their grandmother. The other seven children who survived their mother were John G., Orverly S., William A., Mildred J., Julia, Nancy J., and Casander. After the death of Cynthia Clark, and before the commencement of this suit, the said William A., by deed, acquired the title of the said John G., Mildred J., and Julia in the premises; and he, the said Orverly S., the children of the said James G., the children of the said Nicholas S., and the children of the said Ellen; deceased as aforesaid; are the plaintiffs herein, and as remaindermen are entitled to an undivided eight-tenths of the premises, unless their title has been divested.

By deed dated the 7th day of April, 1865, the said Cynthia Clark and two of her children, the said Nancy J. and Ellen, conveyed their title in the premises to one William B. Tabor. By deed, dated July 26, 1867, the said James G. conveyed all his title as heir of Orverly Clark's estate in the premises to the said Tabor. By deed, dated June 6, 1868, the said Casander conveyed her title to the premises to the said Tabor, and thereafter the sheriff of Grundy county conveyed the premises to the said Tabor by the following deed duly acknowledged, to wit: "To all to whom these presents shall come, I, Nathan A. Winters, as the sheriff of Grundy county in the state of Missouri send greeting: Whereas, in the case of William B. Tabor, plaintiff, against John Clark, William Clark, Nicholas Clark and Mildred Allen, ——— Allen, her husband, Julia A. Clark, Orville S. Clark, defendants, it is ordered by the circuit court of Grundy county aforesaid at the March term thereof, A. D. 1870, that the following lands in said county, to wit: The west half of the southwest quarter of section No. thirteen (13) and the east half of the

southeast quarter of section No. fourteen (14) in township No. sixty-two of range No. twenty-five (25) subject to the life estate of Cynthia C. Clark be sold for petition and division among plaintiff and defendants for cash in hand; and, whereas, in pursuance of said order of sale, I, as the sheriff of said county, caused a notice that said lands would be offered for sale at public vendue at the courthouse door of said county on the 5th day of September, A. D. 1870, between the hours of 9 o'clock a. m. and 5 o'clock p. m. of that day, and during the sitting of said court for cash in hand to be published in the [Grand River Republican] a weekly newspaper printed and published in said county, for at least twenty days prior to said day of sale; and, whereas, at the time and place and on the terms last aforesaid, I, as sheriff, as aforesaid, having previously ascertained that said lands altogether constituted one farm, and could be more advantageously sold in a body than it could be in separate lots, tracts, or subdivisions, offered said lands for sale in one body at public auction, and William B. Tabor being the highest and best bidder for the whole of said land subject to the life estate of the said Cynthia Clark, at and for the price and sum of \$100.00, the same was stricken off, and sold to him for that sum; and, whereas, the said William B. Tabor did fully comply with the terms of said sale, and did pay to me as sheriff as aforesaid the sum of \$100. Now, therefore, in consideration of the premises, I, said Nathan A. Winters, as sheriff aforesaid, do hereby sell, transfer, and convey the real estate aforesaid subject to the life estate aforesaid, to him, the said Wm. B. Tabor, his heirs and assigns, forever. In witness whereof, I have subscribed my name and affixed my seal as sheriff, as aforesaid, this 8th day of September, A. D. 1870. N. A. Winters, Sheriff. [Seal.]" Afterwards, by mesne conveyances the defendant acquired all the right, title, and interest of the said Tabor to the premises, and claims that by virtue of the conveyances aforesaid the title of all the remaindermen had been vested in him.

1. As in partition no additional estate is conferred upon the partitioners (*Whitsett v. Wamack*, 159 Mo. 14, 59 S. W. 961, 81 Am. St. Rep. 339; *Harrison v. McReynolds*, 183 Mo. 539, 82 S. W. 120; *Sharp v. Stewart*, 185 Mo. 518, 84 S. W. 963) the first question to be determined is, what interest in the premises did Tabor acquire by the deeds aforesaid other than that of the sheriff? By the deed of Cynthia and her two children, Nancy J. and Ellen, he acquired the life estate of the said Cynthia, and the said Nancy J. having survived her mother, he also acquired her remainder, or an undivided one-tenth interest in the premises in fee simple. But as the said Ellen did not survive her mother that was all the interest he acquired in the remainder by that deed, and as the said James

G. did not survive his mother, he acquired no interest in the remainder by that deed even if it had contained apt words conveying his interest in the remainder, which it did not, and as the said Casander also survived her mother, by her deed, he acquired her interest in the remainder or another undivided tenth interest in fee simple in the premises, and these two-tenths was all the interest he acquired in the fee simple remainder by the foregoing deeds. *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972. This brings us to the main question in the case.

2. What interest, if any, did he acquire by the sheriff's deed aforesaid conveying the premises, with other lands to the said Tabor. This question must be determined upon the record of the court in the partition proceeding in which it was made, the whole of which was offered in evidence to impeach it, by which it appears that on the 11th of June, 1869, a suit in partition was instituted in the Grundy county circuit court by petition, as follows: "William B. Tabor, Plaintiff, v. John Clark, Nicholas Clark, Mildred Allen, ——— Allen, Her Husband, Julia A. Clark, Orville S. Clark, and William Clark, Defendants. Plaintiff states: That plaintiff and defendants are the owners and hold in joint tenancy the remainder after the expiration of the estate during the natural life of Cynthia C. Clark of the following lands in Grundy county, Missouri, to wit: The west half of the southwest quarter of section No. thirteen (13); the east half of the southeast quarter of section No. fourteen (14) in township No. sixty-two (62) of range No. twenty-five (25). That the rights of all persons in said real estate are as follows, to wit: The plaintiff is entitled to four-tenths of said real estate and that defendants John Clark, Nicholas Clark, Mildred Allen, Julia A. Clark, Orville S. Clark, and William Clark are each entitled to one-tenth of said real estate, all subject, however, to the said estate during the natural life of said Cynthia C. Clark. Plaintiff states: That he knows of no other person or persons holding or claiming any interest in said remainder in said real estate and that the rights of all the parties therein are hereby correctly stated. That the amount and situation of said real estate and the number and parties interested therein are such that division thereof in kind cannot be made without great injury to the interests of the owners thereof. Plaintiff asks: That partition and division of said remainder of said lands be made among the parties thereto entitled. That the interests of the parties be decreed as herein set forth, and that the land be sold for the purpose of partition and division as aforesaid and for such other and further relief as may seem just." The partition was signed by the attorneys, verified by the affidavit of one of them, in which it was alleged that all of the de-

fendants were nonresidents of the state of Missouri. At that time the said Tabor was the owner of the life estate of the said Cynthia Clark. The said John G., William A., Nicholas S., Mildred J., and Orverly S., were all nonresidents of the state of Missouri. The said Mildred J. was the wife of A. A. Lieuallen, and the said William A., Mildred J., and Julia were minors. On the same day an order of publication in the usual form, entitled as in the petition, was made and issued by the clerk of said court against the defendants named in the caption thereof, notifying them that said plaintiff had commenced suit against them and "that the object and general nature of his petition is to obtain partition and division among the parties to said suit of the remainder after the expiration of the estate during the natural life of Cynthia C. Clark of the following lands in said county" (describing the same as in the petition), and requiring them to appear and answer the same at the September term, 1869, of said court, etc., at which term proof of publication of said notice was duly made, a guardian ad litem for the infant defendants (without naming them) was appointed, and judgment by default against the adult defendants (without naming them), was entered, and the cause continued.

At the next ensuing March term of said court and on the 9th of March, 1870, the order of sale recited in the sheriff's deed was made without any appearance of or answer by the guardian ad litem so far as the record shows. The order as entered of record of that date, in ink, in the handwriting of the clerk, with certain lead pencil interlineations therein, which it was admitted on the trial were in the handwriting of one of the plaintiffs' attorneys in said proceeding, is as follows, the interlineations being in parenthesis: "Now at this day comes up to be heard and determined the above-entitled cause by the court here, and appears the plaintiff by his attorney, but all of said defendants being solemnly called comes not, but further makes default, whereupon the court here having heard the proof adduced on the part of the plaintiff and being well advised as to the law and facts of the case, doth find that the lands described in plaintiff's petition are not susceptible of partition and division in kind without great prejudice to the owners thereof, and the court doth further find that plaintiff William B. Tabor, is entitled to four-tenths of said real estate, and that defendants, John Clark, Nicholas Clark, Mildred Allen, Julia A. Clark, Orville S. Clark, and William Clark are each entitled to one-tenth of (the remainder of) said real estate all (of said real estate being) subject to the life interest of Cynthia C. Clark as stated in plaintiff's petition. It is therefore, ordered, adjudged, and decreed by the court here that the sheriff of Grundy county in the state of Missouri, sell the (said remainder

of the) lands described in the petition of the plaintiff herein (after the expiration of said life estate of said Cynthia C. Clark), viz.: The west half of the southwest quarter of section number thirteen, the east half of the southeast quarter of section number fourteen in township number sixty-two of range twenty-five at public auction to the highest and best bidder at the courthouse door in the town of Trenton, in the county and state aforesaid for cash in hand and that the said sheriff report his proceedings to the court herein as the law directs. And it is further ordered that Peery and Burkeholder be allowed the sum of fifty dollars as attorney's fee in this cause and the cause continued." At the next ensuing September term of said court, and on the 5th of September, 1870, the sale was made and on the 7th day of September, 1870, by an entry of record of that date, the cause was "continued to await sheriff's report," and on the next day (the 8th of September, 1870) the sheriff's deed was executed. At the next ensuing March term of said court, and on the 11th day of March, 1871, by an entry of record of that date, the cause was "continued to await sheriff's report," and at the next September term of said court, and on the 9th of September, 1871, the following entry of that date appears: "Now, at this day comes Nathan A. Winters, sheriff, and files his final report in this cause, and this case being settled, it is ordered by the court that the parties here to go hence without day." And this was the last entry of record in the case, and the only one at that term, except a memorandum on the judge's docket consisting of the single word "Settled." And with these entries the case disappeared from the records of the court.

It thus appeared on the face of the record that the sale was not made in pursuance of the order of the court as entered by the clerk on the record of the court, but in pursuance of the order as altered by the plaintiff's attorney, that the deed was executed before the sale was reported to the court, it does not appear that the sheriff's report was ever approved or the sale confirmed by the court. The law in force at the time these proceedings were had was chapter 152, Gen. St. 1865, under which in *Burden v. Taylor*, 124 Mo. 12, 27 S. W. 349, we held that under that statute "a sheriff's deed in partition made before approval of the sale by the court confers no title," and in regard to such proceedings said: "Under the statute, as it read in the revision prior to that of 1865, it was held that where the judgment of the court is for a partition of the property, and directs the land to be sold by the sheriff, the judgment is final, and an appeal therefrom must be taken at the same term at which the judgment is entered. *Durham v. Darby*, 34 Mo. 447; *Hinds v. Stevens*, 45 Mo. 209. In the latter case a change in the law is noticed which was carried into the

revision of 1865, and since then it has been uniformly held that a report by the sheriff of his proceedings under the order of sale and the approval by the court of that report is required, and that, until such approval, the case is still pending. *Pomeroy v. Allen*, 60 Mo. 530; *Parkinson v. Caplinger*, 65 Mo. 290; *Murray v. Yates*, 78 Mo. 18; *Turpin v. Turpin*, 88 Mo. 337; *Harblson v. Sanford*, 90 Mo. 477, 3 S. W. 20; *Holloway v. Holloway*, 97 Mo. 628, 11 S. W. 233, 10 Am. St. Rep. 839; *Buller v. Linzee*, 100 Mo. 95, 13 S. W. 344. It was accordingly held in *Pomeroy v. Allen*, supra, that "in partition sales, the sheriff must report his proceedings to the court, and until there is an approval or confirmation of the same, no deed can be executed." Although under the statute of 1855, it was held that an appeal would lie from an order of sale in partition, it was also held under that law, that the court retained control of the sale and of the execution of the deed in pursuance thereof (*Neiman v. Early*, 28 Mo. 275; *Fortune v. Fife*, 105 Mo. 433, 16 S. W. 687), and that the court, having control over the execution of its own process, could, at the term to which the report of the sale was made, set the same aside without notice to the purchaser (*Neiman v. Early*, supra).

We are cited to a number of cases in which it is held that sales under execution cannot be set aside without notice to the purchaser, but these cases are not in point. *Patton v. Hanna*, 46 Mo. 314. A confirmation of the sale in such cases is not necessary, but sales made under order of court in partition are made subject to the approval of the court. "Sales of land by order of the court in proceedings for partition are judicial sales. As such, they must be reported to the court for confirmation, and until confirmed, they are of no effect." *Rorer on Judicial Sales* (2d Ed.) § 399. "Such approval is essential to the consummation of the sale. Without it there is no authority for making any conveyance to the purchaser, and a conveyance without authority is obviously void." *Freeman on Void Judicial Sales*, § 43; *Freeman on Co-Tenancy and Partition* (2d Ed.) §§ 544, 545; 2 *Freeman on Executions* (2d Ed.) § 311." Applying these principles to the case in hand, the deed in question, having been made before the sale was reported, and the report thereof afterwards made, having never been approved or the sale confirmed by the court, so far as the record shows, no title to the premises passed thereby to the said Tabor. It is contended, however, that it is not necessary that approval of the sheriff's report and confirmation of the sale should appear by a formal entry, but it is sufficient if such approval and confirmation can be gathered from the whole record. The confirmation of the sale was the consummation of, and the most important step in the whole pro-

ceeding. It was the final judgment of the court from which alone an appeal could be taken, and, when once rendered, imported absolute verity and was beyond impeachment except for fraud or want of jurisdiction. An act of such importance, and productive of such grave consequences, should undoubtedly appear upon the record in no equivocal terms. The whole of the record was given in evidence, and has been substantially set out herein, and nothing therein contained can be found indicating that the sale was confirmed. The only entries that could have had any bearing thereon were the last ones made in the case, and there is nothing therein contained showing or tending to show that the sheriff's report was considered or approved, or that his sale was confirmed. On the contrary, the terms thereof tend rather to show that the report of the sheriff was not considered or approved, and the sale was not confirmed, because the case was "settled," when, where, by whom, or by what, does not appear. The court may have thought that the mere filing of the report settled the case, and this seems the most reasonable inference to be drawn from these record entries, but, of course, that was a mistake. Apart from the fact that the property was sold for only about enough to pay attorney's fees and costs; that the plaintiff was the purchaser, and through the whole proceeding he had concealed the fact that he was the owner of the life estate and three-fifths of the defendants were infants, the record abounded in errors, omissions, misnomers, and other irregularities, for which confirmation of the sale ought to have been withheld; some of which go only to some of the plaintiffs herein, and others to all of them. But, as upon the face of the record, it appeared that the sale was not made in accordance with the terms of the order of the court, and was not thereafter confirmed by the court, no title passed by the sheriff's deed as against any of the plaintiffs herein. It is not necessary, therefore, to point out or comment on those defects.

The trial court correctly determined the effect of this deed, and the rights of the parties herein to the real estate in question, and its judgment is affirmed. All concur.

FREDERITZIE v. BOEKER.

(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

1. BOUNDARIES — ESTABLISHMENT — OFFICIAL SURVEYS.

The corners established by the United States surveyors in surveying public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are authorized by the laws of the United States.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 63.]

2. NAVIGABLE WATERS — RIPARIAN RIGHTS — ACCRETION.

Where a United States surveyor in surveying the public lands treated a certain stream as navigable, and meandered the same, thereby making a certain section a fractional section and designating the corner thereof, which would have otherwise been in the middle of the stream, as an "inaccessible point," x, and running the boundary line of the section from a point, a, north of x, in a southwesterly direction along the meander line of the stream to a point, b, due west from x and thence west along the section line, the owner of the fractional section took title to accretions which formed between imaginary lines extended at right angles to the meander line of the stream from points a and b, and his title to the accretions was not restricted to the land which formed within the triangle, a, b, x.

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Action by John H. Frederitzle against Anton Boeker. From a judgment for plaintiff, defendant appeals. Affirmed.

Benj. J. Klene and R. L. Johnston, for appellant. J. C. Kiskaddon, for respondent.

BRACE, P. J. This is an appeal by the defendant from a judgment and decree of the St. Louis county circuit court in favor of the plaintiff.

The petition is in two counts. The first count is ejectment for the recovery of a small tract of land, described in the petition and judgment by metes and bounds, and which it is alleged is an accretion to plaintiff's land from the Meramec river. The second count is for injunction to restrain the defendant from erecting or maintaining an embankment or causeway across said tract of land whereby plaintiff's access to said river would be cut off. On the filing of the petition a temporary injunction was granted as prayed for in the second count of the petition, and, in due course, the cause coming on to be heard on both counts was submitted to the court without a jury, and the following judgment and decree rendered therein: "Now, at this day, come the parties in the above-entitled cause by their respective attorneys, and a jury being waived the cause is submitted to the court on both causes of action stated in the petition, and the court, having heard the evidence and the argument of counsel, doth find that plaintiff, under the first cause of action stated in the amended petition, is entitled to recover of the defendant the possession of the real estate sued for in said first cause of action which real estate is described as follows, to wit: Commencing at a stake set for and at the original corner of the range line between ranges 5 and 6 east, it being the original corner on the bank of the Meramec river to the southeast fractional quarter of section 13, in township 43, of range 5 east, thence south, 37 degrees and 32 minutes west, along the original bank of said Meramec river, 4 chains and 5 $\frac{1}{4}$ links, to a stake set for and at the original corner on the section line between

fractional sections 13 and 24, in township 43, of range 5 east, it being the original corner on the bank of the Meramec river to said southeast fractional quarter of section 13, in township 43, of range 5 east; thence south, 11 degrees and 14 minutes east, 2 chains and 97 links, to the bank of said Meramec river; thence down the said Meramec river, with meanderings thereof, north, 43 degrees and 48 minutes west, 4 chains and 22 links, to a point on said bank; thence north, 18 degrees and 16 minutes west, 3 chains and 25 links, to the place of beginning—said tract of land being situated in St. Louis county, Missouri, and being an accretion to the said southeast fractional quarter of section 13, in township 43 of range 5 east, formed by the action of said Meramec river depositing earth, sand, soil, and other substances to, along, and against said fractional quarter section, and also under said first cause of action to recover of the defendant the sum of \$1 damages for the unlawfully withholding the possession of said real estate from plaintiff, and also one cent per month for monthly rents and profits of said real estate from the rendition of this judgment until possession of said real estate is delivered to plaintiff, and the court doth further find the issues for the plaintiff on the second cause of action stated both in the original and amended petition, and that at the commencement of this action defendant, his agents, and servants were engaged in doing and threatening to do the acts complained of by plaintiff both in said original and said amended petition. It is therefore considered and adjudged by the court that plaintiff recover of the defendant the possession of the aforesaid real estate, and said \$1 damages, and said one cent per month for monthly rents and profits from the rendition of this judgment until possession of said real estate is delivered to plaintiff, and it is further ordered, adjudged, and decreed that the temporary injunction and restraining order hereinbefore made be and it is hereby made permanent, and that the defendant, his agents, and servants be, and they are each and all hereby, forever restrained and enjoined from erecting or maintaining an embankment or causeway on, along, or across said real estate, or any part thereof, and from excavating any earth from or on said real estate, or any part thereof, and that plaintiff recover of the defendant his costs and charges herein expended, and that plaintiff have against defendant a writ of possession and execution to recover the possession of said real estate, said damages, monthly rents and profits and costs."

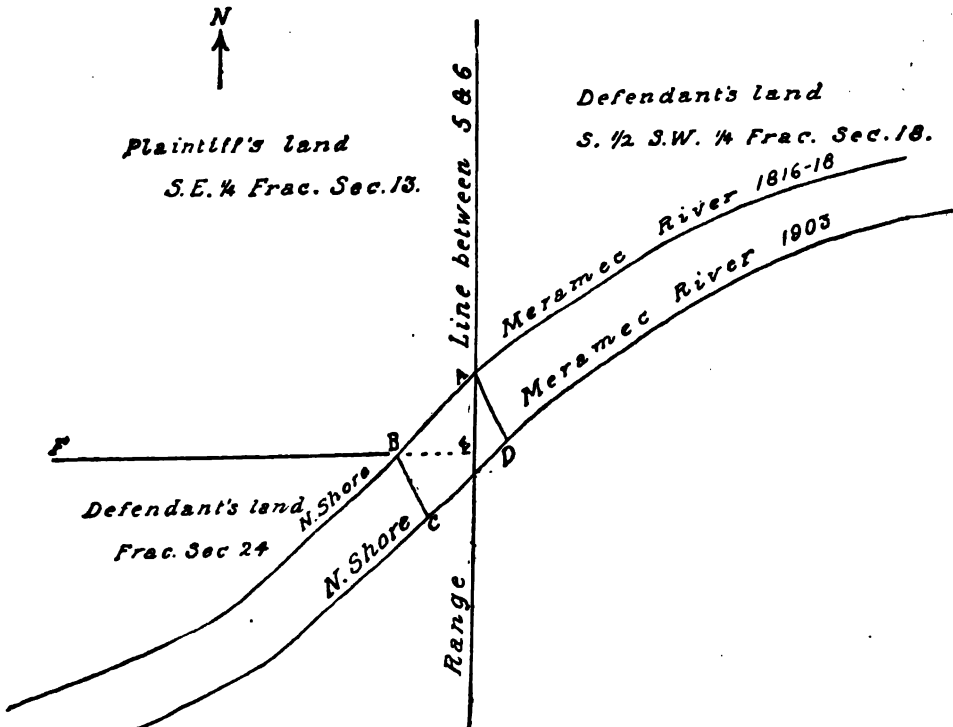
From this judgment and decree defendant appeals.

1. The plaintiff is the owner of the southeast fractional quarter of section 13, township 43, range 5 E., and claims the land in controversy as an accretion to his quarter section. The defendant is the owner of fractional section 24 in said township and

range, and of the S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of fractional section 18, township 43, range 6 E. is in possession of the premises sued for, and contests the plaintiff's claim; his answer being a general denial. The location of the land in controversy in relation to the lands of plaintiff and defendant, respectively, and to the north shore of the Meramec river as it was when these lands were surveyed by the surveyors of the United States government, and as it was when this suit was instituted, is roughly shown by the following diagram:

ized by the laws of the United States." *Climmer v. Wallace*, 28 Mo. 556, 75 Am. Dec. 135; *Mayor et al. v. Burns*, 114 Mo. 426, 19 S. W. 1107, 21 S. W. 728.

It appears from the evidence that according to the United States surveys section 18, township 43, range 5, is a fractional section, made so by the Meramec river, which was treated by the surveyors as a navigable stream, whose shores were defined by meander lines which became the boundary lines of those subdivisions that abutted upon it, and upon which the section lines closed. Hence,



The land in controversy is contained within the lines, a, b, c, d, a. At the time the United States government survey was made it was all under water; the north shore of the Meramec river then being as indicated on the diagram by the line marked "Meramec river 1816-18." Since that time, by the recession of the river to the line marked "Meramec river 1903," it has all become dry land. That the land is an accretion to the land on the north shore as it was when originally surveyed is conceded; and the only question is, does it belong to the plaintiff as an accretion to his southeast fractional quarter of section 13, aforesaid? The circuit court held that it did, and in so doing was manifestly correct. It is well-settled law that "the corners established by the United States surveyors in surveying the public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof as are author-

ized by the laws of the United States." when the range line between 5 and 6 was being run from the south, the southeast corner for that fractional section was established, not at 80 rods from the last corner, which was designated as "an inaccessible point," but in the range line on the north shore of the river 3 chains and 50 links north of that "inaccessible point." The corner as thus established by the United States surveyors is designated on the diagram by the letter "a." From that point the north shore of the river meandered in a southwest direction until it was intersected by the south sectional line of said fractional section at a point designated on the diagram by the letter "b," and thus the south line of said fractional section as established by United States survey became a line designated on the diagram as "a, b, f," that part of the boundary between "a" and "b" being the shore line of the river and the shore front of fractional section 13 to which the land in controversy

was an accretion, and the court committed no error in holding that this accretion was the property of the plaintiff.

2. There is nothing to support defendant's contention that the south line of the fractional section should be extended in a straight line until it intersects the range line at a point marked "e" on the diagram, and that plaintiff has no title to any part of the accretion outside the lines, a, b, e, a. As this case was tried by the court, and as upon the undisputed facts in the case the judgment was for the right party and could not have been other than it was, it becomes unnecessary to note the points made in brief of counsel, which do not affect the merits of the case.

The judgment of the circuit court is affirmed. All concur.

KALBFELL et al. v. WOOD et al.

(Supreme Court of Missouri. Feb. 26, 1906.)

1. PROHIBITION—OFFICE OF WRIT.

The writ of prohibition is granted only to prevent usurpation of judicial power.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Prohibition, § 1.]

2. SAME—OFFICERS SUBJECT TO WRIT—NATURE OF DUTIES—ELECTION COMMISSIONERS.

Under Laws 1901, p. 156, § 15, providing that the judges, clerks, and challengers who serve at primary elections shall be selected by the election commissioners from lists submitted by the managing committee of the party holding the primary, the duty of selecting the judges, clerks, and challengers is an administrative, and not a judicial, one, and hence the election commissioners cannot be prevented by a writ of prohibition from performing that duty in a certain manner.

3. COURTS—REALITY OF CONTROVERSY—PROHIBITION—ELECTION COMMISSIONERS—OFFICERS OF PRIMARIES—SELECTION.

Where a writ of prohibition to prevent the board of election commissioners from selecting judges, clerks, and challengers for a primary election from a certain list was sought so late that the primary had been held before the provisional order in prohibition was returnable, and so that no new primary could be held in time for the election, only a moot question was involved, and the proceeding could not be maintained.

In Banc. Petition by Theodore D. Kalbfell and others against John M. Wood and others for writ of prohibition to prevent respondents from taking certain action as election commissioners. Proceeding dismissed.

Jno. A. Gilliam, Thos. T. Fauntleroy, and Nathan Frank, for plaintiffs. Chas. W. Bates and Wm. F. Woerner, for defendants.

PER CURIAM. On the 9th day of September, 1902, the plaintiffs, asserting themselves to be members of the Republican city central committee of the city of St. Louis, presented their petition to one of the judges of this court in vacation for a writ of prohibition, to be directed to the members of the board of election commissioners of the city of St. Louis. The petition in substance stated that the plaintiffs were, on the 30th of August,

1902, and for two years prior thereto, together with other persons named in the petition, duly and legally constituted Republican city central committee of the city of St. Louis, which said committee is composed of 28 members, one member from each ward from said city, and that the city of St. Louis is a city and municipal corporation of over 300,000 inhabitants, and was such municipal corporation at all the time therein mentioned, and primary elections of political parties therein are governed by the act of the General Assembly of March 13, 1901, known as the "Primary Election Law." Laws 1901, p. 149. The petition then alleged that there was in the city of St. Louis a political party known as the "Republican Party," and that said political party had more than 40 per cent. of the qualified voters of said state, who are qualified to vote at elections held therein. It was then alleged that under the rules and customs of the Republican Party the Republican city central committee had existed for many years as the governing body of said political party in said city, to call and conduct primary elections in said city, and no other organization had any authority to call or conduct such primary elections in said city for such party, and that Louis P. Aloe, James McCaffery, and John M. Wood constituted the board of election commissioners for said city, duly appointed and qualified under the provisions of said act of March 13, 1901. It is then alleged that on the 13th of August, 1902, the said Republican city central committee, at a meeting of its members, legally called and held, ordered a primary election of the Republican Party of St. Louis under the provisions of such primary law to nominate, by direct vote, candidates for the various offices to be voted for at the general election to be held on November 4, 1902, and filed said call with the said board of election commissioners on August 16, 1902. It was then alleged that the said Republican city central committee, composed of the members named in said petition, filed with said board on the 30th of August, 1902, a list of the names of legal and qualified voters members of the Republican Party, from which the said election commissioners should select judges, clerks, and challengers of elections for said primary election, as authorized by the said act of the General Assembly approved March 13, 1901; that after said call had been made for said primary election, and the list of names from which to select judges, clerks, and challengers had been filed with the board of election commissioners, William H. Rudolph and 13 other members of said Republican city central committee, together with William H. Blake, William H. Hahn, and 6 others named therein, conspired to thwart the will and desire of said Republican Party in said city, and declared themselves members of the said city central committee, and on September 2, 1902, filed with said board of election commis-

sioners another list of names, from which they demanded that the said board of election commissioners should select judges, clerks, and challengers of election for said primary election to be held on the 16th of September, 1902; that said board of election commissioners claimed that it had jurisdiction to determine as to which of said bodies, that of which plaintiffs composed the majority, or that of William H. Rudolph and the other associates with him composed a majority, of the Republican city central committee, and from which of said lists it would select judges, clerks, and challengers, and that, unless prevented by a writ of prohibition, the said board of election commissioners would appoint from the list of names of judges, clerks, and challengers submitted by William H. Rudolph and his associates on or about September 2, 1902, judges, clerks, and challengers to serve and act at the primary election to be held on said 16th day of September, 1902; that plaintiffs were remediless in the premises by or through ordinary processes or proceedings by law to prevent the said board of election commissioners from exceeding their jurisdiction in claiming the power and authority to pass upon the lists filed for judges, clerks, and challengers, and that in assuming to adjudicate between the plaintiffs and said Rudolph and his associates, as to which of said bodies constituted the Republican city central committee, the said election commissioners were encroaching upon the jurisdiction of the circuit court of the city of St. Louis and the Supreme Court of Missouri, and therefore the plaintiffs prayed a writ of prohibition directed against said election commissioners to prohibit them from assuming jurisdiction to determine whether plaintiffs or said Rudolph and his associates were members of the Republican city central committee, and to prohibit them from appointing any judges, clerks, or challengers for the primary election to be held by the Republican Party in the city of St. Louis from the lists filed by said Rudolph and his associates, and to prevent and prohibit them from appointing said judges and clerks from any lists save that filed by the plaintiffs on August 30, 1902.

Upon the presentation of this petition to Hon. Waltour M. Robinson, one of the judges of this court, on the 9th day of September, 1902, a rule was granted by the said judge, directed to the said election commissioners to appear before him at chambers in Jefferson City, Mo., on September 12, 1902, to show cause why the provisional writ of prohibition should not issue against them returnable to the Supreme Court of the state of Missouri in banc on the 14th day of October, 1902, and show cause why a final judgment in prohibition should not be entered prohibiting said election commissioners from in any manner recognizing said Rudolph and his associates as members of the Republican city central committee of St. Louis, and pro-

hibiting them from appointing said judges, clerks, and challengers from any lists of names save that filed by the plaintiffs with them on August 30, 1902. The provisional order was served on the election commissioners on September 9, 1902. To that order the election commissioners on the 12th of September, 1902, made a return in which, after alleging the filing of the two lists by the plaintiff and his associates on the one hand, and Rudolph and his associates on the other hand, the said board of election commissioners stated that up to that time there had been no occasion for the said board to select the names of judges, clerks, and challengers for said primary election, and that said board had not yet undertaken to determine what names they would select for judges, clerks, and challengers for said primary election; that said board had not sufficient knowledge or information up to that time upon which to form a judgment as to whether the plaintiffs and their associates or the said Rudolph and his associates constituted the governing and controlling committee of the Republican Party of the city of St. Louis, and that said matters were questions of facts to be determined by said board when it should undertake to select judges, clerks, and challengers in said primary election; that in due time said election commissioners would take up said matter and make due inquiry, and would honestly and faithfully decide said questions upon the evidence before them, and respectfully suggested that neither the Supreme Court or any judge thereof had jurisdiction to issue the writ of prohibition prayed for by the plaintiffs and thereupon on the said 12th day of September, 1902, Hon. Waltour M. Robinson, one of the judges of the Supreme Court of Missouri, in vacation made an order over his hand and official signature, wherein he commanded the said election commissioners of the city of St. Louis to appear before the Supreme Court of Missouri in banc on Tuesday, the 14th day of October, 1902, to show cause why a final judgment in prohibition should not be entered prohibiting the said board of election commissioners and each of them from recognizing in any manner said Rudolph and his associates as members of the Republican city central committee of the city of St. Louis, and from recognizing the lists of judges, clerks, and challengers submitted by said Rudolph and his associates on September 2, 1902, and from appointing any judges, clerks, and challengers for the said primary election to be held on the 16th day of September, 1902, by the Republican Party in the city of St. Louis, from the list filed by said Rudolph and his associates, and from appointing said judges, clerks, and challengers from any list, except that filed by the plaintiffs on August 30, 1902, and the said election commissioners were further commanded "to refrain from any act or recognition of the body claiming to be the

Republican city central committee of St. Louis of which said William H. Rudolph and his associates composed the majority, until further order of this court." Afterwards on the 14th day of October, 1902, two of the said election commissioners, Messrs. Wood and McCaffery, filed in this court their return to the preliminary rule issued as aforesaid by Judge Robinson, in which after admitting they were, together with Louis P. Aloe, the board of election commissioners for the city of St. Louis and that St. Louis was a city over 300,000 inhabitants, and that there was a Republican Party in said city duly organized and having a city central committee and duly authorized under the laws of this state to hold a primary election for the nomination of candidates under the primary election law approved March 13, 1901, and that a call for a primary election of the Republican Party of the city of St. Louis to be held on the 16th of September had been issued, alleged that, as said board of election commissioners, they prepared a notice of said primary election to be held on September 16, 1902, and as required by law fixed September 12, 1902, as the last day upon which delegates could be filed in their office for said primary election, and September 15, 1902, as the last day upon which the personal of any delegate could be changed. They admit that the plaintiffs and his associates, claiming to be the managing and controlling committee of said Republican Party of the city of St. Louis, filed a list of names with said board of election commissioners, from which said board was requested to select judges, clerks, and challengers for said primary election; that afterwards, dissensions having arisen in the said Republican city committee, the attention of the Republican state central committee was called to the said dissensions and said state central committee took cognizance of said charges, and, after notice to the plaintiffs and each of them on September 1, 1902, removed plaintiffs from their respective positions as members of the Republican city central committee, and directed the vacancies to be filled by the remaining members of said Republican city central committee; that said committee did organize, and elect William H. Blake as chairman and William H. Hahn as secretary, and the said Republican city central committee, thus recognized, rescinded the resolution asking the appointment from the lists of judges and clerks furnished by the plaintiff and his associates of judges and clerks for said primary election, and on the 2d of September, 1902, filed another list of names from which said board was requested to select judges, clerks, and challengers for said primary election, and that said election commissioners felt that it was their duty, and they were bound by the action of the Republican state central committee, to recognize the said Rudolph and his associates as the governing and controlling committee of the Republican Party of

St. Louis, and thereupon proceeded to select judges, clerks, and challengers from the list filed by said Rudolph and his associates, and that the said election commissioners were bound by the action of the said Republican state central committee upon this question, which was a political, and not a judicial, one, and it was respectfully submitted to this court that it had no jurisdiction, if the Republican state central committee had determined which of said rival committees claiming to be the controlling committee was such committee, to review said action. To this return of the election commissioners a reply was filed by the plaintiffs, in which they challenge the right of the state central committee to hear the charges against plaintiffs and remove them from the city central committee of the Republican Party of St. Louis. At the request of the parties, a special commissioner was appointed on the 24th day of December, 1902, by this court to take and hear the testimony and report the same to this court. Afterwards, in January, 1903, the said commissioner filed a transcript of the evidence taken before him, and in February, 1903, the defendant, Wood, and McCaffery filed their exceptions to the report of the commissioner.

Thereafter, at the request of counsel and by permission of this court, the respective counsel for the plaintiffs and defendants herein filed their briefs in this cause, that of the plaintiffs in reply being filed October 26, 1903, and the cause was argued and submitted October 27, 1903, more than a year after said primary election had been held, and the general election of 1902 had passed into history.

From the foregoing statement it is apparent now, and was when this cause was argued and submitted, that any judgment this court could render could not possibly afford the plaintiffs any relief, because the primary election had been held more than a year before the issues were made up in this court, and the cause submitted. At that time, and ever since, our dockets have been crowded with causes in which personal and property rights were involved and which could be and have been affected by our judgments, and hence we have permitted these more important and living questions to occupy our time. It is deemed proper, however, to dispose of this matter and remove it from the docket. The writ of prohibition under our laws is granted only to prevent usurpation of judicial power. This court in *State ex rel. v. County Court*, 41 Mo. 44, held that the writ would not lie to a county court to correct its action when performing a mere administrative function in contradistinction to the exercise of its judicial power, and it was held that in the removal of the public buildings of a county the county court acts in an administrative capacity as agent of the county, and prohibition was not the remedy. In *Casby et al. v. Thompson et al.*, 42 Mo. 183, it was

ruled that a writ of prohibition did not lie to restrain the State Auditor from issuing a distress warrant and the sheriff from executing the same, because the duties of the State Auditor were executive and ministerial, and not judicial in their nature, although it was earnestly argued that, when the Auditor makes a settlement between the state and a collector of the revenue, he exercises judicial functions and in effect pronounces a judgment in striking the balance, upon which he could issue his distress warrant. *Hockaday v. Newsom*, 48 Mo. 196.

Has the General Assembly of this state by the "Primary Election Law" of 1901 conferred judicial powers upon the board of election commissioners of the city of St. Louis, within the meaning of the law as to the function of a writ of prohibition, by the provisions in section 15 of said act: "The judges, clerks and challengers who serve at said primary shall be selected by the election commissioners from lists submitted by the managing committee of the party holding the same"? *Laws 1901*, p. 156. We think it is clear by all the analogies of the law, and by the weight of decided cases, that such board of election commissioners is an administrative body with specific statutory powers and duties which in no manner trench upon that judicial power which is by the Constitution of this state vested in the courts. In *Thomson v. Tracy*, 60 N. Y., loc. cit. 37, the claim was made that, because the defendants were enjoined by a writ of prohibition from acting as executor and executrix in a proceeding against the Surrogate Court and the defendants, they had no right to appeal. The Court of Appeals very aptly defined the scope of a writ of prohibition, and concluded by saying: "A writ of prohibition is to prevent the exercise of a tribunal possessing judicial powers of jurisdiction over matters not within its cognizance or exceeding its jurisdiction in matters of which it has cognizance. It will not lie to restrain a ministerial act. *Ex parte Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; *People v. Supervisors*, 1 Hill (N. Y.) 195." In *People v. Election Commissioners*, 54 Cal. 404, the question here raised was squarely presented and as firmly decided that a board of election commissioners was not a judicial body, and their action not judicial, and was not subject to examination or review by the Supreme Court by a writ of prohibition. See, also, *Spring Valley W. W. Co. v. City of San Francisco*, 52 Cal. 111; *Maurer v. Mitchell*, 53 Cal. 291; *State ex rel. Kellogg v. Gary*, 33 Wis. 93. In this last-cited case an alternative writ of prohibition was quashed after return made and issue of fact joined: it appearing it was improvidently granted. The practice has obtained in this court of uniting the election commissioners with the judge of the court in prohibition cases to prevent the opening of the ballot boxes, but it is clear that the

jurisdiction in those cases depends upon the proceeding against the court.

A most instructive case is that of *Home Ins. Co. v. Flint*, 13 Minn. 244 (Gil. 228). In the course of the opinion the court said: "The compliance with this law is the act threatened and sought to be restrained. If the word is used in the ordinary and legal acceptation, clearly there is nothing judicial in the making of the examination and certificate required. The word 'judicial' is defined: (1) Pertaining to courts of justice as judicial powers. (2) Practice in the distribution of justice, as judicial proceedings. (3) Proceeding from a court of justice, as a judicial determination. A judicial investigation proceeds after notice and eventuates in a judgment which is the final determination of the rights of the parties unless reversed by an appellate tribunal. The necessity of notice in the inception and the conclusive character of the determination are perhaps as good a test as any other as to what proceedings are judicial. In this case it cannot be pretended that notice is required or that the determination or certificate would be conclusive in collateral proceedings." In our opinion the facts stated in the petition did not authorize the issuance of the provisional order in prohibition, and the order was improvidently granted for the reason that the board of election commissioners were in no sense a judicial body, and the action sought to be restrained was not a judicial action, and it should now, as was done in *State ex rel. Kellogg v. Gary*, be quashed. Whether Judge Robinson might have reviewed the action of the election commissioners by mandamus as provided by section 23 of the act of March 13, 1901 (*Laws 1901*, p. 162), we are not called upon to decide, but we are clear that prohibition did not lie.

2. But there is another ground upon which we think this cause should be dismissed, and it is this: Courts do not sit for the purpose of determining speculative and abstract questions of law or laying down rules for the future conduct of individuals in their business, but are confined in their judicial action to real controversies wherein the legal rights of parties are necessarily involved and can be conclusively determined. *Thomas v. Musical Mutual Protective Union* (N. Y.) 24 N. E. 24, 8 L. R. A. 178; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 505, 36 Am. Dec. 502. In *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 182, 40 L. Ed. 293, a motion was made in the Supreme Court of the United States to dismiss the appeal on the ground "that there is now no actual controversy involving real and substantial rights between the parties to the record and no subject-matter upon which the judgment of this court can operate," and it was sustained upon that ground without considering any other question appearing on the record or discussed by counsel. In that case the whole object of the bill was

to secure a right to vote at the election to be held, as the bill alleged, on the 3d of August, 1895, of delegates to the constitutional convention of South Carolina. Before the appeal was taken that date had passed, and before entry of the appeal in the Supreme Court the convention had assembled pursuant to the statute by which the convention had been called. The court held that it would take judicial notice of the election of the delegates and the assembling of the convention as public matters of history, without formal proof. Said the court: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when pending an appeal from the judgment of the lower court, and without fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord v. Veazie*, 8 How. 251, 12 L. Ed. 1067; *California v. Railroad*, 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747.

Applying the foregoing principles to the facts of this case, it is and has been apparent since the argument of this cause that the primary for which plaintiffs claimed the right to name the judges, clerks, and challengers had been held a month before the provisional order in prohibition was returnable to this court. No judgment of this court, if it had had jurisdiction by prohibition to so direct, could have availed to have the judges, clerks, and challengers named by plaintiffs inducted into office in time to have held such primary. When this court met on the 14th of October, 1902, the day on which said provisional order was returnable, the primary had been held, and the candidates

nominated thereat had been certified for their appearance on the ballots. Under the law of this state there was not sufficient time to order a new primary and cause the names of the candidates to be certified in time for the November election in 1902; and it is plain no judgment this court could have rendered after the cause was docketed herein could have given plaintiffs the only relief they asked, to wit, an injunction against the election commissioners preventing them from recognizing the Blake-Rudolph committee for the purposes of said primary, which had been held a month before this court convened, nor was it feasible to undo what had been done. It is true that if a defendant, after notice of the filing of a petition for injunction to restrain the building of a house or of a railroad or any other structure, persists in completing the building, the court in which the injunction is pending is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and compel the defendant to undo what he wrongfully did since that time or answer in damages. *Tucker v. Howard*, 128 Mass. 361; *Atty. Gen. v. Railway*, 4 De G. & M. 75; *Terhune v. Railroad*, 36 N. J. Eq. 318; *Platteville v. Railway*, 43 Wis. 493.

But obviously this is not that character of the case. Here no order or judgment of this court, even if it had jurisdiction in the case, could compel the defendants to undo what had been done, and this must have been apparent when the provisional rule was made returnable long after the said primary was to be held, and the nature of the proceeding is such that a judgment for damages cannot be awarded. It is apparent that the provisional rule was improvidently granted, and that there is nothing before us but a moot question, and that no opinion or judgment we might render could be of any benefit to the plaintiffs, and accordingly the proceeding is dismissed. All concur, except LAMM, J., who was not a member of the court when the cause was heard.

KEY et al. v. HARRIS et al.

(Supreme Court of Tennessee. Sept. 9, 1905.)

1. COURTS—APPELLATE JURISDICTION—STATUTES.

Where a bill for winding up the estate of a decedent as an insolvent estate is brought in the county court, as authorized by Shannon's Code, §§ 4066, 4102, instead of adopting the procedure prescribed by sections 4070-4101, prescribing a special procedure in the county court for the administration of insolvent estates of decedents, an appeal from the decree of the county court lies directly to the Supreme Court under the express provisions of section 4907.]

2. STATUTES—REPEAL—IMPLIED REPEAL.

Acts 1873, p. 100, c. 64 (Shannon's Code, §§ 4067, 6028), providing that the county courts shall have concurrent jurisdiction with the chancery and circuit courts to sell real estate of decedents and that the mode of procedure in the county courts shall conform to the regulations for the conduct of similar cases in the chancery and circuit courts, does not impliedly repeal the special system of legislation contained in the Code for the administration of insolvent estates, and does not interfere with the jurisdiction of the subject as distributed between the chancery and the county courts.

3. WORK AND LABOR — SERVICES BETWEEN PERSONS IN FAMILY RELATION.

Where near relatives live together as members of the same family, and services are performed by one for the other, it is presumed that no charge is intended to be made, and to raise a debt out of such circumstances the evidence must establish a contract, or the circumstances or the origin of the services must be so exceptional as to rebut the presumption.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, § 11½.]

4. SAME.

In a suit to establish a claim for services rendered by claimant to her deceased sister, it appeared that deceased was an idiot, and had been so during her entire life; that for a number of years she was almost helpless; that she and claimant lived together; and that all the wants of the deceased were supplied by claimant. *Held*, that claimant was entitled to such compensation as the deceased would have accorded claimant, if she had acquired full possession of her mental faculties before her death, and had possessed an ordinary sense of justice.

5. INSANE PERSONS—CARE OF INSANE PERSONS—RIGHT TO RECOVER COMPENSATION.

An allowance for the services might be sustained on the ground that the same were necessities.

Appeal from Overton County Court; J. N. Cannon, Judge.

Suit by J. W. Key, administrator of Martha Harris, deceased, and another, against Andrew Harris and others. From a decree of the Court of Chancery Appeals dismissing the case, rendered on the cause being transferred from the Supreme Court on appeal from a decree of the county court in favor of defendants, plaintiffs appeal. Reversed.

A. H. Roberts for appellant. E. D. White and E. A. Quarles, for appellees.

NEIL, J. The bill in the present case was filed in the county court of Overton county by the administrator of the estate of Martha

Harris and by Tennessee Harris, a creditor.

The bill alleged in substance that Martha Harris had died intestate, leaving surviving her as her only heirs at law the complainant, Tennessee Harris, her sister, and defendants, who are the children of deceased's brothers and sisters; that the deceased was indebted to complainant Tennessee Harris in the sum of \$815.40 for services performed and for burial expenses and for taxes paid, and that the insolvency of the estate had been duly suggested before the clerk of the county court; that the deceased died the owner of a one-half interest in the tract of land described; that the one-half interest of the deceased was worth not exceeding \$250; and that it was necessary to sell this land for the payment of the above-mentioned debts.

The prayer of the bill was that the estate be wound up as an insolvent estate in the county court.

Some of the defendants filed answers, and others suffered an order pro confesso to be taken against them.

The defense made by those who filed answers consisted in a denial of the debt set up in the bill and also a claim that there was personality.

The county court directed a reference to be made to its clerk for a report on debts and assets.

The clerk reported that there was due Tennessee Harris \$624 for services, \$10 for burial expenses, and \$11.40 for taxes paid, aggregating \$645.40; that from this sum there should be deducted \$30 for rent of land, leaving a balance due of \$615.40.

On exceptions filed the judgment of the county court disallowed the item of \$624 and the item for taxes, but allowed \$10 for burial expenses. The decree of the county court thereupon directed that the whole tract of land should be sold for the payment of the \$10, and that of the proceeds, after paying the \$10, the residue of the funds should be divided among the heirs at law of Martha Harris.

From the foregoing decree the complainants prayed an appeal to this court. Here the cause was referred to the Court of Chancery Appeals.

In that court a motion was made to dismiss the appeal for want of jurisdiction. That court sustained the motion on the ground that the county court had exclusive jurisdiction of the case, and that therefore the appeal should have been prosecuted to the circuit court, and not to the Supreme Court.

The Court of Chancery Appeals, to save time for the parties in the event this court should take a different view upon the question of jurisdiction, found the facts pertaining to the controversy. Those facts, as they bear upon the large claim, make a peculiarly touching story of sacrifices made by the complainant, Tennessee Harris, in taking care of her afflicted sister.

These facts, are found by the Court of Chancery Appeals, are as follows:

"We find that Martha Harris was a woman of very weak mind, if not an idiot, and had been so during her entire life. For a number of years she was almost helpless, not able to move from her chair, or bed, without assistance. She was physically very infirm, to an extent that she required almost constant care and attention of some one. She and Tennessee Harris lived on this little tract of land, which is described as poor and rough, and which had been given them by their deceased father in his will.

"For several years a deceased brother lived on the same place, but all lived as one family. All the wants of this unfortunate sister were supplied by complainant Tennessee, who, from the proof, was tender, affectionate, and attentive to her. This complainant would plow in the fields, and hoe and gather the crops—in fact, not only do her duty as to keeping house, but did all kinds of manual labor—in order to make a living for herself and invalid sister, who was powerless to do anything, by reason of physical debilities and having no mind. This complainant is 53 years old, being four years the senior of Martha, who, it is proven, was as helpless as a baby, and her sister had to wait on her as such.

"It is undisputed that Tennessee was the only one who looked after and waited on Martha. She had to bathe and dress her, and it required nearly all her time towards the last to wait on her.

"The brother of these ladies and his family, as stated to Tennessee, would look after Martha when she went out to work. * * *

"That she worked faithfully and took care of her afflicted sister is abundantly sustained, and that her services were reasonably worth from \$2.50 to \$3 per week. Further, that, if it had not been for her, Martha would have been for a long time a charge on the county and in the poorhouse."

That court found that the account proven was reasonable. They also found that there was no personalty belonging to Martha Harris' estate.

But, as already stated, that court felt compelled to dismiss the case for want of jurisdiction.

The first question we shall consider is whether that court reached a correct conclusion upon this subject.

Prior to chapter 64, p. 100. of the Acts of 1873, to be presently noted with more particularity, the chancery, circuit, and county courts all had concurrent jurisdiction of the sale of lands of decedents for the payment of debts, after the exhaustion of the personal estate (Shannon's Code, §§ 4003, 6071, 6112; *Burgner v. Burgner*, 11 Heisk. 731; *Norville v. Coble*, 1 Lea, 467; *Linnville v. Darby*, 1 Baxt. 307), except where proceedings in insolvency were instituted. In respect of this latter class of cases exclusive jurisdiction

was given to the county court of the administration of all estates not exceeding the value of \$1,000. Shannon's Code, §§ 4086, 4102.

Sections 4070 to 4101, inclusive, laid down a peculiar form of procedure in the county court for the administration of such cases therein in respect of the filing of claims, the ascertainment of debts, the making of reports thereon, appeals from the action of the clerk on such reports directly to the circuit court, the sale of land, and the distribution of proceeds.

But it has always been recognized that this peculiar procedure might be waived by any party who desired to institute proceedings in insolvency in the county court for the sale of real estate, and that the practice of the chancery court might be adopted and used instead.

In Shannon's Code, § 4880, it is provided: "In all cases in which the jurisdiction of the county court is concurrent with the circuit or chancery courts, or in which both parties consent, the appeal lies direct to the Supreme Court."

The preceding section (4879) reads: "Any person dissatisfied with the sentence, judgment or decree of the county court may pray an appeal to the circuit court of the county, unless it is otherwise expressly provided by this Code."

By section 4907 it is provided: "An appeal in the nature of a writ of error lies, at the instance of either party, from the judgment or decree of the court of chancery or of the county or circuit court in equity causes, in all cases tried according to the forms of chancery upon the same terms and subject to the same regulations as an appeal from similar judgments or decrees."

Section 4908 reads: "In all other cases determined in the county court, when either party is dissatisfied with the final decision, an appeal in the nature of a writ of error may be taken by him to the circuit court, or both parties consenting, to the Supreme Court."

It is perceived that the general rule is that appeals from the county court lie to the circuit court. Section 4879. But this rule is subject to exceptions, under which an appeal lies directly to this court. One of these exceptions is when the jurisdiction of the county court is concurrent with the circuit or chancery courts; another, when both parties consent (section 4880); another is when the county court proceeds in an equity cause "according to the forms of chancery" (section 4907).

The present case falls under the latter exception—that is, under section 4907—since it appears that the proceedings in the county court followed the practice of the chancery court. Therefore an appeal could be prosecuted directly from the county court to this court.

If the proceedings in the county court had

been according to sections 4070 to 4101, inclusive, the appeal would necessarily have been prosecuted to the circuit court. Such were evidently the cases of Phillips, Adm'r, v. Hoffman, 5 Cold. 251, and Davidson, Adm'r, in the Matter of John B. Bates' Estate, 2 Heisk. 533.

So, without regard to chapter 64, p. 100, of the Acts of 1873, we are of opinion that the Court of Chancery Appeals erred in dismissing the appeal.

The act referred to is reproduced in Shannon's Code, §§ 4067 and 6028.

The act itself reads as follows:

"Section 1. That the county courts of this state shall have concurrent jurisdiction, with the chancery and circuit courts to sell real estate of decedents and for distribution or partition.

"Sec. 2. That the mode of procedure in such cases in the county courts shall conform in every respect to the rules and regulations laid down for the conduct of similar causes in the chancery and circuit courts."

The language of this statute is very broad and general, but we do not think the Legislature intended thereby to break down the special system of legislation contained in the Code for the administration of insolvent estates, or to interfere with the jurisdiction of the subject as distributed between the chancery and county courts. The rule is that a prior special system of legislation, or a special act for the benefit of a particular locality, is not repealed by a subsequent statute covering the general subject under which such prior special legislation falls, unless there is found in the subsequent act a direct indication of an intention to repeal such prior legislation, or unless there is a necessary inconsistency between the two acts. *Zickler v. Union Bank and Trust Co.*, 104 Tenn. 277, 293-301, 57 S. W. 341.

We do not think, therefore, that the act of 1873 has any real bearing upon the question before us.

It remains to be determined whether the Court of Chancery Appeals acted correctly in reporting in favor of the account of \$624.40 claimed by the complainant.

The rule of law is that, where near relatives live together as members of the same family and services are performed by one for the other, it is presumed that no charge is intended to be made. In order to raise a debt out of such circumstances, there must be evidence introduced showing expressly that a contract was entered into, or the circumstances or origin of the services must be so exceptional as to rebut the presumption.

The authorities upon this subject in this state are *Taylor v. Lincumfelter*, 1 Lea, 83, and cases cited, and *Gorrell v. Taylor*, 107 Tenn. 568, 64 S. W. 888, and cases cited. These cases also contain a reference to foreign authorities. There is a good statement of the principle to be found in 15 Am. & Eng. Encyc. of Law (2d Ed.) page 1083. See

also pages 1084 and 1085, and the authorities cited in the notes.

It is said that the reason underlying the rule is that family life abounds in acts of reciprocal kindness which tend to promote the comfort and convenience of the family, and that the introduction of commercial considerations into the relations of persons so closely bound together would expel this spirit of mutual beneficence and to that extent mar the family unity.

The reason of the law is the soul of the law. When that fails, the law itself fails.

In the present case, under the facts found, Martha Harris was never able at any time during her life to perform any portion of the reciprocal duties arising out of the family relation. She was wholly an object of care, and a burden upon the labor and resources of her sister. The latter was not only moved by sisterly affection, and by that feeling of compassion which would arise in the breast of any one possessed of normal sympathies; but she was, in a sense, under a form of moral compulsion. The burden had been cast upon her, and she could not throw it off without a gross violation of duty and a shock to the moral sense.

We think, in disposing of complainant's rights, all of these considerations should be weighed. So viewing the matter, we are of the opinion that there should be allowed to the complainant such compensation as Martha Harris would have accorded her sister, if she had acquired full possession of her mental faculties before her death, and had possessed an ordinary sense of justice.

From this standpoint something must be conceded for the relationship and for natural sympathy and affection; but we do not think that any difference of opinion could arise over the conclusion that complainant Tennessee Harris was entitled to at least half of her claim of \$624 for services.

We think, also, that the allowance may be sustained on the ground of necessities. *Wal-dron v. Davis* (N. J. Err. & App.) 58 Atl. 293, 66 L. R. A. 591, and authorities cited.

It results that the decree of the county court and of the Court of Chancery Appeals must be reversed, and the cause remanded to the county court of Overton county, to the end that the half interest of Martha Harris in the land described in the bill may be sold for the payment of the sum of \$312 allowed to Tennessee Harris for services, and also the \$10 funeral expenses, and the costs of the cause.

LA FOLLETTE COAL, IRON & RY. CO. v. SMITH.

(Supreme Court of Tennessee. Oct. 21, 1905.)
APPEAL—REHEARING—DIMINUTION OF RECORD—SUGGESTION—TIME.

Where the fact that the appeal record was defective, for failure to show a motion for a new trial and the grounds thereof, was relied on

by appellee as one of the reasons why the judgment should be affirmed, and was set out in the reply brief, but no effort was made to correct it until after judgment had been affirmed, it was too late, on a motion for a rehearing, for appellant to suggest a diminution of the record and have the same perfected.

Appeal from Circuit Court, Campbell County; G. Mc. Henderson, Judge.

Action by James J. Smith against the La Follette Coal, Iron & Railway Company. From a judgment in favor of plaintiff, defendant appeals. On petition to rehear. Denied.

H. B. Lindsay and W. A. Owens, for appellant. Ager & Peters and Lucky, Sanford & Fowler, for appellee.

WILKES, J. This is a petition to rehear.

One of the grounds upon which the case was decided originally in this court was that the minutes of the court below did not show that the motion for a new trial and the grounds therefor were set out, and therefore that the assignments of error could not be considered in this court.

A certificate is now made, after the case is decided, by the clerk of the court below, to the effect that the motion for a new trial and the grounds for the same were regularly set out upon the minutes of the court below, and that it should have so appeared in the transcript to this court, and a certified copy of said minute entries is presented with the petition, and the petitioner asks to suggest a diminution of the record, and to have it made perfect by the insertion of this certified matter.

The rule of this court is that suggestions of diminutions of record shall be made before a case is called for trial, and at such time as will give opportunity to have the record perfected before hearing, or the imperfection of the record will be waived, provided, however, that any such amendment thus supplied, brought before the court before the case is finally disposed of, after hearing, may be considered.

Under this rule, it has been uniformly held by the court that suggestions of diminution and leave to perfect the record must be applied for before the case is finally disposed of.

In the case of *Hinton v. Insurance Co.*, 110 Tenn. 114, 72 S. W. 118, the court allowed a suggestion of diminution to permit the record to show that the bill of exceptions was filed in time in the lower court, and this was done after the hearing and decision of the case, but was put upon the ground that the question of when the bill of exceptions was filed was not raised on the trial of the case, but was observed by the court, and raised upon its own motion in the decision of the case, the attorneys having overlooked the fact; and it was upon this ground that the petition was allowed at that stage of the proceeding. See, to same effect, *Gaut v. Wimberly*, 99 Tenn. 497, 42 S. W. 265.

In the present case, however, the fact that the record was defective upon the ground stated was relied upon on the trial of the case as one of the reasons why the judgment should be affirmed, and was set out in the reply brief; and the attention of counsel was thus brought to the defect, and no effort was made to correct it. The case was under advisement in the hands of the court for about a week, and no effort was made during that time to correct the defect.

In the original opinion handed down it was stated, in addition, that the case had been considered by the court as if the record were perfect; and the court announced that it found no error in the proceedings in the court below.

We think, therefore, that there is no reason to relax the rule, and, inasmuch as opposing counsel insist upon it, it must be enforced, and the petition to rehear is dismissed.

SOUTHERN RY. CO. v. HAMBLLEN COUNTY.

(Supreme Court of Tennessee. March 2, 1906.)

1. COUNTIES—TAXATION—POWER TO TAX—SPECIAL TAX—NECESSITY OF STATING PURPOSE.

Under Shannon's Code, § 5992, defining county courts; Const. art. 2, § 29, authorizing the General Assembly to delegate to counties the power to impose taxes for county purposes; Laws 1903, p. 699, c. 257, authorizing counties to levy an annual tax on every \$100 of taxable property not exceeding 30 cents, exclusive of taxes for certain special purposes; and Shannon's Code, §§ 503, 1394, 6041, 6050, 6053, authorizing the levy of special taxes for certain purposes—an order of a county court levying a so-called "special tax," but not stating the purpose for which such tax is levied, is void. [Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 497.]

2. SAME—STATEMENT OF PURPOSE—SUFFICIENCY.

The chairman of a county court made a report to the effect that there was a floating debt which could be paid by a tax levy of 20 cents on the \$100, and at the next meeting of the court a tax levy was made, including a "special tax" of 20 cents on the \$100 valuation. Held that, even conceding that extrinsic evidence could be considered in aid of the levy, the chairman's report was not sufficient to show the purpose for which the special tax was levied.

3. SAME—PURPOSE OF SPECIAL TAX.

Under Shannon's Code, §§ 503, 1394, 6041, 6050, 6053, defining the purposes for which a county may levy special taxes, a county has no power to levy special taxes to defray expenses incurred in suppressing an epidemic of smallpox or to repay a loan from the sinking fund commissioners.

Petition for certiorari and supersedeas by the Southern Railway Company against Hamblen county to stay the execution of a distress warrant. Judgment for petitioner.

McCauless & Tate, Susong & Biddle, and J. B. Holloway, for petitioner. Hickey & Hickey, for Hamblen County.

SHIELDS, J. This is a petition for certiorari and supersedeas to stay the execution of a distress warrant issued by the clerk of the county court of Hamblen county, and levied upon the property of petitioner, to collect a special tax levied by that county in 1904, upon the ground that the tax levy is invalid for failure to show the purpose of the tax and for want of authority in the county to make the levy.

The chairman of the county court of Hamblen county made and spread upon the minutes of the January term, 1904, of that court, a report containing this statement:

"There is a floating debt on the county, amounting, as near as can be ascertained, to about \$6,000. This debt has been created by sieges of smallpox, and jail improvements, and a borrowed fund of \$2,000 loaned the county some years ago by the sinking fund commissioners. A tax levy of 20 cents on the \$100 will raise a fund sufficient, or nearly so, to pay off this floating debt. I call the court's attention to this for its consideration."

Upon the same day an order was made and entered upon the minutes in these words:

"Upon motion, it was ordered by the court that the tax levy for the year 1904 be the same as that of 1903, except that there be a special levy made of 20 cents on the \$100 assessed valuation."

At the next April term of the court, without noticing this order, a formal levy of taxes for that year was made and entered upon the minutes in these words:

"Be it ordered by the court that the following rate of taxes be, and the same is hereby, laid on all real and personal property and polls for the year 1904:

County tax property, on the \$100 valuation	30 cents
School tax, on the \$100 valuation....	10 cents
Pauper tax, on the \$100 valuation...	10 cents
Railroad tax, on the \$100 valuation..	5 cents
Highway tax, on the \$100 valuation..	10 cents
Pike tax, on the \$100 valuation....	35 cents
Special tax, on the \$100 valuation..	20 cents
Polls	50 cents

"It is further ordered that all privileges shall be the same as that laid by the state, except that the county tax on marriage licenses shall be 50 cents, and on merchants' stock an ad valorem tax for county purposes, the same tax as laid on real and personal property."

The special levy of 20 cents on the \$100 of assessed property is the item contested. The contention of the petitioner is that it is void because the purpose for which it is to be used is not stated in the levy, and, further, if extrinsic evidence can be looked to to show its purpose, as insisted by the defendant, then the defendant had no authority to levy and collect a tax for the purposes claimed.

Counties are provided for by the Constitution, but their creation, and the powers with which they, for the most part, may be vested, is left to the discretion of the Legislature.

They have been created corporations, and the justices in the county court (quarterly court) assembled are their representatives, and authorized to act for them. Code 1858, § 402; Shannon's Code, § 493.

Their powers and duties have been defined by this court in the case of *Burnett v. Maloney*, 97 Tenn. 714, 37 S. W. 693, 34 L. R. A. 541, as follows:

"Counties do not hold and operate under charters as do cities and other municipal corporations. They have no franchises. They make, and can make, no by-laws. They have the same powers and duties throughout the state. They do not have to provide waterworks, and fire departments, and lights, and the 101 necessities for cities and towns. Their ordinary expenses are met by issuance of county warrants payable out of a general fund collected for all purposes. The occasions for extraordinary expenditures are few, such as the building of jails, courthouses, bridges, and hospitals, and if it becomes necessary to incur a debt for these purposes which cannot be at once met out of the usual revenues, they must get their authority to create such debts from an enabling act of the Legislature, which at the same time gives them power to provide for its payment by a special act, and no doctrine is better settled in this state than that the power thus conferred must be strictly construed and exactly followed."

The county court, composed of the justices of the county and known as the quarterly court, has no inherent power of taxation. It is the legislative council of the county, created by the General Assembly to act for it in such matters as it may be authorized, and has only such jurisdiction and powers as are expressly conferred upon it by statute. Code 1858, §§ 4179, 4180, 4186; Shannon's Code, § 5992; *Grant v. Lindsay*, 11 Heisk. 651, 665; *Railway Co. v. Wilson*, 90 Tenn. 271, 16 S. W. 613, 13 L. R. A. 364, 25 Am. St. Rep. 693; *Walsh v. Crook*, 91 Tenn. 388, 19 S. W. 19; *Colburn v. Railroad*, 94 Tenn. 43, 28 S. W. 298; *Shelby Co. v. Exposition Company*, 96 Tenn. 653, 36 S. W. 694, 33 L. R. A. 717; *The Judges' Salary Cases*, 110 Tenn. 388, 75 S. W. 1061; *State v. Akin*, 112 Tenn. 605, 79 S. W. 805.

The General Assembly is authorized to delegate to the several counties in the state the power to impose taxes for county purposes, which they now exercise through their representatives in the quarterly court assembled. Const. art. 2, § 29.

Counties are authorized by the General Assembly to levy taxes for county purposes, usually by special provisions in the general revenue laws, enacted as a rule biennially, for general county purposes, and by special statutes for certain special purposes.

The general revenue law enacted in 1903 (chapter 257, p. 599, of the published Acts of that year) authorizes counties to levy an

annual tax on every \$100 of taxable property, not exceeding 30 cents, exclusive of the tax for public roads and pikes, and schools, and interest on the county debts, and other special purposes, and such privilege taxes as are levied by the state for state purposes.

Among the special taxes which counties are authorized to levy are those for building and repairing courthouses, jails, and other public buildings, for constructing roads and bridges, maintaining the common schools, and the payment of the interest on the county debt. Shannon's Code, §§ 503, 1394, 8041, 8050, 8053.

It is well settled, by repeated decisions of this court, that counties have no power to levy and collect a tax for any county purpose in excess of that authorized by the General Assembly, and that this cannot be done merely by styling the levy "special tax." *Grant v. Lindsay*, 11 Heisk. 686; *Railroad Company v. Franklin County*, 5 Lea, 707; *Burnett v. Maloney*, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541; *McLean v. State*, 8 Heisk. 22; *Winston v. Railroad Co.*, 1 Baxt. 60, 76.

Mr. Cooley, in his work on Taxation, says:

"The municipal corporations of a state, having no inherent power to tax, must take such power as is conferred under the conditions and limitations that may be prescribed, and only for such purposes as may be expressed. This is fundamental. The authority is not only a delegated authority conferred by the state, but it is to be assumed that the state has given all it intended should be exercised, and the grant, like that of all special and limited grants, is to be strictly pursued. Express power to levy particular taxes is a negation of the power to lay others; and, if particular subjects of taxation are enumerated, the corporation cannot reach out to take others." *Cooley on Taxation* (3d Ed.) pp. 554, 555.

Applying these well-settled principles of law, we are of the opinion that the levy in question is void, and that the distress warrant issued to collect the tax assessed under it should be superseded and quashed. We think that an order of the county court levying a special tax should state the purpose for which the levy is made. This is necessary to enable the taxpayers to challenge it, if it be for a purpose not authorized by law, and, if authorized, to compel the application of the tax to the purpose for which it was in fact levied, if a diversion to some other object is attempted. In no other way can an unlawful exercise of the taxing power by counties be ascertained with certainty and proper application of taxes paid enforced. It would always be possible for the authorities intrusted with the power of taxation, when a levy or the application of the tax is called in question, to claim that it was for some purpose for which a special tax is authorized, or that it was levied for the purpose for which it is being used. The object of the tax should be evidenced by some record to which the people can resort for information. With-

out such record the taxpayers are substantially deprived of their right to know the purpose for which they are taxed, and to have the taxes paid by them applied to the purposes for which they have consented to be taxed.

This court, speaking through Mr. Justice Wilkes, has said:

"The taxpayers of every county have a right to know for what purpose they are being taxed, and also to know that taxes collected from them for any specific purpose are applied to such purpose and not to some other, at the discretion of county officials, and according to their ideas of public policy or expediency. The law does not provide for the mixing of special and ordinary funds, nor the supplementing of one by the other by county officials. * * * But the law lays down the rule of action for county officials as well as all others, and from it they cannot depart. When the people consent to be taxed for any purpose they cannot complain: but when they are taxed for one purpose and the fund is applied to another, and when they are misled as to the purpose for which they are being taxed, they have the right not only to complain, but a remedy to redress the grievance, if they apply to the courts in the proper way and at the proper time." *Kennedy v. Montgomery County*, 98 Tenn. 165, 38 S. W. 1075.

But it is said for the defendant that the purposes of this tax sufficiently appear in the statement copied from the chairman's report, entered upon the minutes of the court at the January term. We do not think so. If it be conceded that extrinsic evidence can be considered in aid of a tax levy, of which there is much doubt, that relied upon in this case is not sufficient. It is doubtful whether the order made at the January term in relation to taxes for the current year was intended as a levy. It is vague and indefinite, even when read in the light of the chairman's report, and incomplete, in that no tax on privileges is imposed, which is always done. It seems to be more of an expression of the court of what the levy should be than an actual levy, especially when contrasted with the formal, definite, and complete levy made at the subsequent April term. But, if it was intended as a levy, we think it is evident, from the action of the court at the April term, that it was abandoned, probably because considered defective and void, and the one then made substituted for it. This last levy was made three months after the chairman's report, and contains no reference to it. It was intended to be, and is, complete in itself. There can be only one levy, and that made in April was the one intended by the court to be effective, and, clearly, the one under which the distress warrant against the plaintiff was issued.

But if the order at the January term was intended as a levy, and in force, and we could consider the evidence offered to show

the purpose of the special tax attacked, still we would be compelled to hold it void. The county, or its representatives in quarterly court assembled, had no power to levy a special tax to defray expenses incurred in suppressing an epidemic of smallpox and repay the loan made to it by the sinking fund commissioners. These are general county purposes, intended to be covered by the tax of 30 cents upon the \$100 of assessed property authorized by the Legislature. It is true that it was within the constitutional power of the General Assembly to authorize a special tax for these purposes, but it had not done so. There is a special statute (Shannon's Code, § 503) authorizing the levy of a special tax to pay for repairs made upon the county jail; but it does not appear from the chairman's report what proportion of the sum sought to be raised by the special levy is needed for this purpose. The lawful purpose of the levy is so confused with the unlawful purposes that the valid cannot be separated from the invalid, and the whole is void.

We think, for these reasons, in any view that may be taken of the case, the special levy of 20 cents upon the \$100 worth of taxable property is void upon its face and unauthorized by law, and that the distress warrant issued to enforce its collection as against this petitioner should be superseded, and judgment will be entered in accordance with this opinion.

SCOTT v. STATE.

(Supreme Court of Arkansas. Jan. 13, 1906.)

1. CRIMINAL LAW—REQUEST TO CHARGE—NECESSITY.

In a prosecution for perjury, the court was not bound to charge that a conviction could not be had except on the testimony of two credible witnesses, or on that of one witness and corroborating evidence, where no such instruction was requested by defendant.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 1993.]

2. PERJURY—EVIDENCE—FALSE TESTIMONY.

Where, in a prosecution for assault with intent to kill, by cutting the person assaulted with a knife, defendant testified that he made no assault and had no knife with him at the time, which testimony was alleged to be false; whether defendant had a knife at the time of the alleged assault was material to the issue then being tried, whether he was in fact guilty of the assault or not.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Ed Scott was convicted of perjury, and he appeals. Affirmed.

Jesse E. London, for appellant. Robert L. Rogers, Atty. Gen., for the State.

RIDDICK, J. This is an appeal from a judgment convicting the defendant, Ed Scott, of the crime of perjury, and sentencing him to imprisonment in the penitentiary for the per-

iod of one year as punishment therefor. The facts are that Ed Scott had been previously indicted for an assault with intent to kill one Garfield Cook, by cutting him with a knife. On the trial of that case he took the stand as a witness in his own behalf, and testified that he made no assault and had no knife with him at the time. He was afterwards indicted for perjury, the indictment being based on his testimony that he had no knife in his hand and that he said nothing and did nothing to Cook at the time he was alleged to have assaulted him.

No objection was made on the trial to the indictment in this case, and it seems to us to be according to the usual form and sufficient. Counsel for defendant says that the court erred in failing to charge the jury that a conviction for perjury cannot be had, save on the testimony of two credible witnesses or on that of one witness corroborated by other evidence, showing that the statements of defendant on oath for which he was indicted were in fact false. But defendant asked no such instruction. The cases he cites from Texas, which hold that it is a fatal error for the court to omit giving such an instruction even though not requested, are in conflict with the general rule and with the decisions in this state, and cannot be followed here. As the defendant asked for no instruction on that point he has under our practice no right to complain that the court did not give it. *White v. McCracken*, 60 Ark. 613, 31 S. W. 882; *Fordyce v. Jackson*, 56 Ark. 602, 20 S. W. 528, 597.

Counsel for defendant did request the court to instruct the jury that if the defendant was so far from Cook, at the time he was alleged to have assaulted him with a knife, that he could not cut or harm him with the knife, then defendant could not be convicted of perjury although he testified falsely that he had no knife at that time. The court refused to give an instruction to this effect and counsel contend that this was error. But, in order to convict the defendant of having committed perjury in that case, it was not necessary to show that he was guilty of the assault charged in that case. He was charged in that case with having committed an assault with a knife. It was then material to know whether or not he had a knife at that time. He testified that he had no knife and now contends that even if this testimony was false it was not material because the prosecution for an assault would have failed on another point. But to quote the language of the Court of Appeals of New York "It does not lie with the perjurer to say that if he had sworn the truth the case for other reasons would have failed." *Wood v. People*, 59 N. Y. 123. In that case the court met the same argument made by counsel for appellant in this case by saying: "This argument assumes that testimony in order to be material, must relate not only

to the issue in the cause, but to an issue which might be fully maintained by the party tendering it; in other words, that if the testimony relates to a fact or circumstance which is material as part of an entire case, the accused may escape conviction if he can show that another essential fact could not have been found. If a person swears falsely in respect to any fact relevant to the issue being tried, then we think he is guilty of perjury, although the case failed from defect of proof of another fact, and although the other fact alleged had no existence."

This decision we think was clearly correct. It is a matter of no moment in this case whether defendant was guilty or innocent of the assault charged against him in the other case, for it was certainly material in that case to know whether he had a knife, at the time the assault was alleged to have been committed with a knife. If he willfully testified falsely in that case that he had no knife, then he committed perjury whether he was guilty of the assault or not, and the circuit court properly so held. *Robertson v. State*, 54 Ark. 604, 16 S. W. 582; *Rex v. Rhodes*, 2 Raymond (Eng.) 887; *Wood v. People*, 59 N. Y. 117; 2 Bishop, New Crim. Law, § 1032. The case of *Leak v. State*, 61 Ark. 599, 33 S. W. 1067, cited by counsel for defendant does seem at first glance to support his contention, but the facts in that case were very different from those here and we cannot accept it as authority for the contention made here which is clearly contrary to well-established law.

The evidence was amply sufficient to support the verdict, and, finding no error, the judgment is affirmed.

PLACE et al. v. STATE, to Use of GARLAND COUNTY.

(Supreme Court of Arkansas. Dec. 23, 1905.)

1. EQUITY—PLEADING—MULTIFARIOUSNESS.

A bill against a county clerk and the sureties on his official bond for successive terms of office, alleging that he procured the allowance of improper accounts, that he fraudulently issued scrip to himself on fictitious allowances and on judgments of allowances which he had fraudulently raised in amount, and that the accounts kept by him are so complicated that it is impossible to point out the various items or ascertain the liability of the respective bondsmen without reference to a master, is sufficient to give a court of equity jurisdiction and justify a joinder of the several sureties in one suit.

2. SAME—COMPLETE RELIEF.

In a suit in equity to surcharge the accounts of a county clerk and recover from him and the sureties on his official bonds the amounts for which warrants have been fraudulently issued in excess of the proper amount due, it was proper to give a decree for the amounts of outstanding illegal warrants, with a provision that the judgment for such amounts might be satisfied by surrendering the warrants.

Suit by the state, to the use of Garland county, against Frank C. Place and others.

From a decree in favor of plaintiff, defendants appeal. Affirmed.

Appellant Frank C. Place was duly elected to and held the office of clerk of Garland county for three successive terms, from 1894 to 1900, and gave separate bonds, as provided by law, for the faithful performance of his duties during the several terms. The prosecuting attorney on April 17, 1901, brought this suit in equity in the name of the state of Arkansas, for the use of Garland county, against appellants, Place and the three sets of sureties on his said several bonds, to recover amounts alleged to be due the county on account of fraudulent allowances and issuance of scrip to Place. The complaint, after making certain specific charges of fraudulent procurement of allowances and issuance of scrip whereby Place is indebted to the county on a fair settlement in the certain large sums named, contains the following allegations, viz.: "But the said plaintiff says that the defendant is indebted to the said Garland county in divers other large sums of money, for which he has taken credit in his accounts, but for which he was not entitled under the law. And the said plaintiff, complaining of the defendant, says that he has caused certain allowances to be made him in violation of the law, and that said defendant, after allowances were made by the county of Garland, raised or increased the amounts of such allowances upon the records of the county, and has thus made the records appear as showing allowances to him which were never in fact made by the court; but the defendant nevertheless wrongfully and fraudulently issued to himself scrip thereon, and said warrants have been paid by Garland county. * * * The plaintiff further states that there are divers other sums, for which the defendant takes credit, which are for bills rendered against the county, for which the county is not and never was liable, and are fraudulent and void, but that the said accounts of the said Frank C. Place are so involved and complicated that the plaintiff is unable to point out and designate all of said items. That the said Frank C. Place has been clerk of Garland county for several terms and has different bondsmen for each term, and that the liability of the respective bondsmen can only be ascertained by the stating of the account by a master to be appointed by the court." The prayer of the complainant is that a master be appointed by the court to state an account between the defendant Place and Garland county, that "all of said items for which the said defendant takes credit be carefully examined into, and that he be charged with all fraudulent allowances made to himself and for all fraudulent issues of scrip made to others and for himself, and that judgment be given in favor of plaintiff for the sum due, and for other relief." The defendants demurred to the complaint on the ground (1) that the

court had no jurisdiction of the subject-matter of the suit; (2) that the facts set forth do not constitute a cause of action; and (3) that there is a defect and misjoinder of parties defendant, because the plaintiff has no right to join the several sets of bondsmen in one suit. The demurrer was overruled, and the defendants answered, denying all the material allegations of the complaint as to fraud and indebtedness to the county in any sum. It is specifically denied in the answer that any of the alleged fraudulent warrants have been paid by the county. The court appointed a master, with directions to state an account between defendant Place and the county, such account to show all allowances to him and dates thereof, for what sums, etc., the amounts and numbers of warrants issued to him, and various other matters specifically designated in the order of reference, tending to establish the allegations of the complaint. The master reported, and upon exception thereto the court heard the cause upon the report and depositions of witnesses and documentary evidence, and rendered a decree in favor of the plaintiff against Frank C. Place and S. A. Sammons, E. T. Housley, and W. F. Housley, the sureties on his bond for term of office ending October 31, 1898, in the sum of \$1,751.24, on account for warrants fraudulently drawn by Place in his own favor; and against Place and W. D. McDowell, W. W. Waters, C. G. Bryant, R. H. Rouse, D. L. Moore, B. H. Randolph, Zack Phillips, and W. A. Moore, the sureties on his bond for the term ending October 31, 1900, in the sum of \$2,236.80, on account of warrants fraudulently drawn by Place in his own favor. The court specifically found that the proof failed to show that the warrants so fraudulently drawn by Place had ever been paid by the county, and it was further declared that "the judgment and decree may be satisfied in part or in whole by the turning over and surrendering to the plaintiff of the warrants designated as fraudulently drawn, * * * or by payment in valid warrants of Garland county, or in lawful money." Defendants appealed to this court.

R. G. Davies and Wood & Henderson, for appellants.

McCULLOCH, J. (after stating the facts). 1. Appellants contend that their demurrer should have been sustained, because a cause of action is not stated calling for equitable interference, and that the several sets of bondsmen could not be joined in one action. They rely upon the case of *State v. Turner*, 49 Ark. 311, 5 S. W. 302, as sustaining their contention. That case was a suit against a county collector and six sets of sureties on his several official bonds to set aside erroneous settlements with the county court. A demurrer to the complaint was sustained, and this court affirmed the decision of the circuit

court. The decision is placed upon the ground that the allegations of the complaint lack precision, and do not point out specifically the errors and fraudulent credits complained of, and that no cause is stated for uniting the sureties on the several bonds in one suit. It is pointed out in the opinion that the collector is not required by law to keep books and accounts from which the condition of his account with the county can be ascertained, but that his account is kept by the clerk, and in this way the court distinguishes the case of *State v. Churchill*, 48 Ark. 423, 3 S. W. 352, 880, where upon similar allegations a suit of this kind was maintained against the State Treasurer and the separate sets of sureties on his several official bonds. We think that the facts of this case bring it within the doctrine established in the *Churchill* Case, and that the suit properly lies in equity, and that all the sureties may be joined in one suit. In this way only can the ends of justice be met. Mr. Justice Somerville, in delivering the opinion of the court in *Lott v. Mobile Co.*, 79 Ala. 69, said: "The question of multifariousness is often one of policy and convenience, and therefore rests largely within the discretion of the court. It is sufficient to sustain a bill against such a charge that each defendant has an interest in some one matter common to all the parties. The objection is discouraged, when sustaining it might lead to inconvenience or defeat the ends of justice. Filing separate bills against each set of sureties in this case it seems to us might lead to great inconvenience, in view of the peculiar interests each surety has in the taking of the account, and the correction of alleged errors of credits and payments." The county clerk is the custodian of the books of the county and the keeper of the various accounts of the county, with himself as well as with all others who have dealings with the county. It is here alleged that the clerk presented and procured the allowance of improper and fictitious accounts, fraudulently issued scrip to himself upon fictitious allowances and upon judgments of allowances which he had fraudulently raised in amount, and that the accounts kept by him are so complicated that it is impossible to point out and designate the various items or ascertain the liability of the respective bondsmen without the aid of a court of equity and the reference to a master. We think these allegations are sufficient to give a court of equity jurisdiction and justify a joinder of the several sureties in one suit.

2. It is next contended that the decree was erroneous because the proof failed to show that the fraudulent warrants have ever been paid by the county. It is too plain upon principle, to need citation of authority in support of it, that sureties on official bonds, as well as upon other undertakings, are liable thereon for only such breaches as result in injury to the obligee, and only to the extent of such injury. Appellants say that, not

withstanding the misconduct of the principal which amounted to a breach of his bond, the county suffered no injury, because the warrants have not been paid, and that, being void because of the fraud, the county is in no wise liable for payment thereof. *State v. Hinkle*, 37 Ark. 532, was an action brought at law by the state, for the use of Izard county, to recover from a sheriff illegal fees allowed to him, and for which warrants have been issued, but not paid. This court held that no recovery could be had in that suit without showing that the warrants had been paid. The case at bar is, however, altogether different. This is a suit in equity to surcharge the accounts of the clerk, as well as to recover from him and the sureties on his official bonds the amounts for which warrants have been fraudulently issued to him in excess of the proper amount due. The primary object of the suit is to correct his accounts and to ascertain upon which of his bonds rests the liability for his official misconduct. When this was done the court of equity, which should not grant relief by piecemeal, went further, and properly granted such relief as afforded adequate protection to the county from injury. If the county was not liable for the outstanding illegal warrants, and could not be required to pay them, and should refuse to pay them, then appellants would be liable to the holders of the warrants. Since the county elects to treat the warrants as outstanding liabilities, and to take a decree for the amount thereof, giving appellants the right to satisfy the decree by production and surrender of the warrants, no harm is done to appellants by thus transferring their liability from the holders of the warrants to the county. The court in this way protected the county from the danger of having the warrants pass without notice of illegality into the hands of the collector of taxes or treasurer. It is just such remedy as a court of equity should afford. The warrants in question embraced both legal and fictitious allowances, and if the warrants had been before the court, as in the case of *Shirk v. Pulaski County*, 4 Dill. 209, Fed. Cas. No. 12,794, the court might have inspected them, and, as was done in that case, cut them down to the proper and legal amounts. But in that case the plaintiff brought the warrants before the court, asserting their validity, whereas in the case at bar the warrants were not before the court, and it was not shown who the owners were, nor whether the warrants had ever been paid. If the warrants are in the hands of third parties, and the county refuses to pay them, appellants are liable on their bonds to such holders for the fraudulent misconduct of the clerk in issuing them; if they have been paid by the county, appellants are liable; and if the warrants are in the hands of appellants, or either of them, the decree can be satisfied by production and surrender thereof. So in no event are ap-

pellants injured by the peculiar remedy allowed by the court. If the warrants have never passed out of the hands of appellant Place, appellants should have shown that fact by way of defense.

We find no error in the decree, and it is in all things affirmed.

CHOCTAW, O. & G. R. CO. v. JONES.
(Supreme Court of Arkansas. Jan. 6. 1906.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The defense of contributory negligence, in an action for negligence, rests on an omission of duty on the part of plaintiff, and is maintainable when, though defendant was negligent, the proximate cause of the injury was the negligence of plaintiff.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 58, 112, 113.]

2. MASTER AND SERVANT — ASSUMPTION OF RISK.

The defense of assumption of risk, in an action for injuries received by a servant, rests on contract arising from the contract of employment that he will assume the ordinary risks of the service.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 538, 543, 550.]

3. SAME—PRESUMPTIONS.

A servant is presumed to know the ordinary risks of his employment, but he is not presumed to know of risks caused by the master's negligence after he enters the service.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 892.]

4. SAME — MASTER'S NEGLIGENCE — ASSUMPTION OF RISK.

Where a servant was injured in consequence of the master's negligence, the master, in order to show that the servant assumed the risk, must prove that the servant voluntarily subjected himself to the new danger with full appreciation thereof.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600 907.]

5. SAME—QUESTION FOR JURY.

Evidence, in an action for injuries received by a servant while assisting in pushing from a structure a "bent" consisting of two upright timbers and a cross-piece, in consequence of the negligence of the master's foreman in directing the work, examined, and held, that the question whether the servant assumed the risk arising from such negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1068-1088.]

6. SAME—OBEDIENCE OF MASTER'S ORDERS.

Where a servant is ordered to assist in doing certain work in a certain manner, the servant may rely on the judgment of the master, unless the danger is so obvious that no prudent person would incur the risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 547-549.]

7. SAME — NEGLIGENCE — EVIDENCE — SUFFICIENCY.

Evidence, in an action for injuries received by a servant while assisting in pushing from a structure a "bent," consisting of upright timbers and a cross-piece, examined, and held to justify a finding that the foreman directing the work was negligent in failing to ascertain that the work could be done in the manner ordered without unnecessary danger, authorizing a recovery.

5. SAME—CONTRIBUTORY NEGLIGENCE.

A finding that a servant was not guilty of contributory negligence *held* warranted.

9. SAME—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER—INSTRUCTIONS.

A request to modify an instruction, in an action for injuries received by a servant, that a servant assumes the risks incident to the employment, but does not assume the risk of the negligence of the master, by adding, unless the servant knew of such negligence, or could by the use of ordinary care have known of it, and continued in the employ without objection, is properly refused, because a servant does not assume the risks of the master's negligence unless he realizes the danger to which the negligence exposes him.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600.]

10. SAME.

An instruction, in an action for injuries received by a servant while assisting, under orders of the master's foreman, in pushing from a structure a "bent," consisting of upright timbers and a cross-piece, that if he was of sufficient experience to understand the danger connected with the work, and he knew that a rope was not to be used, and continued at work without objection, he assumed the risk, precluding a recovery, was properly refused; for, though he knew that no rope was to be used, he might not have realized the danger to which he was thereby exposed, and without such realization there was no assumption of risk.

Appeal from Circuit Court, Saline County; Alex. M. Duffie, Judge.

Action by Ebenezer M. Jones against the Choctaw, Oklahoma & Gulf Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 3d of May, 1903, Ebenezer Jones was working for the Choctaw, Oklahoma & Gulf Railway as a member of a bridge gang under a foreman named Collier. On that day Collier and his gang was ordered to assist Tillman, the foreman of another gang, in the erection of a rock crusher on the line of the railway. The wooden structure on which the rock crusher rested was built of heavy sawed timbers. It was located against the side of a steep hill. The top of this wooden structure next to the hill was about even with the hill. On the opposite front side it was 20 feet high. To lift the heavy iron parts of the rock crusher proper and place them in position they used what was called a "traveler" with a crane attachment operated by a steam engine. In placing the top of the crusher in position it became necessary to also use what the witnesses called a "bent." This "bent" consisted of two upright pieces and a cross-piece of heavy timbers, nailed together. These two upright pieces or legs of the bent, upon which the cross-piece rested, were nailed to the top of the wooden frame work on which the crusher rested, and were further held in an upright position by two braces, one on each leg; one end of the brace being nailed to the wooden structure on which the bent rested and the other to a leg of the bent. Jones assisted two or three other men in making and putting up this "bent," working under the direction of the

foreman, Tillman, who had charge and superintendence of the work. After the "bent" had served its purpose Tillman ordered the workman to throw it down. In order to do so it was necessary to knock the braces loose and to draw the nails by which the legs of the bent were fastened to the wooden structure upon which it rested. Jones knocked the end of the brace on his side loose from the structure. He then commenced to draw the nails which fastened the leg. Collier, the other foreman, suggested that a rope be used to lower the bent gradually; but Tillman, who had charge of the work, said that it was unnecessary, and ordered the workmen to push the "bent" down. This was done just about the time Jones finished drawing the nails from the leg of the bent on his side. As the bent was pushed over towards the hill, the upper part of the leg of the bent near which Jones had been working struck the end of a bolt projecting from a part of the traveler. As the other side of the bent continued to fall, it caused the end of the leg upon which Jones had been working to kick up and back, and it struck Jones and knocked him off of the structure. He fell upon a car loaded with rock ballast, and from it rolled to the ground below, a distance of 20 feet in all. His left arm was crushed so badly that it was necessary to amputate it just below the elbow. His right arm was crushed at the wrist, and he suffered other injuries. He brought an action against the company to recover damages, alleging that the foreman, Tillman, was guilty of negligence in ordering plaintiff and the other workmen to throw the bent down without the use of a rope, and also because he ordered it thrown down without removing both ends of the brace on the side next to plaintiff. The defendant answered, and denied most of the material allegations of the complaint, and also alleged that the injuries received by plaintiff were received as a result of his own carelessness and negligence, or the carelessness and negligence of his fellow servants, and without the fault of the defendant, and that it was a risk assumed by plaintiff.

On the trial the court, among others, gave the following instruction: "(1) The court instructs the jury that a person engaged in the services of a railroad company as a bridge carpenter assumes all the risk ordinarily incident to the business; but he does not assume the risk of the negligence of the master himself, or of any one to whom the master may see fit to entrust his superintending authority." The defendant saved its exceptions to the giving of such instruction, and requested the court to modify it by adding the following words: "Unless the servant knew of such negligence, or by the use of ordinary care should have known of such negligence, and continued in the employ of the master without objection." The court re-

fused to make such modification, to which the defendant excepted. The court gave quite a number of instructions at the request of the defendant, covering the doctrine of contributory negligence and assumed risks, but refused to give the following, to wit: "(5) If the plaintiff was a man of ordinary intelligence and understanding, and of sufficient experience to enable him to see and understand the dangers connected with the work about which he was employed in the manner in which it was conducted, then he assumed the risks of such dangers, and cannot recover for an injury caused thereby. (6) The plaintiff alleges that the defendant was negligent in failing to use a rope in throwing down said bent, and also in failing to have a brace removed from said bent before directing it to be thrown down. If you find from the testimony that plaintiff knew, or by the exercise of ordinary care and observation on his part could have known, that a rope was not to be used and that said brace had not been removed, and continued at his work, then he assumed the risks occasioned thereby and cannot recover in this case." Defendant excepted to the refusal to give the above instructions. The jury returned a verdict in favor of plaintiff for the sum of \$4,000, and judgment was rendered for that sum. Defendant appealed.

E. B. Peirce and Thos. S. Buzbee, for appellant. N. P. Richmond and Wood & Henderson, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal by a railroad company from a judgment against it for damages for an injury to one of its employes while he was acting under the orders of a foreman in charge of the work upon which plaintiff was engaged at the time of his injury. The plaintiff and three or four other workmen were on the top of a wooden structure erected as a support for an iron rock crusher. The heavy iron part of the rock crusher was lifted into position by means of a "traveler" with a crane attached, worked by a steam engine. In placing the top of the rock crusher in position the workmen had also to use a "bent." This "bent" consisted of two upright pieces and a cross-piece some 10 or 15 feet long, connecting these two uprights, all of heavy timbers securely nailed and fastened together. The bottom of these two uprights or legs of the bent were fastened to the top of the wooden structure, on which the rock crusher rested. After the bent had served its purpose the foreman ordered it removed. When this order was given some one suggested that a rope be used, so that it could be lowered gradually. But the foreman said that it was unnecessary to use a rope, and ordered the bent to be pushed over and thrown down. As it was pushed over the top of the upright or leg of the bent next to where the plaintiff was at work caught on a bolt pro-

jecting from the "traveler." As the other side of the bent had nothing to stop or control it, it was pushed or fell forward; the side next to plaintiff catching on the projecting bolt caused the bottom of the leg on that side to kick or fly back. It struck plaintiff, knocked him to the ground, and caused him serious injury, on account of which he recovered judgment for damages, and the main question is whether the facts support the judgment.

The liability of the master for injuries to servants rests primarily on the broad principle of law that where there is fault there is liability, but where there is no fault there is no liability. 1 Bevens on Negligence, 734. In this case we may say that, as the foreman having charge of the work for the defendant stood in its place as its representative, if he by negligence while acting as foreman caused the injury, the plaintiff can recover compensation therefor from the defendant, unless the plaintiff was guilty of contributory negligence, or unless the injury resulted from a risk assumed by plaintiff. The defendant not only denies that it was guilty of negligence, but it set up both contributory negligence and assumption of the risk by plaintiff as defenses to the action in this case. There is, of course, a distinction between the defense of assumed risk and that of contributory negligence. The defense of contributory negligence rests on some fault or omission of duty on the part of the plaintiff, and is maintainable when, though the defendant has been guilty of negligence, yet the direct or proximate cause of the injury is the negligence of the plaintiff, but for which the injury would not have happened. It applies when the plaintiff is asking damages for an injury which would not have happened but for his own carelessness. On the other hand, the defense of assumed risk is said to rest on contract, which is generally implied from the circumstances of the case; it being a term which the law imports into the contract, when nothing is said to the contrary, that the servant will assume the ordinary risks of the service for which he is paid. The defense of assumed risk comes within the principle expressed by the maxim "*Volenti non fit injuria*." This defense does not impliedly admit negligence on the part of the defendant and defeat the right of action therefor, as the defense of contributory negligence does; for, where the injury was the result of a risk assumed by the servant, no right of action arises in his favor at all, as the master owes no legal duty to the servant to protect him against dangers the risk of which he assumed as a part of his contract of service. *Narramore v. Cleveland R. R. Co.*, 96 Fed. 298, 37 C. C. A. 490, 48 L. R. A. 68. In other words, the defense of assumed risk rests on the fact that the servant voluntarily, or at least without physical coercion, exposed himself to the danger and thus assumed the risk thereof. Having done

this of his own accord, he has no right, if an injury results, to call on another to compensate him therefor, whether he was guilty of carelessness or not. *Smith v. Baker*, 1891 Appeal Cases (Eng.); opinion of Lord Bowen in *Thomas v. Quartermaster*, 18 Q. B. Div. (Eng.) 685.

But, though the defenses of contributory negligence and assumed risk are separate and distinct, yet it frequently happens that they are both available in the same case and under the same state of facts. For instance, as we have stated, a servant assumes all the risks ordinarily incident to the service in which he is employed, and it is also true that he cannot recover for an injury caused by his own negligence. Now it may turn out that the injury of which the servant complains was not only due to one of the ordinary risks which the servant assumed, but that it was also caused in part by his own negligence. In dealing with such a case it is, so far as results are concerned, immaterial whether it be disposed of by the courts on the ground of assumed risk or contributory negligence, for either of them make out a good defense. For this reason the distinction between these two defenses is not always brought out in the reported cases; it being often unnecessary to do so. We have thought it well to point out the distinction between them to avoid any confusion of the law in its application to the facts of this case. In the application of the doctrine of assumption of risks a distinction must be also made between those cases where the injury is due to one of the ordinary risks of the service, and when it is due to some altered condition of the service, caused by the negligence of the master. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them, and if he negligently fails to do so he will still be held to have assumed them. The decision in the recent case of *Grayson-McLeod Co. v. Carter* (Ark.) 88 S. W. 597, rests on that ground, as do many other cases found in the Reports. But the servant is not presumed to know of risks and dangers caused by the negligence of the master after he enters the service, which change the conditions of the service. If he is injured by such negligence he cannot be said to have assumed the risk, in the absence of knowledge on his part that there was such a danger; for, as we have before stated, the doctrine of assumed risk rests on consent, but, if the injury was caused in part by his own negligence, he may be guilty of contributory negligence. On the other hand, if he realizes the danger and still elects to go ahead and expose himself to it, then, although he acts with the greatest care, he may, if injured, be held to have assumed the risk. *Mahoney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Smith v. Baker*, 1891 Appeal Cases.

Now the injury in this case did not result from one of the ordinary risks of the em-

ployment which a servant of full age and experience must be presumed to have known, whether he did so or not. But, as the jury found, it was brought about during the course of his service by the negligence of the foreman, who had charge of the work and in that respect represented the defendant. Where the condition of the service is thus altered, and the servant is brought face to face with a danger of that kind not ordinarily incident to the work, then, as before stated, new questions are presented. The plea of the master that the servant assumed the risk is met in such a case by the answer that the danger arose from the master's own negligence, which is not one of the risks assumed by the servant. This being so, the master, to make good his defense of assumed risk, must go further and show that the servant voluntarily subjected himself to the new danger with full knowledge and appreciation thereof; for such risk constitutes an addition to those ordinarily incident to the service, and there is no presumption that he had knowledge of it, or assumed it. This question was thoroughly considered and discussed by the judges of the House of Lords of England in the case of *Smith v. Baker*, Appeal Cases 1891. In that case the plaintiff was with other workmen of defendant engaged in drilling holes in rock for the purpose of blasting. Another set of workmen were, by means of a movable crane operated by a steam engine, moving the stones that had been blasted. These stones were often without notice swung over the heads of plaintiff and those working with him. He was aware of the danger, but continued at work without protest, and was afterwards injured by a stone dropping upon him. In discussing the question as to whether the plaintiff assumed the risk by continuing at work under those circumstances, the judges called attention to the fact that the maxim upon which the rule of assumption of risks was based was not "*Scienti non fit injuria*," but "*Volenti non fit injuria*." A majority of them therefore concluded that the mere fact that the servant remained at work after discovering the danger to which he was exposed did not authorize the court to say as a matter of law that he consented to assume the risk. They held that whether he did so or not was under the facts of that case a question for the jury. The justness of this decision has been recognized by some of the American courts. *Maloney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611. But, though this decision of the highest English court seems to be logically sound, yet the law in this country, as settled by numerous decisions, is to some extent different. The rule here seems to be that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so by order of his superior, must bear the risk. In

other words, even though he may perform the work unwillingly under orders from his superior, yet if there was no physical compulsion, and if he knew and appreciated the danger thereof, he will in law be treated as having elected to bear the risk, and cannot hold the employer liable if injury results. *Telephone Co. v. Woughter*, 56 Ark. 206, 19 S. W. 575; *Ferren v. Old Colony R. R.*, 143 Mass. 197, 9 N. E. 608; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501; *Stillier v. Bohn Mfg. Co.*, 80 Minn. 1, 82 N. W. 981; *Mundle v. Hill Mfg. Co.* 86 Me. 400, 30 Atl. 16; *Fickett v. Fibre Co.*, 91 Me. 269, 39 Atl. 996; *Texas & Pacific R. R. Co. v. Swearingen*, 196 U. S. 57, 25 Sup. Ct. 164, 49 L. Ed. 382; *C. Ok. R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96; *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188.

But plaintiff in this case exposed himself to the danger in obedience to an order of the foreman. As the danger was brought about by the negligence of the foreman, before it can be said, as a matter of law, that plaintiff assumed the risk thereof by the mere fact that he went ahead with his work, it must be clearly shown that when he did so he knew and appreciated the danger to which he exposed himself by doing the work. But, as plaintiff was busily engaged in work which required his attention, we think it was open for the jury to say that he did not know of or fully appreciate the danger, and that therefore he did not, by continuing at work, assume the risk of injury to which he was exposed by the carelessness of the foreman. Taking into consideration the fact that it would probably have been safe to have pushed the "bent" over without the use of a rope to control it, but for the fact that there was a nut projecting from the traveler which was liable to catch one side of the bent, that this danger escaped the attention of the foreman whose duty it was to guard against it, and that plaintiff's attention was distracted more or less by his work, we think it exceedingly probable that he not only did not assume the risk caused by the act of the foreman in ordering the bent pushed over without a rope attached to control it, but that he was not even aware of the danger until too late to escape. He knew, of course, that the order had been given to push the "bent" over without the use of a rope; but we think it was open for the jury to find that he did not know and appreciate the danger to him that this order involved, and that therefore he did not, by remaining at work, assume the risk. *Telephone Co. v. Woughter*, 56 Ark. 211, 19 S. W. 575; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Maloney v. Dore*, 155 Mass. 513, 30 N. E. 366; *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71, 42 N. E. 501; *Mundle v. Hill Mfg. Co.* 86 Me. 400, 30 Atl. 16; *Stillier v. Bohn Mfg. Co.*, 80 Minn. 1, 82 N. W. 981; *Nofsinger v. Goldman*, 122 Cal. 609, 55 Pac. 423; *Fickett v.*

Fibre Co., 91 Me. 269, 39 Atl. 996; *Shearman & Redfield on Neg.* § 214.

The next question is whether or not plaintiff was guilty of contributory negligence. Now in this case, as we have before stated, the plaintiff, when injured, was acting in obedience to an order of the foreman in charge of the work, who represented the defendant company. The order of the foreman to push the "bent" over carried with it an implied assurance that the act could be done with reasonable safety; for it is the duty of the master or his representative to use due care, and not to order the servant to perform an act that he knows to be unnecessarily dangerous. The servant has the right to rely upon the judgment of the master, unless the danger is so obvious that no prudent man would incur it under like circumstances. For this reason we do not think that, because the plaintiff, and the foreman under whom he was working were both in a position to have discovered the danger that caused this injury, it necessarily follows that, if one was negligent, both were negligent. It is true that they were both held to the exercise of ordinary care only; but what is ordinary care may vary with the circumstances and with the duty required, and the duty required of these men and the circumstances under which they acted were different. The plaintiff was actually engaged in work under the direction of the foreman. When the "bent" was ordered pushed over, it became necessary for him to unfasten the brace by which it was held in position and to draw the nails by which the end of the leg of the brace was fastened to the structure on which it rested. This required him to look down, instead of upwards. He completed this work just as the "bent" began to fall. Up to that time his attention was necessarily directed to his work. But the foreman was doing no labor himself. He was directing the labor of the plaintiff and others. In order to do this he was standing on the side of the hill, a few yards away from the structure, where he could overlook and direct the work. It was his duty, before ordering the "bent" thrown down, to ascertain that the execution of his order involved no unnecessary danger to the men engaged in the work. When we consider that the plaintiff had the right to rely upon the performance of this duty by the foreman, and that plaintiff's attention was more or less required by the work he was doing, it seems very clear under the facts of this case that the jury were justified in finding that the foreman was guilty of negligence, but that the plaintiff was not. The objection to the fourth instruction or paragraph of charge, on the ground that it permitted the jury to make such a finding, must therefore be overruled. The question of whether plaintiff was guilty of contributory negligence was, we think, properly submitted, and the finding of the jury must stand; for it cannot be said, under the facts of this case, that the

danger was so obvious that no prudent man would have incurred it. *Southwestern Telephone Co. v. Woughter*, 56 Ark. 206, 19 S. W. 375; *Sneda v. Libera*, 65 Minn. 337, 68 N. W. 36.

Counsel for defendant raise several objections to the charge of the court. The first instruction is objected to on the ground that it told the jury that a servant does not assume the risk of the negligence of the master or of one acting for him. This is clearly the law. The modification of this instruction asked by defendant was not correct, for the mere fact that the servant knows of the master's negligence, or could have known of it by the use of reasonable care, and continued his work without objection, does not necessarily show that the servant assumed the risk. As before stated, to have this effect it must be shown, not only that the servant was aware of the negligence, but that he also realized the danger to which he was thereby exposed.

The fifth instruction given by the court, if read by itself, would be misleading; but the court told the jury that all of the instructions must be taken together, and when so read we do not think it was prejudicial.

The refusal to give instructions 5, 6, and 7 requested by defendant was not error. To quote from the brief of counsel for appellant, these instructions were based on the theory that "if plaintiff was of sufficient experience to enable him to see and understand the dangers connected with the work, and if he knew, or by the exercise of ordinary care and observation could have known, that a rope was not to be used, and continued at his work without objection, then he assumed the risk." These instructions make the fact of knowledge on the part of the plaintiff that a rope was not to be used equivalent to knowledge of the increased danger to which he was thereby subjected. The servant may have known that a rope was not to be used, and yet not realize the danger to which he was thereby exposed. Without such realization there was no reason to hold that he assumed the risk of obeying the order of his foreman.

It would serve no useful purpose to take up each of the instructions given and refused by the court. Sufficient to say that we have given the objections presented by counsel thereto careful consideration and are of the opinion that no error was committed. The evidence is sufficient to sustain the judgment, and it is therefore affirmed.

SOUTHERN COTTON OIL CO. v. SPOTTS.
(Supreme Court of Arkansas. Jan. 20, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK—INSTRUCTIONS.

An instruction, in an action for injuries received by a servant while oiling machinery in motion, that if the superintendent directed

plaintiff to oil the machinery while in operation, and plaintiff requested him to stop it, and the superintendent refused so to do, but told plaintiff that it was not dangerous, plaintiff would be relieved of assumed risk in obeying, unless "the danger was so patent that no person of ordinary prudence" would have obeyed, is erroneous, because it leaves out of consideration the fact that plaintiff might have known and appreciated the danger of oiling the machinery while in motion.

2. SAME—OBEDIENCE TO ORDER OF MASTER—EVIDENCE—INSTRUCTIONS.

Where a servant was ordered by the master to oil machinery while it was in operation, being informed that there was no danger, and was injured, an instruction that he assumed the risk of dangers which by the exercise of ordinary care he might have known, that the test was not whether he comprehended the danger, but whether he ought to have done so, and that he was chargeable with knowledge of such danger as he might have known by the exercise of ordinary care, and that he assumed the risk incident to the service he was performing, was erroneous, since, before a servant acting under orders of the master assumes the risk, it must be found that he knew of the danger and appreciated it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 648-651.]

3. APPEAL—HARMLESS ERROR—ERROR FAVORABLE TO PARTY COMPLAINING.

A party cannot complain of an instruction more favorable to him than he is entitled to under the evidence.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4052, 4056-4058.]

4. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

Evidence, in an action for injuries received by a servant while oiling machinery in operation in obedience to the express orders of the superintendent, examined, and held, that the question whether it was negligence to send the servant into moving machinery was for the jury.

5. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a servant, receiving injuries while oiling machinery in motion in obedience to the orders of the superintendent, was guilty of contributory negligence in obeying the orders, was, under the evidence, for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

Appeal from Circuit Court, Jackson County; Frederick D. Feelkerson, Judge.

Action by Jim Spotts against the Southern Cotton Oil Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff, Jim Spotts, brought this suit against the Southern Cotton Oil Company to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant. The defendant (a foreign corporation) was operating a cotton seed oil mill at Newport, Ark., and the plaintiff was in its service as a day laborer. Plaintiff's duties were to perform work of a miscellaneous character about defendant's mill under the directions of the foreman or superintendent, and, among other duties, to keep the machinery oiled. He received the injuries complained of while oiling certain parts of the machinery while it was in motion, and

claims that he did so pursuant to the direct command of the foreman; that he requested the foreman to shut down the machinery, which the latter refused to do. This was denied, and the testimony on this point was conflicting. At the time of the injury, plaintiff was oiling the part of the machinery operating what is known as the "boll reel." He had climbed up and was standing upon the conveyor, several feet above the floor, and was attempting to pour oil into an oil hole on the shaft behind a large cogwheel, called the "crown gear." Engaging the crown gear was a smaller cogwheel or pinion, which was set on a shaft connected with a belt which supplied power to run the boll reel. The plaintiff claimed that on the shaft immediately back of the crown gear, and between it and the bearing into which he was pouring oil, there was a collar which was held in place by a set screw projecting about an inch. His statement as to the injury was that he did not know of the presence of the set screw; that it, as well as the oil hole, was in a dark place behind the crown gear; and that, as he was cleaning out the oil hole preparatory to pouring oil into it, the set screw caught the sleeve of his work coat, threw him against the machinery, and broke his finger, cut his shoulder, and inflicted other injuries. Plaintiff's testimony is in part as follows: "The way I got hurt that morning, Mr. Stark passed through there and he said: 'Spotts, how is everything?' And I said: 'It is all right.' He said: 'Keep everything going and keep oiled up.' He said: 'I smell a hot box. Hunt it up and oil it.' He went into the office and stayed about half an hour, came back and said: 'Spotts, hunt that box up and oil it.' I said: 'All right. I have looked for it, and I can't see which one it is, unless it is the one on the boll reel.' He said: 'By God! for Christ's sake, oil it.' I said: 'You will have to shut down the machinery.' He said: 'Do you think I will shut this down for that little box?' He had always told me to put it there on Sunday, and that Sunday I hadn't worked. After he spoke and told me to get up there and oil it, and I asked him if he would shut down, and he asked me if I was a damned fool to reckon he would shut down the machinery to oil it, I went and got my can and there was a piece of a ladder; I was afraid I would fall on the conveyor. There was a ladder about 10 feet high. It was broken. I went up there, and the conveyor ran along, and there was a shaker, and I put my foot on the block and got up on another conveyor, and I didn't notice the set screw." The defendant denied that there was any set screw at the place named, or that the foreman directed plaintiff to oil the machinery while in motion, and introduced testimony in support of its denial. The jury returned a verdict in favor of the plaintiff, assessing his damages in the sum of \$1,000, and the defendant appealed from

an order overruling its motion for a new trial.

Jno. W. & Jos. M. Stayton, for appellant.
Joseph W. Phillips and Campbell & Suits, for appellee.

McCULLOCH, J. (after stating the facts) The defense put forth by the defendant was that the manner of the plaintiff's injury was one of the ordinary dangers connected with and incident to the service which he was employed to perform, and that by virtue of his employment he assumed the risk, or that the injury resulted directly from the negligence of the plaintiff. Numerous exceptions were saved to the giving of instructions asked by the plaintiffs and the refusal to give certain instructions asked by the defendant. We do not deem it necessary to set forth and discuss all the instructions asked or given. The court correctly put the case before the jury upon the issue of negligence of defendant and contributory negligence on the part of the plaintiff.

Counsel for appellant especially complain at the following instruction, on the question of assumed risk, given on motion of plaintiff: "(7) If you find from the evidence that the foreman or superintendent directed plaintiff to oil the machinery while in operation, and the plaintiff requested him to stop the machinery for such purpose, and the foreman or superintendent refused to do so, but told plaintiff that it was not dangerous, or that he would not get hurt, then plaintiff would be relieved of any assumed risk, and would not be guilty of contributory negligence in obeying such direction, unless the danger was so patent that no person of ordinary prudence and care would have obeyed such direction, or unless, in the manner of obeying such direction and oiling said machinery, plaintiff acted as an ordinarily prudent person would not have done under the circumstances." It is urged that this instruction is defective as a definition of assumption of risk, because it leaves out of consideration the fact that plaintiff might have actually known of the location of the set screw and appreciated the danger in oiling the machinery while in motion, even though the danger was not so "patent that no person of ordinary prudence and care would have obeyed such direction." The instruction seems open to this objection, and, standing alone, would have been erroneous. But the deficiency in this instruction is supplied by others on the subject given at the request of appellant.

The court gave the following at the request of the defendant: "(9) If you find from the evidence that the plaintiff was employed to perform certain work and labor about the boll reel at its oil mill, and one of his duties was to oil its parts, you are instructed that he assumed the ordinary risks incident to this employment, and also all the dangers which were obvious and apparent;

and if he continued in his work having knowledge, or by the exercise of reasonable care might have known the dangers involved, he is deemed to have assumed the risks, and to have waived any claim for damages against the defendant in case of personal injury. The true test is, not whether he did comprehend the danger, but whether he ought to have comprehended it; and he is chargeable with knowledge of such danger as he might have known and comprehended by the exercise of ordinary care, and, though the work of oiling the bearings of the boll reel might have been dangerous, he assumed all dangers and risks incident thereto." This instruction was more favorable to defendant than the law of the case warrants. The doctrine of assumed risk in such cases is so exhaustively treated in the case of *C., O. & G. Ry. Co. v. Jones* (recently decided by this court) 92 S. W. 244, and the principles therein announced so completely control this case that we do not deem it necessary to renew the discussion here. It is clearly pointed out in the case just cited that the defense of assumed risk is based upon the voluntary and conscious exposure to the danger by the servant. When acting under the direct commands of the master, before the servant can be said to have assumed the risk, it must be found that he knew of the danger and appreciated it. It is not correct to say, in the language of the instruction just quoted, that "he is chargeable with knowledge of such dangers as he might have known and comprehended by the exercise of ordinary care," and assumed all the risk incident to the service he was performing. The instruction would have been applicable to a state of fact where the servant was proceeding in the discharge of his regular duties in the ordinary way, but not where he was proceeding under the command of the master and in the face of a danger not incident to his ordinary duties. It entirely ignored the claim of plaintiff that he was under the special direction of the foreman oiling the machinery while in motion, and was assured by the foreman that it was safe to do so. However, the appellant cannot complain that the instruction was more favorable than it was entitled to under the proof.

It is earnestly insisted by counsel for appellant that the evidence is not sufficient to sustain the verdict, but we think it was sufficient. The contention of the plaintiff was that the defendant, through its foreman, was guilty of negligence in sending him up into the moving machinery where, in oiling it according to the command of his superior, his sleeve was caught by the set screw and the injury resulted in consequence. He testified to the facts in support of this claim and the jury accepted his contention and found in his favor. The gravamen of the charge of negligence against defendant was that it sent plaintiff into the moving machinery.

The placing of the set screw was not claimed to be an act of negligence, nor is it claimed that the machinery was defective on that account. It was merely one of the conditions of the injury. The master was bound to know of the structural parts of the machinery furnished to the servant, and it was a question for the jury to determine whether it was negligence to send the servant into the moving machinery for the purpose of oiling it. The defendant denied the charge of negligence, and denied that plaintiff was directed to oil the machinery while in motion or that there was any set screw on the shaft. It introduced testimony in support of its contention, but the jury found for the plaintiff against what seems to be a preponderance of the testimony. It was for the jury to find from the evidence whether plaintiff acted under direction of defendant's foreman, whether it was negligence to do so under the circumstances, whether the set screw was in the position named, and whether the dangers of obeying the orders of the foreman were so obvious and so patent that the plaintiff was guilty of contributory negligence in obeying them. The jury necessarily passed upon all these questions, and we cannot say that the evidence was not sufficient to support the finding.

Judgment affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. COURTNEY.

(Supreme Court of Arkansas. Jan. 6, 1906.)

1. RAILROADS—INJURIES TO ANIMALS—EVIDENCE.

Evidence in an action for the killing of horses by a train reviewed, and *held* sufficient to support a verdict in favor of plaintiff.

2. WITNESSES—HUSBAND AND WIFE.

Under Kirby's Dig. § 8095, providing that a husband and wife shall be incompetent to testify for or against each other, except that either shall be allowed to testify for the other in regard to any business transacted by one for the other in the capacity of agent, a husband, who testified that he was his wife's general agent for the transaction of all her business, was not competent to testify as to the value of horses for the killing of which she sued.

3. APPEAL — HARMLESS ERROR — ADMISSION OF EVIDENCE.

Where incompetent testimony was admitted to show that the value of a team of horses was \$280, the error was not harmless, where one other witness testified that their value was \$280, and one that their value was \$260, and the verdict fixed their value at \$280.

Appeal from Circuit Court, Chicot County; Z. T. Wood, Judge.

Action by the St. Louis, Iron Mountain & Southern Railway Company against Mrs. E. E. Courtney. From a judgment in favor of plaintiff, defendant appeals. Affirmed on condition.

B. S. Johnson, for appellant. Knox & Hardy, for appellee.

RIDDICK, J. This is an appeal from a judgment against the railway company for \$280 as damages for killing two horses owned by the plaintiff, Mrs. E. E. Courtney. We think there is evidence to support the verdict. It was shown that the horses of the plaintiff were struck by the train and killed. This, under the statute, made out a prima facie case in favor of plaintiff. The defendant put on the stand only one witness, and this witness was the engineer in charge of the train at the time of the accident. He said that the stock came on the track "about 100 feet ahead of the engine and right at the trestle." The horses were struck and killed on the trestle. This witness also stated that it was at night and raining, and that the headlight only enabled him to see about 50 or 60 feet ahead of the train, and that when he saw the horses they were probably 40 or 50 feet away. The evidence of other witnesses show that these horses had been running ahead of the train 150 yards or more. If the headlight enabled the engineer to see 50 or 60 feet ahead of the train, he should have discovered the horses before he was within 40 or 50 feet of them. Besides, his testimony that the horses came suddenly on the track from the side is contradicted by witnesses who testified that the tracks of the horses came straight down the track. His statement that they came on the track "about 100 feet ahead of the engine right at the trestle" is not entitled to much credit, if we believe his other statement that when he first saw them they were within 40 or 50 feet of the engine. If he did not see them until he was within 40 or 50 feet of them, how could he tell what they were doing when he was 100 feet from them. The fireman did not testify, and the company relies on the testimony of the engineer only; and, as his statements are to a certain extent contradictory, we think the question of his credibility was for the jury.

The only other question presented relates to competency of the testimony of J. S. Courtney, who testified for the plaintiff. The defendant objected to his testimony on the ground that he was the husband of the plaintiff. Counsel for plaintiff then asked the

following question, "Are you Mrs. Courtney's general agent for the transaction of all her business?" To which the witness responded, "Yes, sir." The court thereupon overruled the objection of defendant. This witness was not present at the time the horses were killed. He did not go to the place where they were killed until a day or two afterwards. The facts in reference to the accident to which he testified were fully established by other witnesses and are not controverted. The only material part of his testimony related to the value of the horses killed. Our statute provides that husband and wife shall be incompetent to testify for or against each other, with the exception that "either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent." Kirby's Dig. § 3095. It will be noticed that under the statute a husband is incompetent to testify for his wife except in regard to some business transacted by him for her as her agent. Now the testimony of the husband in this case was not, we think, testimony in reference to a business transaction done by him as her agent. It was therefore not competent testimony. But the only material part of his testimony relates, as we have said, to the value of the horses killed. He stated that their aggregate value was \$280. The two other witnesses who testified on that point differed, one saying their value was \$280, and the other \$260.

Counsel for defendant say that, if the testimony of the husband was incompetent, we cannot say which of these witnesses the jury would have believed, and that therefore we should not disturb the verdict. But the rule when incompetent evidence is introduced is that prejudice is presumed, and the burden is on the party introducing it to show that no prejudice resulted. That cannot be done in this case, and the judgment must be reversed, unless plaintiff will remit \$20; that being the excess in value found by the jury over that estimated by the witness who gave the lowest value.

Plaintiff is allowed two weeks to elect whether to enter a remittitur or submit to a new trial. If remittitur is entered, judgment for remainder will be affirmed; otherwise, the judgment will be reversed and new trial ordered.

ALABAMA OIL & PIPE LINE CO. v. SUN CO.

(Supreme Court of Texas. April 2, 1906.)

1. CONTRACTS—CANCELLATION—EFFECT.

If it appears from the facts and circumstances attending the cancellation of a contract that it was not the intention of the parties that the act of cancellation should have a retroactive effect and destroy previously vested rights, the agreement for cancellation will be so construed as to preserve those rights.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1204.]

2. SAME—QUESTIONS FOR JURY.

In an action for breach of a contract, evidence held to require submission to the jury of the question whether or not a cancellation of the contract by mutual agreement was intended merely to annul it as to any future operations under it, and not to release a previously accrued right of action for breach.

Error from Court of Civil Appeals of First Supreme Judicial District.

Action by the Alabama Oil & Pipe Line Company against the Sun Company. A judgment for defendant was affirmed by the Court of Civil Appeals (90 S. W. 202), and plaintiff brings error. Reversed and remanded.

Eugene Easterling, for plaintiff in error.
Greer, Minor & Miller, for defendant in error.

BROWN, J. The plaintiff in error sued the defendant in error for the value of 60,000 barrels of oil, which the latter failed to receive under the contract sued on at five cents per barrel, and for the value of 8,000 barrels taken, but not paid for. The pleadings are sufficient to admit the evidence introduced upon which the issues presented to this court arose. The facts in brief are:

The plaintiff in error, a corporation created under the laws of Texas, and the defendant in error, a foreign corporation having a permit to do business in Texas, entered into a contract on the 2d day of December, 1901, by which the Alabama Company agreed to sell and deliver to the Sun Company 360,000 barrels of Beaumont crude oil and the Sun Company agreed to receive the said oil under the terms of the contract which stipulated that the Sun Company should construct its pipe line so that the oil could be delivered to it upon the land on which the Alabama Company's well was situated, and that the said Sun Company should receive 15,000 barrels per month for the first year, 10,000 barrels per month for the second year, and 5,000 barrels per month for the third year, with the exception stated as follows: "Excepting the average amount received during the preceding months shall be greater than the amount required under this contract up to that time, in which event said second party should only be required to take such amount of oil during said month as shall be necessary to make the required amount of oil to be delivered up to

that period." On the 20th day of each month the Sun Company was to pay for the oil received at 5 cents per barrel. It was stipulated that if the well should cease to flow, or the pressure should become insufficient to force the oil into the pipe of the Sun Company, then the latter should pump the oil at its own expense, except that the oil to be used to generate steam for pumping should be furnished by the Alabama Company without charge. This contract was made by R. C. Jelks, president of the Alabama Company, and J. Edgar Pew, general manager of the Sun Company, and no question is made of the authority of either to make the contract. The Sun Company received some oil from the Alabama Company, for which it did not pay, and for which suit was brought; but that is not involved in this writ of error. The well did cease to flow, and the Sun Company took charge of the well and pumped the oil into its pipe line.

On the 31st of July, 1902, the Sun Company had failed to take the quantity of oil required by the contract to the amount of 60,000 barrels. The latter company was pumping the well at the time, having full charge of it under the contract. Jelks, the president of the Alabama Company, became dissatisfied with the operation of the well by the Sun Company, and claimed that the latter company was not making an effort to get the oil out, while the common supply was being exhausted by other companies and persons who were pumping oil from the same field. Jelks called upon Pew, and, stating his complaint against his management of the well, proposed to take the well back and operate it himself; and after some discussion of the matter, which is not necessary here to state, an agreement was reached, and Pew at once disconnected his pipe line from the well and turned it over to Jelks. On the same day Jelks wrote the following note: "Beaumont, Texas, July 31, 1902. J. E. Pew, Agt. Sun Co., City—Dear Sir: Confirming our conversation in your office this morning, in which you agreed that the contract between the Alabama Oil & Pipe Line Co., executed by myself as president, and the Sun Company, executed by you as general manager, dated December 2, 1901, relating to the purchase of oil by said Sun Company from the said Alabama Oil & Pipe Line Co., should be this day canceled and held of no further force and effect, this is to notify you therefore in writing, as requested by you, that said contract is now here declared to be this day canceled, annulled, and to have no further force and effect. Yours very truly, Ala. Oil & Pipe Line Co., R. C. Jelks, President." August 18th Pew wrote to Jelks as follows: "Beaumont, Texas, 8—18—02. R. C. Jelks, President Alabama Oil & Pipe Line Co., Beaumont, Texas—Dear Sir: Acknowledging receipt of yours of the 31st canceling contract of date of December 2, 1901, relating to the purchase of oil by the Sun Company

from the Alabama Oil & Pipe Line Company, we beg to state that, after referring the same to the Pittsburgh office and in accordance with our conversation with you, it is satisfactory to cancel said contract upon the condition that each party hereto shall be released from liability to the other on account of all transactions had under said contract. With this understanding, your cancellation of the contract is satisfactory with us, and we release the Alabama Oil & Pipe Line Company from further liability for the delivery of oil under said contract. We are advised by our Pittsburgh office to make this release in accordance with the conditions herein specified. Yours respectfully, Sun Company, J. Edgar Pew, General Manager." To which Jelks replied as follows: "Beaumont, Texas, Aug. 13, 1902. The Sun Company, J. E. Pew, Mgr., City—Gentlemen: Replying to yours of the 13th inst., we beg to say that the contract of December 2, 1901, to which you refer, has already been canceled by your consent long prior to your communication of the 18th inst. In thus canceling the contract, we did not waive, and do not now intend to waive, any claim for damages, or otherwise, which we have against you, and you are hereby respectfully notified that, as you have consented to the cancellation of the contract, we will hold you as a trespasser if you undertake to interfere in any way with our oil. Yours truly, Alabama Oil & Pipe Line Co., by Watts, Chester & Ellison, Attys." To this Pew replied: "Beaumont, Texas, Aug. 15, 1902. Alabama Oil & Pipe Line Co., Beaumont, Texas—Gentlemen: As there seems to be a misunderstanding between us as to the terms of the cancellation of our contract, and as we cannot and never did consent to such terms as you have asked, we would ask that you renew the connection you have taken apart and place us in a position to continue to take the oil on contract, as we are ready to take this oil now and will want it from month to month. Please have this attended to at once, and notify us when we can get the oil; otherwise, we shall hold you responsible for any failure to obtain the oil that is due us. Awaiting your reply, we are, yours respectfully, Sun Company, General Manager."

It was proved that the oil came from a common source and that the failure to take oil out of a well was a loss of that much to the owner. The district judge instructed the jury to find a verdict for the defendant, which was done, and judgment entered in accordance with the verdict, which judgment was affirmed by the Court of Civil Appeals.

Counsel for the defendant in error claimed in the argument of this case that at the time of the cancellation the Sun Company had the right under the contract to take the 60,000 barrels of oil which it had failed to take in the preceding months. If that were true, it would probably influence the interpretation of the agreement to cancel the

contract; but we have carefully examined the contract and find no warrant for the claim. On the contrary, that instrument specifically provides that the Sun Company should "receive 15,000 barrels per month for the first year, 10,000 barrels per month for the second year, and 5,000 barrels per month for the third year," unless "the average amount received during the preceding months shall be greater than the amount required under this contract up to that time." Then the Sun Company would only be required to take so much as might be necessary to make the quantity required by the contract to be taken up to that period. By the terms of this contract it is made evident that the purpose was to have the oil taken out of the ground by the month, and a failure for any month to get the prescribed quantity of oil was a loss of that much to the Alabama Company, because, the oil being derived from a common source and other parties being engaged in pumping wells in the same field, the common supply would be reduced while the Alabama Company would be getting nothing. The provision for allowing the Sun Company to receive only so much as would complete the full amount when an excess had been before received excluded the idea that a failure to take for any month the specified number of barrels could be satisfied by receiving in addition that quantity of oil in a subsequent month.

The judgments of the district court and of the Court of Civil Appeals rest upon the proposition that as a matter of law the agreement between Jelks and Pew to cancel the contract operated to discharge the Sun Company from its liability for damages on account of its failure to take the 60,000 barrels of oil, without regard to the intention of the parties as it might be manifested by the attending circumstances. It is true that parties to a contract may agree to cancel it, and, if there be nothing to indicate a different intention, each party will be fully discharged from all liability under such contract. But the use of the word "rescind" or "cancel" will not necessarily have that effect. The liability in this case must be referred to the terms of the agreement to cancel, and in order to interpret that agreement we must look to the intention of the parties, the character of the contract to be canceled, and to the situation of the parties at the time, as well as the attending facts and circumstances, which throw light upon the question of intent. If it appear from these facts and circumstances that it was not the intention of the parties that the act of cancellation should have a retroactive effect to destroy previously vested rights, then the contract will be so construed as to preserve those rights. *C. V. Iron Works v. F. Iron River Co.*, 64 Fed. 569, 12 C. C. A. 306; *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370; *Hayes v. City of Nashville*, 80 Fed. 641.

26 C. C. A. 59; *Winton v. Spring*, 18 Cal. 452; *Mayor, etc., v. N. Y. R. Co.*, 146 N. Y. 215, 40 N. E. 771; *Roe v. Conway*, 74 N. Y. 204; *McCreery v. Day* (N. Y.) 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793.

In *Hayes v. City of Nashville*, above cited, Judge Taft uses this language: "It very frequently happens that laymen do not distinguish between these two ways of ending a contract, and, therefore, that words are used by a party which, literally and strictly construed, would effect a complete rescission and destruction of the contract, when the party's real intention was only to declare his release from further obligations to comply with the terms of the contract by the default of the other party, and his intention to hold the other for damages. In such cases courts consider, not only the language of the party, but all the circumstances, including the effect of a complete rescission upon the rights of the parties, and the probability or improbability that the complaining party intended such a result, in reaching a conclusion as to the proper construction of the language used." In *Mayor v. New York Refrigerating Construction Company*, before cited, the Court of Appeals of New York said: "In view of the status when the comptroller, acting under the direction of the commissioners of the sinking fund, served his final notice, we think it was not a rescission in the strict technical sense, which destroyed all rights of action, but was a termination of the contract according to its terms, and left undisturbed all existing liabilities. The rescission had no retroactive effect. This result is to be fairly implied from all the surrounding circumstances, and carries out the obvious meaning of the parties when the contract was executed."

The quotations made fairly reflect the authorities upon this question. In many cases the general proposition relied upon by the defendant in error is expressed broadly upon a state of facts which justified its application; but we have examined all of the cases that we have been able to find bearing upon this question, and we have found no case in which the rule has been enforced where the facts showed a different intention. Of the cases cited in support of the ruling we will notice only the case of *Haldeman v. Chambers*, 19 Tex. 1. In that case Judge Wheeler announced the general proposition contended for by counsel for the Sun Company. The rule as announced was applicable to the facts of that case, for in the canceling instrument this language was used: "And we do hereby release each other from the said agreement, sale, transfer, and assignment." Such explicit language did not leave any room for explanation as to the intention of the parties, and under no rule of construction could it be held that the parties in that case did not intend that all existing obligations which had arisen under previous

contracts should be released and set aside. There was nothing to show a different intention.

In determining the question before us we must consider the evidence in that light which is most favorable to the Alabama Company, and, when so considered, we are of opinion there was sufficient testimony to authorize a finding by a jury that, at the time the agreement between the two companies was made, Jelks did not intend to release the Sun Company from liability for its breach of the contract to receive the oil. It is consistent with the evidence to hold that the words, "this day canceled and annulled, and to have no further force or effect," were intended by Jelks and understood by Pew to express that the contract for the delivery and receipt of the oil was on that day annulled as to future operations under it, and that it was not intended to have any retroactive effect upon rights already accrued between the parties. The construction that the district court and Court of Civil Appeals placed upon the agreement of cancellation would result in a loss to the Alabama Company of the value of 60,000 barrels of oil, because of the failure of the Sun Company to perform its part of the contract by receiving the oil by the month as it had agreed to do. Such a construction should not be applied, unless the evidence was of a character to indicate that the parties intended it so to be.

The judge of the district court erred by instructing a verdict for the defendant, and the Court of Civil Appeals also erred in affirming the judgment of the district court. Therefore it is ordered that the judgments of both courts be reversed, and that this cause be remanded.

LOGAN v. GAY.

(Supreme Court of Texas. April 2, 1906.)

APPEAL—DISMISSAL—FAILURE TO GIVE BOND.

Where, after a decision adverse to defendant in error has been given by the Supreme Court, it appears on motion for rehearing that plaintiff in error gave no appeal bond in attempting to appeal from the district court to the Court of Civil Appeals, as required by Rev. St. 1895, arts. 1400-1402, 1408, the appeal will be dismissed, and the judgments of the Supreme and appellate courts set aside.

On rehearing. Judgments of the Supreme Court and Court of Civil Appeals (87 S. W. 852) set aside, and appeal dismissed.

For former opinion, see 90 S. W. 861.

On Rehearing.

WILLIAMS, J. The motion for the first time calls attention to the fact that, in attempting to appeal from the district court to the Court of Civil Appeals, plaintiff in error gave no appeal bond, and asks that the judgments of this court and of the Court

of Civil Appeals be set aside, and that the appeal be dismissed. The statutes and decisions in this state leave no doubt of the right to thus raise the objection at this late day. *El Paso & N. E. Ry. Co. v. Whatley* (Tex. Sup.) 87 S. W. 819, and cases there cited; *Halloran v. Railway Co.*, 40 Tex. 466.

The condition of the law is not a creditable one which permits a party, who has voluntarily submitted the cause as if an appeal had been duly taken to two courts having jurisdiction over appeals and writs of error in causes of the class to which the particular case belongs, to thus attack the jurisdiction of both courts upon such a ground after a final decision adverse to him has been given, and it is perhaps needless for us to say that nothing but the fact that the rule is too firmly settled to admit of question induces us to sustain this motion. If a change is to be made, it should come from the Legislature, by which such provision might easily be made that appellees and defendants in error appearing in the appellate courts should be required to raise such objection before submitting their causes for decision, or be held to have waived the right to object.

The defendant in error did not appeal in his "fiduciary capacity" from the judgment of the district court, and hence was required by articles 1400-1402, 1408, of the Revised Statutes of 1895, to give bond or make affidavit in lieu thereof as other appellants.

The motion will therefore be granted, and the judgments of this court and Court of Civil Appeals will be set aside, and the appeal dismissed.

WRIGHT v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

INDICTMENT—DATE OF OFFENSE.

An indictment presented on January 18, 1905, charging the date of the offense as on or about the 15th day of November, 1905, is defective, because showing the offense to have been committed after the date of the indictment.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 244-246.]

Appeal from Montague County Court; Geo. S. March, Judge.

W. S. Wright was convicted for selling liquor without a license, and appeals. Reversed.

Chambers & Cook and J. T. Adams, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction of selling intoxicating liquor without license.

The indictment was presented on January 18, 1905, in the district court of Montague county, and transferred thence to the county

court. It charges the date of the offense as "on or about the 15th day of November, 1905," or some 10 months after the date of the presentment. It will hardly need authorities to sustain the proposition that the indictment must charge the offense to have been committed prior to the time of the presentment of the indictment, to show it would be an impossibility for the grand jury to indict a man 10 months after the sitting of the grand jury that presented the indictment.

The judgment is accordingly reversed, and the prosecution ordered dismissed.

DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906.)

JURY—SELECTION BY SHERIFF.

Where a jury had been selected for each week for four or five weeks of a term, and it not being believed that the term would last for six weeks, no jury was drawn by the commissioners for the sixth week, at which defendant was tried, a jury was properly summoned for such week by the sheriff.

Appeal from Johnson County Court; J. D. Goldsmith, Judge.

Lige Davis was convicted of violating the local option law, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for violating the local option law. When the case was called for trial, appellant moved to quash the panel of jurors for the week.

The facts in brief show that a jury had been selected for each week for four or five weeks, and the week during which appellant was tried was the sixth week of the term, and no jurors had been drawn by the commissioners for that week. The evidence discloses that it was not understood the court would last so long, and there being no jurors drawn for that week by the commissioners, the judge ordered the sheriff to summon a jury, which he did. This does not come within the rule laid down in *White v. State*, 78 S. W. 1066, 9 Tex. Ct. Rep. 675. In that case, the county judge had continuously as a practice refused to have jurors drawn by the jury commissioners, and we held this was error. But that case is not analogous. The facts are different from the condition in which the record places this case. This comes within the rule laid down in *Sanchez v. State*, 89 Tex. Cr. R. 339, 46 S. W. 249, and *Martin v. State* (decided at Tyler term, 1905) 90 S. W. 29. We believe this is squarely within the provisions of the statute which authorizes the court to order a jury summoned where, from any cause there is a failure to have sufficient jurors to transact the business of the term.

The evidence supports the conviction, and the judgment is affirmed.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 31, 1906. Rehearing Denied Feb. 21, 1906.)

1. BRIBERY—OFFER—VERDICT.

That the verdict found defendant guilty of "an attempt" to bribe, instead of "an offer," to bribe, as found by the judgment, is immaterial; such an attempt being the same as an offer to bribe.

2. SAME—OFFER TO BRIBE OFFICER TO RELEASE PRISONER—EVIDENCE.

It being provided by statute that, before one can bribe an officer to release a prisoner, such officer must have the prisoner in legal custody, and that where there is not time enough for an officer to secure a warrant for arrest, when informed that a felony has been committed, he may arrest without a warrant, the state, on a prosecution for offering a bribe to a sheriff to release from his custody M., whom he held as prisoner, may show that when it was dark, and all the officers from whom he could procure a warrant had gone, the sheriff was informed that M. had committed a forgery, and was to leave on a train in an hour, and that he went immediately and arrested her without a warrant, and had her in custody, when defendant offered him money if he would release her.

3. SAME—INDICTMENT AND EVIDENCE.

That an indictment for offering a bribe to an officer to release M., a prisoner, does not show what M. was charged with, but merely says that the officer had her in legal custody, does not preclude the state from proving what M. was charged with, and the mode, manner, and method of arresting her, in order to show she was in legal custody.

Appeal from District Court, Victoria County; James C. Wilson, Judge.

Alfred Johnson, Jr., appeals from a conviction. Affirmed.

Dupree & Pool, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an offer to bribe an officer, and his punishment fixed at two years' confinement in the penitentiary. The facts show that appellant offered Geo. H. Heck, sheriff of Victoria county, \$10 to release from his custody Malinda Lewis, whom the sheriff held as a prisoner under the charge of forgery.

Appellant in his motion for new trial complains that the verdict of the jury shows defendant is not guilty of any offense known to the laws of Texas. The verdict reads, "We, the jury, find the defendant guilty of an attempt to bribe an officer, as charged in the indictment," etc. The judgment finds appellant guilty of the offense of an offer to bribe an officer. We think an attempt to bribe is the same as an offer to bribe, and in our opinion there is no merit in appellant's position.

Upon the trial the state introduced Geo. H. Heck, who testified, in substance: That he was sheriff of Victoria county. That in the early part of the night of September 9th last Liebschutz came to the jailhouse where witness was living at that time. That the courthouse was closed and the officers had gone home. Liebschutz was a policeman and

deputy marshal of the town of Victoria. "When he arrived he told me that there had been a forgery committed down at Haller's store, in Victoria." At this point counsel for defendant objected to witness testifying about what Liebschutz told witness about a forgery. The district attorney stated that he expected to prove by this witness that Liebschutz came to witness' home at the jail, and reported to Heck that a forgery had been committed, and also that this case would develop an arrest without warrant, and that the evidence was admissible for the purpose of showing that witness was informed of the offense having been committed, and in order to justify witness in the action he subsequently took in the matter, under the article of the Code of Criminal Procedure (Code Cr. Proc. 1895, art. 250), which authorizes a peace officer to make an arrest when he is informed by a credible person that a felony has been committed and there was not sufficient time for him to get process for the offender. Counsel for appellant objected to the testimony on the ground that appellant is not charged with a forgery, because the allegation of the indictment in the case on trial is that Geo. H. Heck, sheriff of Victoria county, had in his lawful custody one Malinda Lewis, a prisoner, but that indictment does not say that said Malinda Lewis was charged with forgery or any specific crime at all. Defendant further objected, because the testimony of the witness as to what Liebschutz told him about an offense having been committed in Victoria or elsewhere is not proper evidence; had nothing to do with defendant; because the state can introduce the testimony only in support of the allegations in the indictment against appellant, which indictment alleges an effort by defendant to bribe the sheriff of Victoria; and said testimony is immaterial. Furthermore, that the evidence of the witness Liebschutz himself would be the best evidence of the statement made by said witness to the sheriff. All of these objections were overruled, and the sheriff testified, substantially, that Liebschutz informed him that Malinda Lewis had committed a forgery and that she was to leave in about an hour on the train. It was then dark. All the officers from whom he could obtain a warrant had gone, and he went immediately and arrested Malinda Lewis, and had her in custody when appellant offered to give him \$10 if he (sheriff) would release Malinda Lewis. Liebschutz was placed on the stand and testified to having told the sheriff the same facts that the sheriff testified to. The statute provides that, before one can bribe an officer to release a prisoner, such officer must have the prisoner in legal custody, and further provides that where there is not time enough for the officer to secure a warrant for the arrest of a prisoner, being informed a crime has been committed, he can pursue the party, where the offense com-

mitted is a felony, and arrest without warrant. Therefore it became necessary to introduce all of this testimony to show that officer had Malinda Lewis in legal custody. If he had had a warrant, this testimony, of course, would not have been necessary. But, having arrested her upon information and in an emergency, it would be a legal arrest, and hence the testimony is not only germane, but very material in order to make out the state's case. The fact that the indictment did not show what Malinda Lewis was charged with, but merely says that he had her in legal custody, would not preclude the state from proving what she was charged with, and the mode, manner, and method of arresting her, in order to show that she was in legal custody. *Cortez v. State*, 83 S. W. 812, 11 Tex. Ct. Rep. 720; *Moore v. State*, 69 S. W. 521, 5 Tex. Ct. Rep. 583.

We do not find any error in this record authorizing a reversal, and the judgment is affirmed.

CHOCTAW, O. & G. RY. CO. v. LOCKE et al.

(Court of Civil Appeals of Texas. Dec. 20, 1905. Rehearing Denied Jan. 31, 1906.)

RAILROADS—PROCESS—PERSON TO BE SERVED—AGENT—EVIDENCE.

In an action against a railway company, evidence held to justify a finding that the persons on whom the citations were served were its agents, so that service was properly made on them.

Error from District Court, Comal County; L. W. Moore, Judge.

Action by Otto Locke and others against the Choctaw, Oklahoma & Gulf Railway Company. From a judgment in favor of plaintiffs, defendant brings error. Affirmed.

N. H. Lassiter and Robert Harrison, for plaintiff in error. F. J. Maier, for defendants in error.

EIDSON, J. The only question presented in this case for our consideration is the sufficiency of the evidence to support the judgment of the court below, holding that proper service of citation had been made upon plaintiff in error as a basis for the judgment by default rendered against it. Citations were served upon H. P. Greenough and Joe Myers, as agents of plaintiff in error, and on the Choctaw, Oklahoma & Texas Railway Company, through its local agent, H. P. Greenough, as the agent of plaintiff in error. Greenough and Myers each filed affidavits denying that he was the agent of plaintiff in error, and Robert Harrison, attorney for the Choctaw, Oklahoma & Texas Railway Company, filed an affidavit denying that it was the agent of plaintiff in error. The court below heard testimony on the question as to whether either or all of the parties served was or were the agent or agents of the plain-

tiff in error. F. J. Maier, the attorney for defendants in error, testified that, before he had citation issued for plaintiff in error, he ascertained from its folders that one of its principal offices was at Little Rock, Ark., and he addressed a letter to it there, suggesting that he desired to ship horses from the Pan Handle section of Texas to Memphis, Tenn., and asking if it had an agent in Texas authorized to make arrangements for through shipments from that part of Texas over its road to Memphis; and also requested a map or folder of its road; that he received a reply to this letter, stating that same had been referred to B. F. Davis, the live stock agent of plaintiff in error at Oklahoma City, who would advise him (Maier) direct; that soon thereafter he received a letter from Davis, stating that his (Maier's) letter to the general office at Little Rock had been referred to him (Davis), and that he was the live stock agent in charge of the Western territory, and any information he (Maier) wanted he (Davis) would be glad to furnish; that he wrote to Davis, stating that he wanted to know about through shipments of horses from Randall county, Tex., to Memphis, Tenn., and that he saw from the folder of plaintiff in error's railroad that its railroad begins at Amarillo, which is close to Randall county, and asking that, if he (Maier) sent men up there to ship horses to Memphis, Tenn., and they would take the horses to Amarillo, whether plaintiff in error had an agent there that could make a through contract over its road to Memphis, Tenn., or would different contracts have to be made along the route, and requesting the name of such man; and that he (Maier) received from the said Davis a reply to said letter, stating that Mr. Joe Myers was the division freight agent of plaintiff in error at Amarillo, Tex., and that plaintiff in error had a local agent there who would issue contracts and take care of shipments, and that plaintiff in error's road was one road from Amarillo to Memphis, and that only one contract was necessary. This witness also testified that the said Davis sent him a folder having a map on same, which shows the Choctaw, Oklahoma & Gulf Railroad to be one continuous road from Amarillo, Tex., to Memphis, Tenn., and that said folder contains a timetable, showing that trains run through direct from Amarillo, Tex., to Memphis over this road. The letters, map and folder referred to by this witness were introduced in evidence.

We think this testimony amply sufficient to support the finding of the court that Joe Myers was the agent of plaintiff in error, and that citation was properly served on plaintiff in error through him, and that the judgment of default rendered against plaintiff in error was correct.

There being no error in the judgment of the court below, all assignments of error are overruled, and the judgment is affirmed. Affirmed.

SAN ANTONIO & A. P. RY. CO. v. WOOD.*
(Court of Civil Appeals of Texas. Dec. 22,
1905. Rehearing Denied Jan. 25, 1906.)

1. HIGHWAYS — OBSTRUCTION — RAILROADS — LIABILITY FOR INJURY.

Where defendant railroad company negligently placed an obstruction in a roadway, which it knew was commonly used by the public, and plaintiff, while lawfully using such roadway, was injured by such obstruction, defendant was liable for the damages so occasioned without regard to whether the roadway was, as against the owners of the land over which it passed, a public highway.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 420, 421.]

2. TRIAL—ASSUMED FACTS.

Where, in an action for injuries by an obstruction in a highway, there was no conflict in the testimony as to there being a highway at the point in question, the court did not err in assuming its existence in the charge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 432-434.]

3. APPEAL — ASSIGNMENTS OF ERROR—PROPOSITIONS—OBJECTIONS—WAIVER.

Points presented by an assignment of error not embraced in a proposition will be regarded as waived.

4. TRIAL—IMMATERIAL ISSUES—INSTRUCTIONS—REFUSAL.

Where, in an action for injuries by an obstruction in a highway, the issue of whether the road in question was a public highway was immaterial, it was not error for the court to refuse to submit such issue to the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 474-479.]

5. SAME—APPLICABILITY OF INSTRUCTIONS TO EVIDENCE.

Where, in an action for injuries by an obstruction in a highway, the undisputed evidence disclosed that the accident occurred in a public street, and that plaintiff was not on defendant's property at the time he was injured, it was not error to refuse to submit the question whether plaintiff was a trespasser on defendant's property at the time.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-603.]

6. SAME—INSTRUCTIONS ALREADY GIVEN.

It is not error for the court to refuse to give a special instruction on an issue sufficiently covered by the charge given.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-657.]

7. DAMAGES—PERSONAL INJURIES—PLEADING.

In an action for personal injuries plaintiff is entitled to recover compensation for whatever injury the evidence shows he sustained through defendant's negligence, though the evidence does not show that he was damaged to the extent alleged in the petition.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 441-443, 449.]

8. SAME—TIME LOST.

In an action for personal injuries, plaintiff alleged that at the time of the injury he was 32 years of age, physically strong, and by occupation a stockman; that his services were reasonably worth \$100 a month, and that since his injury he had been wholly unable to attend his stock, and had been forced to employ others for such purpose, and spend large sums of money therefor, wherefore he had been damaged in a specified sum. *Held*, that such allegations were sufficient to entitle plaintiff to recover for time lost by reason of his injuries.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 443.]

Appeal from District Court, Aransas County; E. A. Stevens, Judge.

Action by W. W. Wood against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Stayton & Berry and W. H. Baldwin, for appellant. F. Stevens and G. R. Scott, for appellee.

PLEASANTS, J. This is a suit by appellee against appellant to recover damages for personal injuries alleged to have been caused by appellant's negligence in placing an obstruction on or dangerously near a public highway or road along which appellee was driving at the time he was injured.

The petition alleged: "That on or about the 5th day of August, 1902, appellant owned, operated, and maintained a certain line of railroad in and through the county of Aransas, and to and within the corporate limits of the city of Rockport in said county, and then owned, operated, and maintained said road in said county and city. That in constructing the track of said railroad in the said city of Rockport, in said county of Aransas, appellant at the terminus of a side track or switch in said city, negligently, wrongfully, and willfully, projected one of the iron rails on said railroad track over a portion of, or dangerously near to a public highway or road in said city of Rockport; said public highway or road then and there being used by the citizens of said city as a public thoroughfare, and having been so used for a long while, and that by reason of said rail so projected over a portion of said road or dangerously near to it, it was on the said 5th day of August, 1902, an obstruction to travelers along the road; so much so that no one could pass along said road at said place with a vehicle without great danger unless he exercised extraordinary care. That on or about the date last aforesaid the appellee, while driving in a buggy along said road, and while exercising ordinary care and caution and going at a reasonable rate of speed, and driving a gentle horse, said rail so negligently placed by appellant, caught in one of the wheels of said buggy so driven by appellee and suddenly stopped said buggy and the horse hitched thereto, violently throwing appellee from said buggy against one of the wheels of said buggy, thence to the ground, where he fell unconscious, whereby appellee was wounded, bruised, and seriously injured in his head, neck, chest, lungs, and limbs, and his nervous system greatly shocked. Said shock produced concussion of his spine and injury of the parts, which said injuries to the said spine and nerves are permanent and progressive, causing appellee to become a physical and mental wreck, wholly incapacitating him to earn a livelihood for himself and family, either by mental or manual labor. That thereby he has been permanently and totally

*Writ of error denied by Supreme Court.

disabled, has suffered great mental and physical pain at all times since said injury, and at short intervals he is confined to his bed for hours with excruciating pain, producing nausea and fever, great physical suffering and weakness. That he is and has been since said injury thereby prevented from attending to his business affairs. That plaintiff was, at the time of said injury, about 32 years of age, and was strong and robust physically and mentally, and by occupation a stockman, and in all respects capable of performing and carrying on that kind of business, and was so engaged at the time of said injury, taking care of his own stock and doing whatever was necessary to be done on or about the same. That, as such, his services were reasonably worth \$100 per month. But since said injury he has been wholly unable to attend to same and has been forced to employ others for the purpose, and spend large sums of money therefor, wherefore plaintiff says he has been damaged in the sum of \$30,000 by reason of said injury." This defendant answered by general demurrer, general denial, and plea of contributory negligence. The case was tried before a jury, and a verdict and judgment rendered for plaintiff in the sum of \$5,000. Appellant raises no issue in its brief as to the sufficiency of the evidence to sustain the finding of the jury that it was guilty of negligence as alleged in the petition and that the appellee has suffered damage in the amount found by the jury as a result of the injuries received under the circumstances alleged in the petition.

The first assignment of error challenges the ruling of the trial court in admitting in evidence the testimony of W. W. Wood, R. H. Wood, Geo. E. Waterwall, and others to the effect that the road along which plaintiff was driving at the time he was injured had been used by the public as a public highway for more than 20 years. The objection urged to this testimony is "that there was no sufficient allegation in appellee's petition as to the acquisition by the public of a highway at the point in question by use or prescription, and further because it appears that the point in question is within the corporate limits of the city of Rockport which is laid off into lots, blocks, and streets, and duly platted on official maps, and such maps are the best evidence of the existence of a highway crossing defendant's private property and North street at the point of the alleged injury." The evidence shows that the railroad of appellant is constructed along North street in the city of Rockport. This street runs east and west. At the end of the railroad in the center of said street the roadway along which appellee was driving when he was injured crosses the street. This roadway in approaching the street from the south crosses uninclosed property belonging to appellant, and after crossing the street runs across other uninclosed property which is within the city limits, and is subdivided into lots and blocks. The accident

in which appellant was injured occurred at the end of its track in the center of North street. The testimony to which the objection was made is, as set out in appellant's brief, as follows: Appellee testified that he was at the time of the accident driving along a "well-defined public road" to west of the western end of appellant's track. R. H. Wood testified: "I know the place at the end of defendant's 'Y,' where the accident to plaintiff occurred. There is a road running past to the west of the 'Y.' It has been there for more than 20 years, and has been used by the public all the time * * * That the town of Rockport was incorporated and had been laid off in lots, blocks, and streets, and had an official map showing the same. That there was no street shown to cross North street west of defendant's 'Y' nor had one ever been laid out. That the road he testified about crossed uninclosed private property of the railway on the south of North street and across North street and uninclosed private property of individuals on the north. That he at times had been connected with both city and county governments as a county commissioner, city alderman, and mayor. That the road had never been worked or recognized as a public road by either the county or city within his knowledge." Siforina Cabasos testified that the public had been using the road for over 20 years. F. Van Ness testified that the road had been traveled for 15 years. George E. Waterwall testified: "There has been a road across North street west of the end of defendant's track ever since the railroad was built. This road originally crossed North street a short distance further east, but after the railroad was built was moved a little further to the west, to where it is now. The public has been using the old road and the changes therein for about 33 years. I have been a member of the city council, and also city secretary. I know of no road having ever been laid out across Market (North) street at end of defendant's track. The one that is there has been used by the public for 33 years, but was never laid out or worked by either the city or county as a public street or road. It crosses uninclosed private property both south and north of North street."

The appellee in his amended petition upon which trial was had, made the following allegations: "That in constructing the track of said railroad in the said city of Rockport, in said county of Aransas, the defendant, at the terminus of a sidetrack or switch in said city, negligently, wrongfully, and willfully projected one of the iron rails on said railroad track over a portion of or dangerously near to a public highway or road then and there, being used by the citizens of said city as a public thoroughfare, and having been so used for a long while." It is unnecessary for us to determine whether the allegations or the evidence is sufficient to show that the roadway along which appellee was driving was a public highway in the sense that the

public had acquired a right by prescription to use as such as against the owners of the property over which it passed. The undisputed evidence shows that it had been commonly used by the public as a roadway for a number of years with the acquiescence of the owners of the property, and the court in submitting the case to the jury predicated the liability of the defendant upon its knowledge of the existence of the roadway and its common use by the public. If the appellant negligently placed an obstruction in a roadway which it knew was commonly used by the public, and the appellee while lawfully using such roadway was injured thereby, the appellant would be liable without regard to whether the roadway was, as against the owners of the land over which it passed, a public highway. *Allison v. Haney* (Tex. Civ. App.) 62 S. W. 933. We think the principle upon which the case cited was decided is sound in law and morals, and that the decision is not in conflict with those cited by appellant, nor with any decision of our Supreme Court so far as we have ascertained.

The second assignment of error presented by appellant is as follows: "The court erred in its charge wherein the jury were instructed that the undisputed testimony shows that there is a highway or road crossing said North street in close proximity to the end of defendant's railroad track at the place where the plaintiff is alleged to have been injured, which highway or road has been made by the general public traveling in that vicinity for a great number of years, and that defendant owns a strip of land adjoining said North street on the south over which said highway or road crosses and that the end of said railroad track is in said North street. If the defendant knew that the general public had used said road along which plaintiff was traveling at the time of the alleged injury had been used as a thoroughfare by the general public for a great number of years, and assented to or permitted such use over the land although said thoroughfare was not a public street, then the defendant had no right to place an obstruction over or dangerously near said thoroughfare where it crossed said North street and would be liable to [in] damages for any injury to ordinarily prudent persons traveling along said thoroughfare resulting from such obstructions. Because said charge assumes facts not indisputably proven, charges defendant as being liable in damages from the simple placing of an obstruction in the alleged thoroughfare, no matter what might have been its character, or whether or not properly, rightfully, or carefully placed; and further, said charge is upon the weight of evidence, and is not supported by the proper allegations in plaintiff's petition." The assignment is not a proposition in itself, and is not presented as such and the only proposition following it is as follows: "There being a conflict between the oral testimony and official map of the

town of Rockport as to the existence of a highway or road at the point of the alleged accident, it was error for the court to assume in its charge the fact of the existence of such road or highway, but the issue of fact should have been submitted to the jury under proper instructions as to what constituted a highway or road at law." There is no conflict in the testimony as to there being a highway or roadway across North street at the point in question, and the court did not err in assuming the existence of such roadway in the charge complained of. As before stated, the question as to whether the public had acquired a title to the roadway by prescription was immaterial. We can only consider the points in the assignment which are presented by a proposition, and any not so presented must be regarded as waived. The point stated in the proposition being not well taken, the assignment cannot be sustained.

The third assignment complains of the refusal of the trial court to give the jury the following instruction: "You are instructed that it is the duty of defendant to construct and keep in repair safe crossings over its track at the intersection thereof of all public streets and highways. A public street or highway as used in this charge is a street or highway dedicated to public use and over which the public exercises exclusive control. If you believe from the evidence that the plaintiff was injured as alleged by him in his petition, whilst driving past the end of defendant's track in the city of Rockport, and the evidence further fails to show that there was a public street or highway as the same has been defined in this charge, at the place where the accident occurred, and along which plaintiff was traveling at the time, then the defendant would owe plaintiff no duty, in which case you should find for the defendant. If the road over which the plaintiff was traveling passed over uninclosed private property; that is, if the same had never been dedicated by the owner or owners thereof to public use, then you are instructed that the public would not acquire any right thereto by prescription and the plaintiff would in law be a trespasser thereon and would assume all risks." It was not error to refuse this instruction. For the reasons before stated the issue of whether the road in question was a public highway was immaterial and the court properly refused to submit it to the jury. There is no evidence tending to show that appellee was a trespasser at the time he was injured, and it would have been manifest error for the court to have submitted such an issue to the jury.

The fourth assignment complains of the refusal of the court to submit to the jury the question of whether the appellee was not upon private property of appellant at the time he was injured, and therefore a trespasser. The undisputed evidence shows that the accident occurred in a public street of the city of Rockport, and that appellee was not upon

the property of appellant at the time he was injured. There being no testimony tending to support the contention that appellee was trespassing upon appellant's property at the time he was injured a charge submitting that issue was properly refused. The charge given by the court sufficiently instructed the jury upon the issue of contributory negligence, and therefore the refusal to give the special instruction requested by appellant submitting that issue was not error, and the fifth assignment which complains of such refusal cannot be sustained.

There is no merit in the sixth assignment which complains of the refusal of the court to charge the jury that unless they believe that the plaintiff was permanently injured they should find for the defendant. Appellee was entitled to recover compensation for whatever injury the evidence showed he sustained through the negligence of the defendant, and, to entitle him to such recovery, he was not required to show that he was damaged to the extent alleged in the petition. It could as well be contended that in a suit for damages for the conversion of a stock of goods the plaintiff could not recover unless he established the conversion of every article mentioned in his petition as to contend for the proposition advanced by this assignment. There can be no authority for such a proposition, and appellant has not undertaken to cite any. We think the allegations of the petition before set out were sufficient to entitle plaintiff to recover for time lost by reason of his injuries, and the court did not err in instructing the jury that they might, in estimating plaintiff's damages, take into consideration the time lost by him as a result of his injuries.

We are of opinion that the judgment of the court below should be affirmed; and it has been so ordered.

Affirmed.

HAYNIE MERCANTILE CO. v. MILLER.
(Court of Civil Appeals of Texas. Dec. 2, 1905.
Rehearing Denied Jan. 6, 1906.)

VENDOR AND PURCHASER—CONTRACT TO CONVEY—BOND FOR TITLE—RIGHTS OF VENDEE—LIENS.

The purchaser of certain school land executed a written contract to convey the land to M.'s appointee, in consideration of money deposited in a certain bank, subject to the conditions of the contract, "after the three years proof of occupancy had been made." In making the transfer, the purchaser agreed to remit \$500 of the price if the person designated as the appointee would complete the three years occupancy, and release the purchaser from further residing on the land and making proof, which was done. *Held*, that the contract to convey was in effect a bond for title, obligating the purchaser to convey the land to M.'s appointee which was effective, and prior to the lien of an attachment and judgment subsequently recovered against such purchaser, though the deed made by him to the appointee was defective and the money had not been paid over by the bank prior to the levy of the attachment.

Appeal from District Court, Potter County; Ira Webster, Judge.

Action by Haynie Mercantile Company against C. G. Miller. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Veale, Cudington & Bailey and Theodore Mack, for appellant. Wallace, & Lumpkin, for appellee.

STEPHENS, J. Four sections of school land in Moore county were awarded to S. B. Harwell as an actual settler on one of them, on applications dated March 8, 1901. He resided on the home section and met all his obligations as purchaser until the 25th day of November, 1903, when he executed a deed conveying said land to the appellee, C. G. Miller, who had become an actual settler thereon, which deed, together with the applications and obligations of Miller as substitute for Harwell, was filed in the general land office December 2, 1903. This conveyance was made in pursuance of a written contract between S. B. Harwell and J. M. Miller, the father of C. G. Miller, dated September 5, 1903, and recorded in Moore county, September 11, 1903, by the terms of which Harwell, in consideration of \$35,000, deposited in the Amarillo National Bank subject to the conditions of the contract, obligated himself to sell the lands to J. M. Miller, or to such person as he might designate, "after the three years proof of occupancy had been made." However, in making the transfer to C. G. Miller, Harwell "agreed to remit and release the sum of \$500 of the original purchase money mentioned in said contract," if C. G. Miller, who was the purchaser designated by J. M. Miller, would complete the three years occupancy, and release Harwell from further residing on the land and making proof of three years of occupancy. This C. G. Miller did, and, adding his proof of occupancy to that of Harwell, which extended "up to the 25th day of November, 1903," on March 21, 1904, obtained certificate from commissioner of general land office showing final proof of occupancy. November 11, 1903, W. R. Haney brought suit against S. B. Harwell in district court of Hartley county, Tex., for the sum of \$1,975.25, which Harwell owed him, and on November 25, 1903, caused the lands in controversy to be attached, and the return of the levy to be duly recorded. In the following year, after the proof of three years occupancy had been made and accepted, Haney obtained a judgment foreclosing his attachment lien, and appellant, a private corporation and assignee in the judgment, became the purchaser at foreclosure sale, and brought this suit to recover the lands, which resulted in a judgment on an agreed statement of facts against it. Prior to the levy of the attachment, C. G. Miller, who had already become an actual settler, made his applications to the land commissioner to purchase the lands, and Harwell executed a deed conveying the same to him, but owing to a defect

in said deed, the nature of which is not disclosed by the record, the purchase money in the bank was not paid to Harwell till November 30, 1903.

Conclusions of Law.

On the question so much discussed in the briefs and arguments, whether school lands sold to an actual settler are subject to execution against him before he has completed the three years occupancy, we are inclined to agree with appellant in the contention that every purchaser of school lands has a vendible interest therein from the date of his purchase, and that such lands are subject to execution for his debts at any time thereafter, but do not find it necessary to decide that question in this case; since we have concluded that appellant failed to show, by the agreed statements of facts, that the right of the attaching creditor, under whom it claimed, was superior to the right of C. G. Miller as vendee under the contract with J. M. Miller. No attack was made on this contract, which was prior to the levy, and which gave J. M. Miller the right to have the land conveyed to C. G. Miller. The obligation of Harwell was in effect a bond for title, which is itself treated as a species of conveyance in Texas, and while the money had not been paid over by the bank when the levy was made, it had passed out of the control of Miller and Harwell had made a deed to C. G. Miller, and admitted him into the possession of the land. It matters not that this deed may have been defective and that for a valuable consideration Harwell was relieved of part of his obligation. The obligation to convey the land still rested on him, if the deed already made did not have that effect. See *Willis v. Sommerville* (Tex. Civ. App.) 22 S. W. 781; *Downs v. Porter*, 54 Tex. 61; *Taber v. State* (Tex. Civ. App.) 85 S. W. 835. The judgment is therefore affirmed.

CURRY v. STONE.

(Court of Civil Appeals of Texas. Jan. 6, 1906.)

1. INSURANCE—APPLICATION—MISSTATEMENTS—FRAUD—CANCELLATION.

Where certain policies were issued on an application containing false statements fraudulently inserted therein by the insurer's agent, it was the duty of insured, on discovering the fraud, to forthwith disclose the same to the insurance company and tender the policies for cancellation.

2. SAME—FRAUD OF AGENT—RIGHT OF PRINCIPAL.

Where an insurance company was induced to issue certain policies by the fraudulent statements of its agent in the application, such fraud, after having been discovered by insured, would not be imputed to the insurance company, but the latter would be entitled to plead such fraud, and insured's concealment thereof, in defense of its liability on the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1003.]

3. SAME—PREMIUM NOTES—FAILURE OF CONSIDERATION.

Where certain policies were issued to defendant through plaintiff's fraud in inserting certain false answers in the application without defendant's knowledge, and defendants subsequently discovered the fraud before any part of the contract of insurance had been performed by the insurance company, and before any real benefit had been received by him, there was an entire failure of consideration for notes given for the premium due on the policies.

Speer, J., dissenting in part.

Appeal from Wichita County Court; M. F. Yeager, Judge.

Action by J. W. Stone against M. N. Curry. From a judgment in favor of plaintiff, defendant appeals. Reversed.

L. H. Mathis, for appellant. C. C. Huff and Edgar Scurry, for appellee.

CONNER, C. J. This is an appeal from a judgment in appellee's favor in the sum of \$238.28, as the principal, interest, and attorney's fees upon two promissory notes executed by appellant and made payable to appellee, and the sole question presented upon this appeal is whether appellant's special verified plea of a want of consideration for the notes constitutes any defense. The court below sustained general and special demurrers thereto, and appellant having declined to amend, judgment was rendered in appellee's favor as stated.

The special answer referred to covers some eight pages of the transcript and presents a clear case of fraud, but we think it will be sufficient to give the following brief summary thereof: It was alleged in the special plea that at the time of the execution of said notes, appellee was the agent for Wichita county of the National Life Insurance Company of the United States of America, which has its headquarters in Washington, D. C.; that as such agent he was entitled to a commission amounting to 70 per cent. of the gross premiums charged for policies of life insurance for the first year of their issue; that, at appellee's solicitation, appellant made application for policies of insurance on his life, to be payable to his wife as the beneficiary, in the sum of \$5,000; that in connection with his said application appellant was required to submit to a medical examination, during which many questions were propounded and his answers thereto reduced to writing by the medical examiner. It was alleged that it was a rule of the insurance company to require truthful answers to be given, and that appellant in fact gave truthful answers, but that notwithstanding such rule and contrary to their duty, appellee and the medical examiner, fraudulently conspiring together for the purpose of securing the issuance of the policies, applied for and the premiums to their own use, caused certain false answers to certain material questions to be written in his said application. Facts are alleged which tend to excuse appellant for having failed

to read his application, and he alleges that he was ignorant of the fact that his application was false; that had he so known he would not have executed the notes. It is further alleged that appellee fraudulently concealed said fraudulent practices from his principal, and that had his answers been truthfully written as given, the insurance company would not have issued the policies of insurance applied for, but that it, being in fact ignorant of the fraud perpetrated and of the falsity of the answers shown in the application, issued the policies as applied for, and that the notes sued upon were given by appellant for the first year's premiums, which constituted the sole consideration for the notes. It was further alleged that the falsity of the answers as written in said application was susceptible of easy proof, but that, had appellant died during the life or the apparent life of the policies, it would have been impossible for the beneficiary named therein to have established the fact that truthful answers had been made as stated, and that immediately upon appellant's discovery of the fraud which had been practiced upon him and upon the insurance company, which was several months after the issuance of the policies, he forthwith tendered for cancellation to appellee as the agent of said company, said policies of insurance, and demanded a return of the notes sued upon in this case.

Appellee defends the action of the trial court in sustaining the demurrers to the answer on the ground that appellee's knowledge of the acts and frauds complained of, which is shown in the answer, must be imputed to his principal, the insurance company, and that therefore the latter would be estopped from setting the same up in avoidance of the policies; that the policies therefore constitute enforceable obligations and full consideration for the notes forming the basis of the suit. If appellant received exactly what he contracted for, there was, of course, a consideration for the notes. But can it be justly said that he did so? It is elementary in the law of contracts that there is no contract unless the parties thereto assent to the same thing in the same sense, and if it be conceded that the knowledge of its agent, appellee, is to be imputed to the insurance company, and that it therefore would not be heard to urge the acts and frauds detailed in avoidance of the policy, yet it must be admitted, it seems to us, that such acts and frauds introduced elements of hazard not contemplated by either of the principals in the contract of insurance. As comprehended in appellant's application and contract for the payment of premiums, it was intended that he should receive policies of insurance free from hazard, vice, or defect of any kind. It was upon this proposition that the minds of the principals met. No actual waiver of the insurance company appears, and the enforceability of the policy of insurance received

under the circumstances alleged and in the light of the usual course of such cases was in all probability dependent upon the effort and ability of the beneficiary to establish, if, indeed, it was possible, the facts constituting the estoppel. To hold that a policy issued under such circumstances is as desirable and valuable to one in contemplation of death, preparing to provide for and shield those dependent upon him, is to falsify natural instinct and thought, and appellant evidently gave assent to no such thing. Indeed, the general rule that notice to an agent in the business or employment which he is carrying on for his principal is constructive notice to the principal himself, so far as the latter's rights are involved in or affected by the transaction, is not of universal application. One of the exceptions given in Pomeroy's Third Edition of Equity Jurisprudence, § 675, is when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of the facts known by the agent and thus fraudulently concealed. While we know of no Texas case going thus far, and while we are not inclined, in cases where the agent alone is guilty of fraud, to ingraft any such exception upon the general rule in this state, yet the author cites in support of his statement many authorities, and we call attention to the stated exception in order merely to illustrate our general proposition that the policies of insurance actually received by appellant were certainly not entirely free from vice or hazard; the facts alleged in appellant's answer being apparently within the exception named by Mr. Pomeroy.

Besides, we think it quite clear that upon appellant's discovery of the fraud, it was not only his right but also his duty to forthwith apprise the insurance company thereof and tender his policies for cancellation; for it is well established in this state that in cases where the beneficiary of a contract or transaction becomes a party to the frauds of an agent purporting to act for a principal in such contract or transaction, that then the knowledge or notice of such agent will not be imputed to the principal, and the principal in such case will be left free to set up the fraud or concealments involved in the transaction. See *Centennial Life Association v. Parham*, 80 Tex. 523, 16 South. 316; *Cooper v. Ford* (Tex. Civ. App.) 69 S. W. 487; *Loan Association v. Dailey* (Tex. Civ. App.) 42 S. W. 364; *Scripture v. Mortgage Co.* (Tex. Civ. App.) 49 S. W. 644, and authorities therein cited. When, therefore, appellant became apprised, either actually

or by legal imputation, of the fraudulent acts of which he complains, he could no longer thereafter in equity and good conscience insist as against the principal upon the performance of the contract for insurance. From that time the insurance policies would be void and of no further force or effect. Thus, in the case of *Johnson v. The Dakota Fire & Marine Ins. Co.* (N. D.) 45 N. W. 799, the insured, in answer to the contention of the insurance company in a suit on a policy, that false answers to material questions had been given by the insured in the application for the policy, sought to show that he in fact had given truthful answers to the questions named, and that the writer of the application had, as in this case, fraudulently written false answers. Knowledge, however, of the fraudulent acts of the agent complained of was imputed to the insured on the ground that a copy of the application had been indorsed on the policy of insurance, which had been in the possession of the insured for some time, and it was held that thus having knowledge, by remaining silent when he should have spoken, the insured constructively became a participant in the original fraud of the agent, and thereby forfeited his rights under the policy. So here, by similarity of reasoning, as before stated, knowledge coming to appellant, as he avers, of appellee's fraud, silence could be no longer maintained and the insurance company be estopped from urging the fraud against it that had been committed. From thenceforth, at all events, the consideration for a further continuance of the policies wholly failed. Such failure having occurred before any part of the contract of insurance had been performed by the insurance company, and before any real benefit had been received by appellant or the beneficiary, the entire consideration for the premium notes failed as against appellee, although the policies may have prima facie valid until appellant's discovery of the fraud. 1 *Parsons on Contracts* (8th Ed.) pp. 456-463.

We conclude that the court erred in sustaining the demurrers to appellant's answer, and that the judgment should be reversed, and the cause remanded for a new trial.

SPEER, J. I concur in the reversal of the judgment in this case, but do not assent to all of the reasons given therefor in the majority opinion. I construe appellant's answer to present the defense of a failure of consideration as contradistinguished from a want of consideration. Certainly the policies actually contracted for would be a sufficient consideration for the notes sued on. Under the facts alleged in the answer, I do not think the rule that notice to the agent while engaged in the transaction of the business of his principal should be treated as notice to the principal, should in any way be relaxed. It is not, as I understand it, a case for the application of the exception set

out in *Pomeroy's Equity Jurisprudence*, § 675, and referred to in the majority opinion. In the first place, one of the requisites to bring a transaction within this exception is that the fraud must be contrived and carried out for the agent's own benefit. This feature I take to be wanting in the present case, so far as the agent, Stone, is concerned. In soliciting and procuring the application from appellant, he was engaged strictly in the business of his principal, the insurance company, and not his own, and the fact that he received a compensation by way of commissions upon the business in no way makes the business his own rather than his principal's. But, in the next place, Mr. Pomeroy, in the same section and in explanation of what he means by the exception to the rule of notice, goes on to say: "It follows, therefore, that every fraud of an agent in the course of this employment and in the very same transaction does not fall within this exception; and most emphatically it does not apply when the agent's fraud consists merely in his concealment of material facts within his own knowledge from his principal." And in the succeeding section he sums up as follows: "The true rationale is, as I have already shown, that the agent's knowledge of material facts—not necessarily of the ultimate facts—or what the law assumes to be his knowledge, must always from considerations of expediency be regarded and treated as the principal's knowledge; otherwise, the business affairs of society could not be safely transacted. Whenever the knowledge of the agent is actual—that is, whenever he has obtained actual information of certain facts and has, therefore, received actual notice—this imputation of his knowledge to the principal is evident and reasonable."

In the present case there is no independent fraud of the agent shown—a distinguishing feature of those cases out of which the above exception to the law of notice grows—and the fraud relied upon consists only in his concealment of material facts from his principal. It will be observed in this connection that appellant in no way participated in this fraud or concealment, but has placed himself in the attitude of one who has done no wrong, and is ignorant of any wrongdoing upon the part of the agent, Stone. This being true, I see no way to avoid the application of the wholesome and universal doctrine that actual knowledge of material facts acquired by the agent in the prosecution of his principal's business must be imputed to the principal. The numerous cases cited by Mr. Pomeroy appear to be inapt unless this is the true meaning of his language in the section quoted from. I take it for granted that had appellant died without notice of the fraud of appellee, his beneficiary would, under the facts disclosed in this answer, have readily recovered upon the insurance policies against appellee's principal. I think no court would hesitate to render judgment in her favor upon

proof that appellant in good faith made truthful answers to the insurance agent, even though such agent fraudulently concealed the truth from, and misrepresented the answers to, his principal, upon the strength of which such policies were issued. So that it cannot be said that appellant has received no consideration for the notes sued on in this case. Certainly so long as he remained ignorant of appellee's fraud, the insurance company was in no position to avoid liability on the policies. But, after discovering this fraud as shown in the answer, he thereupon became a party to it if he remained silent, and henceforth, of course, no recovery could have been had upon the policies, and the further consideration for the notes failed. So that, in assenting to a reversal of the case, I desire to be understood as putting it on the ground that the policies of insurance issued to appellant were valid and collectible up to the time when he actually did discover, or in law ought to have discovered, appellee's fraud, and that after this time, the policies being voidable, the consideration for his notes failed pro tanto.

COTTON et al. v. RAND et al.*

(Court of Civil Appeals of Texas. Nov. 22, 1905. Rehearing Denied Jan. 10, 1906.)

1. APPEAL—INTERLOCUTORY ORDER—SCOPE OF REVIEW.

The court, on an appeal from an interlocutory judgment appointing a receiver, can only inquire into the merits of the action so far as the facts may bear on the question of the propriety of appointing a receiver.

2. RECEIVERS—GROUNDS OF APPOINTMENT—INTEREST IN PROPERTY.

A petition, in an action praying for the appointment of a receiver of property, which sets forth a contract between plaintiff and defendants with reference to the purchase of the property, thereby showing that plaintiff had a probable interest in the property, is sufficient to justify the appointment of a receiver within Rev. St. 1895, article 1465, authorizing the appointment of a receiver on the application of a party whose right in the property is probable.

3. SAME.

A mortgagee of a part of the property in a mortgage executed by plaintiff, had such an interest therein as to authorize the appointment of a receiver, on his application, to protect the property from material injury.

4. SAME—NOTICE OF APPLICATION—NECESSITY.

In the absence of a statutory provision, rules of equity governing proceedings for the appointment of a receiver require that notice of the application therefor shall be given, except where an emergency demands immediate action, or where it is impossible to allow the time required to give notice before relief is granted, or where the trustee of the property is a non-resident.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 54-60.]

5. SAME—APPOINTMENT WITHOUT NOTICE—VALIDITY.

On an application for the appointment of a receiver of property it was shown that an order for the sale thereof for delinquent taxes had been issued, that the trustee in whose custody the property had been placed was a nonresident.

*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

Held, that the court did not abuse its discretion in appointing a receiver without notice, irrespective of the fact of a subsequent stay in the proceedings to sell the property.

6. SAME—SUBSEQUENT HEARING—EFFECT.

Within two days after the appointment of a receiver without notice, on the application of plaintiff, defendants appeared and filed a motion to set aside the appointment. There was a full hearing of evidence and argument on disputed points and the court adhered to its action and in effect reappointed the receiver. *Held*, that the appointment was valid, though the appointment in the first instance was illegal because made without notice.

7. SAME—ORDER OF APPOINTMENT—DESCRIPTION OF PROPERTY—SUFFICIENCY.

Where the petition praying for the appointment of a receiver of land fully described the land, the order appointing the receiver, which described the property as "the premises described in plaintiff's petition" sufficiently described the property.

8. SAME—GROUNDS—SUFFICIENCY.

On an application for the appointment of a receiver of property it was shown that an order of sale thereof for delinquent taxes had been issued; that no effort was being made by defendant to pay the taxes; that rents were collected, but not used to pay taxes; and that in time the taxes would consume the entire property. *Held*, to justify the court in appointing a receiver though plaintiff had delayed for a long time before asserting his rights, and though the judgment for taxes was subsequently reversed.

9. TRUSTS—TRUSTEE—NONPERFORMANCE OF DUTIES—EXCUSE.

A trustee cannot justify his failure to perform the duties of the trust, by showing that no one asked him to perform them.

Appeal from District Court, El Paso County; J. R. Harper, Judge.

Action by Noyes Rand and another against Frank B. Cotton and others. From an interlocutory order appointing a receiver, defendants appeal. Affirmed.

W. B. Merchant and Patterson, Buckler & Woodson, for appellants. Leigh Clark and W. M. Peticolas, for appellees.

FLY, J. Noyes Rand and Leigh Clark, the appellees herein, instituted this suit against Frank B. Cotton, individually and as trustee, and a number of others, among them being Millard Patterson, administrator in Texas, with the will annexed of Samuel Colt, deceased. The petition alleged that Noyes Rand owned an interest in certain land known as the "Cotton Addition" to the city of El Paso; that Frank B. Cotton was the trustee to whom the land was conveyed; that he had totally neglected and abandoned his trusteeship and failed to carry out the terms of the agreement between him and his associates in the ownership of the land; that he had permitted the taxes on the premises to become delinquent and remain unpaid, ever since 1893, although he could have paid such taxes out of the profits on the land; that judgment had been rendered in favor of the state of Texas and against said Cotton, Millard Patterson, and others for \$9,000 for taxes due; that the premises had been advertised for sale to satisfy the judgment and

it was prayed that a receiver be appointed forthwith to take possession of the property and manage and control the same; that he be given the power to sell or mortgage the property to pay off the taxes; that Cotton be removed and another trustee appointed; and that the several interests of the parties be ascertained and determined. It was alleged that a portion of the interest of Rand in the property had been mortgaged to Leigh Clark and therefore he had joined in the suit. The petition was verified by the affidavits of appellees. On December 19, 1904, the pleadings were presented to the district judge in chambers and he appointed a receiver to take charge of the property and manage and control it until the final hearing of the cause and it was decreed that he be authorized to sell, mortgage, or raise upon the property such sums as should be necessary to pay the back taxes. The appointment of the temporary receiver was made without notice to any of the parties sued. Appellants, on December 21, 1904, filed their motions to vacate and set aside the order appointing the temporary receiver on various grounds, the material ones of which, will be considered as presented by assignments of error copied into the briefs. The motions to vacate were overruled and from that order, and the order appointing the receiver, this appeal has been perfected.

The only exception to the rule in this state, that appeals can be taken only from final judgments, is an appeal from an interlocutory order of the district court appointing a receiver or trustee in any cause. On such appeal there can be no inquiry as to the merits of the cause in which the interlocutory order has been granted, except in so far as the facts may directly bear upon the question of the propriety of the interlocutory order. In this case inquiry cannot be made into the title or interest that appellees have in the property, but the only questions are, did the pleadings and supporting affidavits justify the district court in appointing a receiver to take charge of the property in dispute, during the pendency of the suit, and protect it from being lost or materially injured? Under the allegations in the petition, appellee Rand, has an interest in the property in controversy. Appellees fully pleaded a contract between Noyes Rand, Frank B. Cotton, and others, in regard to the purchase of the "Cotton Addition," and show that Rand has a "probable" interest in the property or its proceeds. That is all that is required by the statute. Article 1465, Rev. St. 1895. In that article it is provided that a receiver may be appointed on the application of any one jointly owning or interested in any property or fund, whose right to, or interest in, the property, or fund, or the proceeds thereof, is probable. It is not required that it should be absolutely certain that the applicant for the receiver has an

interest, but it is sufficient if it be made to appear that the applicant has a probable right to, or interest in, the property, or fund, or proceeds thereof. A portion of Rand's interest in the property or its proceeds was shown to have been mortgaged to Leigh Clark and that would give him sufficient interest in the property to entitle him to protect it from destruction or material injury. There is no provision in our statutes requiring notice of the application, for the appointment of a receiver, but under the rules of equity in matters relating to the appointment of receivers, which govern when not inconsistent with the statutes on the subject, it is firmly established that such notice should be given. There are, however, exceptional circumstances under which notice of the application will not be required and an ex parte proceeding allowed. Emergencies arise requiring immediate action, such as to prevent injury to the property or to preserve it from threatened, impending, irreparable loss or damage, or where it is impossible to allow the time requisite to give notice before relief is granted, or where the trustee of property is a nonresident. *Beach on Receivers*, §§ 150, 153; *Weems v. Lathrop*, 42 Tex. 207.

In this case it was alleged that an order of sale for \$9,000 had been issued against the land in controversy, and that Frank B. Cotton, the trustee in whose custody the property had been placed by the terms of the contract, was the resident of a distant state. Those allegations were sufficient to show that the district judge did not abuse the discretion allowed him in such matters, in granting the receivership on an ex parte hearing. What may have transpired afterwards in connection with a stay in the proceedings to sell the property cannot be used to attack the sound discretion of the judge in granting the receivership. He acted on facts as they appeared in the petition and not on future contingencies. Under the allegations the property was about to be sold and the trustee was living in another state and no one was protecting or caring for the property and the court was justified in acting at once. If, however, the action was illegal in the first instance, appellants went into court within two days after the court made the order appointing the receiver and filed motions to set aside and vacate the order, and on those motions there was a full hearing of evidence and argument on the disputed points, and the court adhered to its action and in effect reappointed the receiver. Appellants have had their day in court, had a fair hearing and have come before this court on a full statement of the facts upon which the court acted. They have had the benefit of everything that they possibly could have obtained, had they been before the judge when the original appointment was made. In the order appointing the receiver the land

is described as "the premises described in plaintiffs' petition" and the second assignment of error claims it to be void for want of a sufficient description of the property. In the petition the land was fully described, and a reference to it makes certain the terms of the decree. *Seguin v. Maverick*, 24 Tex. 526, 76 Am. Dec. 117. It would have been the better practice to have described the land accurately in the judgment without reference to a filed paper that might be misplaced or lost and thereby the means of identification be destroyed. That is a matter, however, of which appellants have no cause to complain.

The third assignment of error must be overruled. The allegations, as hereinbefore stated, show that Rand has a probable interest in the property or the proceeds thereof.

There was sufficient evidence before the court to justify in appointing a receiver. The evidence did not make out a case of estoppel against Noyes Rand. He may have delayed for a long time to assert his rights in the property, but that should not prevent him from having the assistance of a court of equity, in protecting his rights in the property from destruction or material injury. No effort was being made to pay the constantly accumulating taxes, to which were being added penalties and costs. Rents were being collected from the property, but never used to pay the taxes from which there could be no ultimate escape, and it was apparent that in the course of time the taxes must surely consume the whole property. It was not claimed in the motions made by appellants that any effort had been made, or would be made, to pay off the taxes. The district court had all the facts before it and we cannot say there is no evidence to sustain his action in overruling the motions. It may be true, that after the appointment of the receiver an application for a writ of error was applied for in the case, and it may be true that the judgment was afterwards reversed by this court, but the fact remains that at the time the receiver was appointed the judgment for \$9,000 taxes was in full force and effect, that no appeal had been perfected, and that the judgment was threatening the property. The taxes are still due, and must be paid at some time.

In connection with the sixth and seventh assignments of error, it may be again stated that the record shows that Rand has a probable interest in the proceeds of the property, and this court cannot now enter into a trial of his rights. That is a matter to be determined on the final trial and not on interlocutory proceedings. Frank B. Cotton as trustee was in possession of the land, yet he allowed himself to be dispossessed by others who were collecting the rents, refusing to pay the taxes, and denuding the land of its timber. He cannot justify his inactivity and failure to perform the duties of the trust, by the fact that no one asked

him to perform the duties appertaining to the trust. There was no action at law that would obtain adequate relief, and the court properly appointed a receiver to protect the property during the pendency of the suit.

The interlocutory order is affirmed.

McKAY v. ELDER.

(Court of Civil Appeals of Texas. Jan. 10, 1906.)

1. ATTACHMENT—ACTIONS IN WHICH AUTHORIZED—BREACH OF CONTRACT.

A debt resulting from a breach of a contract to deliver cattle is one for which attachment lies.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, § 13.]

2. SAME—AFFIDAVIT—DISJUNCTIVE ALLEGATIONS—INCONSISTENT GROUNDS.

An affidavit in attachment stating that defendant was about to dispose of his property, with intent to defraud his creditors, and that he was about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of creditors, did not state two inconsistent grounds disjunctively.

3. SALES—BREACH BY SELLER—DAMAGES.

The measure of damages for breach of a contract to deliver cattle is the difference between the contract price and the market price of the cattle.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1174-1201.]

4. SAME—BURDEN OF PROOF.

Where, on the issue of damages, in an action to recover for breach of a contract to deliver cattle, plaintiff proved the contract price and the market price of the cattle, no further burden rested on him.

5. EVIDENCE—ADMISSIONS—DECLARATIONS.

In an action to recover for breach of a contract to deliver cattle, admissions of defendant as to having sold the cattle to plaintiff and declarations of plaintiff as to such sale, made in defendant's presence, were admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 772, 786.]

6. APPEAL—HARMLESS ERROR.

Where, in an action to recover for breach of a contract to deliver cattle, the uncontroverted proof of the market value of the cattle was at least \$9 a head, testimony of plaintiff that he had contracted to sell the cattle to one agreeing to pay him \$9 a head was not prejudicial to defendant.

Appeal from Karnes County Court; A. J. Parker, Judge.

Action by John Elder against W. B. McKay. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Goode, for appellant.

FLY, J. This is a suit instituted by appellee for \$67 damages resulting from the breach of a contract for the delivery of 67 head of cattle. This suit was instituted in the county court by virtue of an act of the Legislature of February 12, 1906, which conferred on the county court of Karnes county concurrent jurisdiction in all civil cases with the justice's courts, and coincident with the suit a writ of attachment was obtained and

levied on the 67 head of cattle. Appellant moved to quash the attachment proceedings on the grounds that the suit being based on a breach of contract the debt was not one upon which an attachment could be based, and that two separate and distinct grounds for attachment are set forth. A plea in reconvention in the sum of \$500, for the unlawful issuance and levy of the attachment, was also filed. The motion to quash was overruled, and on a trial by jury a verdict and judgment for appellee was rendered for the damages prayed for.

The motion to quash was properly overruled. The debt was one founded on the breach of a contract, and the damages claimed were actual and capable of being estimated by the usual means of evidence and did not rest in the discretion of the jury. The affidavit was made to facts that could be proved by witnesses, and was not based on hypothesis and conjecture. *Hochstadler v. Sam*, 73 Tex. 315, 11 S. W. 148; *Bank v. Fuchs*, 89 Tex. 197, 34 S. W. 206; *Stiff v. Fisher*, 2 Tex. Civ. App. 346, 21 S. W. 291; *Fleming v. Pringle* (Tex. Civ. App.) 51 S. W. 553. The case of *Stiff v. Fisher*, above cited, grew out of a breach of contract in the delivery of cattle and is directly in point. It was stated in the affidavit for attachment "that the defendant was about to dispose of his property with intent to defraud his creditors, and that he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of creditors." The two grounds are entirely consistent with each other and are not stated disjunctively and the court did not err in holding that the motion to quash on that ground could not be sustained. The evidence showed that appellant agreed to deliver 67 head of cattle to appellee for \$8 a head and that the market price at that time was \$9 a head. The measure of damages was the difference between the contract price and the market price; and when appellee had made proof of the contract price and the market price, no further burden rested upon him. The damages were not speculative, but were fixed and certain.

The admissions of appellant, as to having sold the cattle to appellee, made to Anton Jendrusch, were properly admitted in evidence, as were the declarations of appellee as to the sale of the cattle made in the presence of appellant. Neither of the conversations was denied by appellant. The testimony of appellee to the effect that he had contracted the cattle to Emmett Brownson, who had agreed to pay him \$9 a head for them, could not have prejudiced the case of appellant, because the uncontroverted proof showed that the market price of the cattle was at least \$9 a head. The sheriff was permitted to state a conversation that took place between him and appellant at the time of the levy of the attachment. The evidence was properly admitted. Neither was there

any error in admitting the evidence of the witness Brownson.

The special charges requested by appellant were not appropriate to any issues in the case and were rightly refused. The court gave the correct measure of damages in charge to the jury. The charge of the court is not open to the criticisms made against it. The judgment is affirmed.

STANFORD v. WRIGHT & GREEN.

(Court of Civil Appeals of Texas. Jan. 13, 1906.)

1. CONTRACTS—PERFORMANCE—EVIDENCE.

Whether land suited defendant, within the contract that plaintiffs should locate him on public lands for \$75 per section, subject only to the condition that the land suited him, is a question for the jury, he having settled on it and obtained awards therefor from the state, though he testified that it did not suit him.

2. TRIAL—INSTRUCTIONS—EVIDENCE TO SUPPORT.

There being evidence only of an express contract it is error to instruct that, though the jury find there was no express contract, they may, if they find plaintiffs rendered services at defendant's special instance and request, award such sum as they find they were reasonably worth.

Appeal from Fisher County Court; J. D. Barker, Judge.

Action by Wright & Green against G. W. Stanford. Judgment for plaintiffs. Defendant appeals. Reversed.

Woodruff & Hughes, for appellant. Wright & Green, pro se.

SPEER, J. The appellees, as plaintiffs below, filed suit against appellant to recover the sum of \$200 alleged to be due them upon a contract for services rendered in locating defendant on, and securing awards to be made to him for, certain school lands in Andrews county, Tex. Upon a trial in the county court, to which court the cause had been appealed from the justices' court, there was a verdict and judgment in favor of plaintiffs for the amount sued for. The defendant Stanford has appealed.

Appellant's third assignment of error, complaining of the second paragraph of the court's charge, must be sustained. The charge reads: "But if you believe from the evidence that there was no express contract between plaintiffs and the defendant, but you should further find that plaintiffs did, at the special instance and request of the defendant, render such service for the defendant as to enable him to secure from the state of Texas the awards of said four sections of land, then in such case you will find for the plaintiffs such sums of money as you find from the evidence such services were reasonably worth." The complaint is that this charge submitted an issue not raised by the pleadings or the evidence. We are inclined to the view that the pleadings do not make a case of quantum meruit, but in any event it

is quite clear, we think, the evidence does not raise such issue. Appellees' testimony makes a case of an express contract to pay a specified sum for locating appellant upon public school land. Appellant's testimony, viewed in the light most favorable to the verdict, is to the effect that he made an express contract with appellees, and neither testifies to anything which would tend to show that appellant sought the services of appellees under such circumstances as to raise an implied promise to pay them the reasonable value therefor. Indeed, appellant's testimony goes to show that he did not understand that he was to pay appellees anything whatever, but that he in common with appellee Wright and a number of other persons was to go to Andrews and Gaines counties and there be located on public school lands through other agents, to whom they were to pay the fees for being located.

The fourth assignment of error is to the same effect as the third, and for like reasons will also be sustained.

The first assignment complains of the following charge: "You are further charged that a contract is incomplete as long as one of the parties has the right to accept or reject the proposition; but if you believe from the evidence that plaintiffs made a proposition to defendant to locate defendant upon state school land at \$75 per section, subject only to the condition that said land suited defendant, and you further believe that defendant acting upon such proposition, inspected said land and that said land did suit defendant, and that defendant did secure awards of said land from the state of Texas, you will find for the plaintiffs." While the pleadings did declare upon a contract to pay \$100 per section, yet the evidence indicates that this amount was to be paid either in cash, or the sum of \$75 cash and "the use of the grass on the land," until a specified time. With this exception the charge seems to present the case fairly as made by the pleadings and the evidence. It is true appellant testified that the land did not suit him but over against this statement is the fact that he actually settled upon the land and obtained awards for the same. Under this state of the evidence it was proper to submit to the jury whether or not the land suited him, this being under all the evidence the sole condition of his promise to pay.

For the error of the court in submitting the issue of appellees' right to recover upon a quantum meruit, the judgment is reversed, and the cause remanded for another trial.

FT. WORTH & D. C. RY. CO. v. GARLINGTON.

(Court of Civil Appeals of Texas. Jan. 13, 1906.)

1. WITNESSES—REFRESHING MEMORY.

Where a witness stated that he had no recollection of the facts aside from a record

made by him at the time, and that he could not swear to the facts independent of the record which did not refresh his memory, his evidence was properly excluded, the record being the best evidence.

[Ed. Note.—For cases in point, see vol. Cent. Dig. Witnesses, § 887.]

2. CARRIERS—CONNECTING CARRIERS—LIABILITY—INSTRUCTIONS.

Where, in an action against connecting carriers for injuries to plaintiff's horses, plaintiff admitted at the trial that no injury occurred on the line of one of such carriers, it was proper for the court to charge that, in case plaintiff was entitled to recover, no verdict should be rendered against such carrier.

Appeal from Montague County Court; G. S. March, Judge.

Action by J. W. Garlington against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed in part.

Special charge No. 1, referred to in testimony, requested by defendant Texas Pacific Railway Company, was as follows: As plaintiff's evidence shows that he has confessed in open court that no part of the damages arose while the horses in controversy were on the lines of the Texas & Pacific Railway Company, you are instructed that if you should find, under the main charge of the court, against both defendants you will find in favor of the defendant Texas & Pacific Railway Company, and against the Ft. Worth & Denver City Railway Company for the amount of your verdict as found against both companies.

Spoons & Thompson and Marshall Spoonbaker for appellant. John Speer, for appellee.

STEPHENS, J. Witness Connelly testified by deposition to the condition of appellee's horses when they were transferred from the Ft. Worth & Denver City Railway to the Texas & Pacific Railway at Ft. Worth, he being the business foreman of the latter company at its stock yards in Ft. Worth. In answer to cross-interrogatories he stated that he had no recollection of the horses aside from the record made at the time they were handled by him, which record it was a part of his duty to make, and he knew to be correct, and while he stated that he used the record to refresh his memory, he further stated that he could not say that independent of the record he could swear to the facts inquired about, but knowing that his record was correct, he was willing to swear to all that he had stated in his answer. The deposition was excluded on the objection that the answers to cross-interrogatories showed that the witness knew nothing except what the record showed, and that the record was the best evidence of what it contained, and to this ruling error is assigned.

The question thus raised has often been considered by courts and text-writers, and while difference of opinion still exists, we think the weight of authority, and of reason as well, sustains the ruling complained of. The

true view seems to be that a writing which fails to refresh the memory of a witness but which he knows to be a correct transcript of a fact known to him when the writing was made and since forgotten, is thus made an essential part of his testimony, and when the oral testimony of the witness is offered in proof of such fact the opposite party may require the production of the writing, especially in view of the right of cross-examination. For a valuable discussion of the rule and the authorities, see the opinion of Supreme Court of Connecticut in *Curtis v. Bradley*, 31 Atl. 591, 28 L. R. A. 145, 48 Am. St. Rep. 177. See, also, 1 Wigmore on Evidence, §§ 749, 753, and 754, where the question is exceptionally well treated. See, also, Jones on Evidence, §§ 877-886, and Indirect & Collateral Evidence (Gillett) § 186. The question of the application of the rule where the original writing cannot be produced is not presented to us and is therefore not discussed, but is treated in the authorities above cited. See, also, *M. K. & T. Ry. v. Dilworth* (Tex. Sup.) 67 S. W. 88, and *Sayles v. Bradley & Metcalf Co.*, 49 S. W. 209, 92 Tex. 406. The court did err, however, as between the two defendants, in giving special charge No. 1 requested by the Texas & Pacific Railway Company, as to which there does not seem to be any controversy.

The judgment will be affirmed in favor of the appellee Garlington, but for the error pointed out, will be reversed, and the cause remanded on the issue between the two railway companies.

MISSOURI, K. & T. RY. CO. OF TEXAS v. SISSOM.

(Court of Civil Appeals of Texas. Oct. 11, 1905. On Rehearing, Dec. 13, 1905. Second Rehearing Denied Jan. 24, 1906.)

RAILROADS—ACCIDENTS AT CROSSINGS—ACTIONS—INSTRUCTIONS.

In an action against a railroad for injuries while crossing the track of the railroad, where the answer alleged contributory negligence both in the act and manner of crossing the track, and there was evidence that plaintiff proceeded to cross without looking or listening for the approach of the train which struck him, and that he was walking at a fast gait, and went upon the track immediately in front of the train, a charge that plaintiff was not guilty of contributory negligence if he exercised ordinary care in attempting to cross the track, was erroneous in that it eliminated from consideration the question of contributory negligence in plaintiff's manner of crossing the track.

On rehearing. Reversed and remanded. For former opinion, see 88 S. W. 371.

FISHER, C. J. This is a suit by appellee against the railway company for damages for personal injuries, and upon trial of the case, judgment was rendered in his favor for \$1,000.

The grounds of negligence alleged, and which were submitted by the trial court, are as follows: "That on the 11th day of January, 1904, he attempted to cross the track

of defendant company in the city of Hillsboro, Tex., an incorporated town or city, known as the Dallas Division track, where a public crossing on Elm street in said city intersects said track, said Elm street alleged to be one of the public streets of said city, and while attempting so to do, was struck by the engine of an incoming passenger train upon said track; that at the time plaintiff was struck by said engine and train, same was running at a high rate of speed, and at a higher rate of speed than six miles an hour, in violation of the city ordinances of Hillsboro, Tex., prohibiting the running of engine or cars within said city at a greater rate of speed than six miles per hour; that defendant, its agents, and servants in charge of said engine were negligent and careless in failing to keep a lookout for persons at said crossing, who were about to cross said track, and in failing to discover plaintiff in time to avoid injuring him; that in consequence of said alleged negligence above stated, plaintiff while attempting to cross said track, as he stepped upon the same, was struck by said engine and cars of defendant, and injured as alleged by him in his petition." The charge then withdraws all other allegations of negligence. The appellant pleaded that the plaintiff was guilty of contributory negligence in undertaking to cross the track in front of the train in motion at the time and under the circumstances surrounding him. There is evidence in the record which justified the verdict to the effect that the appellant was guilty of negligence, as submitted by the charge; and there is also evidence which would justify the conclusion that the appellee was not guilty of contributory negligence, as alleged.

The first and second assignments of error contend that the court erred in submitting any issue of negligence as to the failure of the servants of appellant operating the train to keep a lookout for persons approaching the track, because such fact was not sufficiently pleaded, nor was it established by the evidence. As we construe the averments of the petition, the issue was raised, and the circumstances and the evidence bearing upon that question would justify the inference that the engineer and firemen did not keep a proper lookout, notwithstanding their testimony upon this subject.

The point raised in appellant's third assignment of error was sufficiently covered by the instructions given to the jury upon that subject.

Appellant's sixth and seventh assignments of error complain of the admission of the testimony of the witness McDaniel, as to the speed of the train. The evidence complained of was, in our opinion, admissible.

There was no error in admitting the evidence complained of in the eighth assignment of error. We overrule appellant's ninth, tenth, eleventh, twelfth, and thirteenth assignments of error.

There was no error in the trial court's re-

fusing to admit evidence to the effect that the plaintiff was drunk on the occasion, as set out in the statement under the fourteenth assignment of error.

The evidence of settlement, set out under the sixteenth assignment of error, was properly excluded. It appears from the instrument itself that it was intended as a compromise.

The evidence of witness Hoffman as to the speed of the train was admissible. Some objections are urged to the general charge of the court, and special instructions requested by the plaintiff, which were given. These objections are overruled. The general charge, together with the special instructions that were given, in our opinion, present all the questions that were proper to be passed upon, except possibly the question raised by appellant's special instruction No. 7, which the court refused to give, and for the refusal of which, if it had been properly framed, the judgment would have been reversed. At the last term of this court (88 S. W. 371) we reversed and remanded this case on account of the refusal of the trial court to give appellant's special instruction No. 7, which is as follows: "If you believe from the evidence in this case that the servants of defendant in charge of the engine by which the plaintiff claims to have been hurt were exercising ordinary care, that is such care as a person of ordinary prudence would have used under the same or similar circumstances to keep a lookout for persons undertaking to cross the track, then, in such event, you will, without further inquiry, find for defendants on this issue." On June 30th of last term of the court, the appellee, as a part of his motion for rehearing, filed in this court an agreement signed by the attorneys for both parties, correcting the record in so far as it relates to charge No. 7, and they agreed that charge No. 7 was not correctly copied in the record, and that the charge which was actually requested, and which was refused, is as follows: "If you should believe from the evidence in this case that the servants of defendant in charge of the engine, by which plaintiff claims to have been struck, were exercising ordinary care, that is, such care as a person of ordinary prudence would have used under the same or similar to keep a lookout for persons undertaking to cross its track, then, in such event, you will, without further inquiry, you will find for the defendant on this issue." The charge in the record is complete and is accurately quoted in the original opinion handed down by this court at its last term. The charge just set out, which it appears from the agreement was the charge actually requested, is incomplete and omits a material word that is necessary in order to give it a proper legal sense and meaning. It is meaningless to say that an engineer should exercise that degree of prudence which he would have used under the same or similar to keep a lookout. Of course, what is meant is, the prudence that he would

have used under the same or similar circumstances to keep a lookout. This court has held, and it is a rule that is established by repeated decisions, that a trial court is not required to frame a charge so as to make it accurate. The trial judge rested under no duty to supply the word that was necessary in order to give this charge meaning. Therefore, adhering to the rule that prevails in this court, we must hold that the court committed no error in refusing the charge as framed.

The motion for rehearing is granted, and the judgment of the trial court affirmed.

Opinion on Rehearing.

The nature of the case and the questions involved is sufficiently stated in the two former opinions delivered by the court. We have, however, upon further consideration, concluded to reverse and remand on account of the action of the trial court in giving appellee's special charge No. 10, as set out under appellant's fifteenth assignment of error.

The answer of the appellant substantially charged two acts of contributory negligence, one was the manner of the plaintiff in crossing the track immediately in front of the moving train; and the other was in the act of crossing. It is substantially alleged that the plaintiff, in undertaking to cross the track of the defendant in front of a train in motion, was guilty of contributory negligence; and was also guilty of negligence in the manner in which he undertook to cross the same. Under the peculiar facts in the record, these averments present two distinct and separate acts of negligence, upon either of which the jury might have concluded that the plaintiff was guilty of contributory negligence. The charge complained of only submits the theory that if the plaintiff, under all the circumstances in evidence, was in the exercise of ordinary care, such care as an ordinarily prudent person would have exercised under the same or similar circumstances, in attempting to cross the track, then he would not have been guilty of contributory negligence. The effect of this charge is to eliminate from the consideration of the jury the manner in which he did undertake to cross. There is some evidence tending to show that the usual signals of the approach of the train to the depot where the plaintiff was injured were given, and that this was done before the plaintiff approached the track and reached the same, and was then in the act of crossing. There is also some evidence to the effect such as would have entitled the submission of the issue to the jury, that the plaintiff, before he reached the track and attempted to cross the same, could, in the exercise of ordinary care, by looking or listening, have discovered the near approach of the train, and could have ascertained before he reached the track the peril he would be in if he did undertake to cross. There is some evidence in the record which would justify the conclusion that he neither looked nor listened, and that at a

fast gait, he ran upon the track immediately in front of the approaching train. The rapid speed that he was going in approaching the track, with a failure to exercise ordinary care to discover the approach of the train, relates to the manner in which he did undertake to cross. The charge is so framed that the jury may have concluded that they were only authorized, in considering his conduct on the issue of contributory negligence, to take into consideration what was actually done in the act of crossing. For the error of the court in refusing this charge, the judgment will be reversed and the cause remanded.

There was no error in the action of the trial court in refusing the charge as framed, as set out under appellant's third assignment of error. As an instruction upon the issue of discovered peril, this charge is not accurate. If it could be considered for any other purpose, it should also be refused, because it ignores the duty to exercise ordinary care to look out or to ring the bell, or to give warning of the approach of the train.

The writer is inclined to the view that appellant's criticism of the ninth paragraph of the charge of the court, as set out in the fifth assignment of error, is correct. But, however, the majority of the court takes a different view of this question; but as the case will be reversed upon another point, and as an additional charge upon the subject embraced in the charge complained of will doubtless be given, as indicated in special charge No. 7, which was requested, the writer does not want to be understood as formally dissenting, but simply reserves his opinion on the question presented in complaining of the ninth paragraph, so that he will not stand committed to an approval of a similar charge, if it should be again given in this or any other case.

Special charge No. 7, which was refused, as contained in the record, was the supposed error upon which we originally reversed and remanded this case, and as the case will go back for trial, we think the charge should be given, if it contains the correction as pointed out in the second opinion delivered in the case.

For the error pointed out the motion for rehearing is granted and judgment reversed and cause remanded.

WILLS et al. v. INTERNATIONAL & G. N. R. CO.

(Court of Civil Appeals of Texas, Nov. 29, 1905. Rehearing Denied Jan. 24, 1906.)

1. PRINCIPAL AND AGENT—IMPLIED AUTHORITY—RAILROAD CONDUCTOR—EMPLOYMENT OF PHYSICIAN.

A conductor of a railroad train had no authority to employ a physician to attend a trespasser, who had been run over by the train owing to his own negligence.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 276.]

2. SAME—ACTION—BURDEN OF PROOF.

In an action by a physician against a railroad company for services rendered one who 92 S.W.—18

had been run over by a train, the physician having been employed by a conductor, the burden was upon plaintiff to show authority on the part of the conductor.

3. SAME—RATIFICATION—EVIDENCE.

A conductor employed a physician to attend one who had been run over by the conductor's train, and, in an action by the physician against the railroad company, for his services it appeared that a short time previous to the accident another person had been run over and that the conductor had employed plaintiff and that plaintiff's bill had been paid by defendant and that at the time of the accident in question the division superintendent was notified that a physician was in charge of the person injured and that the superintendent gave no directions in relation thereto. *Held*, that such facts did not show a ratification of the employment.

Appeal from McLennan County Court; J. W. Baker, Judge.

Action by W. E. Wills and others against the International & Great Northern Railroad Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Sanford & Denton, for appellants. Baker & Thomas, for appellee.

FISHER, C. J. This is a suit by the appellants against the railway company to recover \$250, as the reasonable value of the services of appellants as physicians and surgeons for medical treatment given to one Scott, who was run over and injured by one of the defendant's trains at the town of Leroy. It is alleged that one of the legs of Scott was cut off by the train, and the other bruised and mangled just below the knee, which necessitated the amputation of both legs above the knee in an attempt to save the man's life; that it was a case of emergency and urgent necessity, demanding immediate surgical operation; that the conductor of the train, acting as the agent of defendant, employed the plaintiffs to attend upon Scott, and render him such surgical attention as was necessary and proper; that the conductor had full knowledge of the circumstances under which Scott was injured, and was the highest officer in authority at defendant's station. The defendant answered by general and special demurrers and special denial, and also pleaded specially that the train by which Scott was injured was a freight train and not allowed to carry passengers; that Scott at the time of his injuries, attempted to board the train when drunk; that the train was moving at a rapid rate of speed; that Scott was guilty of contributory negligence. Therefore, the railway company was not liable. Also pleaded the want of authority in the conductor, as agent, to employ the plaintiffs. The case was tried before the court without a jury and judgment rendered in favor of the appellee. The trial court filed conclusions of fact and law, which are as follows:

"I find: That on the 4th day of July, 1904, one W. A. Scott, without negligence of defendant, through his own fault alone,

while drunk and while a trespasser on defendant's right of way, was run over and injured while attempting to board a freight train of the defendant railroad company, running at from 12 to 15 miles per hour, at the town of Leroy, a station on defendant's line in McLennan county, one of the said Scott's legs being cut off above the knee, and the other leg bruised and mangled just below the knee joint, which necessitated the amputation of both legs above the knee in an attempt to save the man's life. That it was a case of emergency and urgent necessity, demanding immediate surgical attention. That the conductor of the said train, acting in his capacity as such conductor, employed plaintiff Wills, who was a regular practicing physician and surgeon in that community, to take charge of and attend the said injured man. That the said Wills advised the conductor that in order to give the said Scott the necessary attention, the help of another surgeon would be required. That thereupon the said conductor replied: 'The case is in your hands. Get another doctor if necessary, and, if necessary, get two. I am no doctor'—and Wills at once telephoned to the town of West, 8 miles distant, to plaintiff Willie, who was also a regular practicing physician, and requested him to come and assist in the operation on the injured man. That thereupon the said Willie came at once, reaching Leroy in about one hour. That in the interim the conductor and his train had left the station. That plaintiffs immediately took charge of the injured man and amputated both his legs above the knee. That such amputation was necessary in a proper attempt to save his life, and that two surgeons were needed to properly perform the same. That a reasonable fee and charge for said professional services rendered by the plaintiffs is \$250. That the said station of Leroy is a small station at a distance of 35 miles from the town of Mart. That the said conductor of the said train was the highest officer in authority of defendant in matters touching the said train at said station at the time of the said accident. That the said station was a telegraph station of defendant, having telegraphic communication with defendant's division headquarters at the town of Mart, and its general headquarters at Palestine, and there was a telegraph operator in the employ of defendant at the said station at the time of the said accident. That the towns of Leroy and Mart are connected by telephone.

"I further find, that a short while previous to the accident in this case, a man named Hall was run over and injured by a train of defendant at the said station of Leroy; that the same was a case of emergency, demanding immediate surgical attention; that the conductor of the said train, acting in his capacity as such conductor, employed plaintiff Wills to attend the said injured man professionally; that the said plaintiff Wills, in accordance therewith, took charge

of the said man and amputated one of his legs, as was necessary by reason of the character of his injuries, in a proper attempt to save his life; that the said plaintiff Wills thereafter rendered his bill to the defendant for his said services, and the defendant paid the same, and did not at any time question the authority of its said conductor as its agent to make the said contract of employment; that it was not shown whether said Hall was injured by negligence of defendant or a trespasser or not; that sometime previous to the accident in this case a boy was injured by one of defendant's freight trains at the said station by having his hand mashed while riding thereon as a trespasser; that the conductor in charge of said train, acting in his capacity as such conductor, employed a physician at the said station, one Dr. Middlebrook, to attend professionally to the said boy's injuries; that the said doctor thereafter rendered his bill therefor to the defendant for \$7.50, and that the defendant paid the same without questioning the authority of the said conductor as its agent to make the said contract of employment; and that the said plaintiff Wills had knowledge of these facts at the time.

"I further find that the said accident happened in this case about 12 o'clock noon; that the said telegraph operator of defendant at Leroy at once thereafter notified by telegraph the division superintendent of defendant at Mart of the said accident, and also at some time during the afternoon notified the said division superintendent that physicians were in charge of the said injured man, Scott, and rendering him professional service, and that the division superintendent gave no orders or directions relative to the said physicians, and made no reply to the said message informing him that physicians were in charge of the said injured man.

"I further find, that neither of the plaintiffs had any knowledge of any want of authority upon the part of the said conductor, as agent for defendant, to employ them, and that they each rendered their services relying upon defendant's paying them a reasonable compensation therefor; that neither of plaintiffs made any inquiry of the said conductor as to his authority to employ them, and made no other effort to learn whether he did.

"I further find that the said sum of \$250 would be a reasonable fee and charge to either of the plaintiffs for the said professional services rendered in this case, if he had rendered the same alone.

"I conclude as a matter of law as follows: (1) That the burden of proof was upon the plaintiffs to show authority upon the part of the conductor to employ them. (2) That the said conductor was acting beyond the scope of his authority as agent of defendant in employing the plaintiffs; and that there was no sufficient reason why the defendant should not be permitted to deny the conductor's authority to make such employment; and that

therefore defendant is in no way liable to plaintiffs."

We are of the opinion that the court's conclusions of law are correct, as based upon the facts, and that the proper result was reached in the disposition of the case. Under the particular facts of this case, the conductor had no authority to bind the railway company to a contract to pay for the services rendered by the appellants. *Adams v. Southern Ry. Co. (N. C.) 34 S. E. 642; Union Pac. R. R. v. Beatty (Kan.) 10 Pac. 845; Railway v. McVay, 49 Am. Rep. 770; Railway v. Gary, 1 Am. St. Rep. 194; Tucker v. Railway, 54 Mo. 177; Sevier v. Railway (Ala.) 9 South. 405; and as by analogy bearing upon the question, International & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902.* The facts in the record did not raise the issue of estoppel and ratification. Therefore, also, the court was correct in its conclusion upon this question.

We do not undertake to say what would be the power and duty of a conductor of the railway company, where a passenger or employé was injured. Here the party injured was a trespasser. The condition that called for treatment was attributable to his own negligence; and we cannot see how the railroad company can be held liable for the medical expenses incurred in treating such a person, unless it had obligated itself through some authorized agent to incur such liability. We can find nothing in the power usually delegated to a conductor, or in the duties that he is required to perform, that implies the authority to make contracts binding his principal, whereby it should be burdened with the cost and expense of the treatment of injured persons, for whose condition it could in no wise be held responsible. We find no error in the record, and the judgment is affirmed.

Affirmed.

TEXAS & P. COAL CO. v. DAVES et al.*
(Court of Civil Appeals of Texas. Jan. 6, 1906. Rehearing Denied Jan. 27, 1906.)

MASTER AN.; SERVANT — NEGLIGENCE — INJURIES — SUFFICIENCY OF EVIDENCE — RES IPSA LOQUITUR.

Where plaintiff's intestate, while being hoisted out of defendant's shaft in a bucket, was precipitated into the shaft by the cable running off the end of the drum, evidence that the engine and drum were negligently placed, so that the cable was not in proper alignment with the pulley at the top of the shaft, made out a clear case of *res ipsa loquitur*, and was sufficient to sustain a verdict for plaintiff, although defendant's witnesses claimed to have adjusted the machinery in a very careful manner, but were unable to account for the accident unless the drum of the engine was considerably out of alignment with the shive wheel.

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by Mrs. Jennie Daves and another against the Texas & Pacific Coal Company.

*Writ of error denied by Supreme Court March 1, 1904.

Judgment for plaintiffs, and defendant appeals. Affirmed.

John W. Wray, for appellant. W. P. Gibbs and E. B. Ritchie, for appellees.

STEPHENS, J. This appeal is from a verdict and judgment against appellant for \$4,000 damages, resulting to the appellees from the death of J. H. Daves. The nature of the case is thus succinctly stated in appellees' brief: "This suit was instituted on the 16th day of January, 1905, by appellees against appellant to recover damages on account of the death of J. H. Daves, who was alleged to have been the husband, father, and son, respectively, of the plaintiffs—plaintiff alleging that the said J. H. Daves was killed on October 24, 1904, while being hoisted out of one of the coal mines of the defendant in Palo Pinto county, Tex., at which time he was in the employ of said defendant, and engaged, with others, in repairing the defendant's shaft leading into and out of said mine; that the hoisting into and out of said shaft was done by means of a bucket to which was attached a wire rope or cable, which rope passed over a pulley or shive wheel at the top of the shaft, and thence to a cylinder or drum attached to an engine situated near the shaft; that at the time in question, while Daves and others were being hoisted out of said shaft, the wire cable or rope, after circling the drum, or cylinder of the engine to the south end of said drum, climbed itself against the flange and ran off the end of said drum, causing the bucket to be precipitated back into the shaft some 40 feet, Daves being thrown from the bucket and precipitated to the bottom of the shaft and killed; that the engine and drum to which the rope was attached was negligently so placed by the defendant, and had been, only a few days before the killing, so negligently moved and placed, that it was not in proper position and alignment with the pulley or shive wheel at the top of the shaft, thus causing the cable to climb the flange and run off."

We find that the evidence tended to prove negligence as alleged, and warranted the verdict, although the witnesses offered by the appellees to make out their case, being those in charge of and assisting in the work, all claimed to have adjusted and operated the machinery in a very careful manner. They could not account for the accident, however, experts though they were, unless the drum of the engine was considerably out of alignment with the shive wheel, which left room for the inference that they had exercised less care in making the adjustment than was claimed in their testimony. It is a clear case, we think, of *res ipsa loquitur*.

We find no merit in the assignments complaining of the charge or of the court's refusal to give special charges.

Having thus disposed of all the issues raised, we affirm the judgment.

RAINS v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 29, 1906.)

1. HOMICIDE—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for murder held sufficient to support a conviction.

2. CRIMINAL LAW—DECLARATIONS IN PRESENCE OF ACCUSED.

In a prosecution for murder, evidence of a statement of a third person in the presence of accused a few moments after the murder, that "she was the best friend I ever had on earth," was admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 821, 968.]

Appeal from Circuit Court, Clinton County.
"Not to be officially reported."

Calvin Rains was convicted of murder, and he appeals. Affirmed.

E. Bertram, for appellant.

CARROLL, C. The appellant is 75 years old, was convicted of the murder of his wife to whom he had been married for 40 years, and sentenced to the penitentiary for life. The evidence upon which he was convicted is entirely circumstantial, very brief, and is substantially as follows:

W. B. Beard testified: That in passing by the house of the accused between 9 and 10 o'clock in the morning he saw two women, daughters of the accused, go into the barn of accused which was about 75 yards from his house. That he met the defendant and spoke to him, and after passing by, saw him go into the barn, stay a short time, and then go back to his house and remain a short time, and then return to the barn, making three trips to the barn, going each time on the public road which ran immediately by the house and barn. The last time the defendant entered the barn, he heard a voice in the barn, that sounded like a woman, say "she was the best friend I ever had on earth," and almost immediately the accused and two women came out of the barn, the defendant backing, and one woman motioning her hands as if to strike him, and he was moving his hands as if to ward off the blow. He did not know whose voice he heard, nor who the person was addressing, although just before he heard these words he saw the defendant go into the barn where the women were. Mrs. Nannie Guthrie testified: That she was acquainted with the deceased, and lived about a quarter of a mile from her residence, and on the morning of the murder, about 10 o'clock, she heard the dinner bell ringing at their house, and supposed they were having a "family racket" and had rung the bell as they frequently did. In a short time afterwards she was informed that Mrs. Rains had been killed, and went to the house and found her dead, her body yet warm. The accused was at the house when she reached there. Mrs. Shan. Reneau testified: That she heard the dinner bell ring two or three times on the morning of the homicide at about 10 o'clock, that she lived about a quarter of a mile from

the Rains' residence, and saw the witness Beard passing her house 15 or 20 minutes before she heard the bell ring; he was coming from the direction of the Rains' house. She had known the accused some 12 years, and he was always a quiet and peaceable man among his neighbors. E. B. Cross testified: That in the spring of 1905 the accused wanted to sell his place and he told him John Cole would buy it. That he saw him again, and he said that his wife would not sign the deed, but he would sell Cole his interest in the land, but Cole, who was present, said that he would not buy it that way, and accused replied: "Well, it will not be long until it will all be mine." This conversation occurred a few months before the murder. Two physicians testified: That they saw and examined the deceased on the day after she was murdered. That her skull was fractured, a large bruise was over her right eye, and a wound over her ear, a large wound on the left side of the head, several of the ribs were broken loose, and there were other wounds and bruises on the body. That the body was mangled and bruised worse than any they had ever seen. One of these doctors also said that on the day he made the examination he saw the defendant, who told him that he had been out in his garden, and when he went to his house he found his wife struggling and all beaten up and saw two men running from the house towards the woods. That he did not know either of them. And that a lock box in which he kept his money amounting to \$50 had been broken open, and the money taken out. And that he saw in the room a heavy fire shovel that had blood stains on it. This was all the evidence for the commonwealth.

The accused in his own behalf said: That he had been married to his wife who was killed about 40 years; that he saw the witness Beard pass his house between 7 and 9 o'clock in the morning. That his two daughters were at the barn, and that he went up there to show them how to shuck some corn, remaining at the barn but a short time, and making only one trip there. That he went from the barn into his garden to get some vegetables, and was in the garden about an hour when he heard a noise at the house, and, thinking that his wife, whom he had left sitting on the bed, had fallen to the floor, he went to the house and saw his wife lying on the bed, and two men about 30 or 40 yards from the house, neither of whom he knew, running towards the woods, and when he reached his wife, she was struggling, but could not speak, and he begun to scream and ring the bell. He also found that a box in which he kept his money had been broken open and the money taken out. He denied telling Cross that he would sell his interest in the land, or that it would not be long until the land would be his. He also denied that any person said to him at the barn, "she was the best friend I ever had on earth,"

or that he heard any such remark, or made any motions with his hands, as testified to by Beard. That he did not know who killed his wife, or got the \$50. That the officers came to his house on the day his wife was killed, and the next morning went with him to the grave, and afterwards took him to jail. He also said he did not make any search for the two men.

This was all the evidence introduced on the trial, and counsel for appellant earnestly insist that it is not sufficient to sustain the verdict, but this court has repeatedly held that it has no power to reverse a judgment of conviction in a criminal case upon the sole ground that there is not sufficient evidence to sustain the verdict, being restricted to the single inquiry of whether there was any evidence before the jury conducing to show the guilt of the accused. *Vowells v. Commonwealth*, 83 Ky. 193; *Rainey v. Commonwealth*, 40 S. W. 682, 19 Ky. Law Rep. 390; *Nelson v. Commonwealth*, 62 S. W. 1018, 23 Ky. Law Rep. 320; *Kyle v. Commonwealth*, 63 S. W. 782, 23 Ky. Law Rep. 708.

It may be conceded that the evidence in this case does not show in a satisfactory way that appellant is guilty of the crime for which he was convicted, but as a conviction may be sustained on circumstantial evidence alone, we are not prepared to say that there is no evidence in the record tending to establish the crime of appellant. He was tried by 12 men of his own selection, chosen under the forms of law from the body of the people of the county in which he lived. They heard and saw the accused and witnesses testify, and, under the instructions of the court, which fairly presented the law of the case, could not have found appellant guilty, unless they believed beyond a reasonable doubt that he murdered his wife. The jury had the right in the discharge of their duty to consider all the facts and circumstances admitted as evidence on the trial, and to determine in their own way the weight and sufficiency of the evidence heard by them, and they must have been satisfied of appellant's guilt, or they would not have returned the verdict they did. The record does not show any sufficient motive for the commission of this awful crime, and it seems incredible that a man as old as appellant, who had lived with the woman he murdered as her husband for 40 years, could be so overcome with passion or hatred as to take her life in this brutal way. While motive is an essential element of crime, it may be inferred, and it is not necessary to show a bad motive in order to secure or uphold a conviction. Whatever may have been the wicked purpose in the heart of appellant, or the evil motive that prompted him to the commission of this deed, it is not within our province to inquire. However reluctant we may be to believe appellant guilty, in view of the fact that he has had a fair trial before an impartial jury,

and an upright and able judge, all of whom concur in the opinion that he is guilty, we do not, under the law as it has been administered for years by this court, feel at liberty to say that there is no evidence in the record tending to show appellant's guilt.

His counsel also contends that a substantial error was committed in permitting the witness Beard to testify as to the exclamation he heard in the barn; but this evidence was competent as the statement of a fact made to and in the presence of the accused within a few moments after the murder, and does not come within the rule laid down in *Kaelin v. Commonwealth*, 84 Ky. 354, 1 S. W. 594, holding that exclamations of mere bystanders giving expression to their opinion is not competent.

The judgment of the lower court is affirmed.

BOSWORTH v. PEARCE et al.

(Court of Appeals of Kentucky. March 6, 1906.)

GUARANTY—SIGNATURE TO CONTRACT.

Where a contract, whereby an investment company acknowledged the receipt of a sum of money and guarantied its repayment, was signed by parties who were not mentioned in the body of the contract, and who entered into a subsequent contract reciting that they had signed the first contract as guarantors of performance by the investment company, they are bound as guarantors.

Appeal from Circuit Court, Fayette County.
"Not to be officially reported."

Action by George W. Bosworth against L. E. Pearce and another. From a judgment sustaining a demurrer and dismissing the petition, plaintiff appeals. Reversed.

S. S. Yantis and W. Worthington, for appellant. Morton, Webb & Wilson, for appellees.

CARROLL, C. On October 8, 1901, the appellant, George W. Bosworth, entered into the following contract with the Home Investment Company of Lexington, Ky., R. A. Downing, and the appellees L. E. Pearce and James M. Johnson, to wit: "The Home Investment Company of Lexington, Kentucky, having sold to G. W. Bosworth two thousand coupons, hereby acknowledges the payment of \$1,000.00 in payment of dues on same from August 12th to October 14th, inclusive. Said Home Investment Company hereby agrees with said Bosworth that no further cash payment shall be required on said coupons, the weekly redemptions on same be applied to the payment of dues. Said company further agrees and guaranties that all coupons mentioned shall be redeemed and paid not later than six months from this date. On final redemption of same, said company agrees to return to said Bosworth the sum of \$1,000.00, with the profits apportioned thereto, as shown by the company's official prospectus, and that said profits shall not be less than thirty

per cent. of the original principal paid. [Signed] The Home Investment Company, by L. E. Pearce, Sec'y. R. A. Downing. L. E. Pearce. J. M. Johnson. Lexington, Kentucky, October 8th, 1901."

On May 9, 1902, the following written contract was entered into between the appellant, G. W. Bosworth, and the appellees, L. E. Pearce and James M. Johnson, to wit: "Whereas the undersigned signed the contract hereto attached and made a part hereof, as guarantors, and promised and agreed and guarantied to G. M. Bosworth the payment of the money mentioned in said contract upon the terms and conditions therein set forth, and whereas, the said Home Investment Company, named in said contract, has made an assignment for the benefit of its creditors and it unable to carry out its contracts made with certain certificate holders, and whereas, the undersigned as guarantors have become responsible to G. W. Bosworth for the fulfillment of said contract and the payment of the money therein named, and whereas, G. W. Bosworth has agreed with the undersigned L. E. Pearce and J. M. Johnson, for the consideration hereinafter set forth, to accept the sum of \$1,040.00 with interest thereon at the rate of six per cent. per annum from April 8th, 1902, until paid, upon the terms and conditions hereinafter named: Now, therefore, this agreement made and entered into this 9th day of May, 1902, by and between L. E. Pearce and J. M. Johnson, parties of the first part, and G. W. Bosworth, party of the second part: Witnesseth, that for and in consideration of the said Bosworth agreeing to accept less than the amount due him from the said Pearce and J. M. Johnson, under the contract hereto attached, to wit, the sum of \$1,040.00, with interest thereon at the rate of six per cent. per annum from the 8th day of April, 1902, until paid, in full payment and satisfaction of any and all liability of said Johnson and said Pearce to him as guarantors, promisors or otherwise under and by virtue of the contract hereto attached, and which is hereby referred to and made a part thereof. And the further consideration of G. W. Bosworth agreeing not to institute any legal proceeding or action against the said Pearce and Johnson to recover the above named sum of money, for a period of six months from this date, and to give the said Pearce and said Johnson said extension of time to pay the above amount or sum of money with interest as aforesaid, said Johnson and said Pearce do hereby further promise and agree and guarantee to pay to the said Bosworth, six months after the date hereof, the sum of \$1,040.00, with interest thereon at the rate of six per cent. per annum from the 8th day of April, 1902, until paid; and they and each of them do further promise and agree and guarantee to indemnify and save harmless the said G. W. Bosworth against any and all loss or dam-

age he may sustain to the extent of \$1,040.00, with interest thereon at the rate of six per cent. per annum, from the 8th day of April, 1902, until paid, by reason of the failure or neglect or refusal of the Home Investment Company, R. A. Downing, or any other person or persons whose names are signed to the contract hereto attached, and which is hereby referred to and made a part hereof, to pay to the said G. W. Bosworth the sum of money therein set forth upon the terms and conditions therein named. And it is further understood and agreed between the parties hereto that whatever sum or sums the said G. W. Bosworth should receive at any time or times within the aforesaid period of six months, as dividends on his claim set forth in the contract hereto attached, against the Home Investment Company, are to go as credits on this obligation of said Johnson and Pearce so as to reduce their liability hereunder to the extent of said amounts as may be so received by him in the way of dividends on said claim from said assignee of said company. And said Pearce and said Johnson do further agree with the said Bosworth to transfer and to assign to him and do hereby transfer and assign to him, as security for the payment of the above sum of money, and the fulfillment of their obligations and agreements herein contained, one-half ($\frac{1}{2}$) of whatever claim of any kind or description, either as certificate or contract holder or in any other way they or either of them have against the Home Investment Company and the assignee thereof, and they do hereby authorize and empower Charles Kerr, assignee of the Home Investment Company, to pay to said G. W. Bosworth one-half of any and all money due or become due and owing to them or either of them in any way on account of any claim of any kind that they have against the Home Investment Company, or any interest therein to the extent that the same be necessary to pay off and discharge the above obligation of the undersigned only. In testimony whereof the said L. E. Pearce and J. M. Johnson have hereunto set their hands this 9th day of May, 1902. [Signed] L. E. Pearce. J. M. Johnson."

Upon these writings the appellant instituted this action against the appellees, alleging in substance in the petition as amended that it was the intention of himself and the appellees and R. A. Downing that he should pay to the Home Investment Company the sum of \$1,000, and that in consideration thereof, and to secure the repayment of same, the appellees and R. A. Downing signed said contract, and agreed and promised and guarantied the repayment of said \$1,000; that but for said guaranty of the appellees and Downing he would not have paid said sum; that the Home Investment Company made an assignment, and the only amount paid to the appellant by the company or its assignee was \$170. He averred that the consideration

of the last-mentioned contract was the relieving of Downing from liability on the first contract and the promise on his part to extend to appellees time in which to repay the \$1,000, and his promise not to sue the company. He further alleged that the appellees signed and executed the contract on October 8, 1901, as surety and guarantors of the Home Investment Company, and that by executing said contract they bound themselves that the obligation of the Home Investment Company as therein specified would be carried out, or, if not, that in default it would be made good by them, and that, except for said contract of guaranty, he would not have entered into said contract or paid to the company the \$1,000, and asked for judgment against the appellees for \$1,040, with interest thereon from April 8, 1902, to be credited by \$170.

To the petition and amended petition demurrers were sustained, and, the appellant declining to plead further, his petition was dismissed, and he brings the case to this court by appeal.

It is insisted for the appellees that as their names do not appear in the body of the contract made on October 8, 1901, and as there is no language in the writing which expresses or implies any obligation on their part, that this contract imposed no obligation upon them; that the only agreement in the contract to repay appellant the sum therein mentioned was made by the company, and that any promise on the part of the appellees to assume this liability was "a promise to answer for the debt, default or misdoing of another," and therefore void as being within the statute of frauds; that there is no new consideration for the execution of the last contract sufficient to bind the appellees, that it was a new and independent agreement, and to be enforceable must be supported by a new consideration.

The principal question to be determined is, are appellees bound as sureties or guarantors on the contract of October 8, 1901? This contract was signed by the appellees, and it is perfectly plain that they must have signed it for some purpose. Their names are attached to the contract under the name of "The Home Investment Company," and it is evident that it was their intention to become parties to the contract as sureties or guarantors of the Home Investment Company. It is a cardinal rule in the construction of all contracts that all parts of the writing must be given force and effect if it can be done in order to carry out the intention of the parties, and there is no reason why a contract such as this should be excepted from the general rule. Brandt in his valuable work on Suretyship and Guaranty, (section 107), says: "In the construction of a contract of a surety or guarantor, as well

as of every other contract, the true question is what was the intention of the parties as disclosed by the instrument read in the light of the surrounding circumstances. The contract of the surety or guarantor being just as legal as that of their principal, there is no good reason for holding that in arriving at the intention of the parties one set of rules shall govern when the principal, and another when the surety or guarantor, is concerned." Parsons on Contracts, vol. 2, § 5, states the rule thus: "No special words, or form, are necessary to constitute a guaranty. If the parties clearly manifest that intention, it is sufficient; and if the guaranty admits of more than one interpretation, and the guarantee has acted to his own detriment with the assent of the other party, as by advancing money, on the faith of one interpretation, that will prevail, although it be the one which is most for the interest of the guarantee."

Applying these principles to the contract of October 8, 1901, and giving to it the practical construction placed on it by the parties themselves in the writing signed by them on May 9, 1902, in which they state unequivocally that they signed the contract of October 8, 1901, as guarantors, and promised and guaranteed to appellant the payment of the money mentioned in said contract upon the terms and conditions therein set forth, and declared that they had become responsible to the appellant for the fulfillment of said contract and the payment of the money therein named, it leaves no room for doubt that the appellees were parties to the first contract, and signed it with the intention of being responsible for the performance of the contract on the part of the company; and, as such parties, they are according to their own interpretation of the meaning to be given to their signature to it bound to appellant for its fulfillment. It would be idle to say that appellees signed their names to the contract of October 8, 1901, without any purpose or meaning; and it would be manifestly unjust to allow them to escape liability on the ground that their names are not mentioned in the body of the contract. In signing their names to this contract, they declared their intention to become parties to it as strongly as if they had been named in the contract. This view of the case renders it unnecessary to discuss other interesting questions raised by counsel.

Appellees are liable to appellant for \$1,000, with 6 per cent. interest thereon from October 8, 1901, to be credited by any sums paid by the company.

It is therefore ordered that the judgment of the lower court sustaining the demurrers and dismissing the petition be reversed, and the cause remanded for further proceedings consistent with this opinion.

SEHON, BLAKE & STEVENSON et al. v. WHITT et al.

(Court of Appeals of Kentucky. March 14, 1906.)

1. CONSPIRACY — WRONGFUL ATTACHMENT — JOINT DEFENDANTS.

An action against several defendants for conspiring to injure plaintiff's business by maliciously suing out attachments without probable cause cannot be maintained against the defendants jointly, where there is no evidence of conspiracy.

2. APPEAL — QUESTIONS REVIEWABLE — RAISING QUESTION IN LOWER COURT — MISJOINDER OF PARTIES.

In an action against several defendants for conspiring to injure plaintiff's business by wrongfully suing out attachments, defendants could not on appeal take advantage of the failure to prove any conspiracy, in the absence of any motion to require plaintiffs to elect which defendants they would proceed against.

3. MALICIOUS PROSECUTION — MALICE — EVIDENCE.

In an action for damages for the malicious suing out of attachments, evidence that defendants, before procuring the attachments, submitted all the facts to reputable and competent attorneys, and were advised that they had grounds for attachment, was admissible to negative malice.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, §§ 66, 143.]

4. TRIAL — INSTRUCTIONS — OUTSIDE ISSUES.

Defendants are not entitled to an instruction that certain facts constitute a complete defense, when they did not plead such facts as a defense.

5. MALICIOUS PROSECUTION — ACTIONS FOR DAMAGES — INSTRUCTIONS.

In an action for maliciously suing out an attachment, an instruction that, if defendants without "just or legal" cause procured attachments to be levied on plaintiffs' property, they were liable, was erroneous, as defendants were only liable in case they did not have probable cause.

Appeal from Circuit Court, Johnson County.
"Not to be officially reported."

Action by C. M. Whitt and another against Sehon, Blake & Stevenson and others. Judgment for plaintiffs, defendants appeal. Reversed.

P. K. Malin and Greene & Van Winkle, for appellants. C. B. Wheeler, for appellees.

NUNN, J. This action was brought by appellees, Whitt & Huff, to recover damages of the appellants, and charged that they had entered into a combination and conspiracy to injure, and had injured, the appellees' business, by the malicious use of judicial process, without probable cause. Appellees alleged that appellants, Sehon, Blake & Stevenson, Kitchen, Whitt & Co., and Newberry & Crum were creditors of appellees, and that, before their respective debts became due, they each, in pursuance of the conspiracy, caused actions to be instituted, and caused attachments to issue, and to be levied upon the stock of groceries owned by appellees; that by reason of the several attachments the store was closed for about a week, their credit and business reputation injured, and they were damaged to the extent of \$1,000;

that defendant, A. G. Robinson, was agent for Sehon, Blake & Stevenson, and caused the action of his principal to be brought; that appellant, T. C. Rule, was agent of Kitchen, Whitt & Co., and caused the action of his principal to be instituted.

The several appellants answered separately. In each of the answers the conspiracy, and all other material facts, were denied. The proof tended to show that all of appellants' claims were not due when their actions were brought and attachments issued, but that a part of each of their claims were due. There was not any proof, showing a conspiracy, upon the part of the appellants; it was upon this charge the appellees, were authorized to maintain the action jointly against all the appellants, and having failed to prove this, their right to maintain the action against all ceased, or failed, but the appellants are not in a position to take advantage of this for the reason that they did not move the court to make appellees elect, which of the appellants they would prosecute. The appellants proved that prior to the institution of their actions, and the issuing of the attachments, they submitted all the facts, within their knowledge, bearing upon the question of their right to attachments, to reputable and competent attorneys, and were advised by the attorneys that they had grounds for their attachments. This was competent testimony, which tended to show that they were not actuated by malice, and that they had probable cause for the issuing of the attachments, but the appellees cannot complain of the action of the court in refusing to instruct the jury that this was a complete defense to the action, for the reason that they did not plead it as a defense. See *Tandy v. Riley*, 80 S. W. 776, 26 Ky. Law Rep. 98, and *Newman on Pleading & Practice*, pp. 521, 541.

It appears that during the trial the appellants dismissed their action as against A. G. Robinson, for what cause it does not appear. The proof shows that T. C. Rule endeavored to persuade Robinson and others, from instituting actions and obtaining attachments against the property of appellees, giving it as his opinion that appellees were honest and would pay all claims, if given an opportunity, and he did not cause an attachment to be issued for his principal until the other attachments were issued, and levied, he believing that other creditors of appellees would also attach, and any further delay on his part would cause the loss of his principal's claim. Under these facts, we are unable to see upon what ground it can be said that Rule and his principal could be regarded as having instituted the action, and caused the attachment to issue maliciously, and without probable cause; but they did not ask for a peremptory instruction in their behalf. The court gave to the jury two instructions, and the appellants objected and excepted to them, and in our opinion they were erroneous, and prejudicial to the substantial rights

of the appellants. To authorize a person to recover, in an action like this, he must both allege and prove that the defendant instituted and maintained an action or prosecution against him with malice, and without probable cause. The court in this case, in instruction No. 1, used this language: "If the jury should believe from the evidence that the defendants, on the 5th day of April, 1900, conspired together to, and did, unlawfully, wilfully, and maliciously, institute separate suits against the plaintiffs for debts not due, and on said day did unlawfully and maliciously, and without just or legal cause, procure attachments to issue against, and to be levied upon, the plaintiff's store"—concluding by authorizing the jury to find for appellees. This was error. The jury, under this instruction, could not find for appellants unless they believed from the evidence that appellants had just or legal cause for instituting the action, and suing out the attachments. "Just cause" or "legal cause" are not synonymous terms with "probable cause." Appellants may have had probable cause, and yet not have had just or legal cause for the issue of their attachments. The question to be tried in this action is not whether the appellants had actual legal grounds for their attachment, but whether they had probable cause for the issue thereof. If they had such cause there can be no recovery in this action, against them, no matter how clearly the evidence may now show that there was no legal grounds for their issue. See the cases of *Anderson v. Columbia Finance and Trust Company*, 50 S. W. 40, 20 Ky. Law Rep. 1790, and *Metropolitan Life Insurance Company v. Miller*, 71 S. W. 921, 24 Ky. Law Rep. 1561, and other cases cited therein.

For this reason, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

SOUTHERN RY. CO. v. CASSELL.

(Court of Appeals of Kentucky. March 14, 1906.)

1. CARRIERS—TICKETS—CONDITIONS—IDENTIFICATION OF PASSENGER.

A railway ticket, signed by the purchaser, and reading: "I agree to identify myself as the original purchaser of this ticket, by signature or otherwise, to the satisfaction of the conductors, agents, or representatives of the railway companies over whose lines this ticket reads whenever called upon to do so"—does not require the passenger to satisfy the conductor of his identity as the original purchaser, but only requires identification by such proof as would satisfy the mind of a reasonable, conscientious, and prudent man selected by the parties to pass on the question.

2. SAME—BREACH OF CONTRACT—ACTIONS—VENUE.

Civ. Code Prac. § 73, localizing certain actions and pertaining to common carriers exclusively, one part relating to actions on contract to carry property, the other to actions for torts, either injury to the person of a passenger, or for injury to the person or property of another,

does not include actions on contracts to carry passengers.

3. SAME.

Under Civ. Code Prac. § 72, localizing certain actions, applicable to all corporations, except as expressly excluded by other sections, and providing that actions against corporations on contract may be brought in the county in which the contract was made, where a contract for carriage of a passenger over connecting lines of railroad was made by the initial carrier in a certain county on behalf of the connecting carrier, and thereafter ratified by the latter, which undertook to carry it out, the circuit court of the county had jurisdiction of the connecting road, in an action against both roads for breach of the contract.

4. SAME—EJECTING PASSENGER—EXCESSIVE DAMAGES—EVIDENCE.

Where plaintiff was wrongfully ejected from defendant's train about midnight, at a strange town, for failure to satisfy the railroad conductor of his identity as original purchaser of a ticket presented by him, the evidence showing that the conductor's manner was insolent, high-handed, and unnecessarily humiliating, that he acted hastily and without proper consideration or prudence, and that he cursed plaintiff and otherwise treated him harshly in the presence of the passengers on the car, a verdict for \$1,000 for plaintiff was not so excessive as to indicate passion or prejudice on the part of the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1490.]

Appeal from Circuit Court, Anderson County.

"To be officially reported."

Action by H. B. Cassell against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Willis & Todd, for appellant. Charles Carroll and W. H. Morgan, for appellee.

O'REAR, J. Appellee bought a round-trip ticket at Lawrenceburg, Ky., from an agent of the Southern Railway Company in Kentucky, for a continuous passage each way between Lawrenceburg and St. Louis, traveling from Lawrenceburg to Louisville over the Southern Railway in Kentucky, and between Louisville and St. Louis over the Southern Railway. The two companies are represented to be distinct corporations. By reason of a mistake of the conductor on the passenger train of the Southern Railway Company, appellee's identification as the original purchaser of the ticket was rejected, and, as he did not have the means of paying his fare, he was put off the train about midnight at a strange town in Illinois. There was evidence that the conductor's manner was insolent, high-handed, and unnecessarily humiliating. Appellee sued both companies to recover damages for his wrongful ejection from the train.

One of the conditions of the ticket which was signed by the purchaser was this agreement: "I agree to identify myself as the original purchaser of this ticket, by signature or otherwise, to the satisfaction of the conductors, agents, or representatives of the railway companies over whose lines this ticket reads whenever called upon to do so." The

conductor, when taking up the ticket on the return trip from St. Louis, asked appellee to sign his name on the back of the ticket, which he did in the conductor's presence. He was required to again sign his name, but on a separate piece of paper, which he did. He was inquired of as to his name, place of residence, and the sum he paid for the ticket, all of which he answered truthfully. The conductor was of opinion that appellee was mistaken as to the amount paid for the ticket, saying it was too much, which seemed to confirm his suspicion aroused by what he deemed a dissimilarity in the handwriting in which the original signature and the ones made in his presence had been executed. That he was not satisfied the one way or the other from the handwriting alone is shown by his asking the other questions. That his doubts were resolved against appellee on hearing his answer as to what he paid for the ticket is evidenced by the response he made, which was the only fact detailed to him that he evinced a knowledge of himself upon which he convicted appellee of falsehood, and as being an impostor. We have seen that he was mistaken. He evidently did not know the correct rate between Lawrenceburg and St. Louis. Assuming to act upon insufficient knowledge on the point was to resolve a statement of appellee, which the conductor did not know to be untrue, into a doubt, and then to resolve the doubt against the passenger. Appellee was unable to produce any other evidence of his identity except an unused ticket which he had bought in Texas on the trip, and which he had signed when he bought it. He also had a valise with a tag on it on which his name was written, and which the conductor saw, according to appellee's evidence. In addition, appellee testified that he told the conductor that he had 65 cents, which he offered him to pay for a telegram to the station agent at Lawrenceburg, Ky., to inquire whether appellee did not buy a ticket corresponding with the one offered on the date it bore; but the conductor refused to send the telegram. There was some evidence tending to show that the conductor's action was not unreasonable or oppressive. Under these facts the court instructed the jury that it was the duty of the plaintiff to identify himself as the original purchaser of the ticket presented by him by such proof as would have satisfied the mind of a reasonable, conscientious, and prudent man selected by the parties to pass upon the question. This instruction was based upon *B. & O. S. W. R. Co. v. Hudson*, 80 S. W. 454, 25 Ky. Law Rep. 2154. The contract in that case was substantially the same as the one in the case at bar. The contract, properly construed, is not that the purchaser will satisfy the conductor of his identity as original purchaser. No quantity of evidence might have done that. For after all had been done that could have been, and all that any reasonable person would have required, still the

conductor in this instance might not have been satisfied, and would have had the right under appellant's view of the law to have refused the ticket and ejected the passenger under circumstances most unreasonable and unwarranted. Such could not have been the intention of both parties in entering into the contract of carriage. We adhere to the rule adopted in *Hudson's Case*, supra.

At the conclusion of the evidence the trial court gave a peremptory instruction to the jury to find for the defendant the Southern Railway Company in Kentucky. Thereupon appellant Southern Railway Company entered its motion for a nonsuit upon the ground that the Anderson circuit court had not jurisdiction of it in this action. The two companies joined as defendants. Only one of them, the Southern Railway Company in Kentucky, operated a railroad in Anderson county; it being alleged, and not controverted, that appellant did not own or operate any railroad in Anderson county. The question of jurisdiction was preserved by appellant by objectionable practice, and the question is properly presented whether the Anderson circuit court had jurisdiction of appellant without its codefendant being joined in the action.

Sections 72 and 73, Civil Code of Practice, localize certain actions. The latter pertains to common carriers exclusively. It is divisible into two parts—one relating to actions upon contracts to carry property; the other, to actions for torts, either injury to the person of a passenger, or for injury to the person or property of another. The section does not include actions upon contracts to carry passengers; nor does any other section of the Code expressly embrace such action. But section 72, Civil Code of Practice, which applies to all corporations, except as expressly excluded by other sections of the Code, provides that actions against corporations upon contract may be brought in the county in which the contract was made. This is an action upon a contract, for a breach of the contract to carry the plaintiff as stipulated in the signed agreement, and as it was made in Anderson county the venue of the action was properly laid in that county. Appellant was one of the parties to the contract. It was made on its behalf by the Southern Railway Company in Kentucky, and when ratified by it and it undertook to carry it out it was executing the identical contract sued upon in this case. Therefore the Anderson circuit court had jurisdiction of the person of appellant by service of process.

Complaint is made that the verdict is excessive. The jury awarded appellee \$1,000. Under the facts shown we do not think it was so excessive as to indicate passion or prejudice on the part of the jury. We believe the evidence shows the conductor was mad, having just had some difficulty with other passengers on the same subject, and acted hastily, and without proper consideration or prudence. His conduct was unreasonable, overbearing,

and despotic. He must have known that to put the passenger off the train at that time and under those circumstances was a serious matter, to him at least. He should have been sure of his case before acting so, and, in any event, he had no right to curse appellee, and otherwise treat him harshly in the presence of the passengers on the car.

On the whole case, we think the judgment should be affirmed.

BRAMBLETT et al. v. DEPOSIT BANK OF CARLISLE.

(Court of Appeals of Kentucky. March 14, 1906.)

1. INTEREST — PARTIAL PAYMENTS — RENEWAL NOTES — APPLICATION OF PAYMENTS.

Where partial payments are made on interest-bearing notes, and the principal and unpaid portions of the interest are thereafter incorporated into renewal notes, the proper method of applying the payments is to calculate interest upon the original notes until the first renewal or the first payment, and then apply the payment to the discharge of the interest first and then on the principal, and to add unpaid interest to the amount of the renewal notes, allowing interest upon the whole amount of such renewal notes.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Interest, §.132; vol. 39, Cent. Dig. Payment, § 121.]

2. SAME — USURIOUS INTEREST — PAYMENT IN ADVANCE — METHOD OF COMPUTATION.

In calculating interest upon notes on which usurious interest was paid in advance, the crediting of the face of the notes with the amount of usury and legal interest thereon, and calculation of interest upon the amount so reduced at the legal rate, did not result in requiring the payment of interest twice, but was a proper method of computation.

3. APPEAL — HARMLESS ERROR — PLEADING — AMENDMENT.

Where, in an action on notes, the court of its own motion required plaintiff to amend in vacation, so as to give a chronological history of all the transactions, the filing of the amendment after the time limited by the court, but during the vacation, did not harm defendant.

Appeal from Circuit Court, Nicholas County.

"To be officially reported."

Action by the Deposit Bank of Carlisle against G. W. Bramblett and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Lewis Apperson and Kennedy & Dickson, for appellants. John I. Williams, I. B. Ross, and Holmes & Ross, for appellee.

O'REAR, J. Appellee instituted this suit against appellant, Geo. W. Bramblett, upon two promissory notes of \$14,959.90 each, subject to certain credits, and to enforce a mortgage lien created to secure them. The only defense was that of usury. It is claimed, and is a fact, that the notes sued upon represented a series of debts created some years prior, which had been renewed from time to time until they were finally consolidated in the notes sued upon. It was charged, and

was also true, that the bank had exacted 8 per cent. per annum interest for the loan and forbearance of this money, whereas only 6 per cent. is the legal rate. Appellant claimed that the whole of the notes sued upon represented the usury so exacted and taken. In its reply to this answer the bank denied that the notes contained any usury further than \$1,501.05. Upon this issue a reference to the commissioner was had, to hear proof and to report the true amount of usury contained in the notes. The bank was required to produce all of its books and papers bearing on the transactions out of which the notes sued upon arose, so that the commissioner and the parties could get at all the facts in the matter. The only witness who testified in the case was the cashier of the bank. He gave a succinct account of the origin and course of each of the constituent debts, entering into the notes in suit, together with a statement of all sums paid thereon, whether as interest, or otherwise. It is not contended by appellant that his statements were not full and true.

The point in dispute is as to the correct method of calculating the interest and applying the credits. Appellant's contention is that the debts should be taken at the date of their origin as of the amounts actually received then by appellant, and that interest should be counted upon them from that time at the rate of 6 per cent. per annum until the entering of the judgment; that partial payments should be applied, whenever made, first, to the discharge of interest then accrued when there should be enough to discharge it, and, when more than enough to pay the interest then accrued, that the surplus of such payments should then be applied to the principal; that the remainder should be taken as the new principal, and interest calculated and payments applied in this manner without regard to renewals. It is insisted by appellant that the practice of renewals, by which the accumulated interest was carried into a new note and made part of the principal, and then interest calculated upon such principal, was a compounding of interest, and was a taking and exacting of more than 6 per cent. per annum for the loan or forbearance of money; it being contended that the same original loan must always be considered as the principal for the purposes of such calculation. The circuit court rejected this plan, and instead directed the calculation on this basis: That the sum originally loaned should be taken as the original principal, and interest should be calculated upon that sum at the rate of 6 per cent. per annum until the first renewal or payment. That such payment should be applied first to the discharge of interest accrued, and any excess should be applied on the principal. That when the note was renewed accumulated interest, which had not been paid, was then to be added to the remaining principal, which sum was to constitute a new principal, upon

which interest was to be calculated and payments applied as above indicated. This rule applied to all the debts.

We are of opinion, the method adopted by the court is the correct one. It was so held in *Farmers' Bank of Kentucky v. Calk*, 4 Ky. Law Rep. 617; *Rodes v. Blythe*, 2 B. Mon. 335; *Castleman v. Holmes*, 4 J. J. Marsh. 1. In the last-styled case it was said: "When a debt is continued by renewing notes, each renewal is to be regarded as a new contract. The old contract is then settled, and the old note is then generally canceled, and thus there is no other contract in existence but the new one. * * * These transactions of renewing debts by new notes are equivalent to paying the existing debt and again borrowing the money. The old debt is paid off by the new. The interest accrued may be inserted in the new note, and thus the consideration and the amount of the debt are both different to what they were originally." In *Talliaferro's Ex'rs v. King's Adm'r*, 9 Dana, 331, 35 Am. Dec. 140, the same doctrine is recognized, as well as that it is competent for the parties to agree that interest payable at the end of a term may also bear interest. When the notes matured, not only the principal, but the accrued interest, were demandable by the bank. When the parties agreed that, instead of paying either the interest or the principal, both should be incorporated in the new note, it was equivalent in every practical sense to a new loan, then made, of that much money by the bank to its debtor. Clearly, if appellant had been required to comply with his obligation, and to pay the interest when it was due, the bank might have loaned that interest to any one else, and, of course, to appellant, at the legal rate of interest. That the bank, instead of requiring interest to be paid, as it had the right to do, treated it as paid and then reloaned it to the party owning it, changes neither the legal rights of the parties nor the legal effect of the transaction, although in the absence of such agreement such interest would not have borne interest as a matter of law.

It is insisted for appellant that the commissioner and the court erred in the matter of calculating the interest in this further particular: That whereas, even under the rule announced by the court, the amount originally loaned as of the time of the original loan, was taken as the basis of the calculation, yet in certain enumerated instances appellant had paid interest in advance at 8 per cent. for a definite term; that therefore the adoption of the plan indicated ignored that fact, and required the payment of the interest twice. While the plan suggested was the one directed by the court, in actually applying it, it appears that in the instances where the interest was paid in advance, or, which is the same thing, where the discount was reserved by the bank, and only the net proceeds of the note were paid over to the borrower, the commissioner credited the face of the note

with the amount of usury embraced in it, together with interest at 6 per cent. per annum upon such usury, and then took the remainder as the true principal, upon which interest was thereafter calculated at 8 per cent. per annum from the maturity, instead of the date, of the note. The effect of this was in no sense different from the rule announced by the court. Interest was not twice calculated for the same period. It resulted in interest being calculated once only, but allowed it to be paid in advance, as the parties had agreed by their contract it should be. This was held in *Warren Deposit Bank v. Robinson's Adm'rs*, 35 S. W. 275, 18 Ky. Law Rep. 78, to be legal, and not an infraction of the usury laws of the state; for it is competent for parties to agree to pay a legal rate of interest in advance, and such payment is not regarded as usurious. It was proper, then, for the court to have respected the executed agreement of the parties in this case, and to have treated the payment of interest in advance, as the parties did at the time.

A question of practice is presented which, in our opinion, does not affect at all the substantial rights of appellant. It is that after the issue above indicated was formed the court of its own motion required appellee bank to further amend its petition by setting out in detail and chronologically the original and renewal of each of the constituent debts of the notes sued upon, with all payments made thereon, whether of interest or otherwise. The order of the court required this amendment to be filed within a given time, which extended beyond the term of the court. As a matter of fact it was filed within the time, but during the vacation. Appellant contends that there is no authority under the Code to file an amended petition during vacation. Even if this should be conceded, we are of opinion that this proceeding was not hurtful to appellant. As a matter of fact it was not necessary, as the issue was already completed and the proof had already been taken.

Perceiving no error prejudicial to the substantial rights of appellant, the judgment is affirmed.

RICHARDSON v. PEOPLE'S LIFE & ACCIDENT INS. CO.

(Court of Appeals of Kentucky. March, 1906.)

1. ACTION — STATUTORY REMEDIES — EXCLUSIVENESS.

Where a statute gives a new right and prescribes an adequate remedy for its enforcement, the prescribed remedy is exclusive.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 275.]

2. SAME—CUMULATIVE REMEDY.

Where a right exists at law or in equity, a statute giving a new remedy gives a cumulative remedy merely.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, § 275.]

2. INSURANCE — ASSESSMENT COMPANY — INSOLVENCY—RECEIVERS.

Ky. St. 1903, § 677, authorizing the Attorney General to apply for the appointment of a receiver of an insolvent assessment insurance company, on the insurance commissioner reporting that the company is insolvent, does not take away the right of the creditors of an insolvent company to apply for the appointment of a receiver: the remedy given by the statute being cumulative.

“Not to be officially reported.”

Action by H. W. Richardson against the People's Life & Accident Insurance Company for the appointment of receivers. The court appointed receivers and issued an injunction restraining the receiver appointed on the petition of the Attorney General from interfering with the receivers. On motion to dissolve the injunction. Denied.

Thum & Clark, for plaintiff. Hazelrigg, Chenault & Hazelrigg and Caruth, Chatterson & Blitz, for defendant.

HOBSON, C. J. H. W. Richardson, a policy holder in the People's Life & Accident Insurance Company, filed his petition, charging that the company was insolvent; that it had on hand only \$287; that it was absolutely unable to go on with the business; that it had at present liabilities amounting to \$7,000; that an attachment had been levied upon the furniture of the company; that there was a death loss unpaid; that it had ceased to do business, and was in a condition in which it would be unlawful for it to attempt to assess policy holders. He prayed the appointment of receivers to take charge of the assets and property of the company to realize the assets and make distribution. The petition was filed on December 9th. The court made an order appointing receivers; other policy holders having come in and joined in the action. After the petition was filed in the Jefferson circuit court, the Attorney General filed suit in the Franklin circuit court, under section 677, Ky. St. 1903, and obtained the appointment of a receiver in that court. Thereafter the Jefferson circuit court enjoined the receiver appointed by the Franklin circuit court from interfering with his receivers in the possession of the property, and a motion has been made before me to dissolve the injunction; Judge Paynter and Judge Nunn sitting with me on the argument of the case, and Judge Barker being present at the consultation, but not at the argument.

We all conclude that the injunction should not be disturbed. The rule is that, if a statute gives a new right and also prescribes an adequate remedy for its enforcement, the statutory remedy is exclusive and must be followed. *Johnston v. Louisville*, 11 Bush, 527. The rule is also that, if the matter is actionable at law or in equity before the statute, the statute giving a new remedy will be construed as not taking away the common-law remedy, but as merely cumula-

tive. 20 Ency. of Pl. & Pr. 603. Independently of the statute, the creditors of a corporation may in equity, upon a proper showing, have a receiver appointed to administer the assets of an insolvent corporation and protect their rights. Section 677, Ky. St. 1903, merely provides an additional remedy. There is nothing in the statute indicating that the Legislature had in mind taking away from the creditors of this class of corporations the right to protect themselves by an action in equity. It is important that an insurance company shall not go on issuing insurance policies after it is insolvent, and in some cases the creditors might not take steps to have a receiver appointed. To prevent other persons from losing, the statute, by section 677, has created a summary remedy to be exercised by the insurance commissioner and the Attorney General; but the creditors are not required to wait for these officials to act.

The motion to dissolve the injunction is therefore overruled.

WHITE v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 20, 1906.)

1. MUNICIPAL CORPORATIONS—POLICE POWER—SUPPRESSION OF GAMING.

Ky. St. 1903, § 3490, subsec. 1, expressly authorizes the council of fourth-class cities to pass ordinances not in conflict with the Constitution or laws of the state or the United States. By subsection 24 it is authorized to fix by ordinance the penalty for the violation of the provisions of the charter or any municipal ordinance or by-law not in conflict with law. Subsection 33 provides that the city council shall have legislative powers to make by-laws and ordinances for the carrying into effect of all the powers herein granted for the government of the city and to do all things properly belonging to the police of incorporated cities. Section 3513 provides that the police judge of fourth-class cities shall have jurisdiction of certain offenses named, and adds “or immoral behavior or conduct calculated to disturb the peace and dignity of the town * * * all of which are declared to be misdemeanors for which fines or imprisonment or both may be prescribed by ordinance.” *Held*, that such cities have power to pass ordinances providing for the punishment of persons who engage in gaming.

2. CRIMINAL LAW—FORMER JEOPARDY—CONVICTION IN POLICE COURT.

Under Const. § 168, providing that no municipal ordinance shall fix a penalty at less than that imposed by statute for the same offense, and a conviction or acquittal under either shall constitute a bar to another prosecution for the same offense, there can be no prosecution in the circuit court for gaming after defendant has been convicted, in the police court of a city of the fourth class, of the same offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 404.]

Appeal from Circuit Court, Madison County.

“To be officially reported.”

John D. White was convicted of the offense of gaming, and appeals. Reversed.

Jackson & Roberts and H. C. Rice, for appellant.

NUNN, J. The appellant, White, was indicted at the October term, 1904, of the Madison circuit court for the offense of gaming, denounced by section 1977, Ky. St. 1903. A plea of former trial and conviction was entered in bar of the prosecution under the indictment.

There appears to be no controversy as to the facts with reference to the former prosecution and conviction. It was agreed that prior to the finding of this indictment the appellant was arrested, put under bond for his appearance, tried and convicted in the police court of Richmond, Ky. (a city of the fourth class), on the 18th day of April, 1904, for engaging in a game of chance, and the game for which he was indicted is the game for participation in which he was fined in the police court as stated, notwithstanding his plea, and these agreed facts, the court found him guilty, and adjudged that he should pay a fine of \$60, and cost of the prosecution.

There is not anything in the record showing for what reason the court adjudged the appellant's plea in bar insufficient, and we are at a loss to understand why the court refused to sustain the plea, unless it was because the court was of the opinion, under the authority of the case of the City of Owensboro v. Sparks, 99 Ky. 352, 36 S. W. 4, that the council of fourth-class cities did not have the power and authority to pass an ordinance to suppress gaming, at which money or property was bet, won, or lost. The council of fourth-class cities is expressly authorized to pass ordinances not in conflict with the Constitution or laws of this state or the United States. See subsection 1 of section 3490, Ky. St. 1903. And by subsection 24 of the same section it is authorized to fix by ordinance the penalty for the violation of the provisions of the charter or any municipal ordinance, or by-law, that it might pass, which was not in conflict with the laws of the state or the United States, and by subsection 33 it is provided: "that the city council shall have legislative power to make by-laws and ordinances for the carrying into effect of all the powers herein granted for the government of the city, and to do all things properly belonging to the police of incorporated cities."

In our opinion the passage of an ordinance to punish persons who engage in games of chance, at which money or property is bet won, or lost, is not in conflict with the Constitution or laws of this state or of the United States, but, on the contrary, is in harmony therewith, and is one of the things necessary to be done to properly "police" the city. It is further provided by section 3513 of the Kentucky Statutes of 1903, that the police judge of fourth-class cities shall have jurisdiction of many offenses, naming them, and embraces the following language: "or immoral behavior or conduct calculated to disturb the peace and dignity of the

town, * * * all of which are declared to be misdemeanors, for which fines or imprisonment, or both, may be prescribed by ordinance."

In our opinion it would be unreasonable to hold that the General Assembly in the enactment of the charters governing cities of the third and fourth classes intended to restrict the council of such cities from enacting ordinances punishing persons guilty of gaming, disturbing lawful assemblies, or religious worship, working on Sunday, keeping open saloon, or other business houses on Sunday, selling or giving liquor to minors, or any sale of liquor in violation of law, and many other offenses not necessary to mention, which are not specially mentioned in such charters, and the suppression of which is so essential to the peace, dignity, and proper government of all towns and cities. In the charter of cities of the third class it is expressly provided, that the council should make all police regulations to secure and protect the general health, comfort, convenience, morals, and safety of the public. In our opinion this language gives the council power and authority to enact all ordinances necessary to effectuate those purposes, restricted only by the Constitution and laws of the state and United States. This court in considering the case of City of Owensboro v. Sparks, supra, must have overlooked these provisions of the charter, and that case, to the extent it conflicts with the views herein expressed, is overruled. It therefore follows that the lower court erred in adjudging that appellant's plea of former conviction, under the ordinance, was insufficient. The Constitution of the state (section 168) provides that: "No municipal ordinance shall fix a penalty for violation thereof at less than that imposed by statute for the same offense. A conviction or acquittal under either shall constitute a bar to another prosecution for the same offense."

There is another reason why appellant's plea should have prevailed. Section 3513 of the Statutes, in defining the powers of the police court of cities of the fourth class, provides, among other things: "And shall have original concurrent jurisdiction, within the limits of the city, of all offenses within the jurisdiction of justices of the peace." And section 1003 defining the jurisdiction of justices of the peace, in penal cases, gives them concurrent jurisdiction with circuit courts of all penal cases, the punishment of which is limited to a fine not exceeding \$100 or imprisonment not exceeding 50 days, or both. Thus the Richmond police court had concurrent jurisdiction with the circuit court in this case, where the punishment was a fine from \$20 to \$100. There is a distinction between the case at bar and the case of the city of Owensboro v. Sparks, supra. In that case there was a reversal upon the ground that the warrant was issued in the name of the city alone, and not in the name

of the commonwealth. In this case the warrant under which White was tried and convicted issued in the name of the commonwealth, and charged a violation of the state law. It is true that it was recited in the warrant that the prosecution was for the benefit of the city. If the ordinance of the city had been void this language would have been surplusage, and would not have deprived the police judge of his jurisdiction to try the case, under the state law, and the fine would have legally gone to the state instead of to the city. This was a question, however, with reference to which the appellant had no interest. It was solely a matter between the city and the state.

For these reasons the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

ALLISON'S EX'R et al. v. ORNDORFF et al.

(Court of Appeals of Kentucky. March 21, 1906.)

DEEDS—SETTING ASIDE—PAYMENT OF CONSIDERATION—EVIDENCE—SUFFICIENCY.

In an action to set aside a deed, evidence held to support a finding that the cash consideration recited in the deed was not in fact paid.

Appeal from Circuit Court, Logan County. "Not to be officially reported."

Action by Mollie Orndorff and others against John T. Allison's executor and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Hazelrigg & Hazelrigg, for appellants. S. R. Crewdson, S. Y. Trimble, and Perkins & Trimble, for appellees.

CARROLL, C. On June 23, 1903, John T. Allison for a recited consideration of \$2,400 cash in hand paid, and the further consideration of \$1 paid in cash, conveyed to Theodore H. Becker, who is the real appellant in this case, a tract of land in Logan county containing 330 acres. In August following, Allison died, aged 73. This action is brought by his heirs at law to have the deed canceled upon the ground that at the time of its execution Allison on account of age and disease was incapable of entering into a contract or executing a conveyance, and that it was procured by the fraud and undue influence of Becker, and there was no consideration for the conveyance. The lower court granted the relief sought, and Becker appeals.

Quite a number of witnesses have testified as to the mental and physical condition of Allison, and also as to the value of the land. It may be said that the land at the time of the conveyance was reasonably worth \$15 an acre, or \$4,950. There is great conflict in the evidence as to the mental capacity of Allison at the time he made the conveyance. Many of his nearest neighbors testified that he was

not competent to attend to business, that he was feeble in mind and body and unable to comprehend the nature of so large a transaction. Other witnesses of equal credibility testified that his infirmities were not of such a character as to prevent him from transacting business and intelligently understanding the purpose of the contract he made with appellee Becker. Without determining the question as to his competency, it is sufficient to say that he was greatly enfeebled by age and disease and in such a condition as to be easily influenced by a person who might have his confidence. The appellee, Becker, was a few years older than Allison and they had been lifelong intimate friends, they were distantly related, the second wife of Becker's father being a sister of Allison. Allison had all his life been a farmer, and until stricken with disease, an active vigorous man. Becker seems to be what is commonly called "a promoter," and was interested in several schemes of one kind and another, among them being the "Consolidated Asphalt Company of Kentucky" (a West Virginia corporation with a large capital stock and little property). Becker in forming this corporation secured options on a large quantity of land in Logan county and had perhaps bought some. According to his own testimony, he was a man of considerable means.

The principal question in this case is whether or not any consideration was paid by Becker for this land, and upon this issue after a careful reading of the evidence we are entirely convinced that Becker did not pay \$2,400, or any other sum of money, to Allison for this land. Allison was a bachelor, and for many years had lived with a negro woman by whom he had 8 children all living at his death. His relatives for many years previous to his death ignored his existence on account of his conduct in living with, and having surrounded himself by, this negro family. He seems to have been greatly attached to these negro children, whose mother died a few years before his death, and contemplated leaving them what estate he had. On the day this deed was acknowledged by Allison, he was confined to his bed at his home, and Becker in company with the son of the county clerk (who was a deputy) went to his house for the purpose of having him acknowledge the deed. The deputy clerk took the acknowledgment to the deed, and also to another paper that will hereafter be mentioned, and only remained in the house a few minutes, not longer than was necessary to transact the business for which he went there. Becker remained in the room with Allison some time, and during the time he was there, two or three of Allison's negro children, all of them then grown, were in and about the room and house. Becker states positively that on the day the deed was acknowledged and at the time he was there with the deputy clerk, he paid to Allison in money the \$2,400 mentioned in the

deed. He is not supported in this statement by any other witness, and is flatly contradicted by all the facts and circumstances in the case.

On the day that Becker and the deputy clerk went to Allison's house to have the deed acknowledged, the following paper was signed by Allison and acknowledged before the deputy clerk: "Russellville, Ky., June 23, 1903. Bank of Russellville, C. W. Courts, Cashier. You are hereby authorized to deliver the eight bonds herein inclosed of the Consolidated Asphalt Company of Kentucky, namely, one to each of the following named persons, said delivery to be made within one year after my death, and said delivery to be made to each of the persons herein mentioned in the presence of George L. Gillum of Russellville, Logan county, Ky., and Theodore H. Becker, of the city of New York, or in the presence of their legal representatives; and each person mentioned is to give you a receipt for the bond he or she may receive, namely, one bond, face value \$1,000 to be given to Belle Allison, one bond face value \$1,000 to be given to Alex. Allison, one bond face value to be given to Nettie Herrold, one bond face value to be given to Ida Payne, one bond face value \$1,000 to be given to Susie Gautier, one bond face value \$1,000 to be given to Benjamin Allison, one bond face value \$1,000 to be given to James Allison, one bond face value \$1,000 to be given to Virgil, Morton and Omer Allison, all to have this bond as joint owners." This paper is in the handwriting of Becker, and was put with the 8 bonds mentioned in a large envelope and placed in the bank of Russellville on the 23d of June, 1903. On the package was the following indorsement written by Becker and signed by Allison: "Valuable Papers. Property of John T. Allison. This package to be opened twelve months after my death and the contents distributed as herein directed by the Bank of Russellville, Logan county, Kentucky, in the presence of George L. Gillum, of Russellville, and T. H. Becker, of New York, or their duly authorized representatives."

The evidence in the case is very conclusive that these bonds had no value whatever. Except for the testimony of Becker, there

would not be much doubt that Becker exchanged these bonds with Allison for the land with the intention on Allison's part of keeping his legal heirs from obtaining his land after his death and to make provision for his negro children, he doubtless being under the impression at the time that the bonds were equal in value to the land. But Becker states that these bonds had nothing whatever to do with the land transaction, that he paid for the land \$2,400 in money, and that these bonds were given to Allison by an associate in business with Becker several years prior to the conveyance of the land. As there is no evidence to contradict his statement in respect to these bonds, it must be accepted as true. A great deal of the record is taken up with the details of Becker's various adventures in connection with this asphalt company, and the value of these bonds, but in view of his statement that these bonds had no connection with his purchase of the land, this evidence has no relevancy at all. Allison a few days before his death made his will, disposing of what little personal property he had and nominating Becker and George L. Gillum as executors. This will was probated in September, 1903, and the persons named qualified as executors. Shortly afterwards, they made a settlement of their accounts as executors, showing that only some \$500 came into their hands as assets of the estate. If Becker paid to Allison the \$2,400, he carefully avoided making any mention of it in his settlement as executor and refrained from making any statement whatever about it to his coexecutor, who remained in entire ignorance of the fact that a few months before his death Allison had been paid \$2,400 in money by his coexecutor according to his statement. His negro children who were in and about the house on the day Becker claims to have paid it and who remained with him until his death neither saw nor heard of any of it. These and other equally convincing facts that appear in this record leave no room for doubt that Becker did not pay to Allison any consideration whatever for the land deeded to him.

The judgment of the lower court, canceling and holding for naught the deed, is affirmed.

SNYDOR et al. v. ARNOLD et al.

(Court of Appeals of Kentucky. April 11, 1906.)

1. NEGLIGENCE—INJURY—CONCURRING CAUSES—LIABILITY.

If a person is guilty of negligence resulting in injury to another, the fact that a third person concurs or co-operates in producing the injury or contributes thereto, does not relieve the first tortfeasor of liability.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 74, 75.]

2. SAME—UNEXPECTED CONSEQUENCES.

A person is not liable for all the consequences of his wrongful act when the consequences are such as no human being even with the fullest knowledge of the circumstances, would have considered likely to occur, and in order to result in liability, the injury complained of must be one that under the circumstances might have been reasonably foreseen by a person of ordinary prudence to flow from and be the natural and probable consequences of the negligent act.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 12.]

3. TRIAL—DIRECTED VERDICT.

If there is evidence tending to establish a matter in issue, the court should not grant a peremptory instruction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 338-340.]

4. MUNICIPAL CORPORATIONS—OBSTRUCTIONS IN STREET—QUESTION FOR JURY.

In an action against a city and the owner of a lot for injuries resulting from the tipping over of a pile of lumber which it was alleged defendants negligently allowed to remain standing in the street, evidence held to require submission to the jury of the question of defendants' negligence.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1747, 1751, 1752.]

Appeal from Circuit Court, Kenton County.
"To be officially reported."

Action by Joseph N. Snyder and others against Christina Arnold and others. From a judgment for defendants, plaintiffs appeal. Reversed.

B. F. Graziani and J. P. Tarvin, for appellants. Ernst, Cassatt & McDougall, for appellee Christina Arnold. F. J. Hanlon, for appellee City of Covington.

CARROLL, C. The appellant, a boy about nine years of age, brought this action against the appellees to recover damages caused by a pile of lumber falling upon him and injuring him quite severely.

It appears from the record that the appellee Christina Arnold is the owner of a lot that fronts on Crescent avenue, in the city of Covington, and that for the purpose of repairing a building situated on the lot she had hauled and placed on the lot and parallel with the sidewalk, a pile of lumber, the pieces of which were about 16 feet long and 10 inches wide. This lumber was placed one plank above the other in two piles probably an inch apart and each about 4½ feet high. It was so stacked that the outside pile rested on the line of the sidewalk as much as

half the width of one of the planks. The surface of the lot upon which this lumber was piled, inclined upwards a little from the pavement, causing the lumber to lean towards the street. There was no fence between the lot and the street, and the evidence is that this lumber was rather loosely piled and easily disturbed. It remained in this condition for about two weeks, and on the day appellant was injured a load of rock was being hauled on a wagon from the street into this lot. About the time the appellant reached the lumber on his way to a store, where he was going on an errand, the wagon loaded with rock crossed the pavement into the lot, and while appellant was standing on the pavement close beside the lumber waiting for the wagon to go into the lot, the front wheel of the wagon struck one of the plank that projected a couple of feet further out than the remainder and toppled the lumber over on appellant.

The negligence complained of as to appellee Arnold was in stacking the lumber in such a careless and negligent manner as to be easily toppled, or made to fall over, and as to the city, in negligently and carelessly permitting the same to be piled upon a street and remain in that dangerous position for more than two weeks. Neither the owner nor the driver of the wagon were made defendants, and no recovery was sought on account of any negligence on the part of the driver of the wagon. Upon the conclusion of the evidence for the appellant, which was in substance the facts herein related, the trial judge peremptorily instructed the jury to find a verdict for the appellees, and was induced so to do for the reasons thus stated by him: "Supposing that the proof sustains the allegation that the lumber was piled there negligently and carelessly, still I do not think the plaintiff has made a case, because the negligent piling of the lumber and its condition at the time was not the cause of the accident at all. The wagon hitting the lumber was the cause of the accident. There is absolutely no proof—in fact the allegations of the petition do not claim that there was any negligence in the driving of the wagon. The only negligence that is claimed, is that the lumber was negligently piled and allowed to remain there in that condition. Nor is there any proof to show that the defendants, Mrs. Arnold, or the city of Covington, had anything to do with the wagon. It seems to me that the proximate cause of the injury was the wagon hitting the lumber pile and causing the lumber to topple over. That was the direct cause of the accident, and it would not have happened at all if the wagon had not struck the lumber. The only negligence, if any, was in driving the wagon, and that is not claimed as an act of negligence in the petition." It will thus be seen that the sole question in the case is what was the proximate cause of the injury, and

this is one of the most difficult and important questions presented in the trial of negligence cases, it being an established principle of law that there can be no recovery for an act of negligence unless it was the proximate cause of the injury complained of. If the conduct of appellees in piling the lumber at the place, in the manner it was piled, and in permitting it to remain in that position, was not the proximate cause of the injury to appellant, he cannot recover. If the injury is traceable to the negligent and careless manner in which the lumber was piled, although the immediate cause of the accident was running the wagon against the lumber, the appellant may recover. In our opinion the controlling and determining question in this case is, were appellees guilty of negligence in piling the lumber and in permitting it to remain in the position it was in when struck by the wagon. If there was no negligence on their part in this particular, then appellant cannot recover, because the injury to him was due to the driver of the wagon. On the other hand, if they were guilty of neglect in the respect mentioned, the negligence, or carelessness of the driver of the wagon will not excuse them, as the mere fact that another person concurs, or co-operates, in producing an injury, or contributes thereto, in any degree, whether large or small, is of no importance. It is immaterial how many others have been in fault, if the act of the first wrongdoer was the efficient cause of the injury. The weight of authority seems to be against holding a defendant liable for all the consequences of his wrongful acts when they are such as no human being even with the fullest knowledge of the circumstances would have considered likely to occur, and the rule is well settled that to fix liability upon a person for remote negligence the injury complained of must be one that under all the circumstances might have been reasonably foreseen or anticipated by a person of ordinary prudence to flow from or be the natural and probable consequence of the first negligent or wrongful act. These views are fully supported and illustrated in the following cases. *Shearman & Redfield on Negligence*, § 28; *Southern Ry. Co. v. Webb* (Ga.) 42 S. E. 395, 59 L. R. A. 109; *Cole v. German Savings & Loan Society*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432; *Davis v. Chicago, Milwaukee & St. Paul R. Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935; *Wood v. Pennsylvania R. Co.*, 177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728; *Dickson v. Omaha & St. L. Ry. Co.* (Mo. Sup.) 27 S. W. 476, 25 L. R. A. 320, 46 Am. St. Rep. 429; *Western Ry. v. Mutch* (Ala.) 11 South. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179; *Gonzales v. City of Galveston* (Tex. Sup.) 19 S. W. 284, 31 Am. St. Rep. 17; *Reid v. Evansville R. Co.* (Ind. App.) 35 N. E. 703, 53 Am. St. Rep. 391; *Huber v. La Crosse*

City Ry. Co. (Wis.) 66 N. W. 708, 31 L. R. A. 583, 53 Am. St. Rep. 940; *Burger v. Missouri Pacific Ry. Co.* (Mo. Sup.) 20 S. W. 439, 34 Am. St. Rep. 379; *Am. & Eng. Ency. of Law*, vol. 16; *Gilson v. Delaware & Hudson Canal Co.* (Vt.) 26 Atl. 70, 36 Am. St. Rep. 802; *Watson, Damages for Personal Injuries*, §§ 28, 58.

The rule in this state is too well settled to need citation of authority that when there is evidence tending to establish a matter in issue the court should not grant a peremptory instruction, and while we do not express any opinion upon the question whether or not the injury in this case was one that under all the circumstances might have been reasonably anticipated by a person of ordinary prudence to flow or follow from the acts of appellees, or as to whether or not they or either of them were guilty of any negligence, we are convinced that there was sufficient evidence to authorize the submission of these questions to the jury. As stated by Justice Strong in *Milwaukee R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256: "The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib being thrown in the market place."

The judgment of the lower court is reversed, and cause remanded with instructions to grant a new trial, and for proceedings in conformity to this opinion.

DOWNING v. THOMPSON'S EX'R et al.

(Court of Appeals of Kentucky. March 8, 1906.)

1. JUDICIAL SALES—REPORT—SUFFICIENCY.

Where the judgment ordering a sale of land by a commissioner directed the commissioner when and where to sell the land, and the commissioner's report stated that he advertised the time and place of sale as directed by the judgment, it was presumable that the sale took place at that time and place, and the report was not defective for failing to so state.

2. SAME—TIME OF MAKING REPORT—RECORDING.

That a commissioner made his report of a sale of land three days before the time the judgment directed him to report, and that the report was not recorded at the time it was made, was of no importance.

3. SAME—SETTING ASIDE—LIEN FOR TAXES.

That land sold at judicial sale is incumbered with a lien for taxes is not sufficient ground upon which to set aside the sale, but if the purchaser pays the taxes, he is entitled to credit therefor.

4. SAME — DESCRIPTION OF LAND — SUFFICIENCY.

A petition seeking the sale of land described it as "a tract of land in F. county, Kentucky,

lying on the northeast side of the R. turnpike road, containing about 37 acres, bounded by said turnpike road and by the lands of G., K., and T.," it being a portion of the land described in the deed from C. D. to S. D. dated the 3d day of January, 1881, and recorded in Deed Book 62, page 231, in the F. county court clerk's office, and being the entire residue of said land so described that is on the northeast side of said turnpike road, except the tract of 25 acres conveyed by S. D. to G. by deed dated January 3, 1881, and recorded in the same office in Deed Book 62, page 225. The judgment described the land as it was described in the petition, and the commissioner's report of sale described it in the same manner except that it omitted that part of the description following the statement as to the recording of the first deed. Civ. Code Prac. § 125, provides that a petition for the recovery of land or for its subjection to the demand of the plaintiff must describe it so that it may be identified. *Held*, that while it is proper practice to have real estate sought to be sold described in the same way in the petition, judgment and report of sale, yet the description used identified the land, and was sufficient.

5. INFANTS—GUARDIAN AD LITEM—APPOINTMENT—AFFIDAVIT.

Under Civ. Code Prac. § 38, declaring that no appointment of a guardian ad litem shall be made until an affidavit be filed showing that the defendant has no guardian, curator nor committee residing in the state known to the affiant, failure to file an affidavit before the appointment of a guardian ad litem is not cause for reversal, unless it appears that the infant has a curator or guardian or that his interests have been prejudiced by the omission.

Appeal from Circuit Court, Fayette County.
"Not to be officially reported."

Action by M. G. Thompson's executor and others against Lizzie E. Downing. There was a decree for plaintiff directing the sale of certain land. Hattie B. Downing purchased at the sale and from a judgment overruling exceptions to the commissioner's report of sale, she appeals. **Affirmed.**

L. J. Moore, for appellant. H. T. Duncan, Jr., and Allen & Duncan, for appellees.

CARROLL, C. This appeal is prosecuted from a judgement of the Fayette circuit court overruling exceptions filed by appellant as purchaser to the commissioner's report of sale of land sold to satisfy a mortgage debt in the case of the Security Trust & Safety Vault Company, Executor, v. Mrs. Lizzie E. Downing, etc. Eleven exceptions were filed, setting up in substance that neither the commissioner's report nor the judgment sufficiently described the land; that the commissioner's report failed to state where he made the sale; that the report of sale was filed earlier than the judgment directed; that it was not recorded as required by law; that no affidavit was made for the appointment of a guardian ad litem for two of the infant defendants before the guardian ad litem was appointed; and that there was a lien for state and county taxes on the land at the time it was sold. The judgment directed the commissioner when and where to sell the land, and although the report does not state where the land was sold, it does state that he advertised the terms,

time, and place of sale as directed by the judgment, and it must be presumed in the absence of any showing to the contrary, that the commissioner made the sale at the time and place directed by the judgment. The fact that the commissioner made his report of sale on February 17th, when the judgment directed him to report his action on February 20th, and that the report was not at the time recorded, are not important exceptions.

The exception reciting the fact that there was a lien for state and county taxes unpaid on the property sold for several years prior to and including the year in which the land was sold, is not sufficient ground upon which to set aside the sale, but upon it being made to appear to the court that there were unpaid taxes against the property, the court should, if the purchaser pays them, give her credit for the sum paid.

This leaves but two exceptions to be considered, and we will first take up the one relating to the description of the land. The land is described in the petition as follows: "All that tract of land in Fayette county, Kentucky, lying on the northeast side of the Richmond & Lexington turnpike road, containing about 37 acres, bounded by the said turnpike road and by the lands of John Gess, Kriegel and Robert Turley, it being a portion of the land described in the deed from C. C. Downing to Samuel B. Downing dated the 3d day of January, 1881, and recorded in Deed Book 62, page 231, in the Fayette county court clerk's office, and being the entire residue of said land so described that is on the northeast side of said turnpike road except the tract of 25 acres conveyed by Samuel B. Downing and wife to John Gess by deed dated January 3d, 1881, and recorded in the same office in Deed Book 62, page 225."

The judgment describes the land exactly as it is described in the petition, and in the commissioner's report of sale the land is described as follows: "A tract of land in Fayette county, Kentucky, containing 37 acres, bounded by the Richmond turnpike road and the land of Gess, Kriegel and R. Turley, and being a portion of the land described in the deed from C. C. Downing to S. B. Downing dated January 3, 1881, and recorded in Deed Book 62, page 231." It will be observed that the description of the land contained in the commissioner's report is not as full or as accurate as the description contained in the judgment, but it cannot be said that the land sold looking to the judgment and report is not reasonably susceptible of identification by the purchaser. Section 125 of the Civil Code of Practice provides that: "a petition for the recovery of land or for its subjection to a demand of the plaintiff must describe it so that it may be identified," but it has never been held necessary that land sought to be sold should be described by metes and bounds. It is sufficient if the description is such that parties desiring to purchase or purchasing the land can

locate and identify it with reasonable certainty. It is the proper practice to have real estate sought to be sold described in the same way in the petition, judgment, and report of sale, so that there may be no room for doubt or confusion as to the land sought to be sold, and sold under the decree, but in this case the description is not so uncertain or indefinite that the purchaser cannot locate and identify it.

In respect to the exception that the guardian ad litem was appointed for the infants Clay and Dewey Downing before an affidavit was filed, the record discloses the following facts: There were seven infant children, five of them over the age of 14 and two—Clay and Dewey—under the age of 14. Summons was executed in person on the infants over 14, and on Clay and Dewey by delivering to their mother a summons for them—their father being dead. After execution of the summons, and on January 30, 1906, an affidavit in proper form was filed, asking for the appointment of a guardian ad litem for the five infants over 14, and on the same day Mr. James R. Bush, an attorney, was appointed as guardian ad litem for them. Evidently, by oversight, the names of the infants Clay and Dewey were omitted from the affidavit, and the order appointing Mr. Bush guardian ad litem; and without any affidavit being made, an order was entered on the following day appointing Mr. Bush guardian ad litem for the infants Clay and Dewey; on February 16th he filed his report for all the infants, and thereafter judgment was entered. After the exceptions were filed, and before they were disposed of, Mrs. Lizzie Downing, the mother of the infants, tendered her petition showing that on March 28, 1905, she was appointed by the Fayette county court as statutory guardian of all the infants, and setting up that the land was sold for a good price, and asked that the sale be confirmed, and thereafter the court overruled the exceptions, and confirmed the sale.

The Civil Code of Practice, § 38, provides: "No appointment of a guardian ad litem shall be made until the defendant is summoned, or until a person is summoned for him, as authorized by section 52, nor until an affidavit of the plaintiff, or of his attorney, be filed in court, or with the clerk, or presented to the judge during vacation, showing that the defendant has no guardian, curator, nor committee, residing in this state, known to the affiant." This section has been partially construed in three cases. In *McMakin v. Stratton*, 82 Ky. 226, no affidavit was filed before the guardian ad litem was appointed, and this was urged as cause for reversal, but the court held that its absence was not reversible error, as the statutory guardian of the infant was before the court, and therefore the affidavit could not have been made, and the parents of the infant as well as the guardian ad litem made defense for the infant. In *Gardner v. Letcher*, 29 S. W. 868, 16 Ky. Law

Rep. 778, the statutory guardians of the infants were parties to the action, but failed to make defense, and the court appointed a guardian ad litem, who defended for the infants. In this case, as in the *McMakin Case*, no affidavit could have been made, as the infants had a statutory guardian. In *Catlett v. Catlett's Adm'r*, 72 S. W. 781, 24 Ky. Law Rep. 1986, an action to sell land to settle a decedent's estate, the infants were served with process and a guardian ad litem appointed without affidavit. The statutory guardian of the infant purchased the land sold under the decree, although he was not a party to the record. Exceptions were filed to the report of sale by one of the defendant heirs because no affidavit was made before the appointment of the guardian ad litem, and because the land sold at a grossly inadequate price, and it was held that the exceptions should have been sustained, the court evidently being of the opinion that the interest of the infant was prejudiced by the irregularity in the proceedings corroborated by the inadequate price.

This provision requiring an affidavit is intended to protect the interest of the infant by advising the court whether or not there is a statutory guardian, curator, or committee whose duty it is to look after, protect, and represent the infant, and who is presumably better informed about the case than a guardian ad litem would be, and if it appear to the court that there is a statutory guardian, curator, or committee, the court may require him to be made a party to the proceeding. The filing of the affidavit is not a mandatory requirement or a jurisdictional fact, it is merely directory; and, while it is better practice to file the affidavit in all cases where the appointment of a guardian ad litem is asked, the failure to file it will not be cause for reversal, unless it appears that the interest of the infant has been prejudiced. In this case, no one is complaining except the purchaser, and as the absence of the affidavit does not affect the validity of her title, the sale will not be disturbed.

The judgment of the lower court overruling the exceptions is affirmed.

TAYLOR v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 22, 1906.)

1. FORGERY — INDICTMENT — INTENT TO DEFRAUD—ALLEGATION—SUFFICIENCY.

An indictment for forgery of a note which charged that accused forged the name of a third person to the note with intent to defraud a bank, was sufficient without averring of what the accused intended to defraud the bank.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, § 62.]

2. CRIMINAL LAW—ABSENCE OF WITNESS—EXPLANATION—EVIDENCE—ADMISSIBILITY.

On a trial for the forgery of the name of a third person to a note, evidence showing that the third person was absent on account of the feeble condition of her health, and that her

great age prevented her from leaving her home was admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 802, 852.]

3. SAME—ARGUMENT OF COUNSEL—REVIEW—BILL OF EXCEPTIONS.

Where the bill of exceptions does not show any objection to the argument of the prosecuting attorney and does not set forth the argument complained of, the court, on appeal, cannot consider the objection.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2645, 2666, 2819.]

4. SAME—TRIAL—EVIDENCE—ADMISSION OF OTHER CRIME—ADMISSIBILITY.

On a trial for forgery, a letter written by accused in which he substantially admits the charge, is not inadmissible, because it admits another forgery where the reference to the two forgeries are so intermingled as to render it impracticable to submit only so much as relates to the crime charged.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 917.]

5. SAME—PERMITTING JURY TO TAKE PAPERS INTRODUCED IN EVIDENCE.

Cr. Code Prac. § 248, providing that on the jury retiring for deliberation they may take with them papers received as evidence, leaves it in the sound discretion of the trial judge to permit the jury on retiring to take papers introduced as evidence, and the court on a trial for forgery did not abuse its discretion in permitting the jury to take a letter written by accused, and offered in evidence, as an admission of guilt.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2056-2068.]

Appeal from Circuit Court, Boyle County.
"Not to be officially reported."

J. C. Taylor was convicted of forgery, and he appeals. Affirmed.

Rawlings & Voris and Robt. Harding, for appellant.

CARROLL, C. The appellant was convicted of forging the name of Hannah G. Taylor, to a promissory note, payable to the Boyle National Bank. The indictment describes the forged note with sufficient particularity to inform the accused of the offense charged, and with such certainty as to enable the court to pronounce judgment. It charges that he signed and forged the name of Hannah G. Taylor, to the paper, without her consent, knowledge, or authority, and with the intent to defraud the Boyle National Bank. It was not necessary to aver what the accused intended to defraud the bank of. It was sufficient to allege that he forged her signature to the paper with the intent to defraud the bank, and the court did not err in overruling the demurrer. On the trial of the case, the cashier of the bank testified that the accused presented the note signed by himself and Hannah G. Taylor, and believing the signatures to be genuine, he paid to the accused the amount of it, less discount. Sam Minor testified that he was familiar with the handwriting of Hannah G. Taylor, who was not able to appear in court, on account of her feeble condition of her health, and that whilst her name on the note resembled her handwriting, it was not her sig-

nature. James H. Minor produced and read over the objection of the accused, a letter written to him by accused, in which he substantially admitted that he had forged the name of Hannah G. Taylor to the note in question, and also forged names to a note upon which he obtained money from the Citizens' National Bank of Danville. The sheriff testified that he had had for some time a bench warrant for the accused, but was unable to find him, until he was located at Springfield, Ill., where he was arrested and brought back to Kentucky. This was all the evidence introduced for the commonwealth, and was sufficient to take the case to the jury. The accused was the only witness in his own behalf, and said that Hannah G. Taylor signed her name to the note.

Counsel contend that the court erred in permitting the witness Sam Minor to explain why Hannah G. Taylor was not present at the trial of the case, but, in our opinion, this evidence was competent. The accused was indicted for forging her name, and it was proper to show why she was not present. The witness did not state any other fact concerning her absence except that on account of the feeble condition of her health and her great age, she was unable to leave her home and be present at the trial. In this connection, appellant complains of improper argument made by the commonwealth's attorney in respect to the absence of Hannah G. Taylor, but the bill of exceptions does not show any objection on the part of counsel to the argument of the commonwealth's attorney, or the argument complained of, and therefore it cannot be considered. It is also earnestly insisted that serious error was committed in permitting the introduction of the letter written by the accused to James H. Minor. It is urged that this letter, in substance, is not only an admission of his guilt of the crime charged, but also an acknowledgment that he had forged a note and obtained money on it from the Citizens' National Bank, and that this prejudiced the jury against him. It is conceded that this letter was competent evidence, as an admission on his part that he had forged the note for which he was upon trial, but that so much of it as related to the Citizens' National Bank should not have been permitted to go to the jury. When the letter was offered, counsel for appellant objected to the introduction of the whole of it. The reference to the two banks, the cashiers thereof and the notes due to each, together with the incriminating admissions of the accused, in respect to the two forgeries are intermingled throughout the letter, in such a confusing manner as to render it impracticable, if not impossible, to intelligently separate them, and submit to the jury only so much of the letter as related to the crime with which he was charged in the indictment; therefore the trial judge did not err in permitting the en-

fire letter to go to the jury. If the admissions in the letter referring to each bank and note could have been separated, it would have been prejudicial to the accused not to have done so; but, where one charged with crime makes admissions of his guilt, the commonwealth cannot be deprived of this competent evidence merely because he has mingled it in an inseparable manner with other statements that may tend to prove his connection with or commission of other crimes.

After the case was submitted to the jury, upon their request the court allowed the letter, over the objection of the appellant, to be taken to the jury room. Section 248 of the Criminal Code of Practice provides that: "Upon retiring for deliberation, the jury may take with them all papers and other things which have been received as evidence in the cause." This section leaves it in the sound discretion of the trial judge to permit the jury to have papers that have been introduced as evidence, and we are not prepared to say that he abused this discretion in allowing the jury to take this letter.

Not perceiving any errors prejudicial to the substantial rights of the accused, the judgment is affirmed.

TAYLOR v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 22, 1906.)

Appeal from Circuit Court, Boyle County.
"Not to be officially reported."

J. C. Taylor was convicted of forgery, and he appeals. Affirmed.

Rawlings & Voris and Robt. Harding, for appellant.

CARROLL, O. Under an indictment charging him with forging the names of Hannah G. Taylor and W. F. Powers to a promissory note to the Citizens' National Bank of Danville, the appellant was convicted, and appeals.

The evidence in this case and the grounds urged for reversal are substantially the same as those mentioned in the opinion in the case of Taylor v. Commonwealth (this day decided) 92 S. W. 292.

It not appearing that any error prejudicial to the substantial rights of the accused was committed, the judgment is affirmed.

LINDSEY v. HOLLERBACK & MAY CONTRACT CO.

(Court of Appeals of Kentucky. March 29, 1906.)

MASTER AND SERVANT—ASSUMPTION OF RISK.

An employé engaged in removing a dump drove his team hitched to a scraper down a steep place on the dump, pursuant to the order of the employer's agent, who assured him that the place was safe. *Held*, as a matter of law, that he assumed the risk of injury to his team.

Appeal from Circuit Court, Edmonson County.

"Not to be officially reported."

Action by Clement Lindsey against the Hollerback & May Contract Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Milton Clark, for appellant. M. M. Logan, for appellee.

PAYNTER, J. The appellee is a corporation engaged in constructing a lock and dam near Brownsville, and the appellant was employed by it with his team of mules in handling dirt during the construction of the work. There was a dump or large mound of earth, which had been thrown up on the river bank in making the excavation for the lock walls, and the appellee desired to have it removed. The appellee, through its agent, directed the appellant to remove the dirt with his team of mules and scraper. He was driving the mules, and another employé of the appellee was holding the handles of the scraper, when the agent of the appellee ordered him to drive his team hitched to the scraper down a steep place on the dump, and by reason of the steepness the scraper was jerked from the hands of the man who was holding it, without negligence on his part. The scraper struck one of the mules, and lacerated its legs, and caused the injury of which complaint is made. It is averred that the place over which he was ordered to drive was too steep to be perfectly safe; that he made complaint and objection to the agent of the appellee who was then in charge of the work that it was unsafe to drive his team down the dump; that the agent assured him that the place was safe to drive over with his team; that the agent had superior knowledge of the dangerous character of the place over which he was ordered to drive, and he relied upon the assurance of the agent for the safety of his team. The appellant seeks to recover damages for the injuries which his mule sustained. The court sustained a demurrer to the petition, and he refusing to plead further, it was dismissed.

The facts stated above as to the circumstances under which the injury was received are admitted by the demurrer. It is urged that the court properly sustained a demurrer to the petition because the dangerous character of the place was as plain and visible to the appellant as to the agent of the appellee, and, therefore, the former had equal opportunity with the master to know of the danger to be encountered in driving down the dump, and assumed the risk in doing so. For the appellant it is contended that it was a question for the jury to determine whether the appellant had the right to rely upon the assurance of the agent of the appellee that it was safe to drive his team down the dump.

It is the duty of the master to furnish a reasonably safe place for his servant to work.

He is not required to furnish a place that is absolutely safe. Frequently the work which the servant is employed to do is dangerous in itself, and of course the servant assumes the ordinary risks in performing that character of work. If a servant is ordered to do a thing that is obviously dangerous, or so much so that a prudent person would not take the risk of doing it, and the servant does so, and is injured, he is not entitled to recover. *Ross-Paris Co. v. Brown* (Ky.) 90 S. W. 568. It is said in the case of *Wilson v. Chess & Wymond Co.*, 78 S. W. 453, 25 Ky. Law Rep. 1655: "The duty of the master to furnish a safe, or reasonably safe, place in which the laborer may do his work is frequently misunderstood or misapplied. In the first place, the master is not required to furnish an absolutely safe place. If the work is in and of itself dangerous, the master does not insure against such danger. On the contrary, there is nothing better settled than that the servant assumes the ordinary risks and hazards incident to the character of his work. Whatever may be the moral obligation resting upon those who employ people in hazardous work to furnish them the safest possible means to protect them from injury, the law does not forbid a laborer's undertaking a hazardous employment with full knowledge of its dangers, if he wants to. If he does, the law leaves the risk upon him, for he has assumed it." In the case of *Mellott v. Louisville & Nashville R. R. Co.*, 101 Ky. 212, 40 S. W. 696, the court said: "The turn-table was in good working order, every part of it was fully exposed to view, and whatever risk attended its operation was visible. Its movement was slow, the motive power was furnished by him and his fellow servants, but a step was required to place him in absolute safety." It is said in section 326, *Wood on Master and Servant*: "The servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise his own skill and judgment in a measure, and cannot blindly rely upon the skill and care of his master."

While the appellant states the circumstances under which the mule was injured, and alleges that the knowledge of the agent of the appellee as to the danger of performing the work which he was ordered to do was superior to his, yet the averments taken together show to the contrary. The appellant owned the mules, and was evidently familiar with their capacity for going up and down hills and performing work, and the dangers attending the execution of it. The dump was in plain view of him, likewise its declivity, and from the very nature of things he must have had the same means of calculating the danger in the performance of the work assigned him as did the appellee. It seems to us that if there could be a case where the knowledge of the master and servant were exactly the same as to the danger of the work to be performed, this is the case. If there was danger

in driving the mules down the dump with a scraper attached, it was just as obvious to the one as the other. The appellant admits that he knew of the danger; he assumed the risk. It cannot be said in every case the question as to whether the danger was obvious, and whether the servant has a right to rely upon the judgment of the master in the execution of the work assigned him, must be submitted to the jury. There are cases where the facts are admitted, and it would be a question of law for the determination of the court as to whether the danger was obvious, or whether it was so dangerous that a prudent man would not have undertaken it, although ordered to do so by the master. Suppose that when a train was running 25 or 30 miles an hour, and the passenger knew that fact, and the conductor should tell him that he could alight from the train in safety, and he should attempt it and receive injuries, certainly in an action to recover for the injury a court would tell the jury to find for the defendant. Suppose a master would tell a workman to jump from an elevation of 12 or 15 feet, and he should do so, and thereby receive injuries, and a suit was brought to recover for them, a court would tell the jury to find for the defendant, because the danger of making the jump was so obvious that he took the risk himself. Here was a steep bank, a pair of mules with a scraper attached to them was driven down the bank by their owner, and injured; and before starting he was aware of the danger, and, therefore, did it with full knowledge of it. The agent of the appellee did not misrepresent the character of the dump, he did not make a misstatement as to the sharpness of the scraper attached to the mules, nor as to the ability of his employé at the handles to control the scraper. The appellee, with full knowledge of the peril attending his act, must be held to have assumed all the risk of it.

The judgment is affirmed.

WILSON v. TYE.

(Court of Appeals of Kentucky. March 29, 1906.)

1. APPEAL — HARMLESS ERROR — REQUIRING ELECTION.

Requiring contestant in an election contest to elect whether to rely on the allegation in the petition that he was elected to the office, or the allegation that the election was void, is harmless, he having elected to rely on the former and having at the time of the order completed his proof which contained nothing to show that the election was void.

2. ELECTIONS — CONTEST — ELIGIBILITY OF CANDIDATES.

Under Act Oct. 24, 1900 (Ky. St. 1903, § 1596a), repealing the prior election contest law, which expressly authorized the question of the eligibility of the contestee to be passed on, and, in lieu thereof, providing that if it appears that there was such fraud that neither party can be adjudged to have been fairly elected, the court may adjudge that there has been no election, the question of eligibility for the office may not be passed on in an election contest.

Appeal from Circuit Court, Whitley County.
"To be officially reported."

Election contest by C. S. Wilson against Rachel Tye. From an adverse judgment, contestant appeals. Affirmed.

Johnson & Snyder and Greene & Van Winkle, for appellant. Tye, Denham & Jackson, for appellee.

NUNN, J. The appellant and appellee were opposing candidates for the office of county superintendent of common schools for Whitley county, at the November election, 1905. The board of election commissioners for that county canvassed the returns, and found that the appellee had received a majority of votes cast, and the board issued to her a certificate of election. On November 25, 1905, appellant filed a petition, under section 1596a of the Kentucky Statute 1903 and made appellee a defendant, and sought to have the court declare that she was not elected to the office; but that he was. He alleged in substance that she was not eligible or legally qualified to hold and perform the duties of the office, for the reason that she was not 24 years of age, at the time of her pretended election, nor would she be on January 1st, succeeding her pretended election, the time fixed by the statute for her to take the oath and assume the duties of the office. He also alleged that she was ineligible for the reason that she was a woman. He further averred that the ballots furnished by the county clerk used in the election, in the various voting precincts were illegal and void, and for that reason the election should be declared void.

On December 16, 1905, the appellee filed her answer, controverting the petition, and asserted that appellant and the county clerk, an ardent supporter of his, were responsible for the kind of ballots which were used at the election. On December 22, 1905, the appellant filed his reply which completed the pleadings. The appellant completed the taking of his proof, on January 8, 1906. The appellee did not take any testimony. On the 28th of January, 1906, the court made the following order: "This cause having been submitted to the court on the motion of the contestee to require the contestant to elect whether the statements in the petition to the effect that contestant was duly elected to the office of common school superintendent in and for Whitley county, Ky., at the election which was held in said county on the 7th day of November, 1905, shall be stricken therefrom, or as to whether these statements therein to the effect that the election was void shall be stricken therefrom, and the court being advised, sustains the motion, to which the contestant excepts; but, being required to make the election, then and there elected that the statements in the petition to the effect that said election held on the 7th day of November, 1905, was void, shall

be stricken therefrom, which is done, to all of which the contestant excepts." The appellant complains of this action of the court. We are of the opinion that appellant's rights were not prejudiced, by the action of the court in this matter. He had completed his proof before this order was made, and he had introduced no testimony, tending to show that the election was void. On February 3, 1906, the court tried the case, and found that the contestant had not shown himself entitled to the relief sought, and dismissed his petition. After a careful consideration of the former and present statutes upon the subject of contested elections we have arrived at the conclusion that the lower court did not err in dismissing appellant's petition.

Under the provisions of Rev. St. c. 32, art. 7, § 1, subsec. 8, p. 444, Gen. St. c. 33, art. 7, § 1, subsec. 8, p. 520, Ky. St. 1899, § 1581, subsec. 8, those authorized by law to determine the rights of the parties in contested election cases were expressly authorized to pass upon the question as to whether or not the person who had received the certificate of election was eligible or legally qualified to hold the office at the time of the election, or at the time the persons should have been inducted into office; but this provision was repealed by an act of the Legislature, October 24, 1900, and, in lieu thereof, the following provision was inserted: "In case it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery, or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court, subject to revision by appeal, or the Court of Appeals finally may adjudge that there has been no election. In such event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify." Section 1596a of the act of 1900, with all of its subsections, was especially enacted to give the courts the right to try contested election cases, in lieu of board of contest, and it defines the powers of the court and the rules of procedure in the trial thereof; this statute prescribes a special mode of procedure, and the court is compelled to conform to it in the trial of contested elections. It provides a speedy remedy. It prescribes within what time the petition, answer, and reply shall be filed, and within what time each of the parties must take their proof, and it requires both the Circuit and Court of Appeals to hear and determine the case as speedily as possible, giving it preference over all other cases, and then defines how the court shall try it by ascertaining from the record who was elected; but if it appeared that there had been such fraud, intimidation, bribery, or violence in the conduct of the election that neither the contestant nor contestee could be adjudged to have been fairly elected, the court, in such event, should adjudge that there had been no election.

In our opinion when the General Assembly enacted this statute, in lieu of the former statute, with reference to the trial of contested elections, it was intended to relegate the question of eligibility or legal qualifications for the office to a different or other mode of procedure. Consequently the lower court was without power in this action to pass upon the eligibility of the contestee to the office in contest.

For these reasons, the judgment of the lower court is affirmed.

DRAKE et al. v. HOLBROOK.

(Court of Appeals of Kentucky. March 21, 1906.)

1. APPEAL—REVIEW—DISCRETION—CHANGE OF VENUE.

Under Ky. St. 1903, § 1096, making the question of a change of venue a matter of the discretion of the trial court, a denial of a change of venue will not be reviewed except in case of an abuse of discretion.

2. SAME—SUBSEQUENT APPEAL—QUESTIONS CONCLUDED.

Where the sufficiency of an answer was not raised on the first appeal, and the appellate court in effect held that the answer was sufficient, the question is concluded, and will not be considered when raised on a subsequent appeal.

3. FRAUD—MEASURE OF DAMAGES—DECEIT—SALE OF STOCK.

In an action for damages for deceit in the sale of stock where the false representations alleged to have been made were only as to the debts of the corporation, the measure of damages was the difference between the value of the stock of the company in its actual financial condition at the time and its value had the company been in the condition represented.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 60-62.]

4. SAME—INSTRUCTIONS.

In an action for damages for fraud in the sale to plaintiff of corporate stock, the false representations alleged to have been made were only as to the debts of the company. By the first instruction the court fully submitted to the jury the question as to whether defendant had made the false representations, and correctly stated the rule for the measure of damages, if the jury found plaintiffs were entitled to recover. By the second instruction, the court told the jury that defendant was presumed to know the financial condition of the corporation because he was secretary and treasurer of it, and it was his duty to give a correct statement as to the condition of the company, if requested to do so. By the third instruction, the court told the jury to find for defendant, if he did not make any false representations as to the financial condition of the company, or if plaintiffs bought the stock on their own investigation and judgment. Held, that such instructions sufficiently submitted the issues to the jury.

5. TRIAL—INSTRUCTIONS—PARTICULAR EVIDENCE.

An instruction inviting undue attention to a particular part of the evidence tending to support plaintiff's claim is improper.

6. APPEAL—REVIEW—VERDICT.

Where there was a conflict in the evidence, the verdict will not be interfered with.

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by W. P. Drake and others against Rowan Holbrook. From a judgment for defendant, plaintiffs appeal. Affirmed.

Little & Slack and Heavrin & Woodward, for appellants. W. S. Pryor and Glenn & Ringo, for appellee.

PAYNTER, J. This is the third appeal in this case. Drake v. Holbrook, 66 S. W. 512, 23 Ky. Law Rep. 1941; Same v. Same, 78 S. W. 158, 25 Ky. Law Rep. 1491. It is an action for damages arising from the sale of stock in a coal mine where the false representations alleged to have been made were only as to the debts of the coal company. The court held that the intrinsic value of the property had no relevancy to the action, and that the measure of damages is the difference between the value of the stock of the company in its actual financial condition at the time, and its value had the company been in the condition represented to be. The appellants contended that many errors were committed to their prejudice on the trial of the case, some of which alleged errors will be referred to in this opinion.

The appellant moved the court for a change of venue. Evidence was introduced by both parties. The question of the change of venue is addressed to the sound discretion of the trial court. Section 1096, Ky. St. 1903. A careful reading of the evidence convinces us that it did not abuse its discretion, but properly overruled the motion for a change of venue. It is urged that the answer did not deny the essential averments of the petition, and therefore the court erred in overruling appellant's motion for a judgment, notwithstanding the verdict. This question is concluded by the former appeals. If the answer was not good, that question should have been made on the former appeals. This court in effect has held the answer sufficient. Besides the substance of the averments of the petition as to fraudulent representations were repeated in an amended petition which was filed on the return of the case to the lower court after the last appeal, and an amended answer was filed thereto, which fully controverted the material averments which the amended petition contained, and thus an issue was formed and tried.

By the first instruction the court fully submitted to the jury the question as to whether the appellee had made the false representations as to the financial condition of the company, etc., and correctly stated the rule for the measure of damages, if the jury found the appellants were entitled to recover. By the second instruction the court told the jury that the appellee was presumed to know the financial condition of the coal company, because he was secretary and treasurer of it and it was his duty to give a correct statement as to the condition of the company, if requested to do so. By the third instruction the court told the jury to find

for appellee, if he did not make any false representations as to the financial condition of the company or if appellants bought the stock on their own investigation and judgment. We think these instructions sufficiently submitted the issues to the jury. The court did not err in failing to give an instruction as to the alleged representations by Foster. The evidence as to the Foster statement, if it did anything, tended to show that Holbrook made representations as to the financial condition of the company, and an instruction upon that subject would have invited undue attention to a particular part of the evidence tending to support appellant's claim. We have examined the questions as to the admission and rejection of testimony, and we have found no error committed by the court, which was prejudicial to the rights of the appellants. A reversal is sought, because the verdict was contrary to the evidence. There was a conflict in the evidence, and it was the province of the jury to determine the weight and effect to be given to it.

We do not think that the case should be reversed for the alleged misconduct of the attorney for the appellee.

The judgment is affirmed.

SKELTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 22, 1906.)

1. INSURANCE—AGENTS—COLLECTING DUES WITHOUT LICENSE—NATURE OF COMPANY.

A foreign corporation which issues certificates of membership amounting to a contract of life insurance, and employs agents to obtain members who are not required to be attached to a lodge to be insured, though it be an assessment or co-operative insurance company, as defined by Ky. St. 1903, § 664, is a foreign insurance company, within section 633, subjecting to a penalty, an agent of a foreign insurance company who collects insurance dues for it without first obtaining a license.

2. SAME—EVIDENCE—ADMISSIBILITY.

In a prosecution for collecting insurance dues without a license where the defense was as to the character of the association, evidence that various persons had obtained insurance from the association through the agent without becoming members of any lodge is admissible to show the association's method of business, as carried on by the agent with its approval, and that lodge membership was not essential to insurance therein.

3. INDICTMENT—VARIANCE.

An indictment charged defendant with collecting insurance dues without a license from Mrs. "Kate" H. The evidence showed the dues to have been collected from Mrs. "A. E." H.; but there was no controversy as to identity, and no attempt to show that the two names did not represent the same person. *Held*, that the variance was not fatal.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

John W. Skelton was convicted of soliciting insurance without a license, and he appeals. Affirmed.

Campbell & Campbell, for appellant.

SETTLE, J. Appellant, John W. Skelton, was indicted by the grand jury of McCracken county for acting as "agent in this state for the American Benevolent Association, of St. Louis, Mo., a foreign corporation doing a life, accident, and sick benefit insurance business in this state without first procuring and having a license from the insurance commissioner of Kentucky to act as such agent, in that he did aid and assist said association in the transaction of its insurance business, in collecting and receiving dues and premiums from Mrs. Kate Harvey on a policy of insurance issued by said association to her, against the peace," etc. Appellant, by his consent, and that of the commonwealth's attorney, was tried under the indictment by the court without the intervention of a jury, found guilty of the offense charged, and his punishment fixed at a fine of \$51, for which, and the costs of the prosecution, judgment was duly entered against him, and from that judgment he has appealed.

It is not denied by appellant that he was acting as agent of the foreign insurance company, or association named in the indictment, or claimed by him that he had a license from the state insurance commissioner to act as such agent; but it is contended by him, and such was his defense in the lower court, that the company or association in question is merely a benevolent association of fraternal character, and though it makes contracts of insurance, it only does so with its lodge members, and its business of insuring them is carried on by its agents appointed to organize local lodges of the society, and that for these reasons no license is required to entitle its agents to do business in this state. In *Sims v. Commonwealth*, 114 Ky. 827, 71 S. W. 929, every question presented by the record in this case, save one, was fully considered and decided by this court. The one question raised in this case and not decided in that will be considered further on in this opinion. The society represented by Sims in the case, supra, which was called the "National Industrial Benevolent Endowment Company of Lynchburg, Va.," was precisely such an association as the one represented by appellant, and conducted its business of insurance in substantially the same way. In that case the same defense was interposed that was made in this, and it was held in that case as in the case of *United Order of the Golden Supreme Commandery of United Order of Golden Cross of the World v. Hughes*, 114 Ky. 175, 70 S. W. 405, that the company was an "assessment or co-operative company" declared by section 664 Ky. St. 1903, to be an insurance company on the co-operative or assessment plan, although it had its lodges in various localities.

It appears from the evidence in this case that numerous persons have been insured by appellant's company who never became members of the lodge in Paducah, or elsewhere; that such of its members as belong to the

lodge joined it after they were insured; and that lodge membership is not really necessary to entitle one to avail himself of the insurance offered by the company. Indeed, the one policy holder named in the indictment, Mrs. Harvey, did not become a member of a lodge until after the prosecution against appellant was instituted, and more than two years after she was insured by him as agent. It was not, however, for issuing to her the policy of insurance that appellant was indicted, but for collecting and receiving, within a year before the finding of the indictment, from her, for the insurance company of which he was agent, dues and premiums on such policy. In view of the evidence presented by the record we are constrained to say in this case as was said in *Sims v. Commonwealth*, supra: "Although appellant's company may be deemed an assessment or co-operative insurance company, as defined in section 664 of the statute, that fact will not relieve him from the penalty imposed by the judgment of the lower court, for it is, beyond doubt, a foreign corporation, and in law and in fact an insurance company, he was required by section 633 of the statute, supra, to obtain of the insurance commissioner a license to represent it as agent before transacting any business for the company in this state."

It is complained by appellant that the lower court erred to his prejudice in permitting various persons to testify as witnesses for the commonwealth that they had obtained from appellant's insurance association, through him as agent, insurance such as its charter allows, without becoming members of the local, or any lodge of the association. We think this testimony was competent, for the purpose of showing the association's methods of business, to prove that appellant, as its agent, conducted its business by those methods with its approval, and that lodge membership was not essential to the right to insure with the association. Finally it is insisted for appellant (and this is the only question raised in the case at bar that was not settled in the *Sims* Case) that as the only person the indictment charges him with collecting dues and premiums from on a policy of insurance for the association as agent is named therein as Mrs. "Kate Harvey," and the witness by whom the commonwealth proved the acts of appellant constituting the offense charged was Mrs. A. E. Harvey, this difference in name was such a variance between the allegations of the indictment and proof as authorized his acquittal. We are of opinion that this contention is without merit. The gravamen of the offense is the doing of insurance business in this state by appellant as agent of a foreign insurance company without license. Perhaps the indictment would have been sufficient without naming any person to whom insurance for the company was granted. However, that question is not before us; hence it is not de-

cided. But no question was raised upon the trial as to the identity of Mrs. A. E. Harvey with the Mrs. Kate Harvey, named in the indictment as the person of whom appellant, as agent of the foreign insurance company, collected dues and premiums on a policy issued her by that company, though, when upon the witness stand, she was subjected to a lengthy examination and cross-examination touching her insurance transactions with appellant as agent. We take it that her first, or Christian name, is Kate, and that the letters A. E. are the initials of her husband's Christian name. At any rate she is Mrs. Harvey, and it was shown by her testimony, and is not denied by appellant, that she had been insured by his company under a policy delivered to her by him as agent, and that he had repeatedly collected of her dues and premiums thereon, and he did not show, or attempt to prove that any other Mrs. Harvey had been insured by the company of which he is agent. The alleged variance was therefore not material.

In *Kriel v. Commonwealth*, 68 Ky. 362, the accused was indicted for killing Barbara Kriel, his wife, the evidence showed that her name was Margaret Kriel. In the lower court no objection to the evidence was made on that account, and no motion made to withdraw the case from the jury. In passing upon the error in the indictment as to the name of the wife, this court held that after conviction, the court, upon appeal, could not suppose that the misdescription of her given name could have misled, or in any manner have prevented the accused from having a fair trial. *Robinson v. Commonwealth*, 88 Ky. 386, 11 S. W. 210.

No objection was made by appellant in the court below to the testimony of Mrs. Harvey, nor did he move to quash the indictment, withdraw the case, or discharge the jury.

Being of opinion that appellant had a fair trial, the judgment is affirmed.

MOBILE & O. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 22, 1906.)

1. RAILROADS — CROSSING SIGNALS — VIOLATION OF STATUTE—CRIMINAL PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution against a railroad company for violation of Ky. St. 1903, § 786, requiring certain signals to be given at crossings, evidence held sufficient to support a conviction.

2. CRIMINAL LAW—APPEAL—WAIVER OF ERROR—ORAL INSTRUCTIONS.

Under Cr. Code Prac. § 225, requiring instructions to be in writing, defendant in a prosecution for a misdemeanor cannot complain on appeal of the fact that oral instructions were given where no objection was made, and this is true, though the failure to instruct in writing was made a ground for new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2646.]

Appeal from Circuit Court, Fulton County.
"To be officially reported."

The Mobile & Ohio Railroad Company was convicted of violating Ky. St. 1903, § 786, requiring railroads to give signals at crossings, and appeals. Affirmed.

E. T. Bullock and Lansden & Leek, for appellant.

SETTLE, J. The appellant, Mobile & Ohio Railroad Company, was indicted and tried in the lower court for failing to sound the whistle or ring the bell of the locomotive engine of one of its passenger trains in approaching and passing the place where a public highway, known as the "state road," crosses its railroad at or near Cayce, Fulton county; the crossing being outside of an incorporated city or town. The trial resulted in appellant's conviction, and the fixing of its punishment by verdict of the jury, and judgment of the court, and a fine of \$100. Appellant filed motion and grounds for a new trial, which the court overruled, and it has appealed.

The indictment was found under section 786, Ky. St. 1903, which provides: "Every company shall provide each locomotive engine passing upon its road with a bell of ordinary size, and steam whistle, and such bell shall be rung or whistle sounded outside of incorporated cities and towns at a distance of at least fifty rods from the place where the road crosses, upon the same level, any highway or crossing, at which a sign board is required to be maintained, and such bell shall be rung or whistle sounded continually or alternately until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require." Section 798 provides the penalty for a violation of the provisions of section 786, which is a fine of not less than \$100, nor more than \$500.

It is insisted for appellant that the judgment appealed from should be reversed upon two grounds: (1) Because there was no evidence to support the verdict; (2) because the court instructed the jury orally, instead of in writing, as provided by section 225, Cr. Code Prac.

As to the first contention, it is sufficient to say that the seven witnesses introduced by the commonwealth testified in substance that there was a long blast from the engine whistle as the train came in sight, followed by two shorter blasts at the signal post, the last being the signal for stopping at the Cayce station; but there were no signals from the train, either by the blowing of the whistle or ringing the bell, for the public crossing which is 200 yards south of the Cayce depot, though the statute, supra, made it the duty of those in charge of the train to ring the bell or sound the whistle at a distance of at least 50 rods from the crossing and to continuously or alternately ring the one or sound the other until the en-

gine reached the crossing. It is true that much of this testimony was of a negative character; that is, to the effect that some of the witnesses did not hear any ringing of the bell or blowing of the whistle as the train approached the crossing, but others of them were more positive in their statements as to the absence of these signals. It cannot be denied that each of the seven commonwealth's witnesses was favorably situated to see the train, watch its movements, and hear its signals from the time it first whistled for the station until it reached the crossing. One of them was looking for and watching the train with the view of becoming a passenger on it from Cayce, and two others had the horse they were driving killed and their vehicles broken in a collision with the train, which ran into them at the crossing.

Appellant also introduced seven witnesses upon the trial, including the conductor, engineer, and fireman in charge of the train, and many of these, especially the trainmen, testified not only as to the signals given for the Cayce station, but, in addition, that the train whistled for the public crossing, and that the engine bell was rung, not only 50 rods, but at a greater distance, from and before reaching the crossing, and that it continuously rang until the crossing was passed. It is likewise true that appellant's witnesses were also advantageously placed for seeing and hearing the train. It is quite apparent that the evidence was very conflicting. Indeed, we have rarely found evidence more so; but, while this is true, it cannot fairly be claimed that there was no evidence to support the verdict. The jury could not have been actuated by either passion or prejudice in reaching a verdict, for the fine assessed against appellant is the lowest that can be inflicted under the statute. Manifestly the verdict cannot be disturbed upon the ground of a failure of proof.

The second contention of appellant does not meet with our concurrence. It is true that section 225, Cr. Code Prac., provides that in criminal and penal cases instructions that are given by the trial court must be in writing, but in a prosecution for misdemeanor many rights may be waived by a defendant which he would not be allowed to waive in a prosecution for a felony. For instance, upon trial for a misdemeanor, the defendant may consent to be tried by the court without the intervention of a jury, or he may consent to be tried by a jury composed of less than 12 men, or with, or without, his consent, be tried and convicted in his absence. A waiver may also arise from a failure to object. In this way errors of law that are committed by a trial court may often be waived. The record in the case at bar shows that the trial judge, after the evidence was concluded, orally instructed the jury as to the law of the case, but it does not show that he was requested by counsel

for appellant to instruct in writing, or that counsel objected to the oral instructions. However, we do not mean to say that a request from counsel for written instructions was necessary, but do hold that the failure of appellant's counsel to object to the oral instructions, and to have the record show that the action of the court in giving oral, instead of written, instructions was excepted to by appellant, estops it from objecting in this court that the instructions were not in writing. *Herr v. Com.*, 28 Ky. Law. Rep. 1131, 91 S. W. 666.

The fact that the error of the lower court in failing to instruct the jury in writing was made a ground for a new trial will not authorize a review of the question by this court in the absence of an exception taken at the time the error was committed and then entered of record. Nor would the lower court have been authorized to grant appellant a new trial because of the error in question, as complaint of it was made for the first time in the motion for a new trial. *Cr. Code Prac. § 281; Kennedy v. Com.*, 14 Bush, 340; *Com. v. Simons*, 100 Ky. 164, 37 S. W. 949.

Being unable to find in the record any error that was prejudicial to the substantial rights of appellant, the judgment is affirmed.

McGREW'S EX'R v. O'DONNELL

†Court of Appeals of Kentucky. March 22, 1906.)

1. EXECUTORS—LIABILITIES OF ESTATE—PERSONAL SERVICES TO DECEDENT — ACTION — PLEADING.

In an action against an executor for personal services rendered to decedent, allegations as to the amount of decedent's estate were immaterial, and should have been stricken out on motion.

2. LIMITATION OF ACTIONS—REVIVING DEBT—PROMISE TO PAY.

To cut off the running of the statute of limitations there must be a clear and express promise to pay the claim to which the statute applies, and loose declarations are insufficient.

[Ed. Note.—For cases in point, see vol. 33, *Cent. Dig. Limitation of Actions*, §§ 599, 600.]

3. TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

In an action against an executor for personal services rendered to decedent, in which defendant pleaded as a counterclaim certain notes given by plaintiff to decedent, an instruction that, if the jury found for plaintiff they must deduct the sum due on the notes, was erroneous, because assuming that the amount, if any, due plaintiff for her services, was greater than the balance due on the notes.

4. WORK AND LABOR—MEASURE OF RECOVERY.

In an action for personal services, without any contract as to the amount of compensation, plaintiff is entitled to recover the reasonable value of the services rendered, and not such a sum as will reasonably compensate her for the services.

[Ed. Note.—For cases in point, see vol. 50, *Cent. Dig. Work and Labor*, § 56.]

5. SAME—INSTRUCTIONS.

In an action for personal services, an instruction that if the jury believed that plaintiff

was employed "in the years" from December 1, 1897, to December 1, 1902, or "either of them," to perform labor, etc., plaintiff was entitled to recover, should have been modified by omitting the words "in the years," and substituting the phrase "or any part of such time," for the words "or either of them."

6. SAME—PROMISE TO GIVE PROPERTY—EVIDENCE.

In an action for personal services, proof of a statement by the person to whom the services were rendered with reference to her intention to give plaintiff certain property, could not be considered in fixing the value of plaintiff's services but only in determining whether the services were rendered upon the understanding that they were to be paid for.

7. EXECUTORS — ACTION — EVIDENCE—ADMISSIBILITY.

In an action against an executor for personal services rendered decedent, evidence of appraisers as to what they found in the kitchen and larder something like a month after decedent died, was not admissible.

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Action by Annie O'Donnell against one Hammond. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

T. L. Edelen, B. H. Young, Frank Chinn, and Stuart Chevalier, for appellant. John B. Lindsey, for appellee.

HOBSON, C. J. Mrs. Susan McGrew having died testate a resident of Frankfort on December 3, 1902, appellant, Hammond, qualified as the executor of her will. Appellee, Annie O'Donnell, who was a great-niece of Mrs. McGrew, filed this suit against the executor to recover for personal services rendered by her to her aunt for six years prior to her death, at the rate of \$1,000 a year. Mrs. McGrew held on Mrs. O'Donnell at her death two notes which with the credits on them read as follows:

"Frankfort, Kentucky.

"I this 14th day of October borrow from my aunt Mrs. Susan McGrew Five Hundred Dollars at six per cent. interest to be paid back when she calls for it.

"Annie O'Donnell.

"Interest paid April 7, 1902, \$15.00.

"Interest paid Oct. 1, 1902, \$15.00."

"Frankfort, Kentucky.

"I this 28th day of December, 1899 borrow from Mrs. Susan McGrew Five Hundred Dollars at six per cent. interest, to be paid back on time.

"Annie Lee O'Donnell.

"Paid of principal by cash, \$30.00, Feb. 21, 1900.

"Paid of principal by cash, \$20.00, June 1, 1900.

"Interest June, \$15.00.

"Interest Dec., \$13.50.

"1901.

"Interest June, \$13.50.

"Interest Dec., \$13.50.

"Interest June, \$13.50."

The executor by his answer denied the allegations of the petition and pleaded the

notes as a set-off, praying judgment therefor. On final trial there was a verdict and judgment in favor of the plaintiff for the sum of \$3,500 subject to a credit of the amount of the notes, and from this judgment the executor appeals.

The plaintiff alleged in her petition that there came to the hands of the executor real and personal estate of the value of more than \$60,000, all or the greater part of which was yet in his hands, and that he had then in his hands at least \$37,000 of personal estate of the decedent. The defendant moved to strike this out. The court overruled the motion. This was error. The plaintiff can only recover what her services were reasonably worth and it is immaterial what estate the testatrix left or how much was in the executor's hands. The criterion for valuing personal services is the reasonable value of the services and not the amount of the estate of the defendant. The jury had no right to take such a matter into consideration and it should have been eliminated from the case. Appellant insists that a peremptory instruction should have been given in his behalf on the evidence for the plaintiff. He relies upon the rule so often laid down by this Court that as between relatives who are members of the family of the deceased services will be presumed to be gratuitous and will not be allowed to be recovered for without clear and decisive proof that they were rendered with the expectation and understanding that they were to be paid for. But in this case Mrs. O'Donnell was a married woman living some distance from her aunt, and there was sufficient proof to go to the jury to the effect that both she and Mrs. McGrew understood and intended that her services were to be paid for. The court gave the jury this instruction: "If the jury believe from the evidence that the plaintiff Annie O'Donnell was employed by Susan McGrew [in the years] from December 1, 1897, to December 1, 1902, or either of them to perform labor and do work as an agent in the management, repairing, and renting her houses, and that said Susan McGrew also employed said Annie O'Donnell to perform services of a menial nature, in rendering personal services to said Susan McGrew, and that both Mrs. McGrew and Mrs. O'Donnell understood and expected that Mrs. O'Donnell, the plaintiff, should be compensated for all such services as above set out then they should find for the plaintiff in such sum as will reasonably compensate said plaintiff for the services so rendered, if any, not to exceed \$5,000, the amount claimed in the petition, and from whatever sum they find, if any, they must deduct the sum of \$1,028.75, the amount due the estate of Susan McGrew from plaintiff on the two promissory notes for \$500 each, and the interest to December 24, 1903."

The court properly confined the recovery to five years before the death of the testatrix.

To cut off the running of the statute there must be a clear and express promise to pay the claim to which the statute applies. Loose declarations are insufficient. The proof here was insufficient to warrant a recovery for more than five years and the court properly so held. He also properly instructed the jury that they should not find for the plaintiff for any services which were rendered without expectation of compensation. But the instruction given is prejudicial to appellant in that it assumes that the amount of plaintiff's services was more than the balance due on the notes. It was also prejudicial in directing the jury to find for the plaintiff such sum as will reasonably compensate plaintiff for the services rendered. There was proof tending to show that Mrs. O'Donnell neglected her own family and household duties to attend to her aunt. What would compensate her for the self-sacrifice involved is not the question to be tried. She is only entitled to the reasonable and fair value of the services rendered. In lieu of the latter part of this instruction following the word "then" the court should have told the jury that they should allow the plaintiff the fair and reasonable value of the services so rendered in so far as they had not been paid for and that they should allow the defendant on his set-off the amount of the two notes \$1,028.75, and subtract one amount from the other and find a verdict for the party entitled thereto as the case may be. The words "in the years" which we have placed in brackets should be omitted, and the words "or any part of said time" should be substituted for the words "or either of them."

The court should also instruct the jury that the proof as to the statements made by Mrs. McGrew with reference to her intention to give the plaintiff either the house and lot where she lived or the Graham property was not to be considered in fixing the value of plaintiff's services, but only in determining whether the services were rendered upon the understanding and expectation of Mrs. McGrew and Mrs. O'Donnell that they were to be paid for. The fact that appellee executed the notes and made the payments on them as shown is not easily reconciled with the claim now presented, but this is a question for the jury on all the evidence. There is proof in the record fixing the value of appellee's services on the basis of what a trained nurse would charge, but the proof is so indefinite as to what part of the time the testatrix needed a nurse that this evidence does not seem to us of much value. Aside from this testimony there is little in the record which would justify a verdict for anything like the amount found by the jury. The evidence of the two appraisers as to what they found in the kitchen and larder on December 31st should not have been admitted. Mrs. McGrew was sick some time before she died, and that provisions were on hand something

like a month after she died threw no light on the case. Upon the whole record we conclude that a new trial should be granted.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

TINGLE v. KELLY.

(Court of Appeals of Kentucky. March 23, 1906.)

1. SALES—REMEDY OF BUYER—ACTION FOR BREACH OF CONTRACT.

A contract for the sale of a crop of tobacco in the barn of the seller fixed the price per pound and the time for delivery. The number of pounds was not ascertained. *Held*, that the title did not pass to the buyer, and his remedy, on the failure of the seller to deliver, was an action for breach of contract, and not one for the recovery of the tobacco.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 524, 525, 1140, 1141.]

2. SAME—NONCOMPLIANCE WITH CONTRACT BY SELLER—ACTION FOR BREACH—EVIDENCE.

In an action for breach of contract to sell, evidence that a third person with whom the buyer had agreed to sell the same goods retained a specified sum to cover his damages by reason of the failure to deliver was inadmissible.

3. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The error in admitting evidence, in an action for breach of contract to sell, that a third person with whom the buyer had agreed to sell the same goods retained a specified sum as damages for failure to receive the goods, was harmless, where the court charged that the jury should not consider the evidence as establishing the amount of damages to which the buyer was entitled.

4. EVIDENCE—ADMISSIONS.

Where, in an action for breach of contract to sell a crop of tobacco, the amount thereof was in issue, a forthcoming bond executed by the seller in a prior unsuccessful attachment suit brought by the buyer for the recovery of the tobacco, and which stated the amount of the tobacco, was admissible as against the seller, since, under Civ. Code Prac. §§ 215, 258, he could have availed himself of an appraisal before giving the bond.

Appeal from Circuit Court, Henry County.

"Not to be officially reported."

Action by Leonard Kelly against S. V. Tingle. From a judgment for plaintiff, defendant appeals. Affirmed.

H. Kirby Bourne and Moody & Barbour, for appellant. John D. Carroll, for appellee.

BARKER, J. This is an action for breach of contract in failing to deliver a crop of tobacco according to the terms of the sale, which took place between appellant and appellee. The appellee, Leonard Kelly, in April, 1904, purchased of S. V. Tingle, the appellant, his crop of tobacco of the year before, which was then in his barn on his farm in Henry county, Ky., for the price of 8½ cents per pound, to be delivered on the 1st day of May, 1904, at Lockport, Ky. The precise number of pounds of the tobacco was not then known, although estimated to be somewhere in the neighborhood of 12,000 pounds. Afterwards the price of tobacco

advanced almost phenomenally, and, as a result, Kelly resold the crop of Tingle, together with a large quantity of other tobacco, to Mulcahy, Peak & Co. for 14 cents per pound, and the latter shortly thereafter resold it at 18 cents per pound. Tingle became very much dissatisfied with his contract of sale to Kelly, and undertook to persuade him to rescind it and release him, urging, as was apparent, that he would lose a great deal of money by delivering his crop at the agreed price of 8½ cents per pound. Kelly agreed to relieve Tingle of the contract upon the payment of \$600, for which Tingle then delivered him his check, conditioned upon Kelly's being able to secure a similar release from his contract of sale to Mulcahy, Peak & Co.; and, in order to save himself from the consequences of releasing Tingle and failing to obtain a release from Mulcahy, Peak & Co., he drew up the following contract, which both parties then and there signed: "Franklinton, May 3, 1904." "Received of Sil Tingle \$600, payment on tobacco which had been contracted for; and it is hereby agreed that, should any further trouble occur about said tobacco, Sil Tingle is to deliver said tobacco as first agreed, and the said Leonard Kelly agrees to refund said \$600 to Sil Tingle." Afterwards Kelly ascertained that he could not obtain a release from his vendees, Mulcahy, Peak & Co., of which he informed Tingle, delivering him back his check, and demanding that he fulfill his contract by the delivery of the tobacco, according to the original agreement. This Tingle refused to do, whereupon Kelly brought a suit for the recovery of the tobacco, claiming title to it under his purchase, and, as an ancillary remedy, took out a specific attachment under the provisions of article 3, title 8, Civ. Code Prac. The court, in issuing the attachment prayed for in the case, provided that the defendant Tingle should be permitted to retain the property upon giving bond in the sum of \$3,000, under section 252 of the Civil Code of Practice. This forthcoming bond was executed by Tingle, who retained the tobacco, shipped it to Louisville, and sold it in violation of his contract with Kelly. Subsequently, upon motion, the court discharged the attachment, very properly holding that under the contract the title to the property did not pass to Kelly, and that his remedy, if any, was not by recovery of the specific property, but by an action for breach of contract.

Afterwards appellee instituted this action in the Henry circuit court, against appellant, setting up the contract of sale, its breach, and alleging his damages to be \$1,380. The appellant answered denying some of the allegations of the petition, and pleading that the contract of sale was void, because made on Sunday, and also that he had been released by the contract heretofore set out. Appellee controverted the fact that the con-

tract was made on Sunday, and pleaded affirmatively that the contract between him and Tingle, under which the latter delivered to him his check for \$600, was conditioned upon his ability to secure a release from his contract of sale to Mulcahy, Peak & Co.; that this condition was impossible, and he had returned the check to Tingle and demanded a compliance with the terms of the original contract. A denial of this affirmative matter completed the issues between the parties. A trial resulted in a judgment in favor of the appellee (plaintiff) for \$1,000, to test the merits of which this appeal is prosecuted.

Appellant seems to have abandoned his defense that the contract of purchase was invalid because made on Sunday, or that he had been released from his contract of sale by the conditional contract, *supra*, as he offered no instructions based on either of these hypotheses, and the court gave none. The case evidently went off on the question of the amount of damages to which appellee was entitled. There is no complaint, in the brief of appellant, of the instructions given by the court, but two errors being seriously urged.

The first is that the court allowed Kelly to testify that when he came to settle with Mulcahy, Peak & Co. for the tobacco he had sold them, they retained a thousand dollars to cover the damages accruing to them by reason of the failure of Kelly to deliver the tobacco he had purchased from Tingle, and which the latter had refused to deliver. Undoubtedly, this would have been prejudicial error, but for the fact that the court told the jury that they must consider this evidence in nowise as establishing the amount of damages to which the plaintiff Kelly was entitled, if he was entitled to any, but merely as conducing to show, if it did show, that Kelly could not get a release from his vendees Mulcahy, Peak & Co., and that the condition upon which appellee's release of Tingle was predicated had not happened. We are inclined to the opinion that this could have been effected just as well by leaving out the amount retained. It seems to us that it added nothing to the strength of Kelly's testimony—that he could not obtain a release from Mulcahy, Peak & Co.—for him to state the precise sum they retained to cover their damages by reason of his failure to deliver Tingle's tobacco; but we are also of opinion that this incompetent testimony was so hedged about by what the court said to the jury on the subject of its admission, that it was not prejudicial to him.

The second error relied upon is that the court allowed the appellee to read to the jury the pleadings and procedure in the case for the specific recovery of the tobacco. As appellee was defeated in that action, it could not have been detrimental to the interest

of the victor for the jury to know that he had won a branch of the case, except in one particular, which is pressed upon our attention with great force by the appellant. One of the issues in the case at bar was the exact amount of tobacco which Tingle should have delivered to Kelly under his contract of sale; Kelly claiming 12,000 pounds, and Tingle insisting on considerably less. The forthcoming bond executed by Tingle, in order to retain the tobacco, is as follows: "The Commonwealth of Kentucky, Henry Circuit Court. Sylvanus Tingle, principal, and Wm. Green, R. L. Robertson, Amos Tingle, sureties, we do bind ourselves in the sum of (\$3,000) three thousand dollars, that the defendant Tingle will perform the judgment of the court in this action and will have the tobacco in his possession, to wit, 12,000, or its value, forthcoming and subject to the order of the court." Appellant claims he executed this bond because it was necessary for him to do so in order to retain possession of his tobacco, and that he ought not to be bound by the recitation in the bond which he was obliged either to execute or lose possession of his property. The order of the court says nothing about the number of pounds of tobacco, and the affidavit for the attachment describes it as "about 12,000 pounds," whereas the bond which appellant voluntarily signed described the property as "the tobacco in his possession, to wit, 12,000, or its value, forthcoming and subject to the order of the court." If there were not 12,000 pounds of tobacco, this could have been easily corrected by appellant, and if the bond was for too great a sum, then he could have had the property appraised, and executed bond for a less sum.

Section 258 of the Civil Code of Practice, concerning attachments, provides: "The provisions of the first article of this chapter, not inconsistent with, nor applicable to, the foregoing sections of this article, shall regulate the proceedings in cases of attachments against specific property." Section 215: "For the purpose of taking this bond, the sheriff shall cause the property to be appraised by three disinterested housekeepers, to be selected and sworn by him to make a fair appraisal, and shall indorse their appraisal on the order of attachment." Clearly, if appellant believed the forthcoming bond provided for in the court's order for the attachment was for too great a sum, he could have availed himself of the privilege of the appraisal provided for in section 215. The fact that he did not do so is, at least, some evidence that he thought there were 12,000 pounds of tobacco worth \$3,000, and to the benefit of his opinion on that occasion the appellee was entitled upon the trial of this case.

Perceiving no substantial error in the record, the judgment is affirmed.

**SOUTH COVINGTON & C. ST. RY. CO.
v. PHYSIOC.**

(Court of Appeals of Kentucky. March 23, 1906.)

CARRIERS — STREET RAILWAYS — INJURIES TO PASSENGER — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

Where plaintiff boarded a crowded street car, and stood on the steps of the platform thereof while the same was running rapidly and approaching a sharp curve, of whose existence plaintiff had knowledge, it was contributory negligence on his part to release, for the purpose of paying his fare, his hold on the handhold, precluding him from maintaining an action for injuries received through being thrown from the platform as the car rounded the curve.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1372, 1379.]

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by William B. Physioc against the South Covington & Cincinnati Street Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

L. J. Crawford, for appellant. Thos. L. Michie and Threlkeld & Threlkeld, for appellee.

BARKER, J. On the 24th day of March, 1903, the appellee, who lives in Newport, Ky., boarded a street car of the appellant company which was so crowded that he remained standing on the steps of the platform, and held on with his right hand to an upright iron bar fastened to the car, called in the record a "handhold," in order to avoid falling or being thrown off. While he was riding in this position, the conductor, who was inside the car when he boarded it, came to the rear door and called for his fare. Appellee had placed his fare in a pocket on the right side of his overcoat, and in order to get it out, released his grasp upon the "handhold," and, as he did so, the car, which was going at a rapid rate of speed, reached a curve, in rounding which appellant was thrown, or forced to jump, from the platform to the ground, by the lurching motion incident to the sudden change of direction, which so jarred him that he suffered a rupture, and was thereby permanently injured. Although the car stopped for him, he did not again get aboard, but waited and took another, and went to his place of business in Cincinnati. To recover damages for the injury received as above narrated, he instituted this action in the Campbell circuit court, alleging that the accident was due to the negligence of the appellant company in the operation of its car. The essentials of his cause of action are contained in the following excerpt from the petition: "Plaintiff says that he was injured as aforesaid by and through the wrongful and willful neglect and default of the defendant in this, to wit, that the defendant wrongfully, willfully, and negligently constructed and maintained its

street railway track at and over the intersection of Third street and Washington avenue with a curve which was liable to cause its said street car to lurch in going over said curve, and also that the said defendant wrongfully, willfully, and negligently ran its said car over the said curve with great and unusual speed, whereby the said street car was caused to lurch in passing over said curve, and also that the said defendant wrongfully, willfully, and negligently caused, suffered, and permitted its said street car upon which plaintiff was a passenger as aforesaid to become and to remain crowded with passengers so that plaintiff was compelled to stand and remain upon the rear platform of the said car while passing around the said curve. Whereby, by and through the neglect and default of the defendant as hereinbefore stated, the plaintiff was thrown from the said car, and thereby injured as hereinbefore stated." The appellant company placed in issue all of the allegations of the petition, and pleaded contributory negligence on the part of the appellee, and the issues were completed by reply denying the affirmative allegations. A trial resulted in a verdict and judgment for the appellee (plaintiff) in the sum of \$5,000, from which this appeal is prosecuted.

On the trial of the case two grounds of negligence were relied on: First, that the appellant company permitted its rear platform to become so overcrowded that the appellee was compelled to remain standing thereon; and, second, that it was propelled around the curve at so rapid a rate that he was thrown from his position on the platform by the resulting lurch when the car suddenly changed its direction. When the appellee took passage on the car he knew of its crowded condition, and boarded it voluntarily in preference to waiting for one less crowded. In his evidence he made the following statement with reference to his position on the platform, and the manner and cause of his injury: "I hailed the car there this morning, and it was very crowded, and the nearest I could get on was to hang on with my toes on the platform; and I stood in that position and rode facing about southwest. I was standing about this position (illustrating), holding on an upright bar that goes up and down the body of the car; and when the car was going at a pretty rapid gait, faster than ever I seen it; and I just thought at the time that the conductor was behind, because he had not got his fares up then. I usually can get my fare in as soon as I get on the car at that point; and he touched me for my fare as the car was going down the grade there from Monmouth street to this curve, * * * and as we approached this curve going fast the conductor was inside the car and he came to the door, and he asked me for my fare. I released my hold and got the change out of my ticket pocket, overcoat pocket, and as I reached it to him

and he got it, this car hit the curve and it twisted me, threw me in that direction; and I had to run across pretty near the length of this room before I recovered my equilibrium to stand on my feet. Of course I felt angry about it. I might have sworn a little, but I would not get back on the car. I walked the other square to the bridge, and took another car." On cross-examination he said, in answer to the question, "And knowing that to be the case, standing by the edge of the platform, did you release your hold upon the upright bar?" "A. Well, I was not cognizant of the fact that we were on or near that curve. I was facing in the direction that I could not see back of me, and I didn't know that we were at that point. If I had seen that we were coming up to that danger there, I would have protected myself, I would not have paid my fare, I would not have let go, I would have taken care of myself, because I think that is every man's position, to take care of himself. Q. How could you have protected yourself? A. I could have held on tighter. I know very well it could not have swung me off if I had held to it, because I am strong enough to hold my weight up." Again: "Q. In what other way could you have protected yourself besides holding with your right hand? A. I don't know any other way only if I had retained hold of that bar till the car had passed that curve I know I could have held on, because I know you get a pretty hard jolt when going slow, and this car was going rapidly. I believe if I had held on to it, it might have swung me a little, but I do not think it would have thrown me at all if I had hold of the bar."

Two things are patent upon appellee's own statement: first, that he boarded the car voluntarily when it was so crowded that he was compelled to stand on the platform; second, that even there he was perfectly safe until he released his grasp on the "handhold." This he did voluntarily. The conductor did not force, or even ask him, to do so, or know that this was necessary in order for him to pay his fare. Appellee knew the car was running rapidly, and that there were curves in the track, for he, in another part of his testimony, states that he had traveled the line twice daily for three or four years. It is true, he did not have it in mind that he was so near the curve, but when he released his grasp, the retention of which made his otherwise perilous position on the platform secure, this was a voluntary act for which the company was in nowise responsible. The request of the conductor, that he pay his fare, was not of that urgency which required him to imperil life or limb in an effort to comply with it. He could have explained to the conductor his position, or he could have crowded in further, or requested the conductor to stop the car and let him get off, rather than place himself in the peril which was involved in his releasing his grasp of the

"handhold" while the car was being rapidly propelled along the track. It was not the striking of the curve at too rapid a rate that threw him to the ground, but, according to his own statement, this was the result of his releasing his grasp on the "handhold" of the car.

There is nothing in this record that tends to show that any act or omission on the part of the company was the proximate cause of appellee's injury; but, on the contrary, his own statement shows beyond question that he was injured by his own reckless negligence in releasing his grasp of the "handhold" while standing on the edge of the platform of the car. It takes but little familiarity with street cars and natural laws to know that if a passenger stands on the edge of the platform, without holding on to something to prevent him from falling, when the car strikes a curve—whether it be going fast or slow—he is in great danger of being thrown off. Appellee knew this, and, so knowing, he had no right—at the expense of the company—to imperil his life or limb in the manner which his own statement shows he did. His negligence in this matter is too plain for dispute.

The trial court should have sustained appellant's motion for a peremptory instruction to the jury to find for it at the close of appellee's testimony; and for this reason the judgment is reversed for proceedings consistent herewith.

CINCINNATI, P. B. S. & P. PACKET CO.
v. THOMAS MALONE & CO.

(Court of Appeals of Kentucky. March 27, 1906.)

1. CORPORATIONS—ACTIONS AGAINST—PROCESS.

Under Civ. Code Prac. § 51, subsec. 3, providing that in an action against a private corporation the summons may be served in any county on the defendant's chief officer or agent who may be found within the state, or it may be served in the county wherein the action is brought on the defendant's chief officer or agent who may be found therein, and subsection 4, providing that in every action against a common carrier the summons may be served in any county on the defendant's chief officer or agent; or it may be served in the county wherein the action is brought on the defendant's chief officer or agent who resides therein, a summons in an action against a common carrier operating a line of steamboats, instituted in one county cannot be served on defendant's chief officer or agent in another county, but must be served on defendant's chief officer or agent who may be found in the state or upon such officer or agent found in the county where the action is instituted.

2. APPEAL—JURISDICTION—NATURE OF DECISION.

The Court of Appeals has jurisdiction of an appeal from a judgment refusing to enjoin the collection of a judgment and to vacate it, although the amount is less than \$200.

Appeal from Jefferson Circuit Court; Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Action by Thomas Malone & Co. against the Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Myers & Howard and Chas. F. Taylor, for appellant. Pryor, Sapinsky & Castleman, for appellees.

PAYNTER, J. The appellant operates a line of steamboats on the Ohio river east of Cincinnati, Ohio, consequently by the city of Maysville, Mason county, Ky. C. M. Phister is wharf master at that place, receives the freight that is delivered to him for shipment on the steamers, and also the freight that is delivered to him by the steamers for parties to whom it is consigned at Maysville. And he makes the collection of freight bills due the carriers for freight carried by them consigned to Maysville. The appellees sued the appellant in the Jefferson quarterly court on a claim of \$175 and interest, and obtained a judgment thereon. The appellant did not have an agent of any kind in Jefferson county. A summons was directed to the sheriff of Mason county who served it on C. M. Phister and made a return thereon as follows: "Executed the within summons on the defendant Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, this May 20, 1903, by delivering an exact copy thereof to C. M. Phister, its clerk and managing agent—said Phister being the chief officer and agent of the said defendant found in this county at this time; the president, vice president, secretary, librarian, cashier, and treasurer of said defendant being absent from this county and not found herein. [Signed] J. R. Robertson, S. M. C., by Jos. Mackey, D. S." On a return of the summons executed in the manner shown by above, a default judgment was taken against the appellant. It instituted this proceeding to have the judgment vacated upon the claim that it was void for the reasons: (1) That Phister was not its agent; (2) that if he was, he was not the one upon whom a summons should have been served.

It appears that the appellant had complied with section 571 of the Kentucky Statutes by filing in the office of the Secretary of State a signed statement by its president, etc., designating a person as its agent upon whom processes could be served in actions against it. It also appears that F. A. Ladely was the president, general manager and treasurer of the appellant and resided at Covington, Ky., when appellee's action was instituted; that G. P. Quiggin was the secretary of the corporation at that time and resided in Campbell county, Ky. A careful reading of the return of the sheriff shows that he designates Phister as the chief officer and agent of the appellant found in Mason county. Assuming without deciding that Phister was an agent of the appellant upon whom a summons might have been served had the action been instituted in Mason county, the question remains was it such a service as brought the

appellant before the Jefferson quarterly court so as to give the court jurisdiction of the appellee and to render the judgment in question.

Subsections 3 and 4 of section 51 of the Civil Code of Practice read as follows: "(3) In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this state; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein. Or if the defendant operate a railroad, it may be served upon the defendant's passenger or freight agent stationed at or nearest to the county seat of the county in which the action is brought. (4) In every action against a common carrier, the summons may be served, in any county, upon the defendant's chief officer or agent; or it may be served, in the county wherein the action is brought, upon the defendant's chief officer or agent who resides therein; or, if the defendant operate a railroad, it may be served upon defendant's passenger or freight agent stationed at, or nearest to, the county seat of the county in which the action is brought."

We assume without deciding that the Jefferson quarterly court had jurisdiction of the subject of the action. We will only consider the question as to whether the court had jurisdiction of the appellant by reason of the summons served on Phister. Subsection 3 provides how a summons shall be served on a private corporation. When served in a county other than the one in which the action is pending, it must be served on the defendant's chief officer or agent who may be found in the state or it may be served in the county where the action is brought upon the defendant's chief officer or agent that may be found in that county. If the defendant is a common carrier it may be served in any county upon its chief officer or agent or it may be served in the county in which the action is brought upon the defendant's chief officer or agent who resides in that county. The appellant is a private corporation and it also seems to be a common carrier. A summons is served upon a private corporation as provided by subsection 3 and on a common carrier as provided by subsection 4 in exactly the same way, except, it may be served upon a private corporation in the county where the action is brought upon its chief officer or agent found therein and upon a carrier in the county in which the action is brought upon its chief officer or agent who resides therein. It is held in *New South Brewing & Ice Co. v. Price*, 50 S. W. 963, 21 Ky. Law Rep. 11, that a summons may be served on the officers provided for in subsection 3, although the corporation has filed in the office of the Secretary of State a statement designating an agent upon whom service or process might be had. Our conclusion is that the service upon Phister, though he be defendant's chief officer

or agent in Mason county, is not valid. The summons could have been served upon the chief officer or agent who may have been found in the state or upon the agent designated by the statement filed in the office of the Secretary of State. The judgment is void.

This appeal is not taken from a judgment for the recovery of money or personal property. It is an appeal from a judgment refusing to enjoin the collection of a judgment and to vacate it. This court has jurisdiction of the appeal, although the amount is less than \$200. *Shackelford, Clerk, v. Phillips*, 112 Ky. 563, 66 S. W. 419, 68 S. W. 441.

The judgment is reversed for proceedings consistent with this opinion.

CARROLL v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 27, 1906.)

1. CRIMINAL LAW—ARGUMENT OF COUNSEL—AFFIDAVIT FOR CONTINUANCE—EFFECT.

When a continuance is asked in a criminal case because of the absence of an important witness for the accused, and the court permits the affidavit, stating the facts the absent witness would testify to, if present, to be read as the deposition of the witness, it is highly improper for the attorney for the commonwealth to tell the jury in substance that the absent witness, if present, would not have made the statements contained in the affidavit.

2. SAME—NEW TRIAL—MISCONDUCT OF COUNSEL.

Where an affidavit for continuance, stating the facts that an absent witness would testify to, if present, was admitted as the deposition of the witness, and the attorney for the commonwealth said to the jury in substance that the absent witness, if present, would not have made the statements contained in the affidavit, and the court in the presence of the jury refused to reprove the attorney or admonish the jury that they must not consider his comment, such misconduct is ground for a new trial.

3. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.

In prosecution for homicide, an instruction that defendant "had the right to use such force at his command as was necessary, and no more, to avert the real or apparent danger," was improper, and should have omitted the words "and no more."

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 138, 172-174.]

Appeal from Circuit Court, Bell County.
"Not to be officially reported."

Matt Carroll was convicted of the crime of murder, and appeals. Reversed.

W. G. Colson, J. L. Render, E. N. Ingram, D. B. Logan, O. V. Riley, and Greene & Van Winkle, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

CARROLL, C. Under an indictment for the murder of William Begley the appellant was convicted, and his punishment fixed at confinement in the penitentiary for life. As this is the second appeal of the case, and the substantial facts are stated in the former opinion, which may be found in 83 S. W. 552, 26 Ky. Law Rep. 1083, it is not necessary or important to repeat them here.

When the case was called for trial, the appellant moved the court to grant him a continuance, and in support of the motion filed his affidavit, stating what he could prove by the absent witnesses, among whom was Powell Carroll, his most important witness, and the only one who corroborated appellant's statement as to the facts of the homicide, in contradiction of several other persons present and who testified for the commonwealth. The affidavit showed that the appellant had used due diligence to procure the presence of Powell Carroll as a witness on the trial, and stated the other essential facts required by the Code to entitle a party to a continuance because of the absence of a material witness, setting out the testimony that Powell Carroll would give, if present, that he could not prove his statements by any other witness, and that his personal presence would be secured on the next trial of the case if a continuance was granted. The court overruled his motion, but permitted the statements in his affidavit to be read as the evidence of the absent witnesses. It appears that counsel was employed to assist in the prosecution of the case, and that during the first argument made for the commonwealth one of the attorneys so employed, while commenting on the statements in defendant's affidavit for a continuance, which set out the testimony of the absent witness Powell Carroll, and that had been read to the jury as the deposition of the witness, said: "You know that if Powell Carroll would have testified under his oath to the facts as set out in that affidavit that he would have been here and testified to them, as he is a nephew of the defendant." Counsel for appellant at the time objected to this language and requested the court to admonish the jury not to consider it, but the court overruled the objection, to which the appellant at the time excepted. The misconduct of counsel for the commonwealth in making this reference to the affidavit and the failure of the court to admonish the jury as requested is the principal ground upon which a reversal is sought.

When a continuance is asked in a criminal case because of the absence of an important witness for the accused, and the court permits an affidavit stating the facts the absent witness would testify to, if present, to be read as the deposition of the witness, it is highly improper for the attorney for the commonwealth, or other counsel employed to assist the prosecution, to make any statement tending to discredit the statements of the absent witness, because they are contained in an affidavit made by the accused. Counsel may comment on and discuss the statement contained in the affidavit in the same manner that they could comment on and discuss the evidence of a witness if he had testified in person; but beyond this it is not proper to go. The affidavit represents the absent witness. It contains what the commonwealth has consented may be read as his deposition,

and any reference to or comment concerning it as the affidavit of the accused, or as his statement of what the absent witness would say, is highly prejudicial, and has been frequently condemned by this court. When counsel made the objectionable statement before mentioned, he said in substance to the jury that Powell Carroll, if present, would not have made the statements contained in the affidavit for continuance because of his absence, although the commonwealth for the purpose of forcing the accused into a trial, over his objection, consented that, if present, he would have made these statements, and the fact that the court in the presence of the jury refused, when asked so to do by counsel for appellant, to reprove the attorney or admonish the jury that they must not consider his comment, probably left the impression on the mind of the jury that the court agreed with counsel that Carroll, if present, would not have made these statements, and thus aggravated the error committed by the attorney.

In *Redmond v. Commonwealth*, 51 S. W. 565, 21 Ky. Law Rep. 331, the court, in discussing an argument of the attorney for the commonwealth in which he said that the testimony of the absent witness was only what the defendant swore to in an affidavit for continuance, declared this statement of the attorney prejudicial, holding that, when the affidavit was admitted as the statement of the absent witness, the jury should not have been told it was but the affidavit of the accused made for a continuance, and that the accused was entitled to the full benefit of the statements made in the affidavit as if they had been made by the absent witness in person. In *Johnson v. Commonwealth*, 61 S. W. 1005, 22 Ky. Law Rep. 1885, the court in speaking of comments made by the attorney for the Commonwealth relative to an affidavit that was read as the deposition of an absent witness, said: "These statements were entitled to the same respect as if given by the witness in person in a deposition, and there should have been no allusion to them as the defendant's statement of the testimony or imputation that they were not precisely the correct or genuine statements of the witness, especially as one of these witnesses purported to have seen the difficulty and stated the facts substantially as the defendant." In *Darrell v. Commonwealth*, 82 S. W. 289, 26 Ky. Law Rep. 541, the court say: "The defendant was entitled to have the statements made in the affidavit as to what the absent witness would prove considered by the jury as the evidence of the absent witness. It was entirely improper for the county attorney to break the force of the

testimony by stating that the defendant had lied when he made the affidavit and knew it." In *Darrell v. Commonwealth*, 88 S. W. 1060, 28 Ky. Law Rep. 27, the court held that, "when the affidavit is so admitted, its authority is beyond question in that trial. It must be accepted as if it were the duly signed and certified deposition of the identical witness named." In *Martin v. Com.*, 89 S. W. 228, 28 Ky. Law Rep. 295, the court, in a full opinion by Judge Barker, said: "Of what value is it to the defendant to say to him, on the one hand, 'You may file your affidavit as the evidence you could produce by your absent witnesses,' and, on the other, to say to the jury, 'This is not the evidence of the absent witnesses, but merely the affidavit of the defendant, who is swearing in his own interest?' It required no argument to show that such procedure makes the statute 'keep the word of promise to our ear, and break it to our hope.' When the court refused to sustain the motion of appellant, that he should instruct the jury that the affidavit as to what the absent witnesses would prove if present was to be considered as the deposition of the witnesses, he practically placed the seal of his approval upon the Commonwealth attorney's construction of the effect of the affidavit, which entirely nullified the statute, thus depriving the appellant of a valuable defense." And this court has uniformly upheld the rule announced in these opinions, and when it is violated, as in this case, a new trial will be granted.

On a former appeal in this case, in commenting on the instruction defining the right of self-defense, the court held that it was improper to use the words "and no more" in the sentence, "had the right to use such force at his command as was necessary and no more to avert the real or apparent danger to Powell Carroll," and it was therefore the duty of the trial judge on the trial following the rendition of this opinion to omit from the instruction defining the appellant's right of self-defense these objectionable words, but the trial judge, evidently through inadvertence, used them again in the self-defense instruction given on the last trial. The instruction, with the exception of these words, states the law applicable to the rights of appellant in defense of Powell Carroll in clear and appropriate language, and on the next trial of the case these words should be omitted from the instruction. It is not necessary to determine whether or not the court erred in refusing to grant appellant a continuance, as it is not likely that this question will again arise.

Judgment is reversed, with directions for a new trial in conformity to this opinion.

TERRELL v. CITY OF PADUCAH et al.
(Court of Appeals of Kentucky. March 14, 1906.)

1. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—COST—LIABILITY OF CITY.

Where an ordinance authorizing the improvement of a street and a contract executed pursuant to the ordinance provided that the improvement should be done at the exclusive cost of the owners of ground fronting on the street, and that the city should be liable for no part of the cost except at the intersection of streets and public alleys, the city was exempted from liability only in case it had authority to and did bind the abutting property for the cost of the improvement.

2. SAME — ORDINANCE — SPECIFICATION OF MODE OF PAYMENT—CONSTRUCTION OF STATUTE.

Under Ky. St. 1903, § 3457, providing that the common council of third-class cities shall have power to cause streets to be graded, paved, etc., and provide for the payment of the cost out of the city treasury providing the ordinances and contracts for such work shall specify how the work shall be paid for, the proviso is directory and not mandatory, and hence it is not necessary, in order to render the city liable for the work, that the ordinance shall specify how payment shall be made.

3. EVIDENCE—JUDICIAL NOTICE—NAVIGABILITY OF RIVER.

Courts will take judicial notice that the Tennessee river is a navigable river.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 13; vol. 37, Cent. Dig. Navigable Waters, § 12.]

4. NAVIGABLE WATERS—RIGHTS OF PUBLIC.

The rights of the public in a navigable river extend to ordinary high-water mark.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 43, 54.]

5. MUNICIPAL CORPORATIONS—IMPROVEMENTS—LIABILITY OF ABUTTING OWNERS.

Where a city seeks to grade the continuation of a street between the high and low water mark of a navigable stream, intending to use such improvement, when graded, as a wharf, as the public right in the land forming the bank of the river between high and low water mark was paramount to the rights of the owner of the adjacent fee which extended to the river, the improvement of the way for the public across their own property could not be made at the expense of the abutting property holders who were the servient owners.

6. SAME—LIABILITY OF CITY.

Where a city contracts for the improvement of a thoroughfare between high and low water mark on a navigable river, providing that the owners of the abutting property shall be liable for the cost, and the contract for the liability of the adjoining owners is invalid because the right in the land forming the bank of the river between high and low water mark was in the public, the court could, under Ky. St. 1903, § 3458, providing that on trial in equity of any case relating to the improvement of a street the court shall have the right to correct any mistake of the common council relating to such improvement so as to do complete justice to all, enter judgment against the city for the contract price of the improvement.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by Ed C. Terrell against the city of Paducah and others. From a judgment for defendants, plaintiff appeals. Reversed.

Bagby & Martin, for appellant.

O'REAR, J. On July 17, 1899, the city council of Paducah adopted the following ordinance:

"Section 1. That Washington street be improved by grading and graveling the same from First street to low-water mark at river in accordance with Ordinances Nos. 38 and 39 of the Revised Ordinances of the city of Paducah, and charter of cities of the third class governing such improvements.

"Sec. 2. Said grading and graveling shall be done at the exclusive cost of the owners of ground fronting on Washington street between First street and low-water mark; the city of Paducah to be liable for no part of the cost of such improvements, except at the intersection of streets and public alleys; the said improvements to be completed by the 1st day of December, 1899."

Section 38, above referred to, provided, among other things, as follows:

"Section 1. That a street in the city of Paducah shall, when improved, consist of a sidewalk on either side, a gutter next thereto, and the center or street proper.

"Sec. 2. On streets sixty-six feet in width, the sidewalk on each side shall be twelve feet wide, the gutters three feet wide, and the street proper of gravel thirty-six feet wide."

Washington street was 66 feet wide. Advertisement was made for bids for the work in accordance with the provisions of the ordinance and the profile plans and specification on file in the city clerk's office. The specifications provided that the subway should be 66 feet wide, and, when it was accepted by the engineer, gravel to the depth of 12 inches should be spread uniformly over the whole surface and thoroughly compacted by rolling or tamping. Ed C. Terrell was the best bidder, and his bid being accepted, the following written contract was entered into:

"Contract for the Improvement of Washington Street from First Street to Tennessee River between Ed C. Terrell, Contractor, and the city of Paducah.

"This contract, made and entered into by and between E. C. Terrell, as party of the first part, and the city of Paducah, Kentucky, as party of the second part, witnesseth:

"That whereas, the party of the first part has been awarded the contract by the party of the second part for the improvement of Washington street, from First street to the river, in accordance with an ordinance passed for that purpose, the said party of the first part does hereby agree and contract that he will faithfully do and perform all the things required by said ordinance, in and about the improvement of the said street and in accordance with the plans and specifications and profile in the council clerk's office of the city of Paducah, and that he will do the said work in a good and acceptable manner as required by said ordinance, and finish the same by the time as stipulated in

said ordinance, for the compensation of \$1.60 per lineal foot.

"The said city of Paducah agrees to pay the said amount for the said improvement as required by law for all intersections, and to do all other things required by law for the faithful execution of the said work.

"Ed C. Terrell,

"Party of the First Part.

"Dated this 5th day of Sept., 1899.

"City of Paducah,

"Party of the Second Part.

"Attest: W. H. Patterson, C. C. P.

"Jas. M. Lang, Mayor."

At a meeting of the council on September 5th the following order was made:

"The mayor stated that E. C. Terrell being the lowest and most advantageous bidder he had awarded him the contract for the improvement of Washington street from First street to the river at \$1.60 per lineal foot, on each side, and he offered as his sureties R. C. and A. S. Terrell. Contract ratified and sureties approved upon a call of the yeas and nays by the following votes: Clark, Davis, Elliott, Ezell, Fowler, Jackson, Johnson, Jones, Robertson, Smith, Winstead, and Yelser."

Terrell built the street, as required by his contract and the specifications, 66 feet wide. The work was accepted by the city authorities, and their action being reported, the following was adopted: "Resolved by the city council that said work be received and accepted as done in accordance with the contract and that the estimates be placed in the hands of the contractor for collection, and he be allowed \$99.20, the amount due him by the city for intersections as shown by the engineer's apportionment." Terrell then began this action against the property owners fronting on the improvement to enforce a lien on the property for the cost. The city was also made a defendant to the action, and judgment was prayed against it if the property owners were not liable. The property owners resisted a recovery on two grounds, viz.: (1) That the way to be improved was a public wharf, and not a street; and (2) that, by ordinance 38, only 36 feet of the street could be improved as a carriage way, and that, as the ordinance directing the improvement provided that the work was to be done in accordance with ordinance 38, it necessarily provided only for the improvement of 36 feet of the street. The circuit court sustained this last defense, giving Terrell judgment against the property owners for only this part of his work, and refusing to give him judgment against the city for the remainder of his claim. From the judgment in favor of the city, he appeals. The property holders do not appeal. The reasons of the circuit court for the conclusion are that the ordinance authorized only 36 feet of the street to be graded and graveled; that the council knew what the ordinance meant; that the contractor was required to know

at his peril the infirmity in the contract and the ordinance; and that the city was not liable because its council passed a defective ordinance under which payment for the work could not be coerced from the abutting land-owners.

It seems to us that the case comes to this: Either that the city is not liable, because of the terms of the ordinance authorizing the work, and of the terms of the contract made in pursuance to it, or that the city is liable, notwithstanding the terms of the contract, on the ground that the court will presume that the contract meant that the city was not to be bound only in the event that it had authority to bind and had bound the abutting property for the cost of the improvement. The latter proposition is not new to the judicial history of this state, and is not novel to the courts. There are many cases, beginning with *Louisville v. Hyatt*, 5 B. Mon. 190, and extending to *Asphalt Co. v. Gaar*, 115 Ky. 334, 73 S. W. 1106, which held that, under such circumstances, the city is liable, although it by contract provided against liability. It is not deemed necessary to restate the grounds and reasoning upon which the cases rest. They are believed to be sound. In addition, the strongest reason for the application of the rule of stare decisis applies here, as they constitute a rule of property, upon the faith of which it is fair to assume similar contracts have been entered into, and rights attached under them, which it would be unjustifiable to disturb on a mere doubt, by adopting a different construction. The question is: Does this case come within the rule? In its examination we will meet with cases apparently in conflict with the rule, notably *Craycraft v. Selvage*, 10 Bush, 705. But that case and others similar rest upon the peculiar phraseology of the statutes, which were charters of the towns, and from which the authority to make the particular contracts were derived. It is not proposed by anything here said to conflict with *Craycraft v. Selvage*. It may be conceded that where a city is authorized to cause a street to be laid out or improved at the exclusive cost of the abutting property, and the charter of the city provides that in such case the city shall not be liable for the cost of the improvement, but that the contractor shall look alone to his lien upon the abutting property, that the city will not be liable if, by error of its council or other officers, it failed to take proper steps to secure a lien upon the property abutting the improvement for the benefit of the contractor; still, it remains to be seen whether this case falls within that rule.

Charters of all third-class cities, to which appellee belonged when this contract was made, provide: "The common council shall have power to cause to be graded, constructed, reconstructed, paved, or otherwise improved and repaired, all streets, sidewalks, alleys and public ways, or parts thereof,

within the city, of such material and in such manner and under such regulation as shall be provided by ordinance, and may, in their discretion, provide for the payment of the cost of same, or any part thereof, out of the city treasury: Provided, The ordinances and contracts for such work shall specify how the work shall be paid for." Section 3457, Ky. St. 1903. It is thought by some that the proviso in this section is a limitation upon the power of the city to bind itself for street improvements; that, to do so, the ordinance must expressly show how the work shall be paid for, or the power to have the work done at all at the city's expense is withheld. This calls for an interpretation of section 3457, *supra*. The power to grade and improve its streets by a city is an inherent corporate power. The section did not, therefore, confer the power, but it was included in the general grant to the corporation to be a city. This point is material in determining whether the clause following the word "provided" is mandatory or directory, for, if it is mandatory, and is in fact a limitation upon the power granted, its nonobservance would be fatal to the attempted exercise of the power. If, on the other hand, it is directory only, then, although it should still be observed by the city council, if it is not observed the failure would not defeat the exercise of the power, particularly after the work has been done under it in good faith.

Sutherland on Statutory Construction, § 454, lays it down that: "When a statute is passed authorizing a proceeding which was not allowed by the general law before, and directing the mode in which an act shall be done, the mode pointed out must be strictly pursued. It is the condition alone on which a party can entitle himself to the benefit of the statute, that its directions shall be strictly complied with. Otherwise the steps taken will be void. But when the proceeding is permitted by the general law, and an act of the Legislature directs a particular form and manner in which it shall be conducted, then it will depend on the terms of the act itself whether it shall be considered merely directory. * * * Where a statute, in granting a new power, prescribes how it shall be exercised, it can lawfully be exercised in no other way. Negative words in granting power or jurisdiction cannot be directory." The same author says: "Where the provision is in affirmative words, and there are no negative words, and it relates to the time and manner of doing the acts which constitute the chief purpose of the law, or those incidental or subsidiary thereto, by an official person, the provision has usually been treated as directory." *Id.* § 443.

Unless the word "provided" itself implies a limitation on what has preceded, we find in this clause of the statute no negative word. It directs the form of the ordinance and con-

tract. It is not a statute aimed primarily to protect the city treasury, but it is intended to provide a system of public thoroughfares for the city, and incidentally to pay for them by a direct tax upon the abutting property, as provided in section 3449 et seq., Ky. St. 1903, or by an appropriation out of the general levy. The word "provided," as used in statutes, generally, though not always, implies a limitation or restriction upon what has preceded in the context. Sutherland says (Sutherland on Stat. Const. § 222): "Provisos and exceptions are similar, intended to restrain the enacting clause, to except something which would otherwise be in it, or in some manner to modify it." But this is not always necessarily so. The word may, if such be the sense gathered from the whole act or instrument, simply explain what had previously been stated in general terms, or direct the manner of doing what was allowed by the context to be done generally. *Rich v. Atwater*, 18 Conn. 419; *Forscht v. Green*, 53 Pa. 140; *Co. Litt.*, 146 B.; *Stanley v. Colt*, 5 Wall. (U. S.) 166, 18 L. Ed. 502; *Chapin v. Harris*, 8 Allen (Mass.) 596.

Section 3457, Ky. St. 1903, is a part of the subdivision of charters of cities of the third class, devoted to "streets and alleys." For these cities a dual system of improvement is allowed. One is by a direct assessment of the cost upon the abutting property. The other is at the city's expense. The latter, as we have seen, was included in the inherent corporate powers of the city. But the former did not naturally exist, and could not be exercised unless specifically granted by the Legislature. *Dillon on Municipal Corporations*, 605; *Kniper v. City of Louisville*, 7 Bush, 599; *Caldwell v. Rupert*, 10 Bush, 179. The proviso contained in section 3457, Ky. St. 1903, logically applies to the whole system, and because there is a dual system. It is to keep the accounts straight. By its observance there is less apt to be confusion or uncertainty in assessing the cost of improvements. If it applied alone to the city's contracts where it undertook to have the improvements done at its own expense, it would have been a meaningless term and useless, for there is but one way for a city to pay for its own work, and that is out of the money in its treasury, or, which is the same thing, out of the money it may raise by general taxation and put into its treasury. We conclude that the term, as used in this statute, is directory, and is not a limitation upon the power of a city to improve its streets. Nor are we lacking in precedent in this state for this construction. In *Kearney v. City of Covington*, 1 Metc. 339, the charter of the city authorized it to direct street improvements at the expense of the abutting property holders, or to pay for them out of the city treasury. The section of the charter there in question concluded with the proviso that the city council should, by a vote of two-thirds, have the power to pay for grading the streets out of

the city treasury. Of this the court said: "The object or meaning of this proviso is not very clear or certain. It does not require a vote of two-thirds of the city council to authorize a contract to be made for the grading of the streets, where it is intended to make the city responsible, but only requires a vote of two-thirds to pay for the grading out of the city treasury. It may have been intended to confer a power, but it was certainly not intended to limit the exercise of a power necessarily incident to such a corporation. It is the duty of the city authorities to keep the streets in proper repair; and if, as argued, this provision in the charter was intended to restrict them to the mere grading of the streets, and to preclude them from having any further improvements made at the public expense, it would conflict with the general law which requires them not only to put, but to keep, the streets in good repair. Such a construction should not, therefore, be given to it, but it should be construed to relate exclusively to the action of the city council in directing the payment to be made after the work has been done." In other words, the proviso was held to be directory of the manner of doing a thing already allowed by general law to be done.

So far the case has been considered upon the theory that Washington street improved under the ordinance in this case was a public street. Before the improvement it was an open way, extending from the edge of First street—which was near the top of the bank of the Tennessee river—down the bank to low water mark of that river, a distance of about 300 feet. The way was not improved upon any plan of streets, but appears to have been intended for use as a wharf. During high water in the river much of this improved way would be under water, and at times all of it would be. It was in reality the grading and graveling for 66 feet wide, the bank of Tennessee river between high and low water mark. The court takes judicial notice that the Tennessee river is a navigable river, and as such the rights of the public extend to ordinary high-water mark. Gould on Waters, § 42. As the public right in the land forming the bank of the river between high and low water mark was paramount to the rights of the owner of the adjacent fee which called to extend to the river, an improvement of a way for the public across their own property ought not, and under the charter of appellee city cannot, be made at the expense of the abutting property holders; that is, the servient owners. Some part of these lots, it is true, was above the top of the bank, but as they were compelled by the judgment to pay something more than one-half of the cost of the improvement, it is fair to assume that the remainder represents no more than what they could not have been compelled to pay for. This being so, the case comes within the rule first laid down, viz.: The city has attempted to bind by ordinance and con-

tract for a street improvement, property which it could not bind therefor under its charter; for which, under all the cases, the city is liable, even though its ordinance and the contract expressly say it is not liable, provided it was a contract that the city had the power to bind itself on. *City of Louisville v. Hyatt*, 5 B. Mon. 199; *Kearney v. City of Covington*, 1 Metc. 339; *Caldwell v. Rupert*, 10 Bush, 179; *Craycraft v. Selvage*, 10 Bush, 696.

The charter of third-class cities provides further: "That on the trial in equity of any case relating to the improvement of any street, alley, sidewalk, or other public highway, or any part thereof, the court trying the case shall have the right to correct any mistake or error of the city engineer's in estimating and apportioning the cost of such improvement among lot owners, or any mistake or error of the common council relating to such improvement, so as to do complete justice to all parties." Ky. St. 1903, § 3458. This section follows sections 3449-3457, which allows streets to be improved at the cost either of the city or the owners of the abutting property. By its terms the section deals with two classes of errors which the courts are authorized to correct. One is any error or mistake of the city engineer in estimating and apportioning the cost of such improvement among the lot owners. The other is "any mistake or error of the common council relating to such improvement." The end in either instance which the statute expressly declares is "so as to do complete justice to all parties." Now, towns and cities can contract only through their councils or trustees. The contract, to bind the city, must be concerning a matter which the council had the power to make, and it must be entered into pursuant to an ordinance of the town duly enacted. The Legislature contemplated that in the attempted exercise of vested power the city, by inadvertence of some public official, might do or fail to do something, which, strictly construed, would avoid the contract, so that the other party to it would have no recourse, and would lose his labor and material, which, from the nature of such an improvement, would inure to the city's full use, just as though they had in fact been paid for. The injustice of such a result was manifest to the Legislature, as it is to anybody, and it was intended by section 3458, supra, to obviate it. So the Legislature has, by that section, placed the parties to such a contract exactly in the position they would have occupied had it been a contract between two competent individuals under similar circumstances; that is, to allow a court of equity to do complete justice between them when from mistake the contract has been performed by one party, and cannot be specifically executed by the other.

This might involve more than the mere correction of an engineer's mistake. Where the ordinance duly adopted shows the determination of the town council to make the improve-

ment, which is one which it is empowered by law to make, and where, in the attempted exercise of that power and determination, the parties have failed to state some part of the undertaking, or omitted to set out an obligation which the necessity of the case would seem to imply as an incident of that which was expressly undertaken by the parties, it is just that the real object intended should not fail because of such inadvertence. It could not have been in the minds of the parties that one of them was to do work for and furnish material to the other of great value, and get nothing for it. The contract, and the whole proceeding, negatives such thought. On the contrary, it is clear that both parties intended that the work was to be paid for at the stipulated price; that it was for the town, which, as a corporation, got the benefit of it; and that the town intended to pay for it. In execution of this last feature of the contract the town undertook to adopt a method which it had the right as a privilege to adopt, of charging the cost to the abutting property, instead of to all property within the corporation. But upon this point—that is, the right of the town to pay for the work in this way—both the town and the contractor were in error in the assumption that it could be legally done. Now, after the work has been done for the town, in accordance with its specifications, and has been accepted by it, so that it is impossible to place the other party in status quo, the parties discern that they were in error in assuming that the abutting property could be charged with the cost. The Legislature has justly provided that in such case a court of equity may correct the mutual mistake of the parties and decree justice between them, which is to compel the town to pay in the other way, and in this case the only legal way open to it, for that which it has ordered to be done and has got the full benefit of. Nor is this the exercise by the court of a legislative function which the council must alone exercise. The correction of an error in a contract by a court of equity is not the making of a contract. It is merely the reforming of the contract the parties have already made, so as to conform it to the facts and the law. If a contract already performed by one party contain erroneous provisions, or omits provisions that should, under the agreement, have been incorporated in it, or if it contain impossible conditions, courts of equity may nevertheless do justice by substituting the law's implication for the impossible provisions, as well as reform the contract in accordance with the real understanding between the parties. This is an ancient practice and prerogative of courts of equity, who have no more power to make contracts between individuals than to make contracts on behalf of municipal corporations. The parties had the power to contract with reference to the subject-matter. They have contracted. Their minds have met as to what was to be done by appellant, and

the price he was to receive for it. They have by mutual mistake provided that he was to be paid in a way that, as subsequently developed, was impossible of execution. Now, after the work is done and has been received, for a court of equity to decree that the same payment shall be made in another way which is possible and legal is in no sense the making of a contract, or the exercise of a legislative function.

We conclude that upon the whole case the judgment in favor of the city is erroneous, and it is therefore reversed, and the cause remanded, that judgment may be entered in favor of appellant as herein indicated.

MUIR v. MUIR.

(Court of Appeals of Kentucky. March 22, 1906.)

1. DIVORCE—APPEAL.

So much of a decree for divorce and alimony as grants a divorce is unappealable.

[Ed. Note.—For cases in point, see vol. 17. Cent. Dig. Divorce, § 563.]

2. SAME — ALIMONY — STATUTES — CONSTRUCTION.

Ky. St. 1903, § 2122, providing that, if a wife have not sufficient estate of her own, she may, on divorce obtained by her, have such allowance of that of her husband as shall be deemed equitable, does not preclude her from alimony in case the husband have no present fee-simple estate in his property.

3. SAME—PROBABLE EARNINGS—EXPECTANCY.

A husband's contemplated probable earnings and accretions of wealth from any other source may be considered in determining the amount of alimony to be awarded to his wife on the rendition of a divorce.

[Ed. Note.—For cases in point, see vol. 17. Cent. Dig. Divorce, §§ 675-678.]

4. SAME—ESTATE IN POSSESSION.

That a husband held only an estate in possession of certain land owned by his father, and not a fee, did not preclude the wife from being allowed alimony therefrom.

5. SAME—DEFINITION.

Alimony is that provision which the law makes for the support of the wife, on the dissolution of the marriage, out of the estate of the husband, after separation, in lieu of his common-law obligation to support her as wife, if they should have continued living together.

[Ed. Note.—For cases in point, see vol. 17. Cent. Dig. Divorce, § 658.]

6. SAME — AMOUNT — ALIMONY IN LIEU OF DOWER.

As alimony given to a wife on a decree of divorce becomes her portion in lieu of dower, she is entitled in any event to such a sum as her dower interest in her husband's estate would have amounted to.

[Ed. Note.—For cases in point, see vol. 17. Cent. Dig. Divorce, §§ 675-678.]

7. SAME.

A husband's estate at the time of the entry of a divorce decree amounted to at least \$15,000. Both parties were 28 years of age, and he, apart from his dissolute habits and a chronic disease, was in good health and had ability to labor and earn money, while the wife was without means or other prospects to support herself and two children awarded to her custody. The wife and one of the children were also in ill health as the result of syphilis communicated to them by the husband. Held, that a decree awarding her

\$1,000 alimony and \$10 a month toward the support of the children was inadequate, and should be increased to \$5,000.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 678.]

8. SAME—CONVEYANCES IN FRAUD OF WIFE—EFFECT.

Ky. St. 1903, § 2126, provides that sales and conveyances made to a purchaser with notice in fraud or hindrance of the right of a wife or children to maintenance shall be void as against them. *Held*, that mortgages executed by a husband pending suit for divorce to his father and brother, to a bank in which they were officers and large stockholders, and to other creditors generally, with notice, should not be considered in determining the amount of alimony to be awarded to the wife.

9. SAME—LEWDNESS—ADULTERY—CONDONATION.

Lewdness and adultery of a husband was not condoned by subsequent cohabitation, as provided by Ky. St. 1903, § 2120, where the offense was aggravated by syphilis communicated by the husband to her and one of the children.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 169-179.]

Appeal from Circuit Court, Nelson County.
“Not to be officially reported.”

Action by Joseph Muir against Mary E. Muir for divorce, in which defendant filed a cross-bill for similar relief and alimony. From so much of a decree granting a divorce to defendant as awarded her alimony, both parties appeal. Affirmed on plaintiff's appeal, and reversed on defendant's appeal.

See 87 S. W. 1070.

John D. Wickliffe, for appellant. John S. Kelley, for appellee.

O'REAR, J. Appellant, a member of a rich and distinguished family, was married at the age of 20 to appellee, who was about the same age. She was of honorable parentage, who were in modest circumstances. The parties are now about 28 years old. Within a year after their marriage appellant developed the disease of syphilis. Whether contracted before or after his marriage is not shown. He continued to live with his wife, by whom there were born to him two children, there being less than two years' difference in their ages. Appellee claims that she contracted the disease from her husband before she knew he had it, and that one of the children, the elder, has also shown symptoms of the taint in his blood of this dread malady. Appellee did not then leave her husband. She says that she was humiliated by the knowledge of their affliction, but was willing to bear it in silence rather than make it public by an abandonment on that account. In the meantime appellant's conduct toward her became such as to indicate a settled aversion to her, and was so habitually cruel as to put her in fear of life or great bodily harm. She sued him for divorce on this last-named ground; but the action was dismissed on her motion before trial for reasons not affecting this case. Thereafter appellant sued her for a divorce upon the ground of abandonment. She de-

fended, justifying her abandonment under the reasons first stated, and made them, furthermore, a ground for her claim for divorce, which she prayed for in her answer. She also prayed for support and alimony. The chancellor dismissed appellant's petition, granted appellee's prayer for divorce, and adjudged her \$1,000 as alimony, and \$10 per month toward the support of her children. The custody of the children was awarded the mother, and no provision made, though requested by appellant, for him to see them, or have them visit him. He has appealed from the decree, except that part adjudging the divorce, from which no appeal lies.

He contends that his wife was in fault, wherefore it was erroneous to allow her alimony at all. The proof in our opinion sustains the conclusion of the chancellor. It tended to show that appellant had, for some years before his wife quit him, spent most of his nights, or rather a great part of most of his nights, in the town of Bardstown, leaving her and her child, or children, at their home in the country, unattended frequently, and occasionally by a negress servant only. He had no business away from home on many of these occasions, but spent his time loafing about barrooms, and in company sometimes, it was shown, of dissolute women of notorious character. His treatment of his wife was unfeeling and harsh. Witnesses said he assaulted her, struck her, cursed her, abused her, and threatened her. The record leaves no doubt that he had such a settled aversion for her as to indicate a complete alienation of affection. On all the grounds charged by her, including infidelity, the proof amply sustains the chancellor's finding in behalf of appellee.

Appellant's father is a rich man. As his sons reached manhood, and were married, he advanced them each about \$10,000, or settled them in substantial business. After appellant's marriage, his father bought a farm of about 200 acres, known as the “Holtshouser Farm,” paying \$10,000 for it. He took the title to himself, but put appellant in possession of it. Appellant bought another place near by, known as the “Johnson Farm,” for which his father paid. It is worth about \$4,000. The title to it was taken to appellant. His father gave him live stock, such as horses, cows, and stock cattle, and farming implements. There was evidence that appellant's father has said that he gave all this property, except the stock cattle, to his son as an advancement, and had so charged it to him on his book of advancements. The witness further testified that appellant's father showed him the book and entries to that effect. Appellant at the time of the separation was in possession of all his property; but has since sold some of it. The lands he is yet in possession of, and has rented the farms from year to year, collecting and using the rents. He claims, though, that

he is insolvent; that the Holtshouser farm does not belong to him, but belongs to his father; that the Johnson farm he has not paid for, but yet owes his father the purchase money advanced by him to buy it; that he yet owes for the personal property. His father, after the separation and after this suit was brought, was partially paralyzed, so that he ceased to attend to his business affairs, and it was also said he was unable to give his deposition in this case. During this condition, appellant, at the instance of his brother and some other relatives, executed a mortgage to his father and brother, to the bank of which his father and brother were officers and large stockholders, and to his other creditors generally, upon all his property, to secure an alleged indebtedness of about \$10,000. The elder Muir did not know of this arrangement, did not authorize it, and so far as this record shows did not approve it. Other creditors named in the mortgage are shown to have been equally ignorant of its execution. Appellant is a man not lacking in understanding or education. Barring the ailment referred to, he is in good health, and is able to work, but, it seems, is not, or has not been, a successful business man. This, however, is probably due more to his habits than lack of ability. Appellee has no property, no means of support. Her father is a poor man. Her mother has no property. With this situation, what relief should the chancellor have decreed? Appellant contends, nothing. Appellee, dissatisfied with the decree fixing her alimony, has prayed a cross-appeal to have it increased.

The statute is (section 2122, Ky. St. 1903): "If the wife have not sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of that of her husband as shall be deemed equitable." But this does not mean that, if the husband have no present estate, his wife shall not be entitled to alimony. His contemplated probable earnings may be the basis for such allowance. *Canine v. Canine*, 16 S. W. 367, 13 Ky. Law Rep. 124. Nor do we perceive why, if probable earnings, as a reasonable expectation, may properly be considered, probable accretions of wealth from any other source may not also be considered. But, before discussing that feature to a conclusion, we will take up what appellant did own, or was possessed of, at the time of the separation and of the decree. He certainly owned the Johnson farm, worth about \$4,000. He owned a half dozen or more horses, a number of cows and hogs, a quantity of corn, a lot of farming implements, buggies, etc., about 15 head of stock cattle, and some household furniture. The value of all this property is not satisfactorily shown, but it is no stretch to assume from the evidence that the personal property alone was worth \$1,500 or more. It was probably worth more. The Holtshouser place, worth \$10,000, he had in possession. It was not rented to him. The use of it, at least, had been given

to him by his father. It is not essential that the husband should own the fee-simple title to the land in order to have the value of his interest considered in fixing alimony. Alimony is not necessarily carved out of the same estate as dower. If he owned it, or was in possession of it under even an invalid gift, so long as that possession was undisturbed, his wife's right to have the use of a part of it set apart to her as alimony is not less than if he owned it in fee simple. She would simply get less in the former than in the latter event, because her possession would in that case be as unstable as his title, but no less so. If she ought to have had the use of say one-third or one-half his land as part of her alimony, if he had owned it in fee simple, no less than an equal quantity of the same land should be set apart to her, if he owned a less estate in it than a fee simple. Suppose his was a life estate, or any freehold estate, she would nevertheless be as much entitled to support from it as if it were a greater.

Alimony is that provision which the law makes for the support of the wife, or of her who was the wife, out of the estate of the husband after separation, in lieu of his common-law obligation to support her as wife if they should have continued living together. She was entitled to and had his support out of all he possessed, including earnings. When he has broken up that relation, so that she can no longer partake jointly with him of such support, the law sets apart to her enough of his estate, including earnings, to make an equivalent of what she is denied by his fault. Less than that would be to put a pecuniary premium upon the husband's abandonment of his wife (which would be the highest impolicy in society), as where he saw that he was about to come into the possession of an inheritance as heir apparent, if he could get the matter of divorce over with before the inheritance was cast upon him, he would have succeeded in defeating his wife of the enjoyment of her anticipated interest in the property, which he had in prospect. Marriage, as it affects property rights, rightfully affects in some degree all that the husband then has and all that he has in prospect. For, as by experience, their mutual economy and helpfulness, the foundation of a future competency may be laid, many of the early privations undertaken and endured by young married people are in the not unreasonable expectation of future benefits, measurably certain of attainment. Many of these are admittedly too intangible to lay hold on in estimating a precipitated adjustment between the parties. But where they are reasonably certain, and particularly where they have been in a manner realized, though but tentatively, they can be and should be carried into consideration, and such a decree entered as will protect the wife, who is then cut off from the future participation, by a present allowance as nearly the equivalent of what she has been deprived, and which she rightfully would

have come into the enjoyment of, as the circumstances of the case will admit. Alimony given upon a decree of divorce becomes the wife's portion in lieu of dower. *McKean v. Brown*, 88 Ky. 208; *Hawkins v. Ragsdale*, 80 Ky. 353, 44 Am. Rep. 483. Where she is entitled to alimony, it would seem to be improper to give her less, in any event, than what her dower interest in her husband's estate would have been. It would not be too much to say, in this case, that appellant's estate, out of which the alimony should be set apart to appellee, should be reckoned at at least \$15,000. It may shrink upon realization, it is true. In that event, appellee would probably be unable to collect what may be finally set apart to her. The size of the allowance is not so material as what part of it is realized.

In estimating the allowance of alimony, there is no fixed standard. The matter is within the sound judicial discretion of the chancellor. It will be regulated by a number of circumstances that properly enter into the consideration. Among them is the size of the estate of the husband, and its productiveness; his income and earning capacity; his age, health, and ability to labor; the age, health, and station of the wife; and, it may be added, that the particular cause of the divorce may properly enter into the consideration, as will be illustrated further along. We have already discussed the estate of the husband and something of his ability to earn money and to labor to make a support for a family. It has been seen, too, that the wife is without means or other prospects. She has been subjected to a contamination by the fault of appellant that will forever be to her a burning shame, and will doubtless be a perpetual menace to her health and future usefulness. Her children, whose charge and care she has, likewise are the victims of a cause that may, and it seems in one instance now does, threaten their health. This dire calamity, an irremediable tragedy in the life of this young wife, is one, as it was caused by the fault of appellant, he should help her to bear. His share of the burden, in so far as it can be measured in money, should reasonably extend beyond the bare necessities of existence. It should go to maintain the wife and children in as good station, and with equal comforts, as they would have probably enjoyed but for this enforced separation. Her alimony should be fixed at not less than \$5,000. As part of it, she should be given the use of at least one-half of the real estate of appellant, and more if necessary.

The mortgage to Muir and Wilson and others should be set aside or ignored. Section 2126, Ky. St. 1903, pertaining to divorce and alimony, reads: "Sales and conveyances made to a purchaser, with notice, or for the benefit of any religious society, in fraud or hindrance of the wife or child to maintenance, shall be void as against them." This suit was pending when this mortgage was

executed. The mortgagees had notice of appellee's claim, and the pending of the action to enforce it.

As to the custody of the children, and the right of appellant to have them visit him, for the present that order will not be disturbed; but the court may reserve control of that feature of the case, so as to regulate it in the future should it be deemed advisable and proper.

Appellant contends that the offense of his disease was condoned by appellee's voluntarily cohabiting with him after she had knowledge of his condition. The statute allows cohabitation to operate as a condonement of lewdness or adultery. Section 2120. But the offense is aggravated, it seems to us, for a diseased spouse to inoculate the other with a dreadful venereal ailment, possibly curable, possibly not, and then claim a condonement because further cohabitation was indulged after that fact. *Dunlop v. Dunlop*, 3 Ky. Law Rep. 20. A condonement is not shown here. This case is hard. The erring young man undoubtedly suffers, and will suffer, greatly. Nothing is set down here in harshness against him. This result is the law's retribution from him to her whom he has most grievously wronged.

The judgment on the original appeal is affirmed, on the cross-appeal the judgment is reversed, and the cause is remanded for judgment in conformity herewith.

HOBSON, C. J., not sitting.

HOOE v. HOOE.

(Court of Appeals of Kentucky. April 17, 1906.)

1. DIVORCE—CAUSES SUBJECT TO CONDONATION.

Ky. St. 1903, § 2117, cl. 4, provides that a divorce may be granted for concealment of any loathsome disease existing at the time of marriage or contracting such afterwards; and section 2120 declares that cohabitation after a knowledge of adultery or lewdness shall take away the right of divorce therefor. *Held*, that a wife, by cohabiting with the husband after discovering that he has a loathsome disease, cannot condone the offense.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 184.]

2. SAME—CRUELTY—WHAT CONSTITUTES.

By the express provisions of Ky. St. 1903, § 2117, a wife may have a divorce for habitual behavior on the part of the husband for not less than six months in such manner as indicates such a settled aversion to the wife as permanently destroys her peace or happiness.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 62-68.]

3. SAME—ALIMONY.

Where a wife was granted a divorce, and the husband was worth \$13,000, and she had no estate, an allowance of \$3,000 to her, \$500 for the child, and \$500 for attorney's fees was a fair allowance.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 654, 678-680, 801.]

Appeal from Circuit Court, Boyle County.
"To be officially reported."

Suit by Lena Hooe against Ansel Hooe.
From a judgment dismissing the petition,
complainant appeals. Reversed.

E. V. Puryear and Robert Harding, for ap-
pellant. E. H. Gaither, for appellee.

CARROLL, C. From a judgment dismiss-
ing her petition for divorce and alimony and
the custody of her child, the appellant, who
was plaintiff in the court below, prosecutes
this appeal.

She sought a divorce upon two grounds:
First, that at the time of the marriage, ap-
pellee had a loathsome disease, and conceal-
ed from her the existence thereof; and, sec-
ond, that he habitually behaved toward her
for not less than six months in such a cruel
and inhuman manner as to indicate a settled
aversion to her or to permanently destroy her
peace or happiness. It appears from the
record that these parties were married in
January, 1903; the appellee being then about
21 years of age, and the appellant about 18
years. In October, 1903, a boy child was
born of the marriage; in April, 1904, a final
separation took place; and in June, 1904,
this action was instituted. In his answer
the appellee admits that at the time of his
marriage he had a loathsome disease, but
averts that he was unaware of the fact or of
the existence thereof, and that shortly after
his marriage he and his wife discovered the
fact, and that she abandoned him and refused
to live with him, but afterwards came back
to his home, and forgave and condoned his
offense, and lived and cohabited with him
from the time of her return until the separa-
tion, which he averred was without fault on
his part. He denied that he at any time
treated her in a cruel and inhuman manner,
and averred his affection for her and the
child, and his willingness and desire that
they return to his home. The married life
of this couple was brief and unhappy, and
the facts in some particulars are quite con-
flicting; but a careful reading of it satisfies
us that the conduct of appellee towards his
wife was not such as it should be, and that
she is entitled to the relief prayed for in
her petition.

The first question that presents itself is
whether or not his wife condoned or could
condone the offense of which he confesses he
was guilty by living with him after knowl-
edge upon her part of the fact that he had
a loathsome disease. The statute (section
2117, cl. 4) provides that a divorce may be
granted to a party not in fault for "conceal-
ment from the other party of any loathsome
disease existing at the time of marriage or
contracting such afterwards," and further
provides that "living in adultery with another
man or woman or adultery by the wife or
such lewd lascivious behavior on her part as
proves her to be unchaste, shall be grounds
of divorce," and section 2120 declares that

"cohabitation as man and wife after a knowl-
edge of adultery or lewdness complained of
shall take away the right of divorce there-
for." The statute does not in express terms
provide that any of the other causes for which
a divorce may be granted may be condoned,
and it is therefore insisted that the condona-
tion that denies a right of action is limited
to cohabitation as man and wife after a
knowledge of adultery or lewdness, and does
not embrace the ground upon which a divorce
is sought in this case. Without determin-
ing the question whether or not condonation
is limited to these two offenses, we are dis-
posed to place the opinion upon the higher
and broader ground that the offense charged
in this action is one that the wife cannot con-
done by cohabiting with her husband, so as
to deny her the right to obtain from him
a divorce for this cause. Either a husband
or wife might be willing and anxious to con-
done a single act or a series of acts of gross
misconduct or cruel treatment, or other spe-
cific violation of the marriage obligation;
but the affliction of a loathsome disease does
not come within this rule. It is a continuing
offense—not a distinct or separate grievance
that may be forgotten and forgiven in a day
or week, or a species of misconduct that affec-
tionate treatment and gentle behavior might
obliterate. Condonation is defined by Bishop
in his work on Marriage, Divorce and Separation
(volume 2, §§ 269, 308), "as the remis-
sion by one of the named parties of an of-
fense which he knows the other has commit-
ted against the marriage on the condition of
being continually afterward treated by the
other with conjugal kindness. All condona-
tion, especially the implied, is upon the con-
dition, both that the offense shall not be re-
peated, and likewise that continually after-
ward the party forgiven shall treat the other
with conjugal kindness, whereupon a breach
of the condition revives the original right of
divorce." These citations from this standard
work illustrate the idea that a continuing
offense, one that may last for years, that
may grow more malignant with age, is not in
that class of matrimonial derelictions that
may be condoned by the innocent party so
as to estop her from asserting her legal
rights.

There is reason and justice in the doctrine
that the injured spouse may, by his or her
voluntary acts committed with a full knowl-
edge of all the facts, condone a vice or crime.
The drunkard may, and often does, reform
and become a useful and honest citizen, a
good husband, and a kind father. A man
who commits a crime may repent of his
wickedness and lead an upright and valuable
life. The husband, who in a moment of in-
excusable passion behaves in an unkind and
cruel manner towards his wife, may not be
guilty of a like offense; and in these and
other instances that might be cited, where
a reconciliation is effected and the condona-
tion of the injured party is complete, noth-

ing may again occur to disturb the happiness of the home, or interfere with the felicity of the domestic relation, nor will children born of the marriage be afflicted in mind or body by the causes which once disrupted the marital state; but, when either one party or the other has contracted a loathsome disease that may be for all time menacing to the health, dangerous to the life, and distressing to the peace of mind and happiness of the parties, these reasons can have no application, and if, in an effort to avoid a threatened scandal, or prompted by a desire to attempt a reconciliation, or for other motives that the circumstances and surroundings may create, the wife should temporarily return to her husband, and make a fruitless endeavor to resume her duties and station as wife and mother, she ought not to be thereafter denied the power of asserting her legal rights, if it becomes necessary to apply to the chancellor for redress or protection. It may have been declared to be the law in other jurisdictions that offenses such as this can be condoned, but it has never been so ruled in this state; and, as said in *Joseph Muir v. Mary E. Muir*, 92 S. W. 314, 28 Ky. Law Rep. 1355, where a like defense was made, "for a diseased spouse to inoculate the other with a doubtful vaginal ailment, possibly curable, possibly not, and then claim a condonement because further cohabitation was indulged in after that fact, is but an aggravation of the wrong." In this case, not only was the young wife and mother inoculated with this disgusting disease, but the little baby was tainted with it at his birth, and when only a few days old was taken from his mother's arms and carried to a distant place to be treated for the malady, and the mother and child were separated at a period of time in the life of each when constant association was indispensable to the happiness of one and the health and well-being of the other; nor does it appear from the record that either—or appellee—has yet been cured of the disorder.

It is likely that appellee, when he married, believed that he was well; but his innocence in this respect does not affect the question here presented, as his defense is that, although he had this disease, his wife cannot complain of it, because she continued to live with him for several weeks after discovering the fact. During the life of his mother, and when his wife was with her family, during and after her confinement, his conduct was not that of a good husband, if the only persons who testify concerning his behavior can be believed, and their evidence is not contradicted. Many acts, each in itself little, are related, illustrating his lack of feeling and respect for his wife. When his mother died in January, 1904, he requested a Baptist minister, a friend of the family, to go and see his wife, and entreat her to return, promising that he would be a kind

and faithful husband, and would accord her the treatment due a wife. After a visit from the minister she did return to his home, and remained there until April. This minister also testifies that in April, and shortly before the final separation, appellant, in company with the half-brother and sister of appellee, came to see him and again solicited his good offices in an effort to induce appellee to accord to his wife better treatment. This circumstance, and others that are disclosed, bear ample testimony to the fact that appellee's behavior toward his wife was calculated to permanently destroy her peace and happiness, and in the meaning of the statute was cruel. It is not necessary that the husband should be a wife beater, or that his wife should apprehend violence at his hands. These and other specific acts of ill treatment are made a ground for divorce by clause 3, which reads: "Such cruel beating or injury, or attempt at injury, of the wife by the husband, as indicates an outrageous temper in him, or probable danger to her life, or great bodily injury from her remaining with him." Under the statute here invoked, it is that species of cruel and inhuman treatment that indicates a settled aversion to the wife as permanently destroys her peace or happiness; and this character of cruelty may habitually manifest itself in various ways that fall short of assault or bodily injury, and are not attended with apprehension of violence or danger, and in the nature of the case each complaint under this statute must be determined by the facts as they are presented. *Beall v. Beall*, 80 Ky. 675; *Davis v. Davis*, 86 Ky. 32, 4 S. W. 822. We appreciate fully the force of the argument of counsel for appellee that he was many times sorely tried by unwelcome and too frequent visitations from the family of his wife, and it is doubtless true that the irritating presence and meddlesome interference of these officious, but probably well-disposed, relatives was a fruitful source of annoyance and vexation to appellee; but this did not justify or excuse his conduct towards his wife, who appears in the record as a pure, modest, and amiable young woman.

In respect to the allowances asked for, it appears that the real property of appellee is reasonably worth \$13,000, and his wife has no estate; and under all the circumstances we have concluded that it will be better and more satisfactory to both parties if a lump sum is awarded, as the husband will then know what he must pay, and the wife what she will have for her support. *Gooding v. Gooding*, 47 S. W. 1090, 48 S. W. 432, 20 Ky. Law Rep. 955. We think \$3,000 for the wife, \$500 for the child, and \$500 attorney's fees a fair allowance, and the court will make and enforce such orders as may be necessary to secure the payment of these sums. For the present, the mother is entitled to the exclusive custody and care of

the child, with reasonable and proper opportunity for visits by its father; the question of its future disposition to be kept under the control of the court.

The judgment is reversed, with directions for further proceedings in conformity to this opinion.

GALLOWAY et al. v. CRAIG et al.

(Court of Appeals of Kentucky. March 23, 1906.)

1. JUDGMENT—REVIVAL.

The revival in a cause, where judgment was rendered for plaintiff before death of defendant, will be considered that of the judgment, and not of the action, though the notice and order are in terms for revival of the action.

2. SAME—PARTIES.

Defendant's administrator is not a necessary party to proceedings to revive a judgment; it being merely for sale of land, and not granting any personal relief.

3. SAME—NOTICE.

Under Code 1854, § 437, providing that, in revival of a judgment against infants, service of notice must be on them and their father or guardian, or, if neither the father nor guardian can be found, then on the mother, service of notice on them and their mother will be considered sufficient; their father being dead, and it not appearing that they had a guardian.

4. SAME—PREMATURE PROCEEDINGS.

The revival of a judgment against the heirs of the original defendant prior to the time prescribed by statute is a mere irregularity, making a sale under the judgment erroneous but not void.

5. SAME—FAILURE OF GUARDIAN AD LITEM TO ANSWER.

Any failure of a guardian ad litem to file an answer in proceedings to revive a judgment against infants is but an irregularity, not rendering void the sale under the judgment.

6. SAME—COLLATERAL ATTACK.

The sale under a judgment not being void, the remedy of parties to the judgment is by appeal, and not by collateral attack.

7. MORTGAGES—FORECLOSURE—VENUE.

Under Civ. Code Prac. § 62, providing that actions must be brought in the county in which the subject of the action is situated for sale of real property under a mortgage, except for debts of a decedent, section 65, providing that an action to settle the estate of decedent must be brought in the county in which his personal representative qualified, and section 66, providing that in an action for distribution of the estate of a decedent, or for its partition among his heirs, or for the sale and payment of his debts, an action to foreclose a mortgage on land of which one died seised may be brought in the county where the land is situated, when none of the other enumerated actions is pending.

8. JUDICIAL SALES—ACTIONS TO SET ASIDE—LACHES.

Where action to recover land is brought against persons who for more than 20 years have been in the adverse and peaceable possession thereof, every presumption will be indulged in favor of the validity of the judgment under which defendants claim.

Appeal from Circuit Court, Ohio County.
"To be officially reported."

Action by J. Galloway and others against A. J. Craig and others to recover land. Judgment for defendants. Plaintiffs appeal. Affirmed.

Jno. M. Galloway, for appellants. J. S. Glenn and B. D. Ringo, for appellees.

CARROLL, C. In 1874 one Shultz sold to R. H. Simmons a tract of land in Ohio county and gave bond for title. Failing to pay the purchase money, suit was instituted against him, and in 1875 judgment rendered, ordering a sale of a sufficient quantity of the land to pay the purchase money. This judgment was not executed or satisfied when the owner, Simmons, died in October, 1877, a resident of Butler county, Ky., leaving surviving him his widow and four children, aged 12, 10, 5, and 1 years. A few months after his death, a child afterwards named R. L. Simmons was born. In December, 1877, administration on his estate was granted in the Butler county court. In November, 1877, the death of Simmons was suggested in the Shultz case, and it was continued for revival. In April, 1878, a notice that Shultz would move to have the action revived on a day named in the May term was prepared by the attorney for Shultz. This notice did not mention the administrator or the posthumous child, nor was it executed on either of them; but on May 2, 1878, was executed on the widow and four older children "by delivering to each of them a copy of this notice, and an extra copy to the mother with whom they resided." On May 17th A. L. Morton, who was then circuit clerk, was appointed guardian ad litem for the four children and filed his answer. Afterwards 10 acres of land was sold to pay the debt, and in 1878 an order was made confirming the report of the sale. In March, 1878, Mrs. Hill, who had a mortgage in this land, filed her action in the Ohio circuit court to have her lien enforced. Process appears to have been executed in this action on the widow and four older children, a guardian ad litem was appointed for the children and answered, and the Butler county administrator appeared in the case and filed a special demurrer, which was overruled. In November, 1880, a judgment ordering a sale of the land was entered, and under this judgment the remainder of the land was sold; and in 1881 the report of sale was confirmed. The record in these two actions has been lost, and the above somewhat imperfect data were obtained from order books and by a special commissioner appointed to supply as much as possible the lost record. Appellee, Wallace M. Brown, by a series of conveyances, became the owner of the 150 acres of land sold under these decrees, and the appellants, who are children of R. H. Simmons, instituted this action in 1901 to recover from him this land. The chancellor dismissed the petition as to all except the posthumous child, R. L. Simmons, adjudging that he was entitled to one-fifth of the land as he was not a party to any proceedings under which it was sold.

Appellants contend that the sale under

the Shultz judgment was void because the judgment was not revived against the administrator, who was not at any time a party to this action, because the revivor was made too soon and proper notice of it was not given to the infants, and because an attempt was made to revive the action, and not the judgment, and no guardian ad litem was regularly appointed for the infants. They contend that the judgment in the Hill case was void because the Ohio circuit court had no jurisdiction of the subject-matter of the action, and no guardian ad litem was appointed to represent the infants, and therefore they were not before the court when judgment was rendered. Counsel for the appellees concede that the proceedings in these cases were not entirely regular, but insist that they are not void, however erroneous, and cannot be attacked in this collateral proceeding.

We will first take up the objections urged against the validity of the judgment in the Shultz case. It is true that the judgment, and not the action, should have been revived; but the presumption must be indulged in, after the great length of time, that it was in fact the judgment, and not the action, that was revived. Indeed, it does not seem material whether the notice of revivor or the order are designated as an attempt to revive the action, or the judgment, because a judgment in the action had been rendered during the life of Simmons, and it was necessarily the judgment that was sought to be revived. No attempt whatever of any kind was made to revive the action. It would be extremely technical to hold that merely because the notice and order show that it was the action and not the judgment that was sought to be, and was, revived, that therefore all proceedings after the revivor were void. The administrator was not a necessary party to the proceeding to revive this judgment. No personal relief was sought, and upon the death of Simmons the title to this land descended to his heirs. Burge's *Adm'r v. Brown*, 5 Bush, 535, 96 Am. Dec. 369. The land alone was sought to be subjected and the heirs were the only necessary parties to this proceeding, although an action or judgment may be revived against both the personal representatives and the heirs, and in some cases it may be necessary that the personal representative should be made a party. The Code of 1854, controls the proceeding in the Shultz case, and that Code provides in section 437 that a judgment may be revived against the personal representative and heirs, either or both, by delivering a copy of the notice to the persons against whom the judgment is sought to be revived; and section 81 provides that where the defendant is an infant "under the age of fourteen years, the service must be upon him and his father or guardian, or if neither of these can be found, then upon his mother, or any other white

person having the care or control of the infant, or with whom he lives." These infants were under the age of 14 years, their father was dead, and it does not appear that they had a guardian. Therefore it was proper to execute the notice of revivor upon the infants and their mother in the manner in which it was done in this case. *Rodgers v. Rodgers' Adm'r*, 31 S. W. 189, 17 Ky. Law Rep. 358; *Cheatham v. Whitman*, 86 Ky. 614, 6 S. W. 595. That Code also provided that a judgment should not be revived against the heirs until 12 months after the death of the defendant. The judgment in this case was revived against the heirs before the expiration of 12 months after the death of Simmons, and in this respect the proceeding was irregular and premature; but this premature proceeding did not render the sale under the judgment void, but only erroneous. It was merely a clerical misprision (*Webber v. Webber*, 1 Metc. 18; *Morrison v. Beckham*, 96 Ky. 72, 27 S. W. 868), as was the failure of the guardian ad litem to file an answer if there was such failure (*Keller v. Wilson*, 90 Ky. 350, 14 S. W. 332; *Oliver v. Park*, 101 Ky. 1, 39 S. W. 423). The sale under the judgment not being void, the remedy of these appellants was by appeal, and they cannot successfully attack it in this collateral proceeding.

The judgment in the Hill case is assailed chiefly on the ground that the Ohio circuit court had no jurisdiction of the action, because Simmons died in Butler county, Ky., and administration on his estate was granted in that county before the Hill action was instituted, and therefore it is insisted that the Butler circuit court alone had jurisdiction of the action, and that all the proceedings in the Ohio circuit court were void. This action was instituted in 1876, and hence the present Code of Practice controls it. Section 62 of the Civil Code of Practice provides that "actions must be brought in the county in which the subject of the action or some part thereof is situated * * * for the sale of real property * * * under a mortgage lien or other encumbrance or charge, except for debts of a decedent." Section 63, as it read pending this action, provided that "an action to settle the estate of a deceased person must be brought in the county in which his personal representative was qualified"; and section 66 provided that "an action for the distribution of the estate of a deceased person, or for its partition among his heirs, or for the sale and payment of his debts or property descended from or devised by him must be brought in the county in which his personal representative was qualified." These sections of the Code must be construed together, and when so construed there is no conflict between them.

Under section 62 an action for the enforcement of a mortgage lien or other encumbrance on land against the estate of a decedent may be brought in the county within which the land sought to be subjected is situated, or,

If there be an action pending to settle the estate of a deceased person, in the county in which his personal representative was qualified, or, an action pending in such county for the distribution of the estate of a decedent, or its partition among his heirs, or for the sale and payment of his debts, the mortgagee or person holding the lien may assert his claim in the action pending in the county in which the personal representative was qualified, and in such action may have the land upon which he has a lien subjected to the payment of his debt, although it may be situated in another. In other words, there are two jurisdictions in which a person having a lien on real estate owned by a deceased person may seek its enforcement; that is, in the county where the land is situated, or in the county in which the personal representative qualified and where there is an action pending to settle his estate or for its distribution or sale for the payment of his debts. Under these provisions, if an action should be brought to settle the estate of a deceased person, or for its distribution or partition or sale for the payment of his debts, in the county where the personal representative qualified, before an action was instituted by the mortgagee in the county where the land was located, the court might enjoin any creditor of the decedent from instituting an action in any other county and require him to assert his claim in the action pending in the county where the personal representative qualified. This construction is sustained by sections 428-436, Civ. Code Prac., relating to the settlement of the estates of deceased persons, where it is provided in substance that in an action to settle the estate of deceased persons the representatives of the deceased and all persons having a lien upon or interest in the property left by the decedent, and the creditors of the decedent so far as known, must be parties to the action as plaintiffs or defendants and upon the institution of such an action, an order may be made enjoining the prosecution of actions against the representatives of decedent by creditors for their demands. It is also supported by the decisions of this court in *Shields v. Yellman*, 100 Ky. 655, 39 S. W. 30; *Willis' Adm'r v. Roberts' Adm'r*, 90 Ky. 122, 13 S. W. 358; *Citizens' National Bank v. Boswell's Adm'r*, 93 Ky. 92, 19 S. W. 174; *Dehaven v. Dehaven's Adm'r*, 46 S. W. 215, 47 S. W. 597, 20 Ky. Law Rep. 663.

If, however, the action is brought for the distribution of the estate of a deceased person, or for its partition among the heirs or for a sale for the payment of his debts generally, it must be instituted in the county in which his personal representative was qualified, as provided in section 66. This section evidently contemplates an action instituted for the purpose of settling the estate of a deceased person and not the subjection of his real estate to the payment of

a single debt such as is provided for in section 62. It therefore follows that the Ohio circuit court had jurisdiction of the action to subject the land situated in Ohio county to the payment of the Hill mortgage.

It seems entirely proper to add in this connection that courts of equity do not look with much favor upon actions commenced so long a time after the cause of action originally accrued, and when it is sought in an action like this to recover land that has been in the adverse and peaceful possession of bona fide owners for more than 20 years, every presumption will be indulged in favor of the validity of the judgment under which the owners claim title. *Oliver v. Park*, 101 Ky. 1, 39 S. W. 423; *Northington v. Reed*, 75 S. W. 206, 25 Ky. Law Rep. 354; *Jones v. Edwards*, 78 Ky. 6.

The judgment of the lower court is affirmed.

COOK v. BURTON.

(Court of Appeals of Kentucky. March 23, 1906.)

1. DEEDS—CONSTRUCTION—APPURTENANCES—WAYS.

Where the property included in a voluntary assignment for creditors included several lots which adjoined an alley, on land of the assignor, and which had never been opened or dedicated, and in all the orders of the court relative to sales of the lots and in the assignee's deeds the alley was reserved, the right to the free use of the alley passed as an appurtenance to the various lots.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 337, 338; vol. 17, Cent. Dig. Easements, § 37.]

2. CHAMPERTY—SALE OF LANDS HELD ADVERSELY—JUDICIAL SALES.

The statute of champerty making void all sales of land held adversely by a third person has no application to sales under judicial orders.

Appeal from Circuit Court, Fulton County.
"Not to be officially reported."

Action by F. W. Cook against James T. Burton. From a decree in favor of defendant, complainant appeals. Reversed.

Herschel T. Smith, for appellant. Sheldbourne & Kane, for appellee.

CARROLL, C. In April, 1895, J. W. Boyd & Co. of Fulton, Ky., made a voluntary assignment, and included in the property assigned were several lots in Fulton, which are described in the pleadings and evidence in this case as a "mill lot," a "cold storage building," a "brick warehouse," and a small triangular lot called a "coal chute." The assignees requested the county court to authorize them to sell the lot known as the "mill lot," and the court entered an order directing them to sell the same, describing the property in the order and reserving an alley 8 feet wide and 60 feet long between the "mill lot," directed to be sold, and the "cold storage building." This alley commenced on Walnut street and ran north toward the line

of the Illinois Central Railroad Company, and also separated the lot known as the "brick warehouse" from the "coal chute." In other words the "mill property" and the "brick warehouse" are on the east side of this alley, and the "cold storage property" and the "coal chute" on the west side of it. This alley is the bone of contention in this case. Afterwards, the proceedings for a settlement of the estate were transferred to the circuit court, and by order of the circuit court, the assignees were directed to sell the "cold storage property" and the "brick warehouse property." The "coal chute" was not specifically mentioned in this order, but appears to have been included in the lot of ground directed to be sold in connection with the "cold storage property." This order also recognized and described this eight-foot alley, excepting it from the order of sale. Under this order, a sale was made in November, 1895, when a Mrs. Stubblefield became the purchaser of the "cold storage property" and one, I. G. Feltz, the purchaser of the "brick warehouse property." Afterwards, Feltz sold and conveyed to the appellant Cook, the "brick warehouse property," and the appellee Burton, by a series of conveyances, became the owner of the "mill lot" and the "cold storage building" and lot which includes the "coal chute," before mentioned. After appellee became the owner of this property, he commenced making some improvements that extended across and obstructed this alley. Thereupon, appellant, claiming that this alley was laid off and dedicated for the use and benefit of the property owned by him, and that its enjoyment was necessary to the use of his property, sought to enjoin the appellee from in any manner obstructing it. The circuit court dismissed his petition, and he appeals.

It does not appear that this alley was ever opened by the city, or dedicated to the public use. It seems that while J. W. Boyd & Co. owned all this property, this alley was opened for their own convenience. The record does not show whether any mention of it was made in the deed of assignment or not. The first order of the county court directing a sale of any of this property was made in April, 1895, and directed the assignees to sell the lot known as the "mill lot." The order of the court described this lot as follows: "A lot or parcel of ground, situated in Fulton, Ky., beginning at a stake eight feet from the east line of the Boyd cold storage building, on the intersection of the line of Walnut street with the property of J. W. Boyd & Co., so as to reserve an eight-foot alley between the mill lot and cold storage building; thence north and at right angles with the line of said alley, sixty feet to a stake; thence at right angles ninety-seven feet to a stake, the east line running with a wall of the brick warehouse; thence at right angles with the line of the alley, which is reserved between the mill building and the frame warehouse fronting on Walnut

street, sixty feet to a stake at the intersection of the line of Walnut street with Boyd's line; thence with the line of Walnut street ninety-seven feet west to the beginning." Under this order, the property mentioned was sold in May, 1895, and purchased by Howard & Hester. The assignees filed a report of sale, and afterwards, in February, 1897, conveyed this property to Hester & Howard. The report of sale and deed contained the same description as the order directing the sale. In January, 1896, the assignees gave to Hester & Howard an agreement setting out that on "the 2d day of May, last, it was agreed by Feltz & Boyd that the 'coal chute' should be added to the purchasers of said mill, for their benefit, and will so recommend same in our report to the court of Fulton county." In August, 1896, the assignees conveyed to Hester & Howard this coal chute, but it does not appear that they made the agreement, or deed, under or by virtue of any order of court. In September, 1895, the assignees were directed by the court to sell at public outcry, the cold storage lot and the lot on which the brick warehouse stands. The order of court describes the cold storage lot as follows: "A lot of ground in Fulton, Ky., on which the cold storage building stands, beginning at a point on Walnut street, where the line of the eight-foot alley, between the mill property and the cold storage building, intersects Walnut street, thence north with the line of said alley eighty-five feet to an alley; thence westward with said alley to the right of way of the C. & O. S. W. Ry. Co.; thence with said right of way south to the line of Walnut street to the beginning." And describes the brick warehouse as follows: "A lot on which brick warehouse stands in Fulton, Ky., beginning at the intersection of the north line of the mill property where it intersects the eight-foot alley, reserved between it and the cold storage building, at a point sixty feet distance from Walnut street; thence eastward with the line of the mill property ninety-seven feet to a stake on an alley; thence northerly about twenty-three feet to an alley; thence with the line of the alley ninety-seven feet westward; and thence at right angles with the eight-foot alley, between the cold storage building and mill, about twenty-eight feet to the beginning."

At the sale under this order, the brick warehouse lot was purchased by one I. G. Feltz, and in May, 1896, it was conveyed to him by the assignees, the description in the deed being, with some minor variations, the same as the description in the order of court. All the conveyances in the record made by the assignees, and the orders of court, describe and reserve this eight-foot alleyway between the "cold storage building" on the west and the "mill property" on the right, extending from Walnut street to the right of way of the Illinois Central Railroad. The "coal

chute" lies directly north of the cold storage property and this eight-foot alleyway runs between it and the brick warehouse owned by appellant. This alleyway was used by appellant and his vendors for some years after the purchase of the brick warehouse at the assignees' sale. It is true that there are two other outlets from the brick warehouse, one on the north and one on the east, but there is considerable testimony to the effect that this alleyway running from Walnut street to the west side of this brick warehouse property is useful to it in many ways, and quite a valuable appurtenant. It does not appear that appellee has any legal title to this alleyway, or any right to close it. It was intended as much for the use and benefit of the brick warehouse now owned by appellant as for the use and benefit of the cold storage property, the coal chute and the mill property now owned by appellee. When the assignees took possession of all this property, under the deed of assignment, they found this alley running from Walnut street to the Illinois Central Railroad; and one of the assignees testifies that no part of this alleyway was ever sold to any of the purchasers of the property, that it was thought by the assignees and the creditors that it would increase the value of the property if this alley was left for the benefit of the purchasers. The reservation of the alley does not mean the destruction of the triangular piece of property called the "coal chute," as the alley only takes up eight feet of the "coal chute" that lies next to the "brick warehouse" of appellant, leaving for a "coal chute" the balance of the triangle bounded on the east by this alley, on the south by the "cold storage property" and on the west and north by the Illinois Central Railroad. At the time the deed of assignment was made, the "brick warehouse" owned by appellant was standing where it now is, and for some time after the sale of it by the assignees, this alley was used in connection with it, in going to and from the "brick warehouse" to Walnut street. It seems that when the property was sold, there was no building on the "cold storage lot," but that afterwards it came into the possession of Hester & Howard, and they erected a building on it, leaving, however, the alley between it and the "mill property."

The appellee contends that this property, known as the "coal chute" embraces all of the alley north of the "cold storage building" and that its east line runs with the west line of the property of appellant. The effect of his contention is that there is no alley at all north of the "cold storage building," that if there ever was an alley between the "cold storage building" and the "mill property," that it only extended from Walnut street some 45 feet north, or to the northern line of the "cold storage building" and that it was intended exclusively for the use of the "cold storage building" and the "mill property" and not for the benefit of the "brick warehouse"

owned by appellant. He bases this assumption on the fact that the assignees sold this "coal chute," which he contends included all the alley north of the "cold storage" building, to Hester & Howard when they bought the "mill property," and claims to be sustained in this contention by the agreement made in January, 1896, heretofore referred to, between the assignees and Hester & Howard, and also by the fact that in August, 1896, the assignees conveyed to Hester & Howard this coal chute; but neither the agreement nor deed described this "coal chute," or bound it in any way—and aside from this, the assignees had no authority from the court to sell or convey this "coal chute" to Hester & Howard. Appellant does not deny the right of appellee to so much of the "coal chute" as lies west of the alley. He only insists that under his claim of right to the "coal chute" he cannot take possession of the alley from his building to Walnut street. In 1901 Burton & Bran purchased from Hester the "cold storage property" and the "mill property," and soon afterwards Bran sold his interest in the property to Burton. The deed from Hester to Burton & Bran is in the record, and it is under and by virtue of this deed and the deed from Bran of his interest, that Burton owns the "mill property" and the "cold storage property"; and this deed describes the "cold storage property" as beginning "at a point on Walnut street intersecting the eight-foot alley separating this lot from the 'mill lot'; thence north with a line of said alley about eighty-five feet to an alley: Then follows the other boundary. It describes the "mill lot" as: "Beginning at a point on Walnut street eight feet east of where Walnut street intersects the line of what is known as the 'cold storage lot,' or building; thence running north and at right angles with the line of the alley," separating the "cold storage property" and this lot. The deed from Bran to Burton contains the same description of these lots as the deed from Hester & Howard to Burton & Bran.

It will thus be seen that this alley is specifically mentioned and reserved in the deed under which Burton holds this property. It is 85 feet, according to Burton's statement, from Walnut street to the right of way of the Illinois Central Railroad, and it will be observed that the deed of Hester to Burton & Bran, just mentioned, describes the "cold storage" lot as "beginning at a point on Walnut street intersecting the eight-foot alley" separating this lot from the "mill lot"; thence north with a line of said alley about 85 feet. These various conveyances leave no room for doubt that this alley from Walnut street to the Illinois Central Railroad, along the line of appellant's property has been at all times recognized by the various owners of this property, and, in our opinion, the appellee never purchased this alley, never obtained any conveyance to it nor has he any right or title to it. It is

as much an appurtenance to the property of appellant as it is to the property of appellee Burton. It was intended for the use and benefit of all this property. In *Irvine v. McCreary*, 56 S. W. 966, 22 Ky. Law. Rep. 169, 49 L. R. A. 417, this court in an opinion by Judge Paynter, in a case in many respects like this, held that: "On the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant, or reservation as the case may be, of all apparent and continuous easements or incidents or property which have been created or used by him, during the unity of possession, although they could have had no legal existence apart from his general ownership, some things will pass by the conveyance of land as incident, attendant or appurtenant thereto. This is a case where a right of way or other easement is appurtenant to land, and if a house or strip be conveyed, everything passes which belongs to and is in use for it as an incident or appurtenant." To the same effect is *Muir v. Cox*, 62 S. W. 723, 23 Ky. Law. Rep. 6.

This alleyway was opened by the owners of all this property before they made a deed of assignment, its existence was recognized by the court and assignees in making sales of the property, and by the subsequent owners of the property, except appellee. Appellee contends that when Hester & Howard took possession of the "mill property" in May, 1895, under their purchase from the assignees, and at the same time obtained possession of the "coal chute" under some private arrangement with the assignees, not reported to or approved by the court, that they took possession of this alley and were in the open and adverse possession of it at the time that the brick building was sold in the fall of 1895, by the assignees to Feltz, a remote vendor of appellant, and in his answer, appellee pleads and relies on the statute of champerty as a bar to plaintiff's right to claim the alley, or any part of it, or any use or interest therein. We do not think there is any merit in his plea. If it be a fact that Hester & Howard took possession of this alley under their purchase from the assignees, they were mere trespassers and had no right or title to it. All this property was in the possession of the court and, under section 87 of the Kentucky Statutes of 1903, they only had authority to sell and convey so much of the assigned real estate as they were directed by the court to sell. And, as before stated, the court did not authorize or direct them to sell this alley, or any part of it, to any person, nor did they ever report that they had sold it, nor did the court ever direct them to convey this alley, or any part of it, to any person, and at the time that appellee's vendor, Howard & Hester, bought the "mill property," under an order of the court, from the assignees, this alley was in the possession of the court, and it is well settled that the statute of champerty has no application to sales made under

orders of court. *Preston v. Breckinridge*, 86 Ky. 619, 6 S. W. 641; *Carlisle v. Cassaday*, 46 S. W. 490, 20 Ky. Law Rep. 562; *Arnold v. Stephens*, 17 S. W. 859, 13 Ky. Law Rep. 622.

It is therefore adjudged that the judgment of the lower court be reversed, with directions to make and enforce such orders as may be necessary to open this alley eight feet wide from Walnut street, running north to the lot of appellant, so as to afford him the unobstructed use of it from his property to Walnut street, and for other proceedings in conformity to this opinion.

NEW YORK LIFE INS. CO. v. LEVY'S ADM'R.

(Court of Appeals of Kentucky. March 23, 1906.)

INSURANCE—CREATION OF CONTRACT—ACCEPTANCE.

On December 30th deceased applied to defendant's local agent for \$10,000 insurance, to be written in two \$5,000 policies. On January 20th deceased paid the first premium to the agent under an agreement that he was to stand insured as of the date of the application, and on the same day decedent died. The day before the company had, at its general office, considered the application and rejected it for \$10,000, but approved it for \$5,000 and issued a policy therefor, which was sent to the agent, who delivered it to decedent's son. *Held*, that defendant's rejection of the proposal for \$10,000 insurance ended all contractual relations, and there was no insurance for either amount at the time of the death.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 196-202.]

Nunn, J., dissenting.

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by Moses Levy's administrator against the New York Life Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed.

Clay & Clay, James H. McIntosh, and Yeaman & Yeaman, for appellant. Dorsey & Stanley, for appellee.

BARKER, J. On the 30th day of December, 1903, Moses Levy, a citizen of Henderson county, Ky., made written application to the New York Life Insurance Company for \$10,000 of insurance on his life, to be written in two policies of \$5,000 each. This proposal for insurance was made through the company's agent, William Egard, who forwarded it to the main office in New York City. No cash premium was paid at the time of the application, but it is claimed that subsequently, on January 20, 1904, about the hour of noon, at the solicitation of the agent, William Egard, the applicant gave to him a check, payable to the company, for \$776.90, being the cash premium for one year's insurance for the amount applied for. At 11:45 p. m. of that day the applicant suddenly died. On the 19th of January, 1904, the com-

pany rejected the application for \$10,000 of insurance, but approved it for \$5,000, and in pursuance of this action wrote out a policy for this sum on the life of the applicant, conforming in all respects to his application, except in the amount of the policy and the annual premium therefor. This policy was issued on the 20th of January, and mailed to the company's agent at Henderson, Ky., where it was received on the 23d of January, and, although the agent knew of the death of Levy, he delivered it to Leon Levy, his son. The company did not receive notice of the death of Moses Levy until the 28th of January, 1904, and, in ignorance of this fact, on the 26th of January receded from its former determination to insure him for only \$5,000, and issued a second policy, in all substantial respects similar to the first, and forwarded it to its agent at Henderson. This, although received by Egard, was not delivered because of a telegram prohibiting his so doing; the company having in the meantime learned of the death of the applicant.

Leon Levy, the son of the applicant, was duly appointed and qualified as the administrator of his father's estate, and having made demand for payment of the whole amount of the insurance applied for, and being refused by the company, he instituted this action to recover the full sum of \$10,000, alleging in his petition, among other things, the following: "The plaintiff further states that on the 30th day of December, 1903, the decedent, Moses Levy, and the defendant entered into a contract of life insurance, by the terms of which the defendant agreed to and did insure the life of decedent and agreed to pay his administrator the sum of ten thousand dollars. The plaintiff further states that the said Moses Levy on the 30th day of December, 1903, at the instance and request of William Egard, an agent of the defendant, made a written application to the defendant for the sum of \$10,000 insurance on his life. Said application was prepared by said agent and accepted by said company, and is now in the possession of defendant, and cannot be filed herewith. Said insurance was, by the terms of said application, and by the agreement between said decedent and the defendant, to be divided into two policies of five thousand dollars each, which the defendant agreed to issue to said Moses Levy, and under their said agreement said policies were to be incontestable and non-forfeitable for any cause, and were to relate back to and be in force from the date of said application, which was the 30th day of December, 1903. It was also agreed by and between said decedent and said defendant, when the said application was made, viz., on the 30th day of December, 1903, in consideration, that said decedent would pay to the defendant the sum of \$776.90, which sum he did pay on the morning of the 20th day of January, 1904, and the further consideration that said Moses Levy would pay to the defendant

a like sum of \$776.90 on the 30th day of December each year thereafter during the life of said Levy, the defendant agreed to pay to the administrator of said Moses Levy, immediately upon the proof of his death, the sum of ten thousand dollars (\$10,000). It was also agreed, at the time of making said application between said Moses Levy and the defendant, that as soon as the first premium was paid, which was in fact on the morning of January 20, 1904, that the said insurance should be incontestable and nonforfeitable for any cause, and should relate back to the date of said application, and be in force and effect from the date of said application, which was December 30, 1903. It was further agreed by the said decedent and the defendant that if, for any cause, the defendant should refuse to issue both or either of said policies, then the insurance as agreed upon should be in force and effect until the decedent was notified of such refusal on the part of the defendant, and the premiums should then be returned to said Levy by the defendant, and said Levy was not notified of such refusal, nor was the premium returned to him." The defendant company filed an answer, denying all of the material allegations of the petition, including that of the payment of the premium by the applicant. Upon trial of the case, after all the evidence was in, the court awarded the defendant company a peremptory instruction to the jury to find for it on the second policy, and the jury, under the instructions of the court, found for the plaintiff (appellee) for the sum of \$5,000, being the amount of the first policy, which had been delivered by the agent to him. From the judgments based upon these verdicts, the insurance company is here on direct, and the administrator has prosecuted a cross, appeal.

The trial court was evidently of opinion that the issuance of the first policy of \$5,000 was an acceptance pro tanto of the applicant's proposal to the company for insurance in the sum of \$10,000, and therefore it became bound for the sum of \$5,000, provided Moses Levy had paid over to Egard on the 20th of January the sum of \$776.90 as a year's premium on the proposed insurance, as claimed by his administrator to have been done. This position, it seems to us, is not only unsound as a proposition of law, but in effect ignores the uncontradicted fact, shown by the appellee's own evidence, that the appellant company rejected the proposal for \$10,000 insurance on the 19th day of January, 1904, which was the day before it is claimed that the premium was paid by the applicant, and thereby ended all contractual relations pending between the parties at that time. An application for insurance in no wise differs in principle from any other proposal to contract, and must, in order to bind the parties, be assented to in terms as broad and comprehensive as the proposition made.

On this subject Parsons in his work on Con-

tracts (volume 1, 475) thus states the rule: "There is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense. * * * It becomes a contract only when the proposition is met by an acceptance which corresponds with it entirely and adequately." At star page 476, the author says: "Many cases turn upon the question whether this assent to the proposition was entire and adequate. The principle may be stated thus: The assent must comprehend the whole of the proposition, it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter. Thus an offer to sell a certain thing, on certain terms, may be met by the answer, 'I will take that thing on those terms,' or by an answer which means this, however it may be expressed; and if the proposition be in the form of a question, as, 'I will sell you so and so; will you buy?' the whole of this meaning may be conveyed by the word 'yes,' or any other simply affirmative answer. And thus a legal contract is completed. But there are cases where the answer, either in words or in effect, departs from the proposition, or varies the terms of the order, or substitutes for the contract tendered one more satisfactory to the respondent. The respondent is at liberty to accept wholly, or to reject wholly, but one of these things he must do, for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer. The party making the offer may renew it; but the party receiving it cannot reply, accepting with modifications, and when these are rejected again reply, accepting generally, and upon his acceptance claim the right of holding the other to his first offer."

In Page on Contracts, vol. 1, §§ 45, 46, it is said:

"Sec. 45. The acceptance must, furthermore, correspond to the offer at every point, leaving nothing open for future negotiations. An attempted acceptance, which leaves open the adjustment of the price, or the ascertainment of the capacity of the ship chartered, where that is a material term of the offer, or the time of delivery or of payment or an acceptance as to the price only, is without validity.

"Sec. 46. An attempted acceptance which seeks to modify one or more terms of the offer is of no legal effect as an acceptance. It is really a rejection of the offer, and a counter proposition in lieu of the original offer, and must be accepted by the party making the original offer in order to constitute an agreement. * * *

In the leading case in the Supreme Court of the United States (*Ellason v. Henshaw*, 4 Wheat., at page 228, 4 L. Ed. 556) Justice Washington states the principle here involved in the following language: "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another imposes no obligation upon the for-

mer until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either." In the leading case in this state on the subject (*Hutcheson v. Blakeman*, 3 Metc. 80) our court, in an opinion by Judge Wood, announces the principle under discussion, and expressly approves the quotation from *Parsons* and the opinion in *Ellason v. Henshaw*.

The case of *Minneapolis & St. Louis Railway v. Columbus Rolling Mill*, 119 U. S. 149, 7 Sup. Ct. 168, 30 L. Ed. 376, was identical in principle with that at bar. The railway company made the following request of the rolling mill company: "December 5, 1879. Please quote me prices for 500 to 3,000 tons 50 lb. steel rails, and for 2,000 to 5,000 tons 50 lb. iron rails, March, 1880, delivery." On December 8, 1879, the following reply was made to the above letter: "Your favor of the 5 inst. at hand. We do not make steel rails. For iron rails, we will sell 2,000 to 5,000 tons of 50 lb. rails for fifty-four (\$54.00) dollars per gross ton for spot cash, f. o. b. cars at our mill, March delivery, subject as follows," etc. On December 16, 1879, the railway company telegraphed the mill company: "Please enter our order for twelve hundred tons rails, March delivery, as per your favor of the 8th. Please reply." To this the railway company received the following answer by telegraph: "We cannot book your order at present at that price." Thereupon the railway company sent another telegram: "Please enter an order for two thousand tons rails, as per your letter of the eighth. Please forward written contract. Reply." The rolling mill company denied the existence of any contractual relations between it and the railway company growing out of this correspondence, with the result that the latter brought suit for breach of contract. It will be observed that the rolling mill company proposed to sell to the railway company from 2,000 to 5,000 tons of iron rails at a given price, and that the railway company accepted to the extent of 1,200 tons only; the difference between the minimum proposition of the rolling mill company and 1,200 tons, the amount ordered by the railway company, being the only difference between the offer and acceptance, just as in the case at bar, the offer of Moses Levy for \$10,000 of insurance, and the counter proposition contained in the issuance of the first policy of \$5,000, being only a difference of amount. In delivering the opinion of the court, Mr. Justice Gray said: "The rules of law which govern this case are well settled. As no contract is complete without the mutual assent of the parties, an offer to sell imposes no obligation until it is accepted according to its

terms. So long as the offer has been neither accepted nor rejected, the negotiation remains open, and imposes no obligation upon either party, the one may decline to accept, or the other may withdraw, his offer, and either rejection or withdrawal leaves the matter as if no offer had ever been made. A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. *Ellison v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556; *Carr v. Duval*, 14 Pet. 77, 10 L. Ed. 361; *National Bank v. Hall*, 101 U. S. 43, 50, 25 L. Ed. 822; *Hyde v. Wrench*, 8 Beav. 334; *Fox v. Turner*, 1 Ill. App. 153. If the offer does not limit the time for its acceptance, it must be accepted within a reasonable time. If it does, it may, at any time within the limit and so long as it remains open, be accepted or rejected by the party to whom, or be withdrawn by the parties by whom, it was made. *Boston & Maine Railroad v. Bartlett*, 3 Cush. (Mass.) 224; *Dickinson v. Dodds*, 2 Ch. D. 463. The defendant, by the letter of December 8th, offered to sell to the plaintiff 2,000 to 5,000 tons of iron rails on certain terms specified, and added that, if the offer was accepted, the defendant would expect to be notified prior to December 20th. This offer, while it remained open, without having been rejected by the plaintiff or revoked by the defendant, would authorize the plaintiff to take at his election any number of tons not less than 2,000 nor more than 5,000, on the terms specified. The offer, while unrevoked, might be accepted or rejected by the plaintiff at any time before December 20th. Instead of accepting the offer made, the plaintiff, on December 16th, by telegram and letter, referring to the defendant's letter of December 8th, directed the defendant to enter an order for 1,200 tons on the same terms. The mention, in both telegram and letter, of the date and the terms of the defendant's original offer, shows that the plaintiff's order was not an independent proposal, but an answer to the defendant's offer, a qualified acceptance of that offer, varying the number of tons, and therefore in law a rejection of the offer. On December 18th the defendant by telegram declined to fulfill the plaintiff's order. The negotiation between the parties was thus closed, and the plaintiff could not afterwards fall back on the defendant's original offer. The plaintiff's attempt to do so, by the telegram of December 19th, was therefore ineffectual, and created no rights against the defendant."

In the case of *National Bank v. Hall*, 101 U. S. 43, 25 L. Ed. 822, the court, speaking through Mr. Justice Swayne, said: "A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of

the offer. *Baker v. Johnson County*, 37 Iowa, 186. See, also, *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *Chicago & Great Eastern Railway Co. v. Dane*, 43 N. Y. 240; and *Suydam v. Clark*, 2 Sandf. (N. Y.) 133." To the same purport is *Weaver v. Burr* (W. Va.) 8 S. El. 743, 8 L. R. A. 94; *Mutual Life Insurance Co. v. Young*, 23 Wall. 85, 23 L. Ed. 152; *Travis v. Nederland Life Insurance Co.*, 104 Fed. 486, 43 C. C. A. 653; *Taylor v. Merchants' Fire Insurance Co.*, 9 How. 401, 13 L. Ed. 187. It results from the foregoing authority that the declination of the insurance company, on the 19th day of January, 1904, to accept *Moses Levy* as an insurable risk to the extent of \$10,000, although it approved his application to the extent of issuing a policy for \$5,000, was a rejection of his proposal for \$10,000 of insurance, and the issuance of the policy for \$5,000 was a new proposition, which he could accept or reject, as he saw fit. His death on the same day, January 20th, the policy for \$5,000 was issued, and before it was sent from New York, of course, precludes the idea that he accepted it. This conclusion as to the legal effect of what happened in the office of the insurance company in New York obviates the necessity of any discussion of the merits of the administrator's rights predicated upon the payment of the premium by *Moses Levy* on the 20th day of January. The company having rejected his application on the 19th, no contractual relations existed between him and it, and there was therefore no consideration or basis for his payment to *Egard* of the premium on the policy which he had applied for, but which had been refused. All of that part of the discussion on this branch of the case may be, therefore, laid aside as inapplicable to the merits of the litigation, and those authorities relied upon as upholding the administrator's contention, that, after the payment of the premium, his decedent was insured until he had notice of the rejection of his application, are inapposite to the case at bar, for the reason that no premium was paid until after the rejection of the applicant's offer. It is therefore idle to speculate as to what would have been the decedent's rights if he had paid the insurance premium to *Egard* during the pendency of the application of insurance, or how far *Egard* was authorized to bind his company by statements conditioned upon the prepayment of the premium. As no such payment was made during the existence of the application, the reasoning predicated upon this hypothesis falls to the ground.

Appellee does not pretend that the application of *Moses Levy* for \$10,000 of insurance on his life was anything more than an offer on his part to contract with the insurance company until after he paid the premium. His witness, *Egard*, states positively that he explained to the old man that he would not be insured under the application until after he had paid his premium, and that

after the payment of the premium he would stand insured as of the 30th of December, 1903, provided the company finally accepted his application. But the administrator contends that Edgar said that the applicant, after the payment of the premium, would stand insured as of the 30th of December, 1903, and remain insured until after notice that his application was rejected. But by neither was it pretended that, without the payment of the premium, the applicant was insured as of the 30th of December, 1903, or from any other date, and this view is fully set out in the petition. Appellee's whole case is predicated upon the theory that under the contract of the applicant with the agent, after the payment of the premium, the former would stand insured as of the 30th of December, 1903, until notice of the rejection, and that, as he died before receiving such notice, it is claimed he is entitled to the \$10,000. We do not find it necessary to enter into any further discussion of this phase of the case. The fact is not disputed that the money was not paid until after the 19th of January, 1904, at which time the company declined the proposition to insure the applicant for \$10,000, but offered to insure him for \$5,000, which, as we have seen, was a rejection of his offer as a whole, which at once terminated all the theretofore existing contractual relations between the parties. It results, therefore, that at the time of the applicant's death there was no contract of insurance between him and the appellant company, and the court should have sustained the latter's motion for a peremptory instruction to the jury to find for it on the whole case.

The judgment is affirmed on the cross, and reversed on the direct, appeal, for proceedings, consistent with this opinion.

NUNN, J. (dissenting). The court in its opinion did not discuss or pass upon the real question involved in this appeal. No one will take issue with the court in its opinion on the proposition that, to make a binding contract, the minds of the parties must meet. When one party makes a proposition, the other must accept the same, without any material change, to make it a contract. It is conceded by all that insurance may be obtained by oral or written contract, which will bind the company, until its officials shall pass upon and reject the application. One Egard was the agent of the company who took Levy's application for the insurance. The printed form of application furnished him by the company, together with other proof, shows that he had the power and authority to enter into a contract with Levy, in consideration that Levy paid the premium in cash, to bind the company to take the risks on Levy's life from that moment, for the term of 12 months, or until the company, by its officials, had rejected the application and given the applicant notice thereof. The

record shows that the agent, Egard, so explained the matter to Levy, and urged him to then pay the cash. The agent continued from the date of the application, December 30th, to the 20th of January, to urge Levy to pay the cash and let the company take the risk. On the morning of the 20th the agent entered the store of Levy and again urged him to pay the premium, and as an inducement proposed to buy from him some furniture. Then Levy delivered to the agent, for the company, the amount of the first premium, and took a receipt for same.

In the application for insurance made the 30th day of December, 1903, and signed by Levy, the following appears: "That the insurance under any policy issued, on this application, shall take effect as of date of this application, unless otherwise agreed in writing." The policies that were issued were both dated December 30, 1903. The last one was issued, however, on the 26th of January, 1904. The company contends, however, that it did not assume or carry any risks until the issuance and delivery of the policy, in the lifetime of the assured. This is an unreasonable and unfair construction of the contract. It was understood and agreed that Levy was to pay the first premium, \$776.90, in consideration that the company would insure him for 12 months. Yet we find the company issuing a policy on the 26th of January, and dating the policy back to the date of the application, December 30, 1903, and claim it had not insured the applicant and that it had not assumed the risks until the issuance and delivery of the policy, and as he was dead it was not liable. To sustain this contention allows the company to collect a premium for 12 months' insurance, and yet only actually insure for about 11 months. There is evidently something wrong with this construction of the contract. If the company's construction, as upheld by the majority opinion, is correct, it is easy to understand how those in charge of insurance companies can waste and misappropriate so much of the policy holders' money by contributing it to aid in political campaigns, and other ways, and yet remain solvent. In the receipt attached to the application this language appears: "That if a policy be not issued on said application and examination within sixty days from this date [meaning in this case December 30, 1903], said sum [meaning the first premium of \$776.90] will be returned or surrendered on surrender of this receipt to the company." Here we have a stipulation that the company may hold and use the premium for 60 days without any assumption of risks on its part, and then, if it declines to accept the risk, it shall return the money, without accounting for interest, but if it concludes, at the end of 60 days, to approve the application and accepts the risks, it issues a policy and dates it back to the date of the application, and secures a premium from the insured suffi-

cient in amount to pay for insurance for 12 months, and, in fact, the insured only receives 10 months' insurance. The amount that each policy holder is beaten out of is comparatively small, but when you consider the millions upon millions of policy holders, the total amount made in that way by the company is immense. But the application contains another clause as follows: "That any payment in advance on account of premium shall be binding on the company only in accordance with the agent's or cashier's receipt therefor on the company's authorized form."

What does this mean? Is it possible that this language was used for the purpose only of blinding the company to return the premium to the applicant in case it rejected his application? Certainly this was not the purpose of that clause. There was no clause needed to compel it to perform that simple and just act. Is it possible that the company by the use of this language meant to be understood that it was not bound to return a premium it had received from an applicant for insurance, when the application had been rejected by it, unless its agent or cashier had drawn the receipt in a particular manner and upon one of the company's authorized forms? This construction of that clause is absurd. The meaning and purpose was to bind the company to carry the insurance on the applicant from the time of the payment of the premium for 12 months, or until the company rejected the application and notified the applicant thereof. But the company says it did not assume, nor was it bound for, the risk, because its agent in receiving the money from Levy did not give him a receipt upon one of its authorized forms. This and other courts have often decided that persons *suri juris* cannot in advance bind themselves that they shall only be bound by contracts made in a particular way or written or printed upon a particular form, or kind of paper.

If I understand the majority opinion, it is, in effect, conceded that if Levy had paid the premium prior to the rejection of his application, and this date is fixed as of the 19th of January, he would have been insured to that time; but at the moment of rejection the risk of the company would have ceased. I am at loss to understand upon what authority or sound reason the court assumes such a position. It leaves the applicant in an unenviable position, without insurance, without his money to buy other insurance, and ignorant of the fact whether he would be compelled to apply to some other company for it.

The opinion states that the rejection of the application took place on the 19th of January. I find written on the face of the original application the following: "Jan. 20, 1904. Approved for \$5,000.00." "Jan. 26, 1904, approved for \$5,000.00." The proof shows that this was done at the home office of the company. The court construes the approval of the first

\$5,000 as a rejection of the application. This is rather a strained construction, but concede it to be correct, in my opinion it did not relieve the company of the risk it incurred on the morning of the 20th of January, when it received the money from Levy for the first premium, and as Levy died before the return of the premium, and before he was notified of the rejection of his application, the beneficiary named in the application should be permitted to recover.

But the court says in substance, although the agent taking Levy's application had the power to receive the first premium, and bind the company, yet the proof shows that this power and authority of the agent was limited so that it could not incur any risk, unless the company approved the application. To illustrate this proposition: Suppose on the 30th day of December, 1903, Levy had paid the company the first premium, and the authorized form of receipt of the company had been executed, and the company then said to Mr. Levy, "You are now insured and will remain insured until the expiration of 60 days, unless we within that time reject your application, in which event you have never been insured." If such was the contract, and the appellant had died before the issue of the policy, all the company would have had to do to relieve itself from the loss would have been to reject the application. Suppose some witness did in effect make this statement; can this court believe, or is it compelled to believe, that an insurance company or an individual would make such an unfair and unconscionable a bargain with any one, or, if made, is it possible that this court will uphold such an agreement? "I take your money, and you are insured from this moment, provided I accept your application, but I take 60 days to consider your application, and if you die before I issue your policy I will reject it, and relieve myself of responsibility." This, in substance, is the contract that the court says was proven in this case.

For these reasons, I dissent from the opinion of the court.

JOHNSON v. PADUCAH LAUNDRY CO. (Court of Appeals of Kentucky. March 29, 1906.)

NEGLIGENCE—ACTS CONSTITUTING—VAT NEAR STREET.

A laundry company maintaining a vat four feet from a street is not guilty of negligence, rendering it liable to one who left the street for his own purposes and was injured by falling into the vat.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 52, 54, 57.]

Nunn, J., dissenting.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by George Johnson against the Paducah Laundry Company. From a judg-

ment in favor of defendant, plaintiff appeals. Affirmed.

Hendrick & Miller, for appellant. Quigley & Mocquot, for appellee.

HOBSON, C. J. The Paducah Laundry Company has at the rear of its laundry, on Fifth and Jefferson streets, in Paducah, a vat, into which the pipes containing the steam from the laundry are run to be condensed; the steam coming from the boiler in the dry room. The vat is 6 feet deep, 3 feet wide, and 12 feet long, and is kept full of water. It is four feet from the sidewalk and is situated in an open lot. On the 18th of January, 1904, George Johnson went to church with his uncle, and, as they went home, his uncle, desiring to step aside on a call of nature, they started for the wagon yard, and for this purpose left the sidewalk near the vat and started across the lot. It was dark, and all at once Johnson slipped into the vat, which was filled with boiling water. His arms caught on the edge of the vat as he went down, but he was badly scalded up to the waist. His injuries were very painful, and to some extent permanent. He was laid up for some time. He was compelled to spend large sums in doctor's bills. The vat was left open much of the time. The manager's attention had been called to it before the accident. The plaintiff also offered to show that another person had previously fallen into it. There was a wooden top covered with zinc which was sometimes put over the vat, but it was not fastened in any way. The street was a much traveled street. There was no danger from the vat as long as a man stayed on the pavement. The lot was open and uninclosed, the top of the vat was level with the ground, and there was nothing to give notice of the danger when it was dark. The defendant, at the conclusion of the plaintiff's evidence, introduced its witnesses and showed by its manager that the laundry shut down about 6 o'clock, and that about the time it was shut down the top was on the vat. The accident to Johnson happened about 8 o'clock. It also showed that persons in the neighborhood would come upon the lot and get water out of the vat. At the conclusion of all the evidence the court peremptorily instructed the jury to find for the defendant, and the plaintiff appeals.

It is conceded that Johnson was a trespasser upon appellee's property, and the question to be determined is whether the laundry is liable for maintaining so dangerous an excavation within four feet of the highway. The rule of law on the subject is thus stated in 2 Shearman & Redfield on Negligence, § 715: "The occupant of the land is under no obligation to strangers to place guards around excavations made by him, unless such excavations are so near a public way as to be dangerous, under ordinary circumstances, to persons passing upon

the way and using proper care to keep upon the proper path, in which case he must take reasonable precautions to prevent injuries to such persons. Where the excavation is at a considerable distance from the public path, there can be no question that the owner or occupant is not liable to a mere stranger falling therein, whether consciously or unconsciously; but he is liable if he leaves an unguarded excavation so near to the highway that a person accidentally slipping from the highway falls into it. Of course, it is culpable negligence to leave a pit or other excavation in such an unguarded state as to cause injury to a person having a right to be upon the land, and using that right with ordinary care; and although a passenger along the highway, in endeavoring to avoid the excavation, goes upon the excavator's land, that fact does not of itself bar his right of recovery." To same effect, see 1 Thompson on Negligence, § 1228, and cases cited. In this section several illustrations of the rule are given. The learned author then says: "The true distinction, taken by Chief Baron Pollock in a well-considered case, and adverted to with approval in other cases, was thus expressed: 'When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in case of a horse or carriage way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but, when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off the road on a dark night, and losing his way, may wander to any extent, and, if the question be for the jury, no man can tell whether he is liable for the consequences of his act upon his own land or not. We think the proper and true test of legal liability is whether the excavation be substantially adjoining the way; and it would be very dangerous, if it were otherwise—if in every case it were left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous.'"

In the case before us the plaintiff's own testimony shows that he deliberately and purposely left the highway for the purpose of walking across the lot to take his uncle out of sight of the street. He was willfully using the defendant's property for his private purposes without any invitation from the defendant, and without its consent. So far as he is concerned, it is immaterial how far the vat was from the highway. He was not a traveler on the highway at all when he fell into the vat. He was then a trespasser on appellant's lot, having intentionally left the highway for purposes of his own. The case

would not be essentially different if there had been no highway adjoining the lot. It is insisted, however, that the owner of this uninclosed lot in a city ought to know that trespassers are liable to come upon it, and that a vat of boiling water is a thing so dangerous that it is negligence in the owner not to guard it as to one who falls into it in the dark. The general rule is that the owner of private grounds is under no obligation to keep them safe for the benefit of intruders who come upon them for their own purposes, however innocent the purpose may be. 1 Thompson on Negligence, §§ 945, 946. The exceptions to the rule are where the owner of the property expressly or impliedly invites the use of it, or so maintains it as to make it what is sometimes called an attractive nuisance, especially in the case of children and animals. See, also, Bishop on Noncontract Law, §§ 845-853; Bransom's Adm'r v. Labrot, 81 Ky. 638, 50 Am. Rep. 193, and cases cited. The case before us does not fall within either of these exceptions.

In the case of Union Stock Yards Company v. Rourke, 10 Ill. App. 474, one who was crossing another's grounds in the city of Chicago without authority fell into a deep pool of water over which a crust had formed resembling dry land, and was drowned. The owner was held not liable, on the ground that he was under no obligation to keep the place safe as to intruders. In Stone v. Jackson, 32 Eng. Law & Eq. 349, a woman crossing the defendant's unfenced ground in order to make a short cut and avoid an angle in the street, as many persons were accustomed to do, fell into an unguarded vault which was open. This was in a city, and the vault was perhaps as dangerous as the vat in this case. The owner was held not liable. In Hounsell v. Smyth, 7 C. B. (N. S.) 731, a person was crossing an open tract of land lying between two highways, and fell into an open and unfenced mine. The court held that persons crossing the grounds with the owner's permission must take the permission "with its concomitant conditions, and it may be perils." In Benson v. Baltimore Traction Company (Md.) 28 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436, a class of students were given permission upon request to inspect a power house. One of them while there fell into an uncovered vat of boiling water in a dark place where he could not see. It was held that he could not recover. In a note to this case a number of authorities are referred to. The general rule on the subject is thus admirably stated by Chief Justice Bigelow in Sweeney v. Old Colony, etc., R. R. Co. (Mass.) 87 Am. Dec. 644: "All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which

a legal duty or obligation has been omitted. Thus a trespasser, who comes on the land of another without right, cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon."

In Brinkley Car Works v. Cooper (Ark.) 67 S. W. 752, 57 L. R. A. 724, the defendant had upon its premises a pool of hot water. A child six years old walked into it, and was burned. It was held that there could be no recovery; the company having no notice that children were in the habit of playing there. There is also a note to this case citing a number of other authorities. In a note to Woodward v. Miller, 100 Am. St. Rep. 200, the rule of law on the subject is thus stated by Judge Freeman: "In order to maintain an action for an injury due to negligence, there must be shown to exist some obligation or duty toward the plaintiff which the defendant has left undischarged or unfulfilled. [Citing authorities.] Hence it is that the owner of dangerous premises is not answerable for injuries suffered by a trespasser or mere licensee who comes thereon without invitation, allurement, or right. To such persons he owes only the duty to do them no wanton or willful harm. This seems a harsh rule, which justifies a man, legally, in keeping his property in a needlessly dangerous condition; but it has the support of the authorities, without, perhaps, exception."

Any number of authorities may be cited to sustain this conclusion. The tendency of the later case is rather to limit the exceptions to the rule than to extend it. See Ryan v. Towar (Mich.) 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 481; Uthermohlen v. Bogg's Run Company (W. Va.) 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884, and cases cited. The principle was recognized by this court in Reeves v. French, 45 S. W. 771, 46 S. W. 217, 20 Ky. Law Rep. 220; Schauf's Adm'r v. City of Paducah, 106 Ky. 228, 50 S. W. 42, 90 Am. St. Rep. 220; and Illinois Central Railroad Company v. Waldrop, 72 S. W. 1116, 24 Ky. Law Rep. 2127.

Fences are passing out of use in all our cities. There are on many vacant lots excavations made for buildings and other purposes—wells, cisterns, vault pits, and the like. The owner of vacant property is not required to fence it, and every one who in the dark goes upon a vacant lot without permission takes the risk of such things. A deep excavation for the foundation of a house or a well or cistern would be practically just as dangerous as the vat in question; but the owner of a city lot, who had on it a well, cistern, or privy vault with a defective cover, would not be held liable to a stranger who went upon the lot in the night to answer a call of nature, and while there was hurt by reason of the defective covering of the hole, or for want of coverings. The reason for the rule is that the owner owes him no duty. The person who goes upon a vacant lot at night is bound to know that there may be danger in so going upon land that he is not acquainted with, and he takes the risk of what he finds on it. The vat was an essential part of the laundry. It was used to cool the pipes and was near by it. It was no more an instrument of danger than unfenced machinery, or a number of other things which in the cases referred to were held not to make the owner liable.

Judgment affirmed.

NUNN, J. (dissenting). It seems to me the court in its opinion has applied law not applicable to the facts of this case. The quotations from Thompson and Shearman & Redfield on Negligence, and their quotations from Chief Baron Pollock, are general principles of law, ordinarily applicable, in ordinary cases, to the owners of property, and their liability to persons injured thereon. But there is another principal of law, which is just and humane, that will not permit an owner of real estate, with impunity, to place a death trap, i. e., a vat of scalding water, thereon, and have it exposed at a place where he knows, or has reason to anticipate, that others will likely suffer death or great bodily harm by reason thereof. The contrary of this proposition would be monstrous. Is it possible that in Kentucky, when one neighbor or person steps a few feet or inches from the highway, upon the land of another, and thereby becomes technically a trespasser, he is without the pale of the law, and all protection, or redress for injuries? This is certainly not the law in all cases, and under all circumstances. Mr. Thompson, as quoted in the opinion, only says this is the general rule, clearly indicating that under certain circumstances the owner would be responsible for injuries to trespassers. It is evident that Mr. Thompson did not submit to the rigid and harsh rule as taken from Chief Baron Pollock, for in his book on Negligence (section 950) he uses the following language: "On the one

owner or occupier of real property may become liable, on the footing of negligence, to persons who are injured in their persons or their property, through the needless, wanton, or grossly negligent act of exposing other dangerous things upon his premises or upon the highway adjacent thereto, attracting children or animals, or endangering the safety of the unwary. * * * The general rule remains that a trespasser or mere licensee, who is injured by a dangerous machine or contrivance on the land of another, cannot recover damages, unless the machine or contrivance is such as an owner may not lawfully erect, or unless the injury was inflicted willfully, wantonly, or through the gross negligence of the owner or occupant of the premises." In 2 Shearman & Redfield on Negligence, § 706, the following appears: "A mere passive acquiescence, on the part of the owner or occupant, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. They take all risks upon themselves, and have no right to complain of any defect in the premises, even though caused by the direct act of the owner (e. g., pit sunk in the land), unless the act is malicious, or is committed with notice of the fact that strangers are likely to approach, and without any effort to warn them of the danger, under circumstances which justify a belief that the owner was indifferent to the injuries which might happen to them."

In the case of Newark Electric Light & Power Company v. Garden, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725, the court said, in speaking of the liability of the owner of the property to a technical trespasser: "In such a case as this one, its special facts are for consideration, and upon them, and not solely with reference to the ownership or occupancy of the locus in quo, the question of duty must be determined. 'It is true that, where no duty is owed, no liability arises. * * * But it has been often said duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property, and its openness to accident, the rule will vary.' Hydraulic Works Co. v. Orr, 88 Pa. 332. It makes no difference, where the circumstances give rise to duty, that the plaintiff was 'technically a trespasser.' Schilling v. Abernethy, 112 Pa. 437, 3 Atl. 792, 56 Am. Rep. 320. The true question is: Was he 'a trespasser there, in a sense that would excuse the defendant for the acts of negligence, * * * whether the owner or occupant of the premises is liable under any circumstances, and, if so, under what circumstances, for injuries received by a person while on such premises, and by reason of their dangerous condition?' In Union P. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the question was thus stated, and, answering it, the Supreme Court held that, under the circumstances of that

case, the person injured could not be regarded 'as a mere trespasser, for whose safety and protection, while on the premises in question, against the unseen dangers referred to, the railroad company was under no duty or obligation whatever to make provision.' The fact that, in these cases, the court gave due weight to the circumstances that, in each of them, the person injured was a child, would not justify us in restricting the application of the principle upon which they were decided to cases which present the same peculiarity. The doctrine of all of them is that duty of care may, by reason of the circumstances, be due by the owner of property to one who is technically a trespasser upon it; and the youth of those most likely to suffer from a failure to discharge such duty is simply one of circumstances which, when present, is to be considered with the rest."

See volume 21, *Amer. & Eng. Ency. of Law*, p. 471: "It seems very clear that the doctrine of duty to the particular person injured, on which so many cases lay stress, is, in fact, only an application of the general rule of natural and proximate causes hereinafter considered. That is to say, the duty, the breach of which is negligence, is to refrain from doing that which will likely cause injury to others, or to do that which, under the circumstances, reasonable prudence requires. An act or omission from which injurious consequences could not, in a sense, have been foreseen, is not negligence. If, therefore, for example, a party invites others on his premises, he will be held to contemplate their presence there, and to know that dangerous conditions or appliances will likely produce injuries. A duty arises, accordingly, that the premises shall be reasonably safe for the purposes intended. Where the use of premises is not contemplated, as in the case of trespassers, the proprietor is not, as a rule, negligent in failing to maintain the premises in a safe condition, for the simple reason that injury to others is not reasonable to anticipate. That this is the controlling principle is further evidenced by numerous cases wherein an owner of premises has been held liable to trespassers, where either their presence thereupon was known or should have been anticipated. It seems misleading in the extreme to state that no duty is owing to trespassers, or licensees, or persons not on the premises by invitation, express or implied. No duty is owing only where injuries should not reasonably have been apprehended. The cases, however, for the most part, discuss the question with reference to the duty owing to persons in particular situations with reference to the property or premises on which the injuries occurred, rather than their situation with reference to the likelihood of injuries within the range of contemplation of the party sought to be charged with liability therefor."

See, also, next page (472) which is as follows: "A number of cases lay down the

rule that an owner of premises owes no duty with reference to the safety or immunity from injuries of trespassers thereon. Other authorities declare that the liability of a proprietor in such circumstances is only that he shall not be grossly negligent, and shall abstain from the infliction of injuries by active misconduct or wantonness, or intent and purpose to harm. But the preferable view is believed to be that a party's liability to trespassers depends on the former's contemplation of the likelihood of their presence on the premises, and the probability of injuries from contact with conditions existing thereon. While, as a rule, a party will not be deemed to anticipate the commission of a willful wrong, yet where, under the circumstances, a technical trespass may reasonably be anticipated, the owner of premises will be liable for a failure to take reasonable precaution to prevent injuries to the trespassers."

See, also, *Railway Co. v. Fitzsimmons*, 31 Am. Rep. 208; *Schilling v. Abernethy* (Pa.) 3 Atl. 792, 56 Am. Rep. 322; *Cauley v. Railroad Co.*, 40 Am. Rep. 667; *Insurance Co. v. Groom*, 27 Am. Rep. 689; and *Plummer v. Dill* (Mass.) 31 N. E. 128, 32 Am. St. Rep. 463. These authorities all recognize the general rule as stated in the opinion, but also announce the rule to be that, when the owner of land makes an excavation or other dangerous thing thereon, at a place where persons are likely to be injured by reason thereof, and the owner has reason to anticipate such injuries, and fails to provide reasonable means to protect them from injury, he is responsible, although the injured persons are technical trespassers. This rule was also approved by this court in the case of *Reeves v. French*, 45 S. W. 771, 46 S. W. 217, 20 Ky. Law Rep. 220. Reeves sued French for damages for injuries received by reason of his falling into a chute or cellar, under French's house. Reeves claimed he fell in from the sidewalk. French contended that Reeves left the street voluntarily, and walked across a vacant lot until he arrived at the cellar, which was 10 or 12 feet from the street, when he carelessly and negligently fell into it. The court in that case referred to *Thompson on Negligence*, and Reeves being a trespasser and voluntarily leaving the sidewalk, and falling into the cellar 12 feet from the street, and denied his right to recover; but the court in arriving at this conclusion used the following significant language, which is peculiarly applicable to the case at bar: "There was no proof in the record which tended to show that there was any travel along French's house adjoining the vacant lot, or that French had the slightest reason to believe that any one in passing over the vacant lot would fall into the chute on that side of the house."

The proof in this case shows that this vat was 12 feet long, 8 feet wide, and 6 feet deep, and was filled at all times with boiling

or scalding water, which was level with the surrounding ground, and one end of the vat was less than 4 four feet from the sidewalk. It was not inclosed in any way, nor was there anything to give warning of its presence to persons approaching it. It was situated near the center of a city containing 25,000 or 30,000 inhabitants, much travel near it, and in a place which would attract persons to enter after dark, for the purpose stated in the opinion. The proof shows that appellant had no knowledge of the vat, and that appellee's manager had been warned of the danger to persons in leaving it uninclosed and exposed; and also appellant to prove that another person, previous to appellant's injury, had fallen into the vat, and received injuries in the same way. The court refused to allow this proof, but it was competent. In view of this evidence, the case should have been submitted to the jury, on the issues made, and an instruction given to the effect that, if the jury believed from the evidence that this vat of scalding water was so near the street or sidewalk and at a place where persons would likely be injured by falling into it, and if they further believed that the defendant knew, or had reasonable grounds to anticipate, that persons would approach and fall into it, and defendant failed to use or exercise ordinary care to inclose or cover it, and protect persons from injury by falling into it, then the jury should find for plaintiff.

For these reasons, I dissent from the opinion of the court.

MUTUAL LIFE INS. CO. OF KENTUCKY v. TWYMAN et al.

(Court of Appeals of Kentucky. March 29, 1906.)

1. INSURANCE—LIFE POLICY—ASSIGNMENT BY INSURED.

The charter of a life insurance company, in effect the same as Ky. St. 1903, §§ 654, 655, providing that a policy for the benefit of insured's wife or children shall not be made liable for his debts, but on his death the insurance shall be paid to the beneficiaries free of his debts, does not prohibit the insured in a paid-up policy, payable to his wife and children, and stipulating that he may, with the consent of the company, assign it or change the beneficiaries, from assigning it, without the consent of the beneficiaries, and he may borrow money from the company and assign it as collateral, without such consent.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 473.]

2. SAME—ASSIGNMENT OF POLICY AS COLLATERAL—RIGHTS OF INSURER ON NONPAYMENT OF DEBT.

Where the insured in a paid-up policy, authorizing him to assign it or change the beneficiaries, borrowed money from the company and assigned the policy as collateral by an assignment authorizing the company, on the nonpayment of the debt to cancel the policy, the company, on the insured failing to pay the debt, must resort to equity to enforce its rights based on the surrender value of the policy determined in the manner provided by Ky. St. 1903, § 653,

and on the court finding that such value exceeded the debt, the sum left over should be ordered paid over to the insured or the same should be used for the purchase of paid-up insurance, as the insured might elect.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 887.]

Paynter, J., dissenting.

"To be officially reported."

On petition for rehearing. Former opinion reversed and judgment below reversed.

For former opinion, see 89 S. W. 178.

Falconer & Falconer, Long & Price, and Kohn, Baird & Spindle, for appellant. C. J. Bronston, for appellees.

SETTLE, J. In view of the importance of the questions involved in this case and the uncertainty of the court as to the correctness of some of the conclusions expressed in its opinion of October 12, 1905 (See Mutual Life Insurance Co. v. Twyman, etc., 89 S. W. 178, 28 Ky. Law Rep. 167), a rehearing was granted upon the court's own motion, the opinion withdrawn and an oral argument allowed. Since the resubmission of the case it has been duly considered by the full bench, with the result set forth in this opinion.

The following brief statement of the facts will be necessary to give an understanding of the questions presented for decision. On March 14, 1884, the appellant insurance company issued and delivered to the appellee, James C. Twyman, a policy of \$2,000 upon his life, payable at his death to his wife and two sons, all of whom are still living. The policy was what is called "A fifteen payment life," that is after the payment of 15 annual premiums it became a paid up policy. The insured paid on this policy 15 annual premiums of \$90.66 each, the aggregate of which amounted to \$1,359.90. Five months after the payment of the fifteenth and last premium, appellee, James C. Twyman, borrowed of appellant \$700, and for this amount executed his promissory note, of date, July 8, 1898, bearing 7 per cent. interest from date, and payable one year after date. To secure the payment of the note he, without the consent of the beneficiaries, assigned and delivered to appellant the policy. No indorsement was made on the policy, but on the face of the note this statement appears: "As collateral security for the payment of this note, I hereby assign, transfer, and deliver to the said company, policy No. 8800 for \$2,000, which is to be returned to me upon the payment of this note and interest at maturity. The said policy is hereby assigned and surrendered to said company for cancellation in satisfaction of this note, and in settlement of the cash surrender value of said policy." Appellee, James C. Twyman, made the following payments of interest on the note: \$24.50, January 11, 1899; \$24.50, July 8, 1899; \$24.50, January 11, 1900; \$24.50, January 1, 1901, but failed to make any further payment of interest, or to pay the prin-

cipal of the note, whereupon appellant, on May 12, 1902, undertook, without the consent of insured or the beneficiaries, to cancel the policy on the life of the former, by calculating its cash surrender value as of that date, in doing which, it professed to compute interest at 6 per cent. on the amount of the loan from the date of the note to May 12, 1902, and applied the sums paid on the note as interest, as of the dates of their payment respectively, which left, as claimed by appellant, after satisfying the note, a balance of the cash surrender value of the policy amounting to \$5.47, and this sum appellant tendered appellee, James C. Twyman, in money, which he refused to accept. Having failed to obtain the latter's acceptance of the sum thus tendered him, appellant instituted this action in equity against him, his wife and children, to have the policy canceled and compel appellees to accept the \$5.47, alleged to be due them in settlement of its cash surrender value, less the amount appropriated in satisfaction of the note. Appellees filed a demurrer to the petition, which the lower court sustained, and appellant refusing to plead further, judgment was entered dismissing its action, and from that judgment it has appealed.

The demurrer was based upon two grounds: (1) That such a pledge and assignment of the policy as was attempted by appellee was forbidden by appellant's charter; (2) that in any event it could not, without the consent of the beneficiaries, legally be assigned or pledged for a loan to the insured, or forfeited or canceled by appellant because of the failure of the insured to repay such loan. The charter of appellant (amendment enacted in March, 1878) provides: "Any policy of insurance heretofore issued, or that may hereafter be issued by said company, for the use, benefit, or advantage of the wife, widow, children, father, or mother of any person whose life may be insured by said company, shall not be held or made liable for any debts, contracts, or engagements of the person whose life is or may be insured, and all such insurance in the event of the decease of the person whose life is or may be insured, shall be paid to the person or persons named in the policy as beneficiaries therein, or to their assigns or legal representatives, to be held by him, her or them, free and discharged of and from all existing debts, contracts and engagements whatsoever of the said deceased person." We are now satisfied that we were in error in holding in the former opinion that the foregoing provision of appellant's charter presented a legal barrier to the assignment to it by the insured of the policy in question, and also in holding that the charter provision, supra, nullified that clause of the policy which says: "This policy is issued and accepted upon the express condition that the insured, James C. Twyman, with the consent of the company, may at any time assign it,

or before assignment change the beneficiary therein, or make any other change." We find that the section supra of appellant's charter is in meaning and effect the same as sections 654 and 655 Ky. St. 1903, and the latter but substantial re-enactments of sections 30, 31, and 32 of the general insurance law contained in the act of March 12, 1870, 1 Pub. Acts 1869-70, pp. 71, 72, c. 645; Gen. St. 1888, Appendix, pp. 40, 41.

The object of the several sections of the statutes, and also of the provision of appellant's charter quoted above, is to exempt policies on the life of the husband or father that are made payable to the wife or children from the debts of the insured, or where the policy is made payable to any person, having an insurable interest in the life of the insured, to exempt it from the payment of the latter's debts. But as we shall presently see from repeated decisions of this court, such statutes or charter provisions do not interfere with the right of the insured to change the beneficiary, or assign the policy, if the right to do so is expressed or reserved in the policy itself. In other words, the rule that a policy of life insurance vests when issued in the person named in it as the beneficiary, and that because of such vested right it cannot be transferred by the insured to any other person, does not, it would seem, apply where the policy contains a stipulation to the effect that the insured may change the beneficiary. In such a case the right vests conditionally, not absolutely. In *Hopkins v. Hopkins*, 92 Ky. 324, 17 S. W. 864, we find this doctrine clearly stated in a controversy between husband and wife over a policy issued to the former by the same insurance company appearing as appellant in the case at bar. The policy insured the life of the husband, was made payable at his death to his wife, if living, and if not, to their children. The policy contained a clause, with reference to the right of the insured to assign it or change the beneficiaries, word for word like that of the policy in this case. *Hopkins* and wife separated, and the action grew out of the refusal of the insurance company to permit the wife, for herself and child, to pay a past due premium on the policy, and to assume the payment of the future premiums, which she claimed the right to do, on the ground that she as the beneficiary named in the policy acquired upon its issue a vested right to the policy and the insurance it provided for, and that the clause in the policy authorizing a change of beneficiary was in conflict both with the charter of the company and the general law of the state, and therefore void. In disposing of this contention, the court said: "The general rule is that the right to a policy of insurance, and the money to become due under it, vest immediately upon its issue in the person named in it as the beneficiary, and that this interest, being vested, cannot be transferred by the insured to any other person. *Central Bank of Washington v. Hume*,

128 U. S. 195, 9 Sup. Ct. 41, 52 L. Ed. 870. The vested right cannot be divested without the consent of the person invested with it. This is so as to insurance in both mutual and ordinary life insurance companies. This does not hold true, however, where the contract of insurance provides that the insured may change the beneficiary. In such a case it vests conditionally only. The right of the one named in the policy is then subject to be defeated by the terms of the very contract naming him as the beneficiary. It is a condition of the contract, and his right is therefore subject to it." After quoting the same provision of appellant's charter that we have made a part of this opinion, and also quoting the several sections of the General Statutes which are substantially the same as sections 654-655, Ky. St. 1903, the opinion further says: "The clause in the policy relative to a change of beneficiary does not, in our opinion, conflict with these provisions of the company's charter and the general law. They certainly do not in express terms forbid such a condition in the contract, nor can the prohibition be fairly implied. They merely mean that when a married woman is entitled to insurance, or the proceeds of it, it must be held to be her separate estate, and not liable for the debts of her husband or those of the person through whom it was obtained. The insurance is her separate estate so long as it remains payable to her. This, however, does not prevent the insertion of a condition in the contract by which her right to the insurance may be defeated. * * * "

In the later cases of *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937; *Baldwin v. Haydon*, 70 S. W. 300, 24 Ky. Law Rep. 900; *Wrathor v. Stacy*, 82 S. W. 420, 26 Ky. Law Rep. 683, the rule announced in *Hopkins v. Hopkins*, etc., supra, was approved and followed by the court. So, by the foregoing authorities, it seems to be well settled in this state that where it is provided in a policy of insurance that the insured may change the beneficiary, his right to do so cannot be questioned, and the fact that such right is conferred by the policy prevents it from vesting absolutely in the first or a subsequent beneficiary. This being true, the several decisions of this court so holding, constitute a rule of property which, under the doctrine of stare decisis, should be adhered to in this case. It therefore follows that the insured, James C. Twyman, had the right without the consent of his wife and sons to dispose of the policy in question; that is, "at any time to assign it, or before assignment change the beneficiaries therein, or make any other change," with the consent of the insurance company. For, though payable to the wife and children at his death, the reservation in the policy of this right to him prevented it from becoming a policy for their use or benefit, so long as he might continue to live, and be capable of exercising such right. The right of the wife and children as beneficiaries was therefore

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contingent and subject to the right of the insured to dispose of the policy as he saw fit. *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; *Marsh v. Sup. Council, etc.*, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; *Sabin v. Phinney*, 184 N. Y. 423, 31 N. E. 1087, 30 Am. St. Rep. 681; *Swift v. Swift*, 96 Ill. 309; *Splawn v. Chew*, 60 Tex. 532; *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458; *Hopkins v. N. W. Life Assur. Co.*, 99 Fed. 199, 40 C. C. A. 1.

From what has already been said it is hardly necessary to add that we think appellee James C. Twyman had the legal right to borrow money of the appellant insurance company, and to assign to it the policy he held upon his life as collateral security for the payment of the note evidencing the loan, as was done by him, but we are of opinion, notwithstanding his failure to pay the note at its maturity, appellant had not the arbitrary right to forfeit or cancel the policy at its own option, and certainly not upon such an inequitable basis as would deprive the insured of any part of the cash surrender value of the policy in liquidating his debt, if it had such value over and above the debt. Such forfeitures have been condemned by this court. In *N. Y. Life Ins. Co. v. Curry & Bro.*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297, the authorities on the subject were reviewed by this court. The facts of that case were that one George Anderson, who was the owner of a paid-up life policy of insurance upon his life for \$630, in the New York Life Ins. Company, payable to his estate borrowed of that company \$130, and assigned his policy as collateral security for its payment, upon the condition that in case of default in any payment of interest on the loan, the company might declare the debt due, cancel the policy, and apply its cash surrender value to the payment of the insured's note and interest. In discussing this provision of the contract between the parties, this court in an opinion by Judge O'Rear said: "That is pure and simple a provision for the forfeiture of the policy upon such terms as the payee of the note may require and at its option. The difference between this and the ordinary unqualified forfeiture lies alone in the extent of the forfeiture. It operates as an enforced conversion without further notice to or consent of the borrower of his collateral, if he promptly fails to pay interest on the debt. The contract of insurance between appellant and Anderson had been fully executed so far as Anderson was concerned. He had paid all that he was required to pay to be entitled to receive from appellant the full sum stipulated to be paid (\$630) at his death. The \$130 was borrowed from appellant since that completion of the contract. The courts have uniformly held in favor of the insurer that agreements for the forfeiture of the policy when premiums were not paid when due are valid, and their enforcement upheld. This is said to be because on the prompt payment of the premium

depends the mutuality of the contract and the ability of the insurance company to meet its obligations. But both the reason and the rule are restricted to the matter of premiums alone. Forfeitures are disfavored in law. When they are merely penalties for the nonpayment of borrowed money, they are not allowed. They lead to, and themselves are, unconscionable oppressions of the unfortunate." After quoting with approval the cases of *St. Louis Mut. Life Ins. Co. v. Crigsby*, 10 Bush, 310; *Montgomery v. Phoenix Ins. Co.*, 14 Bush, 51; *Northwestern Ins. Co. v. Fort's Adm'r*, 82 Ky. 269; *Mut. Life Ins. Co. v. Jarboe*, 102 Ky. 80, 42 S. W. 1097, 39 L. R. A. 504, 80 Am. St. Rep. 343; *Manhattan Life Ins. Co. v. Patterson*, 109 Ky. 624, 60 S. W. 383, 53 L. R. A. 378, 95 Am. St. Rep. 393, and holding that they are in line with the case *supra*, the opinion concludes as follows: "In the case at bar there is no perceivable reason why the insurance company lending the money is, or can be, in a different position from any other lender of money had the policy been assigned to the latter as collateral, and a default in payment of the interest had occurred. If it loans money on its policies held by its policy holders, its rights as lender are exactly what they would be if, instead of the policies, the borrower pledged stocks, bonds, or policies in other companies, or gave a chattel or real estate mortgage to secure the loan. There is nothing in appellant's business or charter rights, so far as we are advised, which entitles it to privileges when loaning its money not enjoyed generally by banks, trust companies, and other corporations or individuals. We are of opinion that the provision in the loan agreement for a surrender or forfeiture of the policy upon the nonpayment of the interest upon the loan is void."

Applying this principle to the case at bar, the question naturally presents itself, what remedy has the insurance company in a case like this? It cannot sell the policy in satisfaction of the debt, or by suit obtain a decree for its sale, for such sales of insurance policies are forbidden by law. It would manifestly be unjust to require it to remain out of the use of the money due it from the borrower until the death of the latter with the view of then deducting it from the proceeds of the policy, for he might live until the debt would exceed in amount the proceeds of the policy. Originally, the sole purpose of life insurance was to afford indemnity or protection to the family of the insured against poverty and want in case of the loss by death of his services, and for this object alone life insurance companies were primarily created and organized. But under the developing processes of industrial life and commercial expansion the object of life insurance has been extended, so as to allow those who hold policies to pledge or assign them, under proper restrictions, as security for loans to be employed in business adventures and commer-

cial pursuits. Whether such extension of the use of life insurance is a departure from the philanthropic sentiment that gave it birth, is not for us to say; it is sufficient to know that it is recognized by the courts, and consequently to be respected and upheld within proper and legal bounds. Having this in mind, and at the same time the advantage possessed by the insurance company over the borrower whose policy is pledged to it as security for a loan, it should be the care of the courts in settling a controversy between the company and borrower, such as is here presented, to see to it that the insurance company shall not be aided in enforcing an unconscionable bargain exacted of the borrower by reason of his necessities. It should be put upon the same plane with other money lenders in making loans to its policy holders, and the borrower compelled to pay what he may justly owe it, as he would to any other creditor. When the appellee James C. Twyman failed to pay the note due appellant, and accrued interest, according to the terms of the contract, the latter, instead of treating such failure as a forfeiture of the assigned policy, and without his consent, arbitrarily fixing its cash surrender value, should, like any other creditor holding a debt secured by lien, have resorted to a court of equity for the enforcement of its rights. Though, in an action for such a purpose a decree for the sale of the policy, as other collateral or mortgaged property may be sold, would not be allowed, for the sale of a policy of insurance in that way, as already said, is forbidden by law, the court could decree its cancellation upon allowing to the insured its full cash surrender value, less appellant's debt.

We are of opinion that an equitable basis for ascertaining the net or surrender value of the policy in controversy is provided by section 653, Ky. St. 1903, and if upon the return of the case to the circuit court, appellees by answer insist that the cash surrender value of the policy, in view of its immediate cancellation, is greater than the sum at which it was fixed by appellant, it will be the duty of the court to ascertain such value as provided by section 653 of the statutes *supra*, and if its value as thus ascertained shall be found to exceed the amount of the note, principal and interest due appellant from the insured, the sum left after deducting the amount of such indebtedness, he will be entitled to receive, in money, or, if he so elects, in paid up insurance of like tenor as the old policy, the amount of the new policy to bear the same ratio to the amount of the old policy as the sum so left bears to the total net value of the old policy. If, however, the insured does not elect to take the paid-up insurance, but accepts in money what, if anything, is found to be due him, the court should decree the cancellation of the policy. If in adjusting the rights of the parties, as above directed, it shall be found that the val-

ue of the policy is not greater than the debt of the insured, the policy should still be cancelled.

For the reasons indicated, the judgment is reversed, and cause remanded with directions to the lower court to overrule the demurrer to the petition, and for further proceedings consistent with the opinion.

PAYNTER, J., dissents. CANTRILL, J., not sitting.

DAVIS v. CHESAPEAKE & O. RY. CO.
(Court of Appeals of Kentucky. March 29, 1906.)

1. CARRIERS—WHO WERE PASSENGERS—EXPRESS MESSENGERS.

An express messenger, carried in a special car under a contract of the carrier with the express company for transportation of express matter, is a passenger for hire.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 978.]

2. SAME—INJURIES TO PASSENGERS—RELEASE OF LIABILITY—VALIDITY.

Under Const. § 196, and Code Va. 1887, § 1296, prohibiting carriers from contracting away their common-law liability, a Virginia contract, whereby an express messenger at the time of his employment released all claims against the express company or against the carrier for injuries he might receive, whether through negligence or otherwise, was void, so as not to affect his right to recover for injuries received in Kentucky.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1252-1259.]

Appeal from Circuit Court, Greenup County.

"To be officially reported."

Action by John A. C. Davis against the Chesapeake & Ohio Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Davis & Mathews, Scott & Dinkle, and D. C. T. Davis, Jr., for appellant. Worthington & Cochran and W. H. Wadsworth, for appellee.

PAYNTER, J. The appellant, Davis, was employed by the Adams Express Company as a messenger. Under a contract with the Adams Express Company had with the appellee, his duties required him to go upon appellee's trains to look after packages and property which it was transporting under its contract with the express company. While on one of appellee's trains in the discharge of his duties he was injured by the alleged negligence and carelessness of appellee. The principal defense relied on is a contract of release which the Adams Express Company required the appellant to execute upon entering its service. The preamble of the contract recites that he had applied to the express company for employment as a servant at a fixed compensation; that his duties were to take charge of goods which the express company transported upon cars and other

conveyances of railroad companies; that the railroad companies required of the express company, as a condition of their permitting messengers to travel upon their trains in the performance of duties, that they should be indemnified and released from all liability for and in respect of any damage or injury which might be sustained by him in the course of his employment, whether the same be occasioned by the negligence of the railroad company or otherwise. The contract of release contains the following stipulations: "Now, therefore, in consideration of such employment to be given by the said express company, and the compensation to be paid therefor, and in consideration of \$1, lawful money of the United States of America, paid by the Adams Express Company to the undersigned, the receipt whereof is hereby acknowledged, the undersigned for himself, his heirs, executors, administrators, and assigns, hereby fully consents to and ratifies each and every bond or other instrument or contract of indemnity against such liability, and each and every release of said liability or other similar contracts executed and to be executed by the said express company to any railroad or other carrier, and the undersigned agrees to assume all risks of death or accident, or damage to him, or to his or any of his property, and does hereby release and discharge said Adams Express Company and any connecting carrier, railroad company, express company, or other company or person or connecting carrier in whose car or other conveyances he may travel in the performance of his duties as aforesaid, from any and all claims, liabilities, and demands of every kind, nature, and description, for or on account of his death or any injury or damage to his person or property of any kind or nature sustained by the undersigned, whether caused by the negligence of the said Adams Express Company, or any of said railroad companies or other carriers or otherwise." The contract was executed in Virginia, and the injury of which he complains was received in Kentucky. The court below held that the contract was enforceable, hence appellant's right to recover was denied.

For the appellant it is urged that the contract is against public policy and is declared invalid both by the Code of Virginia and also by section 196 of the Constitution of Kentucky, for each denies the right of a common carrier to contract for relief from common-law liability. For the appellee it is insisted that the rule of public policy which renders invalid stipulations by common carriers restricting their liability for loss occasioned by their negligence does not apply when they engage to do some thing which it is not under obligation as a common carrier to do, and that when it enters into a contract as a private carrier for hire, it may exempt itself, by contract, from liability for its negligence, or that of its serv-

ants or agents. While there is some conflict in the authorities on the question, we are of the opinion that the courts which hold that an express messenger though carried in a special car, under a contract with the express company for transportation of express matter, announce the correct doctrine in holding that they are passengers for hire. The sum which the express company pays the railroad company for conducting its express business, on its cars, over its line of railway is necessarily, in part, for the transportation of the express messenger. The express messenger is not a trespasser, because he is being transported by the railroad company under a contract and for the same reason he is not a licensee. He is an employé of the express company and not of the railroad company. If he is not a trespasser or a licensee, or an employé of the railroad company, he must necessarily be a passenger. While the railroad company could not be compelled to enter into a contract by which it would receive into the express car the messenger of the express company and thus transport him, still when he does agree to, and does receive him on that car for transportation, though his business is to look after express matter, he is being transported for compensation, hence, as a passenger for hire. *Fordyce v. Jackson*, 56 Ark. 594, 20 S. W. 528, 397; *Blair v. Railroad Co.*, 66 N. Y. 313, 23 Am. Rep. 55; *Brewer v. Railroad Co.*, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647; *Kenney v. Railroad Co.*, 125 N. Y. 422, 26 N. E. 626; *Pennsylvania Co. v. Woodworth*, 26 Ohio St. 585; *Railroad Co. v. Thomas' Adm'r*, 79 Ky. 169, 42 Am. Rep. 208; *Jones v. Railway Co.*, 125 Mo. 686, 28 S. W. 863, 26 L. R. A. 718, 46 Am. St. Rep. 514; *Yeomans v. Navigation Co.*, 44 Cal. 71; *Railroad Co. v. Ketcham*, 133 Ind. 846, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550; *Chamberlain v. Railroad Co.*, 11 Wis. 238; *Railroad Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 845.

It is said in *Hutchison on Carriers*, § 564: "It seems that if the person who is injured by the negligence of the employés of the carrier, is lawfully upon its conveyance, under a contract which does not make him an employé or servant of the company, he will be entitled to the same care and diligence for his safety as one who is strictly a passenger. Thus where one was upon a train as an express messenger, carrying express freight, under contract with the company, by which he was entitled to be carried, without a distinct price for his passage, and was injured by the negligence of the company's agents in the management of the train, or in putting obstructions in its way, it was held that such messenger was entitled to the same care and circumspection on the part of the company and its agents in his carriage as if he had been traveling upon

the train as a passenger, who had paid a distinct price for his transportation." In 3 *Thompson on Negligence*, § 2651, it is said: "In respect of the measure of duty which the carrier owes him and his right of recovery for an injury happening through the negligence of the carrier's servants, an express messenger stands on the same footing as a U. S. postal clerk. He is on the carrier's vehicle lawfully, and for a consideration paid the company, and his legal rights are therefore those of a passenger for hire." In section 1578, vol. 4, *Elliot on Railroads*, it is said: "The courts have held the relation of carrier and passenger to exist in cases of mail agents, or postal clerks, and a similar rule is declared as to express messengers."

In the case of *Kentucky Central R. R. Co. v. Thomas' Adm'r*, 79 Ky. 163, 42 Am. Rep. 208, the party killed by the railroad accident was an express messenger and the court in speaking of the relation he sustained to the railroad company said: "That the intestate was a passenger and entitled to the privileges and subject to the duties incident to that relation, is not disputed." In the case of *Louisville & Nashville R. R. Co. v. Kingman*, 35 S. W. 264, 18 Ky. Law Rep. 82, this court held that a postal clerk carried by a railroad company, under its contract with the government, is to be treated as a passenger, as regards the liability of the company for injuries received by him while being thus carried.

Having concluded that an express messenger is a passenger for hire, the question remains: What effect has the contract in question upon his claim for damages resulting from the alleged negligence of the appellee? Section 1296 of the Virginia Code of 1887 reads as follows: "No agreement made by a common carrier for exemption from liability, for injury or loss, occasioned by his own neglect or misconduct shall be valid." Section 196 of the Constitution of Kentucky reads as follows: "No common carrier shall be permitted to contract for relief from its common law liability." Thus we have a declaration from the state of Virginia, through its Legislature, and the state of Kentucky, through its organic law, as to their public policy with reference to the right of a common carrier to contract for relief from its acts of negligence. Under the Virginia Code, a common carrier cannot contract for exemption from liability for injury or loss occasioned by its own negligence or misconduct. Neither under the Virginia Code nor the Constitution of this state is the contract in question enforceable, if it is an effort upon the part of appellee to be relieved thereby of liability, to a passenger for hire, who is alleged to have been injured by its negligence, or that of its agents or servants. Before the enactment of the Virginia Code and the adoption of the constitutional provision of this state, such a contract

would not have been valid at common law in either state. From the nature of the business of the Adams Express Company and the duties to be performed by its messengers, and the fact that the appellee conducted an interstate business, shows that the parties attempted to relieve themselves from liability for negligent acts whether they occurred in Virginia or Kentucky.

So the parties to the contract contemplated that it should operate both in Virginia and Kentucky, and in any other state through which the carrier ran and express matter was carried. The alleged negligent act was committed in Kentucky, therefore, the cause of action arose in this state, and the appellee is relying upon a contract that was to operate in Virginia as well as Kentucky, for relief against its alleged negligent act. In the case of *C. C. & St. L. Ry. Co. v. Drulen*, 80 S. W. 781, 26 Ky. Law Rep. 108, 66 L. R. A. 275, the court had under consideration the question as to the effect of a contract made in another state and to be performed, in part, in this state and which if made in this state would have been against public policy, and the court said: "But as to that part of the contract that is to be performed in Kentucky, it will be read in the light of the laws and Constitution of this state, and be construed and applied accordingly. It will be conclusively presumed that the parties so intended, and that, therefore, the provision limiting the carrier's common-law liability was not intended to apply to that part of the shipment that was to be performed here, for the court will not presume that the parties intended either a vain, or illegal thing. That contracts to be performed partly in two states will be construed according to the laws of each of the states relating to the portions to be performed there respectively, is sustained in *Bishop on Contracts*, § 1394. If shipper and carrier by entering into the contract beyond this state, would incorporate binding provisions in it, limiting the duties and liabilities of carriers in this state, notwithstanding the prohibition of the Constitution, it would be to put the bargains of individuals above the organic laws, and to substitute them to that public policy exercised by the state for the best welfare of the whole people of an organized society. This they ought not, and will not, be permitted to do." Our conclusion is that the contract is not only against the public policy of Virginia, but also of Kentucky. If it were valid under the Virginia Code, it would not be valid here, because the cause of action arose in this state, and the contract was intended to relieve the appellee from its negligent act in Kentucky.

We will consider briefly the claim of appellee, that in contracting to haul the messenger and goods of the express company, it was not contracting as a common carrier, but as a private carrier. This position is sustained by the case of *B. & O. R. R. Co. v. Voigt*, 176

U. S. 498, 20 Sup. Ct. 385, 44 L. Ed. 560, and the opinions of courts in some other jurisdictions. It may be true (but the question is not before us) that an express company could not compel railroad companies to provide an express car for the transportation of its messengers and packages, but having made the contract and proceeds to execute it by transporting the messenger and its packages, does not deprive it of its character as a common carrier. It carries the messenger and packages for hire. The railroad company is a common carrier by virtue of the business it conducts, and not by virtue of the responsibilities which may be placed upon it by law, or its contracts. The mere fact that it makes some special arrangement with some person or company for the transportation of persons, or property, over its line, in a particular way or under certain conditions, does not deprive it of its character as a common carrier, or convert it into a bailee for hire. The case of *Greenwich Ins. Co. v. Louisville & Nashville R. R. Co.*, 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313, is not in conflict with the conclusion we have reached. There, the contract under consideration was not for the transportation of passengers or goods, but was a contract by the railroad company giving its permission to the erection of a building upon its right of way, upon certain conditions, hence, the court held the contract was not made with reference to its business as a common carrier. In the case of *Railroad Co. v. Lockwood*, 17 Wall. 359, 21 L. Ed. 627, the question arose as to the liability of the railroad company to a drover, who under a special arrangement rode upon a freight train to look after stock which was being carried thereon. The contract with the drover provided that the carrier was not to be liable to him for injuries resulting from its negligence, and the court said: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character, and becomes an ordinary bailee for hire, and therefore may make any contract he pleases; that is, he may make any contract whatever, because he is an ordinary bailee, and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God, or public enemies. The civil law excepts also losses by means of any superior force, and any inevitable accidents. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not

follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced that a special contract as to the terms and responsibilities of carriers, change the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, while the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes risks of inevitable accidents in the carriage of his goods? Suppose that the contract relates to single crate of glass or crockery, while at the same time the carrier receives from the same person 20 other parcels, respecting which no such contract is made, is the company a public carrier as to the 20 parcels, and a private carrier as to the one? On this point there are several authorities which support our view, some of which are noted in the margin. A common carrier may, undoubtedly, become a private carrier, or a bailee for hire, when, as a matter of accommodation, or special engagement, he undertakes to carry some thing which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regular established business for carrying all of certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibilities does not divest it of the character."

The drover in this case could have compelled the railroad company to have accepted his fare and transported him on its passenger trains as a passenger, and the mere fact that it agreed to do so on a freight train, did not deprive him of his relation to the railroad as a passenger. The express messenger could have compelled the railroad company to have accepted fare and transported him upon a passenger train. The mere fact that it did so in the express car did not deprive him of his relation to the railroad company as a passenger entitled to all the relief which the law guarantied him. In the case of *B. & O. S. W. Ry. Co. v. Volght*, the Supreme Court endeavored to distinguish that case from *Railroad Co. v. Lockwood*. In our opinion the reasoning in the *Lockwood* Case applies with great force to the case under consideration.

Several of the Supreme Courts of the states have taken the view of the law that we have herein expressed. In our opinion, the contract under consideration is against public policy, and not enforceable.

The judgment is reversed for proceedings consistent with this opinion.

TRUSTEES OF HOME FOR POOR CATHOLIC MEN v. COLEMAN.

COLEMAN v. AMISS' EX'R.

(Court of Appeals of Kentucky. March 29, 1906.)

1. WILLS—ACTION FOR CONSTRUCTION—COSTS.

In an action for the construction of a will in which it is sought to set aside several bequests, including a residuary bequest for the establishment of a Home for Poor Catholic Men, where the residuary bequest was sustained and certain others set aside, it was error to charge the residuary legatees with the payment of costs and attorney fees of the plaintiff, under Ky. St. 1903, § 889, providing that the party succeeding in an action shall recover his costs, but when a plaintiff succeeds against a part of the defendants, he shall recover against such only.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1686.]

2. EXECUTORS — LIABILITIES — PAYMENT OF LEGACIES—LACHES.

An action in which it is sought to charge an executor personally for the amount of a legacy paid by him under order of court, not commenced until nine years after the payment, and after it was too late to recover it from the legatee, was barred by laches.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 1744.]

3. SAME—VALIDITY OF ACT OF EXECUTOR.

Under Ky. St. 1903, § 3848, providing that when the will under which an executor acted shall be declared invalid all lawful acts done by the executor shall remain valid and effectual, where a legacy was paid by an executor under order of court, as directed by the will, and that provision of the will was afterwards declared invalid, the act of the executor was nevertheless valid so that he was not personally liable for the amount paid.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by Thomas F. Coleman against the trustees of the Home for Poor Catholic Men under the will of John D. O'Leary, and against the executor of C. J. Amiss, and others. From a judgment for costs against the trustees, they appeal, and from a judgment in favor of the executor, the plaintiff appeals. Judgment reversed on appeal of trustees, and affirmed on appeal of plaintiff.

P. B. Muir, for appellant Trustees of the Home for Poor Catholic Men. D. W. Sanders and J. W. S. Clements, for appellant Coleman. McDermott & Ray, for appellee Amiss' Ex'r.

PAYNTER, J. The will of John D. O'Leary was probated May 19, 1893, by which he devised a large estate. C. J. Amiss was nominated and qualified as executor of

the will. He instituted a suit September 25, 1893, in the chancery court for the settlement of the estate. The appellant, Coleman, and one Hays, on May 18, 1894, appealed from the order probating the will, and on their motion the appeal was dismissed June 4, 1896. The commissioner's report was filed October 30, 1896. The trustees of the Home for Poor Catholic Men were the residuary legatees under O'Leary's will, and on November 20, 1896, the executor was ordered to pay the residuum to them. This action by the appellant, Coleman, was filed April 12, 1900. The appellant, Coleman, is an heir at law of the testator. By the petition he attacked the provisions of the will, and sought to have them set aside, and have the part of the estate thus attempted to be devised remain as undevised estate. The bequests upon which attack is made are shown by the petition as follows: Paragraph No. 2 attacks the bequest to the Rev. James M. Hays for masses; paragraph No. 3 is an attack upon the bequest of \$1,000 for masses, to be paid to Bishop McCloskey; paragraph No. 4 is an attack upon a bequest of \$3,000 to Bishop McCloskey in trust for the parish poor schools of Louisville; paragraph No. 5 is an attack upon a bequest of \$3,000 to the bishop of Cork, Ireland, for general charity in his discretion; paragraph No. 6 is an attack upon the residuary devise to establish a "Home for Poor Catholic Men"; paragraph No. 7 is an attack upon a devise of land to the Jesuit order. The court below held that the various provisions of the will to which we have alluded were valid. An appeal was prosecuted to this court which delivered an opinion sustaining the various devises, except the bequest to the bishop of Cork, and the devise of the land to the Jesuit order. On the return of the case, upon the motion of the appellant he was allowed one-half of his costs and \$1,500 as attorney fees for prosecuting the action, and the trustees of the Home for Poor Catholic Men were ordered to pay them. The trustees have appealed from that order.

The trustees of the Home for Poor Catholic Men have no interest whatever in the controversy between the beneficiaries of other devises and bequests to which we have referred, because if they had all been declared invalid, the sums bequeathed and property devised would not have been part of the residuum. Under section 4843, Ky. St. 1903, the property thus attempted to be disposed of would have become a part of the estate of the testator for distribution among his heirs. The bequests had been paid to the various persons named in the will, and the Home for Poor Catholic Men had been established for several years before this action was instituted. The appellant is presumed to and did know that the executor, Amis, was proceeding to perform the duties imposed on him by the will. While plain-

tiff claims that the action was for the construction of the will, it was in effect an action to recover the various amounts we have mentioned, and the property we have described. Another reason why it has the characteristics of an action to recover property is that the various bequests had been paid to the beneficiaries and the property had been delivered to the persons to whom it had been devised. It seems to us that it would be most inequitable to compel the trustees to pay the appellant's attorney fees and part of his costs to recover property in which they had not the slightest interest, and in no event under the law could it go to them. Had the appellant, Coleman, succeeded in invalidating the devise to the trustees of the Home for Poor Catholic Men, the utter destruction of the charity would have been accomplished. It seems to us that it would be most inequitable and unjust to compel the trustees of the Home for Poor Catholic Men to pay appellant's attorney fees and part of his costs in his effort to destroy the charity and to take the property. Section 389, Ky. St. 1903, relates to costs in various kinds of actions; it reads as follows: "The party succeeding in any ordinary action, on the merits or otherwise, shall recover his costs, unless differently provided in this chapter; if the plaintiff shall succeed against part of the defendants, and not against others, he shall recover his costs from the former, and the latter shall recover their costs against the plaintiff. In actions in equity, the party succeeding on the merits or otherwise shall recover his costs, except against nominal defendants; but when the plaintiff succeeds against a part of the defendants, he shall recover his costs against such only. Defendants who are necessary nominal parties, and against whom the complainant does not succeed, shall not recover their costs; but each party shall be decreed to pay his own costs. Defendants who are not necessary parties shall recover their costs, but in actions between parceners, tenants in common, joint tenants, and for settling the distribution and division of deceased persons' estates, and to settle partnerships, and to settle or enforce trusts, courts shall have a judicial discretion in regard to costs."

In construing this statute, and determining how the costs and attorney's fees should be paid, this court has never given it any construction which would sustain the claim of the appellant. On the contrary, the rule enunciated in them denies his right to recover. The question as to attorney fees and costs have been passed upon by this court in the following cases: *Thirlwell's Adm'r v. Campbell*, 11 Bush, 164; *Urey's Adm'r v. Urey's Ex'r*, 86 Ky. 366, 5 S. W. 859; *Taylor v. Minor*, 90 Ky. 549, 14 S. W. 544; *Fristoe v. Gillen*, 80 S. W. 823, 26 Ky. Law Rep. 149; *Abert v. Taylor, etc.*, 37 S. W. 676, 18 Ky. Law Rep. 615; *Bailey's Adm'r v. Barclay*, 60

S. W. 377, 22 Ky. Law Rep. 1246. It is true that the court allowed counsel for fees to the trustees in *Spalding v. St. Joseph Industrial School*, 107 Ky. 882, 54 S. W. 200, but that expense was incurred in defense of the trust fund and to carry out the wishes of the testator. In the consideration of this question we do not desire to follow counsel in an effort to ascertain the English rule in regard to the allowance of attorney fees and costs in charity cases. Under the statute of this state regulating the allowance of costs and attorney fees it is not proper for the court to make a successful litigant, though it be trustee of a charity, pay the attorney fees and costs of a plaintiff who was endeavoring to destroy the charity (not to establish it) by an action to recover the corpus of the trust fund and appropriate it to his use. There is not the slightest evidence that the trustees lack in capacity to manage the trust, or that there has been any abuse of the trust; hence, no occasion for the interference of the court. *Attorney General v. Wallace's Devises*, 7 B. Mon. 621. The evidence shows that Coleman never even asked the trustees for the privilege of exercising any visitorial rights he may have; therefore there could not have been any refusal to permit him to exercise them. He had not spoken to the trustees since the death of the testator. The power and discretion was vested in the trustees to locate and manage the home. The manner of acquiring and transmission of the title to the property does not in the least degree reflect on the judgment or integrity of the trustees. The record shows that they have acted in the utmost good faith in the acquisition and management of the home.

Coleman v. Amiss' Ex'r.

The statement of the case made in the opinion is pertinent to the question involved on this appeal. In addition to the other facts stated, it is proper to say that the executor of O'Leary's will was ordered on the 5th day of March, 1894, to pay to the bishop of Cork the bequest to him, and it was paid on that day. The amended petition to charge Amiss personally for the amount paid the bishop of Cork was filed March 21, 1903, nine years after the money had been paid to him. Appellant dismissed his appeal from the order probating the will. He did not do anything, either by word or act, to apprise the executor that he intended to question the validity of the bequest. He did not make known his purpose to question the validity of the bequest or the payment of it until it was too late for him to recover it from the bishop of Cork. In some cases the statute of limitations will bar a claim, but a court of equity will bar one for laches when the

plaintiff has delayed for an unreasonable time to assert his rights. In section 1520, Story's *Equity Jurisprudence*, it is said: "But a defense peculiar to courts of equity is that founded upon a mere lapse of time, and the staleness of the claim. In cases where no statute of limitations directly governs the case. In such cases courts of equity act sometimes by analogy to the law, and sometime act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches, or long and unreasonable acquiescence in the assertion of adverse rights." In our opinion the appellant delayed for an unreasonable time to assert his rights; therefore, his action is barred by laches.

By section 3848, Ky. St. 1903, it is provided that when "the will under which he [executor] acted shall be declared invalid * * * all * * * lawful acts done by such executor * * * shall remain valid and effectual. * * *" The money paid the bishop of Cork was so paid as directed by the will to execute which Amiss was appointed. Certainly an act done as directed by the will until it is set aside is lawful, in the meaning of the statute. In other words, it means any act done which would have been lawful if the will had not been invalidated, is to be treated as lawful when done before it is invalidated. If that was not the purpose of the statute, it would be meaningless. While the whole will was not declared invalid, the clause in question was, and the reason and purpose of the enactment of the statute applies in the one as in the other case. Acts done by the executor after the probate of the will and before it is invalidated are binding, and are not affected by the nullification of the will. *Jones' Ex'r v. Jones' Widow*, 14 B. Mon. 464; *Woods' Adm'r v. Nelson's Adm'r*, 9 B. Mon. 604. A court of competent jurisdiction probates the will, and the will and order of probate authorizes the executor to act as it were for the testator. And it is essential to the safety of the community, and but giving due respect to the authority of judicial proceedings, that the lawful acts done under a will before it is invalidated, should be treated as valid. Having reached the foregoing conclusion, it is unnecessary to decide whether or not the statute of limitations bars Coleman's right to recover; and it is also unnecessary to determine whether or not the order in the settlement suit is a bar to his right to recover.

The judgment is reversed on the appeal of the trustees of the Home for Poor Catholic Men for proceedings consistent with this opinion, and affirmed on the appeal of Coleman against Amiss' executor.

STATE v. STUART et al.

(St. Louis Court of Appeals. Missouri. Jan. 30, 1906.)

1. CRIMINAL LAW—EVIDENCE—DEMURRER.

Where there is any substantial evidence of defendant's guilt, an instruction in the nature of a demurrer to the evidence is properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1725, 1726.]

2. ASSAULT—EVIDENCE.

In a prosecution for assault, evidence held sufficient to establish that one of the defendants participated in the affray in a manner other than as a peacemaker.

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

John Stuart and William Vollmer were convicted of assault, and they appeal. Affirmed.

B. L. Matthews and R. L. Shackelford, for appellants. R. L. Johnston, for the State.

BLAND, P. J. The grand jury of St. Louis county preferred an indictment against the defendants, charging that at said county, on September 1, 1903, defendants made a felonious assault on William A. Trent, with a deadly weapon, with the felonious intent to kill him, said Trent. Defendants entered a plea of not guilty and were put upon trial, which resulted in a verdict finding them guilty of common assault. Judgment and sentence followed the verdict, from which, after an unsuccessful motion for new trial, defendants appealed. Trent, it appears, had left the county and was not present at the trial.

William Morische, the principal witness for the state, testified: That he owned Morische's Grove, in St. Louis county, located near the grounds of the Delmar Jockey Club, and at the time of the difficulty Trent was his cook. That on September 1, 1903, at about 3 p. m., he and Trent started to the Jockey Club, walking on the track of the Suburban Railway Company. That when they got in back of the paddock of the Jockey Club, Stuart and Vollmer, addressing them, said: "Here comes the sons of bitches now. Don't you follow us." And Trent said: "We ain't following you, and we ain't sons of bitches either." With that Stuart pulled a gun out of his pocket and came towards Trent. Witness stated that he then ran about 40 or 50 feet, dropped his hat and started back for it, and saw Stuart and Trent fighting, and saw something that looked like a gun in the hands of both Stuart and Vollmer, and heard a pistol shot about the time the fight commenced. That Vollmer was 40 or 50 feet away when the fight began, but came up during its progress and took part in it, and when Trent had Stuart down in a ditch, Vollmer took hold of Trent, beating and pulling him off of Stuart. That Vollmer beat Trent with something that looked like a revolver. That Trent was bruised and cut about the face, and was bleeding profusely, and he helped him on a car and took him

home. That he did not know who fired the shot, but was certain it was fired before the men rolled into the ditch. Witness also testified that Vollmer mixed in the fight before the parties rolled into the ditch. The physicians who attended Trent said his injuries were flesh wounds, not of a serious nature. George Merida testified, for the state, that he saw the three men fighting and roll into the ditch, but could not tell one from the other; that one of them had a gun in his hands. George Angelin also testified that he heard there was trouble and went to the scene; that when he arrived two of the men were rolling into the ditch, and the other was standing by; that he saw nothing further of the fight until some men pulled Trent out of the ditch, and he then saw that Trent was cut and bruised about the face and was bleeding; that he saw nothing of the fight until the shot was fired.

For the defense, the evidence tends to show that Trent was about 25 or 26 years of age, was a large, strong, muscular man, and that Stuart was weak and sickly; that in the fight Stuart was backing and Trent was following him up and the two finally rolled into a ditch; that Vollmer was some distance away, but came up after Stuart and Trent rolled into the ditch and then pulled Trent off of Stuart, but did not strike Trent; that no shot was fired until after the men rolled into the ditch; that Stuart came out of the fight dirty and bloody, with his clothing torn; that Vollmer had nothing in his hands and all that he did was to pull Trent off of Stuart; that Stuart tried to get away from Trent and kept backing off from him, but Trent followed him up and "clinched him," and then they both rolled into the ditch.

At the close of all the evidence, the defendants offered an instruction in the nature of a demurrer to the evidence. The refusal of the court to grant this instruction is assigned as error. It is the well settled rule in this state, that the weight of evidence in a criminal, as well as in a civil, cause is for the jury and when there is any substantial evidence of defendant's guilt, an instruction in the nature of a demurrer to the evidence should not be given. *State v. Warner*, 74 Mo. 83; *State v. Pollard*, 174 Mo. 607, 74 S. W. 969; *State v. Forrester*, 63 Mo. App. 530. Defendants' counsel contends, with great force and zeal, that there is no substantial evidence that Vollmer took any part in the fight, other than as a peacemaker, and seize upon the following excerpt from Morische's testimony on cross-examination as conclusive of this fact, to wit: "Q. And what did you notice Vollmer do when he came up where they were, what were his actions? A. He beat Trent to get him loose." This evidence should be considered along with the other evidence of the witness. In his direct examination he was asked the following questions: "When you turned and looked back both of them [referring to Stuart and Vollmer] were

up there? A. They were both fighting in the middle of the Suburban right of way and both fought right into the ditch. Q. You mean the two defendants with Trent? A. Yes, sir." Witness further testified that Vollmer had something in his hands that looked like a pistol. Now, it may be that Vollmer was forced to strike Trent with the pistol or some other weapon to get him off of Stuart to prevent him (Trent) from doing Stuart great bodily harm; but whether or not he was an active participant in the fight, as aider and abettor of Stuart, or merely as a peacemaker, was submitted to the jury under appropriate instructions. The jury found against defendants' contention, and there is substantial evidence to support its finding, and the trial court approved the verdict by overruling the motion for new trial. This is the end of the matter, for appellate courts will not invade the province of the jury to pass upon the credibility of witnesses or weigh their evidence. *Kingman v. Waugh*, 139 Mo. 360, 40 S. W. 884; *Chouquette v. Railroad*, 152 Mo. 257, 53 S. W. 897; *Williams v. Railroad*, 153 Mo. 487, 54 S. W. 689; *Chitty v. Railway*, 166 Mo. 435, 65 S. W. 959; *Downing v. Railway*, 70 Mo. App. 657; *Tower v. Pauley*, 78 Mo. App. 287; *Land & Lumber Co. v. The Company*, 79 Mo. App. 543; *Temple v. Railway*, 83 Mo. App. 64; *Colyer v. Railway*, 93 Mo. App. 147.

It is contended that the verdict is the result of passion and prejudice. There is nothing in the record to convince us that the verdict is other than the result of the cool and dispassionate judgment of the jury. The case was fairly tried, and the issues were fairly and intelligently submitted by the instructions given. It appears to us that the verdict was reached by reason of the fact that the jury gave the greater weight to the evidence of the witnesses for the state.

Discovering no reversible error in the record, the judgment is affirmed. All concur.

TRIMBLE et al. v. SOUTHWEST MISSOURI LIGHT CO.

(Kansas City Court of Appeals. Missouri. Jan. 8, 1906.)

1. CONTINUANCE — REFUSAL — PROCEEDINGS OUT OF COURT.

The only occasion on which a party to a suit can properly apply for a continuance of his cause is in open court, in the presence of his adversary; and where a continuance is refused, the applicant cannot contend that he was misled by a statement by the judge out of court to the effect that a continuance would be granted if a certain showing was made.

2. SAME—ABSENCE OF COUNSEL—DILIGENCE.

Where defendant knew for a long time the relation of his lawyer to the plaintiffs in the action and his unfavorable opinion with reference to the merits of the defense, but, notwithstanding such knowledge, deferred discharging him until the day before the case was to be tried, and then employed another lawyer, who was at the time confined to his bed by sickness, want of proper diligence was sufficiently shown to justify the denial of a continuance.

Appeal from Circuit Court, Jasper County, Howard Gray, Judge.

Action by J. McD. Trimble and another against the Southwest Missouri Light Company. From an order overruling defendant's application for continuance, defendant appeals. Affirmed.

R. H. Field, for appellant. A. E. Spencer, for respondents.

BROADDUS, P. J. The only question raised on the appeal is that the court erred in overruling defendant's application for a continuance. The plaintiffs, Trimble and Braley, are lawyers residing at Kansas City, Mo. For the January term, 1904, they commenced suit in the Jasper county circuit court against defendant for legal service rendered in its behalf. On the 2d day of January, 1905, the defendant by its attorney, C. A. Loomis, filed its answer to plaintiffs' petition. On February the 4th and the 25th day of said term, the defendant filed an application for a continuance of the cause, which was overruled, and the cause proceeded to trial, which resulted in a finding and judgment for the plaintiffs.

The application for a continuance, omitting the caption, is as follows: "Comes now J. W. McAntire, who, being first duly sworn, makes oath and says that he is by profession a lawyer practicing in the courts of Missouri, and resides at Joplin, Mo.; that until yesterday the only connection he has had with the above-entitled cause was to file an answer prepared by Charles A. Loomis, a lawyer of Kansas City, Mo., who was employed by the defendant to defend said suit, as this affiant is informed; that a few days ago the judge of this court called attention of this affiant to depositions in this case, which he read, but he was not at that time employed or retained for the company in this case; that Charles A. Loomis, so far as this affiant knows at that time, was the only one employed at that time; that since the taking of these depositions, as affiant is informed and believes, said Charles A. Loomis has either withdrawn from said cause or been released from such employment and that he was compelled to go to some other point to attend to some other lawsuit; that thereupon, as affiant is informed, Judge R. H. Field, of Kansas City, was employed to attend this case; that on yesterday, February 3d, in the afternoon, this affiant was informed that Judge R. H. Field was confined to his bed by an attack of grippe, and could not possibly be in attendance at this time to try said cause at this term of court; that this affiant was employed to present this matter to this court and postpone this case; that this affiant has never consulted with any one representing the defendant, and does not know what the facts are upon which the defense is based; that John A. Eaton, who rendered a large part of such services for plaintiff, is now a member of the firm

of Eaton & Loomis, but is not and never was employed for defendant in this case; that George M. Myers, who was general manager of defendant, and as this affiant is informed claims that the defendant has a meritorious defense in this case, but that owing to the fact of its attorney employed to try said cause being unable to attend said trial on account of sickness," etc.

Among the facts shown on the hearing of the motion are the following: It appeared that after O. A. Loomis, who was the law partner of John A. Eaton, and who had rendered for plaintiffs a part of the service in controversy, a question as to the propriety of said Loomis, under the circumstances, and because of his opinion of the case being unfavorable to defendant, of further representing the defendant as its attorney. It was determined by Geo. A. Myers, defendant's general manager, that he should be discharged. Mr. Loomis then dropped out of the case, and defendant then retained Judge R. H. Field to act for it. Judge Field was employed on Friday, the day before the case was set for trial. Immediately upon being retained in the case, Judge Field sent the following telegram to the Hon. Howard Gray, the judge of the Jasper circuit court, viz.: "I have been retained as attorney case Trimble & Braley vs. Southwest Missouri Light Company, but it is impossible for me to go down tonight, as am sick at home with grippe. Am sorry cannot be there tomorrow, and, under circumstances, must ask indulgence of the court until some day next week or later. Trimble & Braley have been served with copy of this message. Answer my expense. R. H. Field, Attorney. 2:00 p. m." Judge Gray answered as follows: "Will continue on application if showing as per your telegram is made." At the time Myers employed Judge Field to represent defendant in the case, he knew that Field was sick in bed and could not appear on the following day for the trial. And it is matter of inference from the facts shown that Myers, when he employed Loomis in the case, was aware of the fact that he was the partner of Eaton, who had been connected with plaintiffs in the rendition of the services sued for, and it was shown that his principal reason for discharging Loomis was that his opinion was unfavorable to defendant's defense. There were other developments in the case, but sufficient have been given for all practical purposes.

The defendant contends that it was misled by the telegram of Judge Gray to its lawyer, Judge Field, to the effect that a continuance would be granted if the showing supported the statements of Field's said telegram. There is no doubt but what Judge Field stated the truth when he said he could not be on hand at the trial because of his sickness. But the utter weakness of defendant's position in that respect is that Judge Field and Judge Gray had no legal authority

to provide for a continuance in the manner adopted. The only occasion in which a party to a suit can properly apply for a continuance of his case is in open court in the presence of his adversary. Any other practice would tend to interfere with a full administration of justice, and would be ex parte in its character. It is a matter of general knowledge among lawyers that requests for continuances are frequently made to the judge outside of the courtroom. It is only necessary to call attention to the impropriety of such a practice, in order to condemn it in the mind of every judge and lawyer. Judge Gray, when the matter came before him, very properly felt himself under no legal obligations to grant the continuance under the showing made by the plaintiff that the application was not made in good faith but for mere delay. The defendant, after discharging one lawyer, just on the eve of the trial, employed another that its agent knew could not attend and render service because he was confined to his bed by sickness. Myers knew long before he discharged lawyer Loomis his relation to Eaton as a partner, and his opinion with reference to the merits of its defense to plaintiffs' demand; but, notwithstanding, he deferred to employ another lawyer until the day before the case was set for trial, and then employed Judge Field, who was sick and unable to attend such trial. If the conduct of Myers is not to be construed as evincing a purpose of getting a continuance for mere delay, it at least shows clearly want of proper diligence. Furthermore, the defendant was represented by several lawyers on the trial, and there is nothing in the record going to show that the rights of defendant were prejudiced in the slightest degree on account of the absence of Judge Field. From aught that appears in the record, the defendant was intelligently and ably represented in every particular, and that the result of the trial was because of the strength of plaintiffs' case and the weakness of that of the defense.

Affirmed. All concur.

FICKLIN & SON v. WABASH R. CO.*

(Kansas City Court of Appeals. Missouri.
Jan. 8, 1906.)

1. CARRIERS—LIVE STOCK—SHIPMENT—LIMITED LIABILITY—CONSIDERATION.

Where a live stock transportation contract limited defendant's liability in consideration of a "reduced rate," but it appeared that defendant had but one rate for the carriage of the stock between the points in question, such contract in so far as it attempted to limit defendant's liability, was without consideration and would be treated as an ordinary bill of lading, on which defendant was bound to perform the common-law obligations of a common carrier.

2. SAME — DEATH OF STOCK — PROXIMATE CAUSE.

Where plaintiffs, who were experienced shippers of live stock, knew before they began loading certain cars with sheep, that the cars

*Rehearing denied March 3, 1906.

were too small, but voluntarily took the risk of overcrowding, by which five of the sheep were killed presumably from suffocation before the transportation was begun, the proximate cause of the death of such sheep was the negligence of the plaintiffs.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 931.]

3. SAME—ISSUES—VARIANCE.

Where, in an action against a carrier for loss of certain sheep, plaintiff alleged that the sheep were lost because of defendant's negligence and carelessness, and unnecessary violence in handling its trains carrying the sheep, but the proof showed that the sheep were lost from the carrier's pens before their transportation was begun, there was a fatal variance.

4. SAME—DAMAGES—ESTOPPEL.

Where, in an action for injuries to sheep because of the carrier's failure to provide double-deck cars to accommodate the whole band, plaintiffs, who were experienced shippers, took out of the cars furnished 50 sheep more than was necessary to relieve overcrowding, knowing that such sheep would necessarily deteriorate in weight and appearance while being kept in the pens waiting for another car, plaintiffs could not recover damages against the carrier for such deterioration.

Appeal from Circuit Court, Gentry County; W. C. Ellison, Judge.

Action by Ficklin & Son against the Wabash Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Geo. S. Grover and H. C. McDougal, for appellant. Peery, Lyons & Wood, for respondents.

JOHNSON, J. Action for damages against a common carrier alleged to have been sustained in consequence of negligence in providing cars for the shipment of live stock and in the transportation of the same to market. Plaintiffs recovered judgment in the sum of \$25, and defendant appealed.

Allegations in the petition pertinent to the questions submitted to us for determination are as follows: "Plaintiffs further state that on the 20th day of February, 1904, they were the owners of 488 head of sheep which they desired to ship from said station at Stanberry to the market at South St. Joseph, Mo., on the 22d day of February, 1904, and asked that cars be furnished for such shipment; that defendant failed and refused to furnish said cars on said last-named date, but notified plaintiffs on the 29th day of February, 1904, that sufficient cars for the shipment of said sheep were at Stanberry, and that defendants were ready to receive said sheep for transportation. That plaintiffs immediately drove said sheep to Stanberry, and delivered the same to defendant at its stock pens at its station at said city of Stanberry, and defendant received and accepted said sheep at said station, and placed the same in its said stock pens and received and accepted said sheep for transportation from said city of Stanberry to the stockyards at the city of South St. Joseph, Mo.; but the defendant failed and refused to furnish cars as it was its duty to do, for the shipment of all

of said sheep, but furnished cars only for 417 head thereof, leaving 71 head of said sheep in its pens at Stanberry; which said 71 head of sheep defendant negligently and carelessly refused to transport to said market at South St. Joseph, Mo., until the 2d day of March, 1904, and said defendant negligently and carelessly refused to furnish any cars for the transportation of the same until said last-named date; and said 71 head of sheep did not arrive on said market until the 3d day of March, 1904, owing to the carelessness and neglect of duty of defendant as aforesaid; that 71 head of sheep, if transported with reasonable diligence by defendant, would have arrived on said market on the 1st day of March, 1904, and the 3d day of March, 1904, the market price of said sheep was greatly reduced and said sheep were sold for a much less amount than if they had reached said market on March 1, 1904, that said sheep were greatly shrunken in weight—more than they would have been if promptly transported; that the appearance of said sheep was affected so as to greatly reduce their market value; that on account of the failure of defendant to ship all of said sheep together, on February 29, 1904, plaintiffs were compelled to pay extra commission charges for the sale of said sheep, and were compelled to pay extra railroad fare to look after said sheep; that on account of the carelessness and negligence of defendant and unnecessary violence in handling its trains carrying said sheep, four of the same were lost, and not delivered to plaintiffs nor their agents and five of said sheep were killed in transportation by rough handling and lack of care as aforesaid."

In the answer, defendant pleaded the shipping contracts signed by plaintiffs, in which are found a number of stipulations that, if enforceable, limit the liability of defendant in various respects. These restrictive provisions are all based upon the consideration of a "reduced rate" and cannot be sustained for the reason that the evidence including that offered by defendant, shows an entire failure of the consideration stated. It appears that defendant has but one rate for the carriage of sheep from Stanberry to St. Joseph, which is charged in all cases regardless of the value and number of the animals offered for shipment. It must be presumed that plaintiffs in giving their assent to the special agreements embodied in the contract were moved thereto by the representation and understanding that they were receiving a reduced rate for the rights they released and the duties they assumed. If, in fact, the so-called consideration was a fiction, the benefits and immunities to defendant founded upon it rest upon nothing and fall for lack of support. *Fountain v. Railroad* (not yet officially reported) 90 S. W. 893; *Summers v. Railroad* (Mo. App.) 79 S. W. 481; *Ward v. Railroad*, 158 Mo. 228, 53 S. W. 28. The shipping contracts will be treated as ordinary

bills of lading, and defendant held thereunder to the common-law duties and liabilities imposed upon common carriers.

Plaintiffs' evidence shows that 492 head of sheep were brought from their farm to the station instead of 488 head, as alleged in the petition. Before loading, plaintiffs discovered that, instead of providing the two double-decked cars 36 feet in length as ordered, defendant had for their use four single-decked cars, each 34 feet long. Plaintiffs protested to defendant's agent that the cars were insufficient for the transportation of the number of sheep they had, but finally concluded they could be made to answer the purpose, and loaded all of the animals into them. Five of the sheep were killed in the process, presumably by suffocation, and plaintiffs removed 75 head from the cars and put them back in defendant's shipping pens, and ordered another car for their transportation. The 417 head remaining in the cars were billed out and carried by defendant and its connecting lines to their destination. This number included the 5 dead. Of the 75 returned to the pens, 4 escaped therefrom and were lost. The remaining 71 were held two days waiting a car and were then shipped and carried to market where they were sold. Plaintiffs in the petition claimed damages for the killing of the 5; the loss of the 4; loss in weight; and value of the detained, and increased expense incurred from defendant's failure to furnish the two double-decked cars.

In the instructions given, plaintiffs were not permitted to recover for the dead sheep and, in the event of a retrial of the case, no recovery for them should be allowed in any state of the pleadings under the facts disclosed. Conceding the negligence of defendant in failing to furnish the kind of cars ordered, it was the negligence of plaintiffs in knowingly overloading the cars that was the proximate cause of the killing. Plaintiffs are experienced shippers, and knew before they began loading that the cars were too small for the whole shipment. They knowingly and voluntarily took the risk of overcrowding, and cannot complain if the result, reasonably to have been anticipated, followed their own want of due care. The court did instruct the jury to find for plaintiffs for the four lost sheep if they "were lost in transportation by defendant and not delivered to the consignee." This was reversible error. The cause of action pleaded is founded in negligence and with respect to the lost sheep it is averred "that on account of carelessness and negligence of defendant and unnecessary violence in handling its trains carrying said sheep, four of them were lost," etc. The specific act of negligence charged is "violence in the handling of its trains," from which but one inference is admissible, that the sheep were lost from the train while in transit as the result of care-

less operation. There is no evidence to sustain the charge. Plaintiffs admit the sheep were lost from the pens. The instruction submitted an issue totally at variance with the conceded facts. Plaintiffs argue that the variance is immaterial because the duty imposed by law upon the defendant while the sheep were in the shipping pens was that of a common carrier and not a custodian, and therefore the only facts constitutive of the cause of action were the reception of the sheep in the pens by defendant, and its failure to deliver them at their destination. One weakness of this argument, and we need look to no other, is that it overlooks the fact that plaintiffs, in their petition, made a specific act of negligence elemental to their cause of action. They did not choose to stand upon a general averment, but selected a particular ground, notified defendant to meet them there, and they must recover upon that ground, or not at all. The vice of the instruction lies as much in the absence of any proof to sustain the issue presented as in the failure to submit in its entire scope the cause of action pleaded.

Another error is properly before us under the demurrer to the evidence. Defendant contended throughout the trial that, had two double-decked cars of the dimensions ordered been provided, the number of sheep brought in would have overloaded them, and plaintiffs would have been compelled to make a second shipment, while plaintiffs insisted that all of the sheep could have been loaded safely into the two cars. One of the plaintiffs testified as a witness and, on cross-examination, was compelled to admit that the small excess of area in the two double-decked cars over that in the four single cars would not have accommodated more than 25 head of sheep; but he said that when he found the cars would not hold all of the sheep, he took out 50 head more than was necessary to relieve the overcrowding under the idea that, as he had to make a separate shipment, it was of no consequence whether it contained 25 or 75 head. To make it clear that the two large cars would have held the 492 head, plaintiff was quite positive that 50 more could have been sent with the first lot without any danger of overcrowding, and now complains of the very damage he, as an experienced shipper, knew the 50 head would likely sustain in being held in the railroad pens for another car. He knew the animals would certainly lose in weight and appearance, and become less marketable, and that market values are constantly fluctuating, and yet, for no reason at all, unnecessarily subjected himself to this damage. There is no sound principle that warrants the recovery of any damages so incurred. Plaintiffs by their own act invited loss to the 50 head.

For the errors noted, the judgment is reversed, and the cause remanded. All concur

RAMSEY v. FIELD et al.

(Kansas City Court of Appeals. Missouri.
Jan. 8, 1906.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS — ORDINANCE — DELEGATION OF LEGISLATIVE AUTHORITY.

Under Kansas City Charter, art. 9, p. 137, providing that the city council shall have power to construct sidewalks "to such extent, of such dimensions, and with such material as may be provided by ordinance," prescribing the width of a sidewalk is a legislative function which devolves on the city council, and which it cannot delegate to a ministerial officer.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, § 756.]

2. SAME.

Under Kansas City Charter, art. 9, p. 137, authorizing the city council to construct sidewalks of such dimensions and in such manner as may be provided by ordinance, a sidewalk ordinance providing that the width of the sidewalk shall "not be less than five feet, laid so that the outer edge shall be as directed by the city engineer," does not authorize the engineer to let the work at any dimension greater than the minimum and thus constitute an unwarranted delegation of legislative authority to him, but requires him to let the contract in the language of the ordinance, and is consequently sufficiently definite as to the width of the sidewalk to satisfy the charter provision, as it may be assumed that the contractors will bid upon the minimum dimension, and the ordinance therefore practically provides for a sidewalk five feet in width.

3. SAME.

Where the space between the property line and the curbing on a street was 11 feet, an ordinance providing for the construction of a sidewalk not less than 5 feet in width, to be laid "so that the outer edge shall be as directed by the city engineer," delegates to the city engineer the authority to locate the walk within the 11-foot space, and is consequently invalid for uncertainty, under Kansas City Charter, art. 9, p. 137, authorizing the city council to construct sidewalks of such dimensions and under such regulations as may be provided by ordinance.

4. SAME—PARTIAL INVALIDITY OF ORDINANCE—EFFECT.

Under Kansas City Charter, art. 9, p. 137, authorizing the city council to construct sidewalks of such dimensions and under such regulations as may be provided by ordinance, where an ordinance for the construction of a sidewalk contains no provision for the width or location of the walk, except that embraced in an invalid section, the rejection of the invalid section leaves no authority for the construction of the walk, and renders the ordinance and tax bills issued thereunder unenforceable.

Appeal from Circuit Court, Jackson County; John G. Park, Judge.

Action by Jeremiah W. Ramsey against Annie C. Field and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. E. Smith, for appellant. Gage, Ladd & Small and R. H. Field, for respondents.

ELLISON, J. This action was instituted to recover the amount of three special tax bills issued for the construction of a sidewalk in front of defendant's property on Baltimore avenue, in Kansas City. The judgment in the trial court was for the defendant. In

his reply to defendant's answer, plaintiff made the following admission of facts in the case: "Plaintiff admits that Baltimore avenue was then, as now, fifty (50) feet wide, and the division line between the roadway for vehicles and teams, and the sidewalk for pedestrians, was the curbing set and constructed thereon, eleven feet from the line of the private property, abutting on Baltimore avenue, with the said eleven feet, or so much thereof that should be appropriated by ordinance of said city, left for sidewalk purposes, that the width and the location of the said walk constructed under said Ordinance No. 10,239 on Baltimore avenue, was not determined nor prescribed by ordinance of said city, other than as prescribed in section 3, of said ordinance as follows: 'Sec. 3. The width of the sidewalk shall not be less than five (5) feet, laid so that the outer edge shall be as directed by the city engineer.'"

The defendant insists that the ordinance just quoted is void, in that it fails to prescribe the width of the sidewalk. The charter of Kansas City provides that the city council shall have power to construct sidewalks "to such extent, of such dimensions, and with such material, and in such manner, and under such regulations as may be provided by ordinance." Charter, art. 9, p. 137. It thus clearly appears that the width of a sidewalk is a legislative function devolving on the city council. This the plaintiff does not deny; but he says the ordinance did sufficiently prescribe the width of the walk. To prescribe that a walk shall not be "less than five feet" in width is a provision that it may be any greater number of feet, and so a walk ten feet wide would meet the requirement of the ordinance as fully as one of five feet. The question has been directly decided by the Supreme Court of Illinois; the court saying that "we are unable to see how it can be seriously contended that to describe a walk as 'not less' or 'not more than' so many feet wide is a substantial compliance with the statute, which requires the ordinance to prescribe the width of a sidewalk." *Mansfield v. People*, 164 Ill. 611, 45 N. E. 978, affirmed and approved in *People v. Hills*, 193 Ill. 281, 61 N. E. 1061. But it is also held by that court (distinguishing those cases) that, where the material which a contractor was to use should be "not less" than certain named dimensions, the ordinance was valid. Thus that curbstones should "not be less than four feet long"; that a bed of sand should "not be less than seven inches"; that the bed of cinders for a pavement should be "at least six inches deep." And the Supreme Court of this state in *Sheehan v. Gleeson*, 46 Mo. 100, reluctantly held that an ordinance prescribing that a curb should "not be less than four inches in thickness" was valid.

It seems to me that the true solution of the question depends upon the character of the authority, which the ordinance confers upon

the city officer letting the contract for the work. If such an ordinance means that such officer must let the contract in the language of the ordinance, then we may very well conclude that it is definite enough to use the expression "not less than" a certain named dimension. For, practically speaking, it may be assumed that contractors will always figure and bid upon the minimum dimension, and thus "not less than" a certain mentioned number of feet would, for all practical purposes, be that number of feet which is mentioned. But, if such an ordinance is to be construed as authorizing the contracting officer, in his discretion, to let the work at any dimension greater than the minimum, manifestly it ought to be held invalid, as being a failure to exercise the legislative function cast upon the council by the charter and delegating it to a ministerial officer. We therefore must conclude that the Supreme Court in the Sheehan Case assumed that the ordinance there considered meant that the city engineer should advertise for bids and let the contract in the language of the ordinance, and that it did not mean that he had any discretion above the minimum dimension stated.

As to that part of defendant's objection to the ordinance here under consideration, we feel bound by the decision of the Supreme Court in the Sheehan Case; for we cannot see any practical distinction between the ordinance in that case, prescribing that curbing "shall not be less than four inches in thickness, and shall be set in the ground at least twelve inches below the surface of the pavement," and the ordinance in this case, prescribing that "the width of the sidewalk shall not be less than five feet."

But the second branch of defendant's objection to the ordinance must be sustained. The space between the property line and the curbing next to the street, properly used for vehicles, was 11 feet, and so under this ordinance the "outer edge" of the walk might reach to the curb, "if directed by the city engineer." In other words, the city engineer was left to say where the walk should be laid within the space. That was a "manner" and "regulation" which the charter commands the council to direct, and it cannot be delegated to the engineer. If it be said that the council itself has undertaken to locate the walk, we would be compelled to answer that it was so indefinite as to be invalid for uncertainty. *Wetmore v. Chicago*, 206 Ill. 367, 69 N. E. 234. In *McChesney v. City of Chicago*, 171 Ill. 253, 49 N. E. 548, a sidewalk ordinance, which contained nothing from which it could be inferred whether the walk was to adjoin the curb line or property line, was held to be void for uncertainty. If the power was put in the hands of the city engineer, then it was an unauthorized delegation. *Bradford v. City of Pontiac*, 165 Ill. 616, 46 N. E. 794; *McCrowell v. City of Bristol*, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653; *Chase v. Scheerer*, 136 Cal. 248, 68 Pac. 763.

And so it has been decided in this state in a great number of cases. *Haag v. Ward*, 186 Mo. 347, 348, 85 S. W. 391.

But plaintiff urges that much of the walk authorized by the ordinance had been built by the other property owners along the line in front of their property; that such walk, so built, was five feet wide and a certain uniform distance from the curb line; and that the walk in controversy was built to be uniform with such other portions of the walk. We cannot see how that can aid the case. It is an attempt to validate the ordinance by showing what was done under it. In *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455, it is said that: "A valid assessment cannot be made under an invalid ordinance, and its constitutionality [the ordinance] is not to be tested by what has been done under it, but by what it authorized to be done by virtue of its provisions." In other words, the validity of an ordinance was to be tested like the validity of a statute. In the *City of St. Louis v. Allen*, 53 Mo. 55, the court said of an illegality authorized by statute: "It is true it is not likely to happen, but the fact that it may possibly happen is enough to condemn the law." To the same effect are *Dexter v. City of Boston*, 176 Mass. 247, 57 N. E. 379, 79 Am. St. Rep. 306; *Colon v. Lisk*, 153 N. Y. 194, 47 N. E. 302, 60 Am. St. Rep. 609; *Collins v. New Hampshire*, 171 U. S. 33, 34, 18 Sup. Ct. 768, 43 L. Ed. 60; and *Minn. v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455.

Plaintiff further suggests that an objectionable and invalid section of an ordinance may be rejected and yet the remaining portion be enforced, and cites *Haag v. Ward*, 186 Mo. 325, 85 S. W. 391, in support thereof. That case does not sustain plaintiff. It is there decided that an invalid section may be rejected and the remainder of the ordinance stand if it would be complete authority under the charter to construct the work provided for. But in this case, if we reject section 3, there is no provision for width or location of the walk left, and therefore, in effect, no authority for its construction.

We will affirm the judgment. All concur.

McDONALD v. McDONALD.

(Kansas City Court of Appeals. Missouri.
Jan. 8, 1906.)

CONTINUANCE—ORDER—SETTING ASIDE.

An action for divorce was continued on the ground of defendant's detention in another state on account of illness. Two days later, the continuance was set aside and the cause set for hearing four days thereafter. When the continuance was set aside, defendant's counsel did not know her address, and some of her important witnesses resided at distant places in the state. *Held* error.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, §§ 42, 58, 149.]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Action by George E. McDonald against Almena P. McDonald. From an order setting aside a continuance, and setting the case for hearing, defendant appeals. Reversed.

Montgomery & Montgomery and Porterfield & Conrad, for appellant. Charles E. Morrow, W. D. Steele, Geo. F. Longan and C. C. Kelly, for respondent.

ELLISON, J. The plaintiff instituted his action for divorce. The cause came on for hearing in the trial court at the May term, 1905. The defendant made application for a continuance, and on May 25th, the court continued the cause to September 26, 1905. On May 27th, the court set aside the continuance, and set the case for hearing on June 1st. On the latter day, plaintiff was granted a divorce, the defendant not being present at the hearing. Defendant then appealed to this court.

Defendant was not present in court, being absent from the state, when the cause was continued at her instance, through her attorneys. The ground of continuance was inability of defendant to attend court, being detained in Illinois on account of sickness. It appears that immediately after the continuance plaintiff began an inquiry into the reality of her allegation that she was sick in Illinois and that he received answers by telegraph from persons in that state, which, if true, indicated strongly that defendant was not sick, at least so as to be disabled from attending court. Thereupon, on the 27th day of May, the trial court, after hearing these telegrams read, concluded that the continuance had not been obtained fairly or in good faith, and set it aside, and then immediately put the cause down for hearing on June 1st, being four days thereafter, counting an intervening Sunday. On June 1st, defendant, still being absent, made an application through her attorneys for a continuance, which the court overruled. It appears that on May 27th, when the court set aside the continuance and set the case for June 1st, the defendant's counsel did not then know her address in Illinois. That some of the witnesses in her behalf, important to her case, were not at Sedalia, the place where the cause was pending, but resided at distant places in the state. The trial court erred in setting aside the continuance and setting the cause for hearing so soon thereafter. The charges each of the litigants makes against the other, are of a very serious nature. Judging from the argument of counsel at the hearing of this appeal, there is much feeling in the controversy, which promises a full and complete investigation into the matrimonial affairs of the couple. Manifestly, a time too short, the circumstances considered, was allowed the defendant for preparation for trial after her continuance was set aside.

As the cause will be heard on the merits,

we refrain from any comment upon phases of the case pertaining to the merits, which appeared in the argument made by the respective counsel. And, in view of our conclusion, it is not necessary to notice the point made that the trial court erred in setting aside the continuance on a hearing of unsworn matter in the shape of telegrams from persons residing in another state.

The judgment is reversed, and the cause is remanded. All concur.

COONCE v. NATIONAL BISCUIT CO.

(Kansas City Court of Appeals. Missouri. Jan. 8, 1906.)

MASTER AND SERVANT—INJURIES TO SERVANT—MINORS—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a boy 14 years and 6 months old, was employed in defendant's cracker bakery to guide or turn empty cracker pans on a conveyor which operated with a slow movement by means of an endless chain oversprockets. Plaintiff knew that defendant used pans with pieces out of the bottom, and had been warned several times not to let his fingers get caught, but to keep them out of the openings in the bottoms of the trays: Notwithstanding such warnings, he permitted his fingers to pass through such openings into the chain and remain there until they were injured by the chain passing over the sprocket. He testified that he could see the openings in bottoms of the trays, and the reason why he did not see the hole at the time he put his fingers there was that he was not paying attention. *Held*, that plaintiff was guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 692-698.]

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Eddie E. Coonce, by Henry Coonce, his next friend, against the National Biscuit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Harkless, Cryslar & Histed, for appellant. Battle McCordie and Milton J. Oldham, for respondent.

ELLISON, J. The plaintiff was an employé of the defendant, and while engaged in its service he suffered the injury for which he brought this action, and recovered judgment in the trial court for \$200.

Plaintiff's work was in the cracker department. At the time he was injured he was standing at the end of a conveyor, which was a contrivance operating on some spur wheels, which had an endless chain running around them, and which was a conveyor to carry wooden pans or trays containing crackers from the south end of the department to this department. The crackers would be taken out by girls as the trays passed along, moving very slowly; that is to say, the pans had a constant slow movement—so slow that the crackers could be taken out by the girls as they passed, and the tray continue to move on empty to the end of the conveyor, where the plaintiff stood. They would then be turned under the conveyor and carried back again

beneath it on another carrier to their starting point; the system constituting a constant return of the pans. This conveyor was about 30 feet in length and about 4 feet in width and stood up 8½ feet from the floor. On the sprockets at either side of the conveyor ran an endless chain, with small links about an inch long, which pass over the sprocket, and thus keep up the slow revolution of the conveyor carrying the pans. When the trays reached where the plaintiff stood, his duties were to guide or turn them under so that they would be conveyed back, to be again loaded with crackers; and also to take out pieces of crackers left in the tray. At the time of his injury plaintiff was taking some broken crackers out of a tray, which had a piece of the bottom out about two inches wide extending across the tray. He put his fingers through this opening as the tray moved along, his hand moving with it, until they were caught on one of the wheels carrying the chain, and one of them injured.

We cannot allow this judgment to stand in the face of the evidence given by plaintiff in his own behalf. He makes a very candid statement showing himself to blame for his injury, and the defendant not at fault. He stated that he knew that defendant used trays with pieces out of the bottom similar to the one at which he was hurt; that defendant's foreman had warned him several times not to let his fingers get caught, "to keep them out of these, and watch it," and he also heard him warning the others; that he instructed him how to perform his service; that he knew what would result if he did put his fingers through; that he could see the holes or the openings in the bottoms of the trays as they passed along; and that the reason he did not see the hole at the time he put his fingers through was that he "wasn't looking over that way," and that, if he had paid any attention and looked, he could not have failed to see it. On re-examination by his attorney he did not qualify the foregoing. He stated that he did not see the hole. But that was for a good reason—he was not looking. He was asked by his attorney, "Were you paying attention to your business?" and "You were looking out to attend to your business, weren't you?" and he answered, "Yes, sir." This was, of course, a mere conclusion of his, and did not qualify nor modify his specific statements of facts. There is a statement in plaintiff's petition which was not borne out by the facts. It is that plaintiff's hand "was caught in a broken place in the bottom of the tray." That statement would indicate that his hand was forcibly held in the broken place until it was carried along to the wheel and hurt. The fact was that he merely put his fingers through the broken place (one of them through a link in the chain) and allowed them to remain as the tray moved along until they came in contact with the wheels. Necessarily, he must have known that his fingers were through the bot-

tom of the box and one of them in the link and that it was liable to be bruised or mashed as it moved along to the wheel. The only explanation to be given is that he himself gave, that he was paying no attention and not looking. His positive and unequivocal statement of the facts of the case bar a recovery.

It is true that at the time of his injury he was only 14 years and 6 months old, and a year older at the time he testified. But the simple nature of his work, the explanations of what he was to do, the warnings he was given, and the ease with which he could have performed the work safely, with even the most ordinary attention, disclose that the case is without merit, unless, indeed, we are to hold that an employer is an insurer of the safety of an employé of that age.

The judgment must be reversed. All concur.

HEINTZ v. ST. LOUIS TRANSIT CO.

(St. Louis Court of Appeals. Missouri. Jan. 2, 1908. Rehearing Denied Jan. 16, 1908.)

1. STREET RAILROADS—COLLISIONS WITH VEHICLES—FAILURE OF MOTORMAN TO RING BELL.

Where a driver saw a car approaching before or at the time he turned to cross the track, the failure of the motorman to ring the bell afforded him no right of action for injuries received by being struck by the car.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1259.]

2. SAME—PROHIBITED RATE OF SPEED.

It is negligence per se to run a street car at a speed prohibited by a city ordinance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 176.]

3. SAME—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Where a driver of a vehicle saw a car approaching, and believed he would have time to cross before it would overtake him, and in so doing he was struck by the car and injured, and the injury would not have been caused but for defendant's running the car at a rate of speed prohibited by ordinance, the question of such driver's contributory negligence was for the jury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 257.]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Jacob Heintz, Jr., against the St. Louis Transit Company. From a judgment granting a new trial, plaintiff appeals. Reversed.

Block, Sullivan & Erd, for appellant. Boyle, Priest & Lehman, for respondent.

BLAND, P. J. On October 30, 1903, about 5:30 p. m., plaintiff was driving his two-horse wagon on the west side of Broadway, in the city of St. Louis. Defendant has a double railroad track in the center of Broadway. Cars traveling north run on the east track, and those traveling south run on the west track. Plaintiff attempted to cross the

tracks by driving diagonally to the east side of the street. His horses were traveling in a walk. When plaintiff started across the street he looked south and saw a car about one-half block, or 150 feet away, traveling north. He did not stop or hurry his team, but proceeded to cross the track in a walk. The car overtook him just as the front wheel of his wagon rolled over the east rail of the east track. The wagon was pushed back to the west track, the horses thrown and dragged under the car, and plaintiff was thrown from the wagon to the ground. The wagon and horses were damaged, and plaintiff received injuries. He recovered a verdict for \$2,500. At the close of plaintiff's evidence the defendant moved the court for a peremptory instruction to find for it, which the court refused to give. One of the errors assigned in the motion for new trial is the refusal of the court to give this instruction. The court granted a new trial on the sole ground that it was of the opinion that error was committed in refusing defendant's said instruction. Plaintiff appealed from the order granting a new trial.

The negligence alleged was the failure of the motorman to ring the bell as required by ordinance, running the car at a prohibited rate of speed, and violation of the vigilant watch ordinance. In addition to the facts above stated, plaintiff's evidence is that the car was running at a speed of 25 miles per hour; that the motorman did not ring the bell or check the speed of the car, until it was within five or ten feet of the wagon; that it was not dark, and a large electric light hanging near the scene of the accident was lighted. There is no evidence as to the distance in which a car running at a speed of 25 miles per hour could be stopped. The want of such evidence eliminates from the case the application of the humanitarian or last chance doctrine, and leaves for consideration only two acts of negligence alleged and proven: First, the failure of the motorman to ring the bell; second, running the car at a prohibited rate of speed. The first affords plaintiff no right of action or ground of complaint, for the reason he saw the car before, or at the time, he turned to cross the track. To have rung the bell would not have warned him of a danger he did not know of before he was in a position of peril. *Murray v. Transit Co.*, 176 Mo. 183, 75 S. W. 611. In respect to the second act of negligence—running the car at a prohibited rate of speed—we may repeat what has often been ruled by all the appellate courts of the state, namely, that it is negligence per se to run a street car at a speed prohibited by a city ordinance. Plaintiff proved a good cause of action by offering the ordinance in evidence and proving its violation. But it is insisted that, notwithstanding defendant's negligence in running its car at a prohibited rate of speed, it is not liable, for the reason plaintiff's own evidence conclusively shows he was guilty of

negligence that contributed to his injury. Plaintiff testified that he saw the car coming at "full speed" when he turned his horses to cross the track, and thought he would have time to cross before the car would overtake him, but could not tell at what rate of speed the car was traveling. His judgment was at fault, and if he is to be convicted of negligence, as a matter of law, it must be on the ground that he did not realize the speed at which the car was running. He was in front of the car, and it was coming toward him. In this situation it was difficult, if not impossible, for him to correctly estimate its speed. On a very similar state of facts this court, in *Murray v. Transit Co.*, 108 Mo. App. 501, 83 S. W. 995, following what the Supreme Court tacitly decided on a prior appeal of the same case to that court (*Murray v. Transit Co.*, 176 Mo. 183, 75 S. W. 611), held that the question of whether or not the plaintiff was guilty of contributory negligence was for the jury.

If a motorman operating a street car sees a pedestrian or vehicle crossing or about to cross the tracks in front of his car in time to stop the car and avoid a collision, and he fails to do so and injury results, the motorman will be held to have been negligent. That he honestly believed the pedestrian or vehicle would clear the tracks in time to escape danger from the car would not be received as an excuse for his error of judgment. If one afoot or driving a vehicle attempts to cross a street railroad track without first looking and listening for an approaching car, he will be adjudged guilty of negligence as a matter of law; and, if he goes upon the track in such close proximity to a car that a collision is unavoidable, and is injured, he cannot recover. His duty to look and listen before proceeding to cross the track is co-equal with that of the motorman to keep a vigilant watch ahead, etc. Yet, according to the decisions in the *Murray Cases*, if a pedestrian or driver of a vehicle looks and sees a car approaching, but underestimates its distance from him and proceeds to cross, believing he has time, and is injured by being struck by the car, his error of judgment tends to excuse him, and, instead of convicting him of negligence as a matter of law, whether or not he was negligent is a debatable question that should be submitted to the jury to be threshed out by them. The reason for this discrimination is that the motorman, from his experience and skill and from his position of vantage, is presumed to know the speed of his car, the time and space in which he may stop it in safety, and the distance he is from one in peril on or about to go upon the track; while the pedestrian on or about to go upon the track acts upon the appearances as they present themselves to him, and if he is deceived thereby and is injured, and the appearances are such as might deceive a man of ordinary skill and prudence, then he is not guilty of negligence as a matter of

law, and the question whether or not he was negligent should be referred to the jury, where the evidence shows, as in this case, that he would not have been injured but for the negligence of the motorman.

Respondent cites and relies upon the case of *Fanning v. Transit Company*, 103 Mo. App. 151, 78 S. W. 62. The evidence in the *Fanning* Case shows that the plaintiff saw the car that struck her, coming at a rapid and reckless rate of speed (a mob being in pursuit of the person in charge of the car); that plaintiff had time to cross the track before the arrival of the car, if she had used ordinary diligence, as did her two companions, who preceded her. The evidence also shows that she saw the car when it was from 200 to 250 feet from the crossing and, without again looking, leisurely proceeded to cross the track and was struck just as she stepped over the outside rail. As to her contributory negligence, under the evidence, there could be but one reasonable opinion.

On the facts in the case at bar, reasonable men might differ as to whether or not plaintiff was guilty of contributory negligence, and for this reason the case should have been submitted to the jury.

The judgment is reversed, and the cause remanded, with directions to the trial court to set aside the order sustaining the motion for new trial, to overrule said motion, and enter judgment on the verdict of the jury. All concur.

MURMANN et al. v. WISSLER.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1906.)

1. SALES—DELAY IN DELIVERY—WAIVER—ACCEPTANCE.

The acceptance of goods, after the expiration of the time within which they were to be delivered, is but prima facie evidence of the buyer's waiver of the delay.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 453.]

2. SAME—MEASURE OF DAMAGES.

Where goods not delivered in time were bought for a specific purpose known to the seller, by whom they were manufactured, and could not be had elsewhere, and the buyer paid a portion of the purchase price in advance, he did not waive his right to recover full compensation for the seller's default, in the absence of fault on his part, by accepting the goods after the time agreed on for their delivery.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 453.]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Henry Murmann and others against A. Wissler. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Plaintiffs have been partners in the candy business, in the city of St. Louis, for a number of years. In 1902, 1903, and 1904 they had a contract with the Columbia, Grand, and Imperial theaters, in said city, for sell-

ing candy to theater goers by means of a slot machine, described as an automatic box, which would open by dropping a silver dime into the slot. These boxes were small affairs, and when in use were screwed on the back of the theater seats. In January, 1902, plaintiffs had installed their boxes in the Columbia Theater, but had none to put in the Grand and Imperial. The boxes they had in the Columbia were cast-iron affairs, and could not be manufactured as readily as they desired. With a view of installing boxes in the Grand and Imperial Theaters, Murmann, one of the plaintiffs, went to defendant Wissler, who is a manufacturer, principally of civil engineers' and surveyors' instruments, with one of the iron boxes in his hand, to see if defendant could manufacture a lighter box in shorter time than it would require to make them of cast iron. After discussing the matter in several interviews, Murmann gave defendant an order for 1,500 boxes to be made of sheet steel, for which he agreed to pay \$750, \$400 of which he paid when he gave the order. The balance was to be paid when the order was filled. Murmann testified that defendant guaranteed the boxes would be as good or better than the sample (which was made of cast iron) and agreed to deliver them in 60 days; that the contract was made in October or November, 1902, but the firm received no boxes until April 4 or 5, 1903, when it got 645 from the defendant; that of this number 30 had to be removed and returned to defendant, for the reason the lids would not remain closed; that in a week or 10 days 150 more were found out of order and would not work, and he returned them to defendant and received others; that they were continually getting out of order and he was continually returning them to defendant and getting others, so at the end of the season (May 15, 1903) there were but little over one-half of the boxes in use; that the 1,500 boxes were never received; that from May 15th to August following he kept after defendant and got enough boxes to fit up both theaters (the Grand and Imperial), altogether something over 1,300 boxes, but had the same trouble with them, and after many complaints defendant suggested that the defect could be remedied by inserting a steel pin so as to prevent the catch from flying back; that it was agreed that the defendant should insert the pins for 7 cents per box or per pin; that the pins were put in 860 boxes and they worked much better, but did not fill the purpose for which they were intended, and plaintiffs were continually returning the boxes to defendant until he finally said, "You fellows are taking up too much time," and that he did not want the boxes at his shop; that plaintiffs tried the boxes for the seasons of 1903 and 1904, but they were continually getting out of order, would not answer the purpose for which they were intended, the public was dissatisfied

with them, and on January 9, 1904, they took them out. Murmann also testified that the cast-iron boxes in the Columbia worked well and were still in the theater, that plaintiffs paid workmen from \$350 to \$360 for putting in the boxes made by the defendant, and that he (Murmman) charged his company \$150 for his time spent in looking after the boxes. Murmann's evidence shows that the cast-iron boxes had a brass spring, and that he told defendant a good many of these springs broke and he thought a steel spring might be stronger, but defendant made no answer to this suggestion. He stated that the total number of boxes received from defendant was 1,376, delivered between April 1 and August 1, 1903. The chief difficulty with the automatic operation of the boxes was in the spring, and Murmann testified that defendant always claimed the spring was "too powerful." The evidence for plaintiffs tends to show that their loss per day by not having proper boxes was about \$10. The suit was to recover money paid for the boxes and for the loss of profits that would have accrued had proper boxes been furnished at the time it was agreed they should be furnished. The answer was a general denial and an affirmative statement that the boxes were manufactured according to Murmann's instructions and under his immediate supervision. A counter claim was also pleaded in which defendant claimed plaintiffs owed him \$59.75 for inserting pins in the boxes, \$20.40 for work and labor on other boxes, and \$29.50 for putting steel springs in cast-iron boxes, and the balance of the contract price for boxes manufactured and delivered to plaintiffs. The defendant testified that he did not agree to manufacture the boxes in any particular time, but told Murmann it would take at least three months to make the necessary die for making the boxes; that he did not agree to make the boxes like the sample nor guaranty that they should be as good or better than the cast-iron ones; that the boxes were made according to Murmann's directions and practically under his supervision; that he gave special instructions to put in steel springs, which were too strong, and the whole trouble with the automatic action of the boxes was on account of the spring; that he commenced to make the boxes as soon as the necessary die could be prepared, and after the completion of the die made them as rapidly as possible. Defendant gave evidence tending to prove his counterclaim. The jury found the issues for plaintiffs, and assessed their damages at \$500, and found for defendant on his counterclaim for \$59.51. Timely motions for new trial and in arrest of judgment filed by defendant were overruled, whereupon he appealed to this court.

David Murphy, for appellant. Lee Meriwether, for respondents.

BLAND, P. J. (after stating the facts). The only error assigned by defendant is the giving of instruction No. 3, and the refusal of the court to give the following instruction (not numbered):

"(3) The court instructs the jury that plaintiffs cannot recover against defendant for a failure to furnish the sheet steel boxes on or before January 6, 1903, if the jury believe that defendant made and entered into an agreement with plaintiffs that he would so furnish said boxes at said time, if the jury further find that plaintiffs waived said condition and accepted said boxes after January 6, 1903, and used them in their business from April 4, 1903, until January, 1904, and had alterations and repairs made upon them. The jury are instructed, if you find for the plaintiffs on their cause of action in fixing the amount to be awarded them, you should consider the following elements: (1) The delay, if any, of defendant in delivering the boxes beyond the time within which he agreed to deliver them (if you find from the evidence that he did agree to deliver them within a specified time) and failed to do so. You will allow plaintiffs for the loss in profits to plaintiffs on sales of candy, if any, during the period between the dates of agreed delivery, and actual delivery occasioned by the delay in delivering said boxes (provided you further find from the evidence that the boxes in question were of a kind not to be had or obtained by plaintiffs, except by special order, involving several months to manufacture and deliver) provided you do not find that plaintiff did not waive such delay."

"The court instructs the jury that plaintiffs cannot recover against defendant for a failure to furnish the sheet steel boxes on or before January 6, 1903, if the jury believe that defendant made and entered into an agreement with plaintiffs that he would so furnish said boxes at said time, if the jury further find that plaintiffs accepted said boxes after January 6, 1903, and used them in their business from April 4, 1903, until January, 1904, and had alterations and repairs made upon them."

The instruction given submitted to the jury to find from the evidence whether or not the plaintiff waived the time in which the boxes were to be manufactured. The one refused moved the court to declare as a matter of law that the acceptance of the boxes by plaintiffs, after the date on which they were to be delivered, was a waiver of performance within the contract period, and that no damages could be recovered on account of the delay in the delivery of the boxes. The controversy, then, is whether the waiver of the time in which the boxes were to be delivered under the contract was a question of law to be passed on by the court or a question of fact to be determined by the jury. Whether or not there was a waiver is ordinarily a question of intention, and therefore a ques-

tion of fact, unless the alleged waiver depends upon the interpretation of a writing. Where it does so depend, it is, of course, a question of law, if the writing is unambiguous. *Lee v. Hassett*, 39 Mo. App. 67. In 7 Am. & Eng. Ency. of Law, p. 154, the law is stated as follows: "By accepting work that is finished after the time agreed upon, or in a different way from that contracted for, and by assenting to such default, he waives strict performance and forfeits all remedies but damages for the faulty workmanship and for his own consequent loss, and the right to deduction for any defectiveness in the work." "Waiver," says Bishop, "is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards." Bishop on Contracts (1887) § 792. In *Fairbanks, Morse & Co. v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113, citing *Stiepel v. Life Ass'n*, 55 Mo. App. 224, the court said: "Waiver involves the notion of an intention entertained by the holder of some right to abandon or relinquish, instead of insisting on the right." In *Warner v. Crane*, 50 Mich. 300, 15 N. W. 465, cited in *Dalley v. Kennedy*, 64 Mich. 208, 31 N. W. 125, it is said: "Waiver is a voluntary act. . . . But that action is in no sense voluntary which a party cannot decline to take except at the peril of liberty of life or property." In *West v. Platt*, 127 Mass. 367, 372, it is said that waiver depends altogether on the facts of the matter to which it pertains.

The evidence relied upon to establish a waiver, in the case at bar, all came from one of the plaintiffs (Murmman), and, of course, plaintiffs are bound by this evidence, which shows that they had a contract to put the automatic boxes in three theaters; that they only had on hand enough of such boxes to supply one of the three theaters, and contracted with defendant to manufacture 1,500 other boxes to be delivered in 60 days; that after the expiration of the 60 days defendant had not made any of the boxes, and was repeatedly urged to "hurry them up," but that he did not even commence to make them until more than a month after the time for their delivery had expired, and thereafter they were accepted, from time to time, as manufactured, until 1,367 had been made and delivered. The evidence also shows that plaintiffs paid \$400 on the contract price of the boxes in advance; and Murmman testified that the boxes could not be procured elsewhere, and that plaintiffs were compelled to take them from defendant whenever they could get them to keep their contract with the theater companies. On this evidence it seems to us that it is a grave question of doubt whether or not there was any evidence of a waiver of the damages accrued from the

nondelivery of the boxes in the time stipulated. Plaintiffs had paid more than one-half the contract price for the boxes and were in a situation that almost compelled them to accept the boxes as they were manufactured. The acceptance of goods or machinery after the expiration of the time in which they were to be delivered is but prima facie evidence of waiver, and is therefore a question for the jury. *Merrimack Mfg. Co. v. Quintard*, 107 Mass. 127.

The general rule of damages in the purchase and sale of personal property, where the seller fails to deliver within the time agreed upon, is the difference between the contract price and the market price at the time and place of delivery; but if the goods are bought for a specific purpose known to the vendor, or where the thing sold is to be made by the vendor to be used for a particular purpose, and cannot be had elsewhere, or where the purchase price is paid in advance, the rule does not apply, and the buyer ought to receive full and just compensation if he suffers loss by default of the other party and is not himself in fault, and he does not waive his right to such recovery by accepting the goods after the time agreed upon for their delivery. *Redlands Orange Growers' Association v. Gorman*, 76 Mo. App. 184, approved by the Supreme Court on certification to said court (161 Mo. 203, 61 S. W. 820, 54 L. R. A. 718); *Ramsey v. Tully*, 12 Ill. App. 463; *Van Winkle & Co. v. Wilkins*, 81 Ga., loc. cit. 104, 7 S. E. 644, 12 Am. St. Rep. 299.

We think that, if there was any substantial evidence tending to prove a waiver, it was clearly a question for the jury, and affirm the judgment. All concur.

INGWERSEN v. ST. LOUIS & H. RY. CO.
(St. Louis Court of Appeals. Missouri. Jan. 16, 1906.)

1. PLEADING — AMENDMENT — NEW CAUSE OF ACTION.

Where plaintiff sued an initial carrier for delay in transporting his live stock to destination, an amendment charging that the delay was due to the negligence of a connecting carrier was not objectionable as stating a new cause of action, prohibited by Rev. St. 1899, § 655.

2. CARRIERS — DELAY IN CARRIAGE OF LIVE STOCK — PLEADING — VARIANCE — AMENDMENT.

Under the statute making the initial carrier responsible for any loss sustained from negligent delay in the carriage of live stock, whether such carrier or a connecting carrier was at fault, proof that the delay in the transportation of plaintiff's cattle arose from the negligence of a connecting carrier constituted a material variance from the petition alleging such delay to be that of the initial carrier, requiring an amendment of the petition in case of the making of the statutory objection required by Rev. St. § 655.

3. APPEAL — VARIANCE — OBJECTIONS NOT MADE AT TRIAL.

An objection to a material variance between the pleading and proof will not be considered when made for the first time on appeal.

4. CARRIERS—DELAY IN TRANSPORTATION OF LIVE STOCK — TIME FOR FILING CLAIM — WAIVER.

Where a carrier's general freight agent made no objection to a claim for a delay in the transportation of live stock, because of a lack of verification, or because it was not filed in time, but denied liability because the delay occurred on the line of a connecting carrier, plaintiff's alleged failure to file the claim within the time required by the bill of lading was waived.

5. SAME — CONNECTING CARRIERS — BILL OF LADING—CONSTRUCTION.

By the first clause of a bill of lading, defendant, the initial carrier, agreed to transport certain cattle from shipping point to destination. The second clause declared that, if the destination was on defendant's road, defendant would deliver the cattle to the consignee at that point, but, if the destination was beyond defendant's line, it would deliver the property to the next connecting carrier, and another paragraph limited defendant's liability for loss or damage to such as occurred on its own line, and declared that its duty should cease on delivering the stock to the connecting carrier. *Held*, that the bill of lading was a through contract of carriage, and that defendant was liable for delay occurring through the negligence of a connecting carrier.

Appeal from Circuit Court, Pike County; D. H. Eby, Judge.

Action by Thomas B. Ingwersen against St. Louis & Hannibal Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. D. Hostetter, for appellant. W. O. Gray and Dempsey & McGinnis, for respondent.

GOODE, J. Action for damages for delay in transporting live stock. On January 19, 1904, the respondent delivered to the defendant, the St. Louis & Hannibal Railway Company at Bowling Green, Mo., 80 head of cattle to be carried to Chicago, Ill. The cattle should have reached Chicago in time for the market of the succeeding day; but a delay, which occurred within seven miles of the city, prevented them from reaching there until too late for the market, and consequently they had to be sold on the market of the 21st, when, on account of a lower price ruling and the decrease of weight caused by the delay, a considerable loss was entailed. It was to recover damages for this loss that the present action was instituted. The petition says there was unreasonable delay in the transportation of the stock, which caused them to be delivered to the consignee at destination after 3 o'clock in the afternoon of January 20th, instead of early in the morning, as they should have been; wherefore they had to be sold on the next day's market for 45 cents a hundred pounds less than they would have brought on the market of the 20th. The petition then proceeds as follows: "Plaintiff further says that, by reason of said delay in the transportation of said cattle and the long stay in the cars without food and water caused by said delay and negligence on the part of the defendant,

its agents, employes, and servants, there was a shrinkage of 3,200 pounds in the weight of said cattle more than there would have been had they arrived at said destination within a reasonable time, and that by reason of the appearance of said cattle caused by said delay and the long stay in said cars as aforesaid he was compelled to accept as the best price possible 45 cents per hundred pounds less than he would have gotten had said cattle arrived within a reasonable time as aforesaid."

It will be seen that there is no precise allegation that the defendant's negligence caused the delay, though probably that is the natural inference to be drawn from the language of the petition. The substance of the pleading is that there was a delay in transit which resulted in loss to the plaintiff, and that the defendant's agents and servants were negligent in the matter. Now, the defendant insists that, as the evidence proved the delay was due to the negligence of a connecting company, a verdict against the plaintiff should have been directed. In dealing with this point, it is to be premised that, as the gravamen of plaintiff's case was unreasonable delay in transporting his stock to destination and a consequent loss, we think an amendment to show the delay was the fault of a connecting carrier would have been permissible. Such an amendment would not have substituted a new cause of action for the one originally stated, which, of course, is not allowed. *Rev. St. 1899, § 657; Heman v. Glann, 129 Mo. 325, 31 S. W. 589.* The case would still have been one for negligent delay in carrying stock, and resting on the statute, and requiring the same measure of damages. *Lottman v. Barnett, 62 Mo. 159; and see, on this subject, Rippee v. Railway Co., 154 Mo. 358, 55 S. W. 438; Ross v. Mineral Land Co., 162 Mo. 317, 62 S. W. 984; Schwab Clothing Co. v. Railway Co., 71 Mo. App. 241; Stewart v. Van Horne, 91 Mo. App. 647.* It would have differed from the original case in respect of the negligence being that of a connecting carrier instead of the one which received the stock for shipment. Now, it is true that all the evidence, including the plaintiff's own testimony, showed no delay occurred on the defendant's road, and that the defendant transported the cattle to Hannibal, the end of its line, and there delivered them to the Chicago. Burlington & Quincy Railway Company, in the scheduled time. The delay occurred at the outskirts of Chicago on the terminal railway; and, if due to negligence at all, it was the negligence of the company operating the last-named road. But the defendant omitted to call this discrepancy between the petition and the evidence to the attention of the lower court, either by objecting to testimony irrelevant to the allegations of the petition or in the motions for new trial and in arrest of judgment. In truth, instead of objecting to testimony going to show where

the delay occurred and affording room for the inference that it was due to the neglect of a connecting carrier, the defendant itself introduced most of that evidence. The theories of defense were that the defendant was exonerated from liability by these alleged facts: First, the delay occurred on the line of a connecting carrier; second, it was not due to negligence even on the part of that carrier, but to unavoidable causes; third, the notice of plaintiff's loss and claim for damages was not given within 10 days after the loss occurred. The defendant tried the cause along those lines and requested and obtained instructions submitting the defenses for which it contended. Probably if the omission to allege in the petition negligence on the part of the connecting carrier had been invoked against plaintiff's right to a verdict, in such a way as to draw the court's attention to the omission, an amendment would have been ordered. The motion for new trial does not mention the variance between the petition and the proof, and, in the motion to arrest the judgment, the only point made was that the petition failed to state a cause of action. That point can be raised at any stage of a case, and, if it was well taken, we would reverse the judgment; but, manifestly, the petition stated a perfect cause of action.

The contention now is, not that there was a failure to state a cause of action, but that the one stated was unproved. In order to entitle the defendant to a reversal of the judgment on this point, it should have been raised somewhere in the proceedings in the court below. *Mellor v. Railway Co.*, 105 Mo. 455, 471, 16 S. W. 849, 10 L. R. A. 36; *Chouquette v. Railway Co.*, 152 Mo. 257, 53 S. W. 897. Inasmuch as the statute made the defendant responsible for any loss plaintiff sustained from negligent delay in carrying his stock, whether defendant or a subsequent carrier was at fault, we think the deviation of the evidence from the petition was in particulars and not in the substance of the case alleged; that it was a material variance requiring an amendment of the petition, had the statutory objection been made. Rev. St. 1899, § 655. This question arises often and is always difficult, for there is no definite test by which to distinguish in practice between a material variance and a failure of proof, though it is easy to give abstract definitions of the two terms. The writer said all he can on the subject in *Litton v. Railway Co.* (Mo. App.) 85 S. W. 978, and *Hensler v. Stix* (Mo. App.) 88 S. W. 109. The plaintiff's case is for a negligent delay for which defendant is responsible; and in our opinion this case was both alleged and proved. By failure to prove "the allegation of the cause of action or defense to which the proof is directed, in its entire scope and meaning," is meant a lack of evidence to support the cause of action alleged, not merely a failure to prove some

particular allegation. Rev. St. 1899, § 798. But, even if the discrepancy amounted to a failure of proof, the court had power to set aside the verdict and allow an amendment. Rev. St. 1899, § 799. To hold otherwise is to ignore a plain statute. It is my opinion that, in view of this statute, in order to obtain a reversal for failure of proof, the party complaining must, at some time and in some definite, and not covert, way, direct the trial court's attention to the matter, instead of keeping silent before and after verdict and first raising the objection on appeal. But I am not sure that the decided cases support this opinion. However, we are confronted with a material variance, not a failure of proof. A variance must be challenged in the manner presented by the statute, but there was no open challenge of this one. The motion in arrest was rather adapted to cover than to expose the point, for the prayer that the judgment be arrested, because the petition stated no cause of action, tended to divert attention from the omission to state a cause of action in conformity with the evidence and to rivet the court's thought on the inquiry of whether it stated any cause of action at all. The rule declared in *Mellor v. Railway Company* (pages 466 and 471, of 105 Mo., pages 851 and 853 of 16 S. W., 10 L. R. A. 36) that objections must be timely and specific, and legal ambushes in practice ought not to be encouraged, is wholesome, as it tends to make the decision of causes turn on their merits instead of technicalities. Believing that the defendant sustained no harm from the failure to amend the petition to conform to the evidence, and that it was susceptible of amendment in the trial court's discretion, had any point been made about the matter, we decline to reverse the judgment on this assignment of error.

Besides a general denial, the answer avers that defendant carried the cattle from Bowling Green, where they were received, to its terminus at Hannibal, Mo., on time, and there delivered them to the Burlington Railway Company, which carried them without substantial delay to Chicago, where they arrived during the morning of January 20th; that said morning was dark and foggy and the terminal district and stockyards were wet, muddy, and dark, and an unusual quantity of live stock was brought into the yards at Chicago that morning; that this dark and foggy weather made the handling of trains slow and difficult, which fact, and the unusually large number of trains of stock waiting for access to the stockyards, caused an unavoidable delay in moving into the yards the train on which plaintiff's cattle were carried, in consequence of which, they were not unloaded until about 3 o'clock in the afternoon.

In further defense, the answer pleads certain clauses of the bill of lading which are alleged to bar plaintiff's recovery. The reply

denied generally the averments of the answer. We copy those portions of the bill of lading invoked as a defense:

"St. Louis & Hannibal Railway Company's Live Stock Contract.

"Executed at Bowling Green, Mo., Station, Jan. 19th, 1904.

"This agreement, entered into by and between the St. Louis & Hannibal Railway Company, party of the first part, and T. B. Ingwersen, party of the second part, this 19th day of Jan., 1904, witnesseth, that whereas, the St. Louis & Hannibal Railway Company, as a common carrier, transports live stock at less than its regular tariff rates when its liability is limited by contract as follows:

"It is mutually covenanted and agreed by and between the parties hereto: That said party of the first part will transport for the said party of the second part three car loads of cattle said to contain 48 head together with the party or parties in charge thereof, as hereinafter provided, from Bowling Green, Mo., Station to Chicago, Ill., Station consigned to Ingwersen & Jansen at Union Stock Yards, Ill. Subject to minimum weights applying on cars of various lengths as per tariff and rules in effect on the date of shipment, at the through rate of Tff. per car from Bowling Green to Chicago, Ill., the same being a special rate, less than the regular tariff rate applying on shipments not covered by the conditions and stipulations herein contained.

"And it is further understood and agreed, by and between the parties hereto, that if the destination of the aforesaid stock be located on the line of the St. Louis & Hannibal Railway, then the St. Louis & Hannibal Company agrees to deliver the same at destination after payment of proper charges by said consignee, but if the ultimate destination of said stock be located beyond the line of the St. Louis & Hannibal Railway, the St. Louis & Hannibal Railway Company hereby agrees to deliver same to the next connecting carrier; and it is understood and hereby agreed that the St. Louis & Hannibal Railway Company shall be held liable under this contract only for loss or damage occurring on its own line, and while the said stock is in its actual custody; and that the duty and liability of said company shall absolutely cease and terminate upon delivery of the aforesaid stock to its next connecting line; and when the stock is destined to any point beyond the line of its railway said first party guarantees to protect the through rate from point of origin to ultimate destination in consideration of the covenants and agreements herein set forth. In consideration of the aforesaid special rate, the party of the second part hereby covenants and agrees that the liability of the said party of the first part shall be only that of a private carrier for hire.

"And it is further agreed by and between the parties to this contract, that in consideration of the covenants herein set forth, said second party expressly agrees that as a condition precedent to his right to any damage for any loss or injury to the stock shipped under this contract during transportation thereof, he will give notice in writing of his claim therefor, verified by affidavit, to the general freight agent of the said first party, within ten days after said loss or damage has been sustained."

The testimony for the plaintiff supported the averments that the cattle were delayed in transit an unreasonable time, and that they did not arrive at destination until the afternoon of January 20th, too late for the market of that day, and in consequence brought a lower price than they would have brought.

It appears that the plaintiff complained of his loss to the defendant's station agent at Bowling Green, who told him to put his complaint in writing and submit it to the company, which plaintiff did on January 30th, and within 10 days after the loss occurred; but the complaint, or notice of loss, was not verified by affidavit, nor did the general freight agent of the defendant company receive it within 10 days. Plaintiff delivered it to the station agent at Bowling Green, and the latter transmitted it to the general freight agent, who got it about the 3d or 4th of February; that is, some 15 days after the loss. Without making any objection to the form of the notice, its lack of verification, or that it was tardy, the general freight agent acted on it as sufficient, and proceeded to investigate the cause of the delay which he found had occurred on the terminal railway at Chicago. Thereupon, the general freight agent wrote to plaintiff's attorney that, as the defendant company had no special contract with the plaintiff for delivery of the stock in any particular time at destination, and as the defendant had handled the stock on its line and delivered it to a connecting carrier promptly, it was not liable for any subsequent delay. It is obvious from these facts that the defense to plaintiff's action, based on the circumstance that the notice of loss was not verified or delivered to the defendant's general freight agent in 10 days after the loss occurred, is untenable. Any failure to comply strictly with the terms of the bill of lading in regard to giving notice of a claim for loss was waived by the defendant. *McCullough v. Insurance Co.*, 113 Mo. 606, 21 S. W. 207. Therefore we overrule the error assigned because of an instruction the court gave excluding that defense from the jury's consideration.

It is insisted that a verdict should have been directed for the defendant because the evidence showed that, if the delay in carrying the stock was due to negligence at all, and not to unavoidable causes, a connecting carrier was to blame; and, as the bill of lad-

ing provided that the defendant should only be liable for loss or damage occurring on its own road, it was not answerable to the plaintiff in damages. This agreement in the bill of lading is said to have been supported by a good consideration, as a special and reduced freight rate is recited. We may grant, for argument's sake, that there is sufficient proof, *prima facie*, that a lower rate of freight than usual was charged for the shipment, to constitute a good consideration for releasing the defendant from its common-law liability. But this action does not rest on defendant's common-law liability as a carrier, but on negligence. In truth, the measure of a common carrier's liability for delay in the transportation of freight is not the same as its liability for failure to safely deliver the freight. The carrier is bound to use diligence to perform the contract of carriage expeditiously, but, if there is no stipulation to transport the goods to destination in a stated time, is excused for delays of an unavoidable character, even though they were not due to the act of God or the public enemy, which alone will excuse failure to safely carry and deliver the freight. *Hutchinson, Carriers* (2d Ed.) §§ 328-331; 4 *Elliott, Railways*, § 1484; *Leonard v. Railway Company*, 54 Mo. App. 298. Not only is this an action for negligence, but it is one founded on the statute of this state which provides that, when a common carrier receives property to be transferred from one place to another within or without the state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to the property caused by its negligence or the negligence of any other common carrier, railroad, or transportation company to which such property may be delivered, or over whose line it may pass. Rev. St. 1899, § 5222. The same statute gives the receiving carrier an action against a connecting carrier to recoup any damages the former may be compelled to pay a shipper on account of the latter's negligence. As the statute is construed by the courts, it does not absolutely preclude a carrier from limiting by contract its liability for damage to property, while in transit, to such damage as occurs on its own lines or is due to its own negligence. The theoretical right is conceded to an initial carrier to contract that it shall not be liable for losses on the line of a connecting carrier and because of the latter's negligence. *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110; *Marshall & Michel Grain Co. v. Railway Co.*, 176 Mo. 480, 75 S. W. 638, 98 Am. St. Rep. 508; *Bank v. Railroad Co.*, 72 Mo. App. 82. But this right is qualified by the proviso that, if the receiving carrier enters into a contract of affreightment by which it agrees to carry the

property to destination, it cannot so far limit its liability that it will not be answerable for the negligence of a connecting carrier. Cases cited.

It follows that the essential question, in dealing with this defense, is whether or not, by the bill of lading in the present case, the defendant made a through contract of carriage; that is to say, undertook to transport the stock from Bowling Green, the point of shipment, to Chicago, the destination. The meaning of written instruments is usually to be ascertained from all their provisions, if possible giving effect to every term and such an interpretation as will harmonize it with the other terms of the instrument. In view of this precept of the law, we might hesitate to say the defendant contracted to carry plaintiff's stock to Chicago, and not simply to the end of its own line, to be thence transported by a connecting railway company over the balance of the route, were the question open in this state. But affreightment contracts, in no material respect differing from the one before us, have been construed by its highest courts to be through contracts of carriage. *Western Sash & Door Co. v. Railway Company*, 177 Mo. 641, 76 S. W. 998; *Popham v. Barnard*, 77 Mo. App. 619, 628. By the first clause of the present contract the defendant agreed to transport the cattle from Bowling Green to Chicago. The second clause provided that, if the destination was on the line of defendant's road, defendant would deliver the property to the consignee at that point; but, if the destination was beyond the line of defendant's road, it would deliver the property to the next connecting carrier. The second paragraph provided that the defendant should be held liable only for loss or damage occurring on its own line, and its duty and liability should cease and terminate on delivery of the stock to a connecting line. The construction put on an agreement in that form is that the undertaking to carry to destination, though coupled with the proviso that the receiving carrier's liability for damage shall be confined to losses occurring on its own line, makes the agreement one for through carriage by the initial carrier. *McCann v. Eddy*, *Popham v. Barnard*, and *Western Sash & Door Co. v. Railway Company*, *supra*; *Bank v. Railway*, 72 Mo. App. 82; *Marshall v. Railway Co.*, 74 Mo. App. 81. In view of the authorities in this state, we hold the trial court rightly refused to instruct for a verdict in favor of the defendant, on the theory that it was not liable for damage to the stock after it passed from defendant's custody into a connecting carrier's.

It is conceded that the damages assessed by the jury were reasonable, and the judgment will be affirmed.

BLAND, P. J., and NORTON, J., concur.

STATE ex rel. SONS v. HOLLAND.
(St. Louis Court of Appeals. Missouri. Jan.
30, 1906.)

APPEAL—MOTION FOR NEW TRIAL—AFFIDAVIT
FOR APPEAL—ORDER—PRESERVATION—BILL
OF EXCEPTIONS.

The filing of a motion for a new trial, the action of the court thereon, the filing of an affidavit for appeal, the order granting the appeal, the extension of time in which to file a bill of exceptions, and the filing of the bill, are all matters of record entry which should appear in appellant's abstract of the record proper, and cannot be properly shown by the bill of exceptions.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2306-2309, 2315, 2319-2321.]

Appeal from Circuit Court, Barry County;
Henry C. Pepper, Judge.

Petition by the state, on the relation of H. P. Sons, against John Holland. From a judgment for defendant, relator appeals. Dismissed.

See 85 S. W. 356.

E. C. Frost, for appellant. Davis & Steele, for respondent.

BLAND, P. J. This is an action to recover a delinquent poll tax of \$3 for the year 1900, due Capp's Creek township, road district, in Barry county, Mo. It was begun on April 3, 1901, by B. D. West, the constable of Capp's Creek township, filing with the justice of the peace of said township a list of the delinquent poll taxes, duly certified by the collector of said county, which showed some 40 delinquents, defendant among the number. The justice did not mark the delinquent list "Filed." He said he forgot to so mark it, but of his own motion made out and filed the following statement: "Account against John Holland for \$3.00 delinquent poll tax at Capp's Creek, road district. Filed April 3, 1901. W. D. McMillan, J. P." Summons was issued, and on the return day parties appeared and tried the case. The justice rendered judgment for plaintiff, and the defendant appealed to the circuit court. At the February term, 1902, of the circuit court, the plaintiff filed the collector's verified list of delinquent poll taxes. On the same day the defendant filed a motion to dismiss the cause, on the ground that the circuit court had "no jurisdiction over the subject-matter or of the person of defendant, for the reason that no cause of action was filed with the justice of the peace, and no cause of action is stated in the cause." The plaintiff filed the following amended statement in the circuit court, on the same day: "H. P. Sons, Collector of Barry County, Missouri, to the use of Capp's Creek Township Road District,

Plaintiff, v. John Holland, Defendant. Plaintiff for amended statement says that the defendant owes Capp's Creek Township Road District the sum of three dollars, his delinquent poll tax for the year 1900, for which he prays judgment." On the same day the defendant filed a motion to strike out the amended statement, for the reason said amended statement does not state any cause of action, and for the further reason the plaintiff has no right or authority to file the amended statement because the court has no jurisdiction over the subject-matter.

The court heard the testimony of the justice of the peace and the constable, which showed that the constable got the delinquent list from the clerk of the collector and gave it to the justice, asking him to institute a suit, and that the justice had the list for about two hours and forgot to mark it "Filed," but permitted the constable to withdraw it for the purpose of instituting suits against the other delinquents therein named. The circuit court entered judgment dismissing the cause because there was no statement filed with the justice of the peace.

The case is here by abstracts in lieu of a full transcript. The abstracts contain nothing from the record proper to show that the motion for new trial was filed and overruled, that the affidavit for appeal was filed and appeal granted, or that a bill of exceptions was ever filed. Under the title "Bill of Exceptions," it is stated that a timely motion for new trial was filed and overruled, and that an affidavit for appeal was filed and appeal granted, and that 60 days' leave in which to file bill of exceptions was given and within the time allowed, to wit, on March 7, 1902, the bill of exceptions was signed by the judge, but it nowhere appears that it was ever filed. The filing of a motion for new trial and the action of the court thereon, the filing of an affidavit for appeal and the order granting the appeal, and the extension of time in which to file bill of exceptions and the filing of the bill, are all matters of record entry, and should appear in appellant's abstract of the record proper. They form no part of the bill of exceptions, and it cannot be made a vehicle to carry into an appellate court that which is matter of record proper. Western Storage & Warehouse Co. v. Glasner, 150 Mo. 426, 52 S. W. 237; Butler County v. Graddy, 152 Mo. 441, 54 S. W. 219; St. Charles ex rel. v. Deemar, 174 Mo. 122, 73 S. W. 469; Williams v. Harris, 110 Mo. App. 538, 85 S. W. 643.

Therefore there is nothing before us for review, and the appeal is dismissed. All concur.

SMOOT v. KANSAS CITY.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. JUDGMENT—CONFORMITY TO PLEADINGS—
DAMAGES—PERSONAL INJURY—AMOUNT DEMANDED.

In an action for personal injuries, there can be no recovery for doctor's fees or loss of time in excess of the amounts claimed in the petition for such items.

[Ed. Note.—For cases in point, see vol. 80, Cent. Dig. Judgment, §§ 443-445.]

2. APPEAL AND ERROR—EXCESSIVE VERDICT—
REMITTITUR.

A remittitur will be permitted by an appellate court where it can reasonably estimate the excess in the verdict or judgment, and it is apparent that no injury can be done the defendant by such action.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4469.]

3. SAME.

In an action for personal injuries, no allegation as to hernia was made until the filing of an amended petition, two years after the filing of the original petition and 20 days after an amendment of the original petition. The evidence as to the nature of the injuries was conflicting, two physicians testifying that there was no hernia and denying the existence of other permanent injuries. Instructions given authorized a recovery for doctor's fees and loss of time in excess of the amounts claimed in the petition for such items. Held not a proper case for an entry of remittitur in the appellate court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4462-4470.]

4. WITNESSES—PRIVILEGED COMMUNICATION—
PHYSICIANS—OBSERVATION.

Information acquired by a physician from observation of his patient is privileged under Rev. St. 1899, § 4659, precluding physicians from testifying concerning "information" acquired from a patient.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 774.]

5. SAME—ESTABLISHING RELATIONSHIP.

Information by observation acquired by a physician prior to the establishing of the relation of physician and patient is not privileged under Rev. St. 1899, § 4659, precluding a physician from testifying concerning information acquired from any patient while attending him in a professional character.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 771, 774.]

6. APPEAL AND ERROR—ISSUE OF FACT—CONFLICTING EVIDENCE—SUBMISSION TO JURY.

The appellate court will not disturb the action of the trial court in submitting to the jury an issue of fact, embraced in the pleadings and supported by substantial evidence.

Appeal from Circuit Court, Pettis County; George F. Longan, Judge.

Action by Absalom L. Smoot against the city of Kansas City. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This cause is here upon appeal from a judgment of the Pettis county circuit court against defendant in the sum of \$5,000. The amended petition, upon which this proceeding rests, was filed at the May term, 1902, of the Pettis county circuit court, and is as follows: "For cause of action against de-

fendant, plaintiff states that on July 25, 1900, and at all times herein mentioned, defendant was, and still is, a municipal corporation of the first class, of the state of Missouri, organized and existing under a special charter as by law provided, with all the powers, privileges, and liabilities incident thereto. That at all said times, and for a number of years prior thereto, Brook street and especially that portion thereof hereinafter referred to, was a public street and thoroughfare of and within said defendant city, and at all said times there was a public sidewalk on the west side of said Brook street, and especially that portion thereof in front of number 2235 Brook street, and said sidewalk was, with the knowledge, consent, and invitation of defendant, used as a general public sidewalk for the purposes of travel, at all said times. Plaintiff further states that on said 25th day of July, 1900, and for a long time prior thereto, defendant carelessly and negligently maintained said sidewalk on said Brook street, and especially that portion thereof in front of said number 2235 Brook street, namely about 273 feet south of the southwest corner of said Brook street and Twenty-second street, and allowed the same to be maintained and to remain in a dangerous and defective condition in this, to wit: The stringers of said sidewalk at said point were rotten and decayed and were broken, dilapidated, and insecure. The boards of said sidewalk at said point, and for several feet on both sides thereof, were loose, decayed, and broken, and some of them entirely missing, and defendant carelessly and negligently failed to maintain barriers, light, or other warnings at or near said point of said sidewalk to warn pedestrians of said defect and dangers at said time, namely, said July 25, 1900, and for a long time prior thereto. Plaintiff says that defendant knew of said defects, and all of said defects on said July 25, 1900, and for a long time prior thereto, or by the exercise of ordinary care and caution on its part, could have known thereof at all said times, and in reasonable time to have remedied said defects prior to said July 25, 1900, by the exercise of ordinary care and caution, but defendant carelessly and negligently failed to do so. Plaintiff states that on or about said July 25, 1900, at about the hour of 9 p. m. thereof, he was lawfully walking in a southerly direction over and upon said sidewalk on said west side of Brook street, and as he reached a point of said sidewalk about said 273 feet south of the southwest corner of said Brook street and said Twenty-second street, the same being directly in front of said number 2235 Brook street, he stepped his left foot in a hole in said sidewalk, where two of said boards, and parts of another one of said boards were out and missing, owing to the defects above set forth and he was thereby thrown violently into said hole and upon said sidewalk and against

said sidewalk upon the ground, greatly injuring him in this, to wit: Plaintiff's left leg and knee and left arm and elbow were wrenched and bruised; three ribs of left side of plaintiff's body were fractured; plaintiff's back and spine and spinal cord were wrenched and his entire nervous system shocked; and plaintiff's heart and lungs were injured, but plaintiff does not know, and for that reason cannot state, the nature of said injuries to his heart and lungs; and plaintiff was ruptured in his left side, producing hernia. Plaintiff says that all of said injuries are permanent, and that on account of said injuries he has been compelled to obligate himself for large sums of money for doctor's and surgeon's hire, namely, \$200, and will so long as he lives be compelled to obligate himself for large sums of money for said items, on account of said injuries; and that, on account of said injuries, plaintiff has been compelled to lose time from his means of livelihood, to his damage in the sum of \$250, and that he will, so long as he lives, be compelled to lose time from his means of livelihood, on account of said injuries; and plaintiff further says that, on account of said injuries he has suffered, and will so long as he lives suffer great physical pain and mental anguish, all to his damage in the sum of twenty-five thousand (\$25,000.00) dollars, for which amount, together with costs, he asks judgment against the defendant."

To this petition defendant on the 16th of June, 1902, filed the following answer: "Comes now the defendant, Kansas City, and for its answer to the petition of plaintiff admits that it is a municipal corporation duly organized and existing according to law, but denies each and every other allegation in said petition contained. For a further answer to said petition, defendant states that at the time and place where plaintiff claims to have been injured he so carelessly and negligently conducted and demeaned himself that the injuries, if any, received by said plaintiff as alleged in said petition were caused and directly contributed to by his own fault and negligence. Wherefore defendant prays that it may go hence without day and have judgment for its proper costs in this behalf sustained."

It is not essential to the proper determination of the legal propositions involved in this proceeding to burden this opinion with a detailed statement of the testimony developed at the trial. It is sufficient to say that plaintiff introduced evidence tending to show the defective sidewalk and by reason of such defects he was injured. Also testimony tending to show the nature and character of such injuries. On the part of the defendant the testimony tended to contradict that of the plaintiff, and that the plaintiff did not receive the injuries complained of and that whatever injuries were received they were not of a permanent nature. The testimony to

which proper objections and exceptions were presented, as well as the instructions complained of, will be given due consideration in the course of the opinion. Upon the submission of this cause to the jury upon the evidence and instructions of the court, they returned a verdict finding the issues for the plaintiff and assessing his damages at the sum of \$5,000. Motions for new trial and in arrest of judgment were timely filed and by the court overruled, and judgment entered in accordance with the verdict. From this judgment the defendant prosecuted his appeal to this court, and the record is now before us for review.

Edwin C. Meservey, W. H. H. Platt and Jas. M. Garner, for appellant. H. J. Latshaw, Jr., Chas. E. Yeater, and E. M. Perdue, for respondent.

FOX, J. (after stating the facts). Upon this record the complaints of appellant may thus be briefly stated: (1) That the trial court erred in giving instruction No. 4. (2) The court erred in admitting evidence of subsequent repairs upon the alleged defective sidewalk. (3) The court erred in refusing instruction No. 2, which withdrew from the consideration of the jury the question as to whether or not plaintiff was suffering from hernia as a result of the injuries received by him, at the time of the accident.

We will treat these assignments of errors in the order as herein indicated. Instruction No. 4 complained of is as follows: "The court instructs the jury that if you find for plaintiff, then, in estimating the amount of damages to be awarded him, you may take into consideration such sums of money, if any, that you may find and believe from the evidence plaintiff has obligated himself for on account of doctor's and surgeon's hire in treating the injuries, if any, in evidence, and allow him such an amount, not to exceed \$850, for said items as would be reasonable compensation for said services, if any; and if you further find and believe from the evidence that plaintiff will in the future, on account of said injuries, if any, be compelled to pay out or obligate himself for doctor's or surgeon's care, you may also take that fact into consideration, and allow him therefor such an amount as, under the evidence, would be reasonable compensation for said future services, if any; and if you further find and believe from the evidence that plaintiff has, on account of said injuries, if any, been compelled to lose time from his means of livelihood, you may also take that fact into consideration, and allow him therefor such an amount as, under the evidence, would reasonably compensate him for said loss of time, if any; and if you find and believe from the evidence that plaintiff will in the future be compelled, on account of said injuries, if any, to lose time from his means of livelihood, you may also take that fact

into consideration, and allow him such a sum therefor as will, under the evidence, reasonably compensate him for said future loss of time, if any. And if you further find and believe from the evidence that plaintiff has, on account of said injuries, if any, suffered physical pain or mental anguish, you may take that fact into consideration, and allow him such an amount therefor as, under the evidence, will reasonably compensate him for said physical pain, if any, or mental anguish, if any; and if you further find and believe from the evidence that plaintiff will in the future suffer either physical pain or mental anguish on account of said injuries, if any, you may also take that fact into consideration and allow him therefor such an amount as you may believe, under the evidence, will reasonably compensate him for said future physical pain, if any, or mental anguish, if any, not to exceed in all the sum of twenty-five thousand (\$25,000.00) dollars." This instruction is manifestly erroneous in this that it authorizes a recovery for doctor's and surgeon's hire in any sum not exceeding \$350; when in the petition upon which this cause was tried, it was alleged that the damages for those items were only the sum of \$200. It is also erroneous in not limiting the amount of recovery for loss of time from his means of livelihood to the amount claimed in the petition. It will be noted that the petition only claims the sum of \$250 for loss of time from his means of livelihood.

The verdict in this case was for the sum of \$5,000. There was no remittitur in the trial court of any part of such recovery, nor was there any offer of that kind. It is suggested, however, that the errors of this instruction can be cured in this court by an entry of remittitur, and the question with which we are confronted upon this instruction is whether or not, upon the disclosures in the record of this cause, this court should adopt that course. There is no dispute as to what the law is upon this proposition. It is well settled and there is no conflict in the cases by the appellate courts of this state as to the proper rule. The fundamental rule, to be deduced from all the authorities upon the question of entering a remittitur either in the trial court or in the appellate court, is that where the court can reasonably estimate the excess in the verdict or judgment and that it is apparent that no injury can be done the defendant by entering such remittitur then a remittitur may be permitted. *Ice Co. v. Tamm*, 90 Mo. App. 189, is a well considered case upon this proposition, and all of the authorities are fully and exhaustively reviewed. It was ruled in that case that it was no longer an open question as to the power of the courts to permit a remittitur to be entered in cases where verdicts were excessive, and the learned judge very appropriately announced that "undoubtedly the courts have, and constantly exercise, this right in cases where the amount of the excess is exactly calculable

from the evidence," and it is made clear from that case that, so far as the power of the court to permit the entering of a remittitur is concerned, there is no dispute, but the difference of opinion exists as to when this duty should be exercised, and the learned judge upon that question said: "But a wide difference of opinion exists as to their duty when unjust damages have been awarded in instances where there is no positive criterion for determining what the damages ought to be; that is, in actions for personal injuries, other cases sounding in tort and, we suppose, those in contract for unliquidated and uncertain damages. *Loyd v. Railroad*, 53 Mo. 509; *Waldhier v. Railroad*, 87 Mo. 37; *Furnish v. Railroad*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781; *Nicholds v. Plate Glass Co.*, 126 Mo. 53, 28 S. W. 991; *Burdick v. Railroad*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528 (in which the authorities on the subject are reviewed); *Rodney v. Railroad*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150; *Hollenbeck v. Railroad*, 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; *Chitty v. Railroad* (Mo. Sup.) 65 S. W. 959. All those decisions concede the trial court's power to permit such an amendment of the verdict and thereupon refuse a new hearing, because the trial judge is largely concerned with the facts. He must review the finding on them and set it aside if unsupported, in his opinion, by the weight of evidence. But there are exceptional cases in which an excessive verdict cannot be thus cured even at nisi prius. If the jury were erroneously charged concerning the measure of damages and, in obedience to the court's instruction, included in their assessment of damages improper elements, and it is impossible to ascertain precisely how much the verdict was increased thereby, a remittitur is insufficient to redress the error, which can only be done by granting a new trial." The case of *Slatery v. City of St. Louis*, 120 Mo. 183, 25 S. W. 521, was an action to recover damages for injury to property. In that case the following instruction was given: "If the jury believe that the building of the bridge in Twenty-Firststreet in front of plaintiff's premises had occasioned a loss of rent to plaintiff between September, 1890, and October 12, 1891, the date of beginning of this action, the jury will include in their verdict, if they find for plaintiff, the amount of such loss of rent as is shown by the evidence." This instruction was in no doubtful or uncertain terms condemned by this court, and it was expressly ruled that the error of it was not cured by entering a remittitur. *Burgess, J.*, in treating of that instruction, thus announced the rule: "The plaintiff was not entitled to recover damages to her property and at the same time damages for the loss of rent. It is clear that if the entire property had been taken or rendered useless and of no value that she could not have recovered, in an action for damages to the property, also

what it would have rented for up to the time of bringing the suit. 'In an action for a negligent injury to real property, the rule of damages generally adopted is to allow to the plaintiff the difference between the market value of the land immediately before the injury occurred, and the like value immediately after the injury is complete.' 2 Shearman & Redfield on Negligence, § 750. To the same effect is *Pinney v. Berry*, 61 Mo. 359. The measure of damages was the difference between the value of the property immediately before the injury and immediately afterwards as its market value was affected by reason of the erection of the bridge. *Spencer v. Railroad*, 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668; *Kansas City v. Morton*, 117 Mo. 446, 23 S. W. 127; *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684. The error of this instruction was not cured by the remittitur of the sum of \$258.72, as it is impossible to determine from the evidence what amount was allowed by the jury for damages occasioned by the loss or decrease in the rental value of the property."

Applying the rules, as thus indicated by the cases heretofore cited, should this court undertake to cure the error of instruction No. 4 by ordering that a remittitur be entered? Upon a careful consideration of the entire record we have reached the conclusion that it should not. The record in this cause presents an action for personal injuries, and it is clear that there is no positive criterion for determining what the damages ought to be, nor can this court determine what elements of damages were considered by the jury in arriving at their verdict. They were directed by instruction No. 4, without any limit being fixed, to assess the damages for the loss of time by the plaintiff from his means of livelihood, and it would be simply pure guesswork by this court, as was said in *Slattery v. City of St. Louis*, supra, as to what amount was allowed by the jury for damages occasioned by the loss of such time. It is manifest from this record that the main controversy in this cause is as to the nature and character of plaintiff's injuries, and the amount he is entitled to recover. The question of the verdict returned in this cause being excessive is sharply presented by the disclosures of the record.

We have read in detail all of the evidence developed at the trial of this cause and it is apparent that upon the question as to the nature and character of the injuries received by plaintiff, that this is by no means a one-sided case, and, while this court will not undertake to retry the case upon a purely question of fact, nor determine upon which side the evidence preponderates, yet where there is an erroneous instruction given directing the jury as to their authority to assess damages, this court will consider all the evidence and say whether or not the ends of jus-

tice would be best subserved by having the case resubmitted to a jury upon instructions which are free from any error. The original petition in this case was filed July 25, 1900; it did not allege or in any manner mention any such injury as hernia; nearly two years after that time, on May 8, 1902, the petition was amended by interlineation, still no intimation or allegation that hernia was the result of any of the injuries complained of, and on May 28, 1902, he filed the amended petition upon which this case was tried in which, for the first time, it was alleged that he was suffering from hernia as a result of the injuries received. During the progress of the trial at Sedalia the court appointed Dr. Overstreet and Dr. Evans of that city to make an examination of the plaintiff in respect to the injuries complained of in the petition. They testify that there was no hernia and that the plaintiff was not suffering from any such trouble, and also testified that they found no enlargement or displacement of the heart and no pleura or lung trouble, and that so far as the factured ribs were concerned that they were so completely healed that they were unable to determine whether or not they had ever been fractured. In view of these disclosures of the record it is highly important that this cause be submitted to a jury upon instructions which in no way give them a roving commission to speculate as to the amount of damages sustained by the plaintiff.

This brings us to the consideration of the complaint by appellant of the exclusion of testimony by Dr. Monahan. Dr. Monahan was introduced by the defendant. He was assistant police surgeon of Kansas City, Mo. He stated that he was not on the city pay roll, but said: "I handled the rich and poor alike, that is those that could pay me, paid me, and those that could not pay me I gave them the attention just the same." He was working under the city police surgeon and rendered services in cases of accident to persons regardless as to whether or not he was to receive any pay from the person or not. Dr. Monahan went to the place of this accident and he saw the plaintiff sitting on the edge of the sidewalk. The error complained of is specially directed to the exclusion of the answer to this question: "Q. I will ask, you, doctor, if you saw the plaintiff spit any blood while on the sidewalk or in the street before getting into the ambulance on Brook street?" The action of the court in excluding the answer to the question, as above indicated, was doubtless predicated upon section 4659 Rev. St. 1899, which precludes any physician or surgeon from testifying concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon. The provisions

of this section have frequently been invoked in the trial of causes in this state. The meaning, object, and purposes of this statute are nowhere better stated than in *Gartside v. Ins. Co.*, 76 Mo., loc. cit. 451, 43 Am. Rep. 765. It was there ruled that it was intended by the provisions of this statute to cast "the veil of privilege" or secrecy over information acquired by a physician while professionally engaged in the sick chamber, and necessary to enable him to prescribe. Information acquired by a physician from inspection, examination, or observation of the person of the patient, after he has submitted himself to such examination, may as appropriately be said to be acquired from the patient as if the same information had been orally communicated by the patient." It was further said by the learned judge writing the opinion in that case, that it was "doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of a physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source upon which he must rely, viz. his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was ever intended by the Legislature and virtually to overthrow it." *Smart v. Kansas City*, 91 Mo. App. 586; *Streeter v. City of Breckenridge*, 23 Mo. App. 244.

It will be observed that under the rule above indicated, that in order to render observations and opinions acquired by a physician privileged that it must appear that the relation of physician and patient must first be established. As was ruled in the *Gartside Case*, that after a patient has submitted himself to an examination by the physician then information acquired by observation would be excluded on the same ground as a direct communication by the patient to the physician. So far as the question propounded in this case is concerned, it does not appear as to whether or not the information desired from Dr. Monahan as to the spitting of blood, was from observation prior to any sort of examination of the plaintiff. It is clear that when Dr. Monahan first appeared upon the scene of the accident if he observed the plaintiff and that he was not at that time spitting blood, there is no reason why such testimony should be excluded, for that is prior to any submission by the patient to the examination of the physician, and so far as this record is concerned, as to that particular question, it nowhere appears that this was information from an observation by Dr. Monahan after he had commenced an examination of the patient. The question was simply as to whether or not he saw the plaintiff spitting any blood, while on the sidewalk or in the street, before getting into the ambulance on Brook street. The learned trial judge, when this witness was before

him, very intelligently and clearly expressed his doubts upon the proposition. He said: "As to this evidence of the witness, Dr. Monahan, if the witness was only asked to testify, and the purpose was only for him to testify, to what he saw, what he heard or learned from the patient on the sidewalk, or on the street, at the time he was picked up by the ambulance, it was done in a public place and in the presence of others, there would be a very serious question in my mind whether they would be entitled to protection and be entitled to be considered as confidential communications. However, I do not think that is the important testimony, and cannot be very important, because all of the evidence that has gone before shows that there was no special examination made, except the undoing of the shirt and feeling of the heart or place complained of, and then the patient was put in the ambulance and taken to the hospital, as I remember, either there or the station, where an examination was had and the patient treated. I am satisfied that that evidence would be absolutely incompetent. Anything that this physician learned at the hospital when he did make the examination, upon which he made his prescription and made his diagnosis, would be incompetent, would come within the rule laid down by the statute, that is, it is a privileged communication, and information that the physician is not allowed to disclose if the other party objects. As I say, the first part of it presents a very serious question in my mind. However, as that is not very important and is not the main point in this witness' testimony, I am going to exclude the entire testimony and hold that the witness is not competent to testify to anything that he learned from this witness either by talking to him and asking him questions or by making an examination of the body." It is sufficient to say upon this proposition, that upon the retrial of the cause if it appears that the relation of physician and patient had been established and that the plaintiff had submitted himself for examination by Dr. Monahan, that then any information acquired by observation after that time would be incompetent. But, on the other hand, if prior to the establishment of this relationship the doctor observed the patient and acquired information from such observation, we know of no rule of evidence that would make such information privileged.

Appellant complains that the court committed error in the admission of testimony in respect to repairs upon the sidewalk subsequent to the date of the accident. We have examined the disclosures of the record upon that question and it is not shown that any such testimony was admitted, nor does it appear that to the question which appellant construes as having reference to subsequent repairs, that there was any timely objections and exceptions. It is conceded that any testimony of any subsequent repairs upon this

alleged defective sidewalk would be inadmissible; therefore, upon a retrial of this cause, any testimony offered along that line should be promptly excluded.

This brings us to the final contention of appellant that the court erred in refusing instruction No. 2. This instruction was as follows: "The court instructs the jury that there is no evidence in this case to sustain the allegation that plaintiff received a hernia by falling upon the sidewalk at the time and place alleged in his petition, and in assessing his damages, if any, you cannot consider such hernia, if any, which plaintiff may now have, and the same is withdrawn from your consideration." It is sufficient to say of this assignment of error in the refusal of this instruction, that this court would not be warranted in reversing the judgment on that ground alone. The record discloses at least some evidence that the plaintiff was suffering from hernia as a result of the injuries received by the accident complained of in this proceeding, and even though it be conceded that the preponderance of the evidence upon this subject is upon the side of the defendant, yet, under the firmly established rule of this court, we will not undertake to weigh the testimony or determine upon which side the evidence preponderates.

The distinction between the trial court and the court of review, in respect to awarding new trials upon the ground that the verdict is against the weight of evidence, must be borne in mind. The trial court has the witnesses before it, can observe the manner and conduct of the witnesses while upon the stand, and upon a motion for new trial it is especially the province of the trial court to review the testimony, and it has the unquestioned right to set aside the verdict and grant a new trial if in its judgment the verdict is against the weight of the credible evidence in the cause. In this court we simply have the disclosures of the record with at least sufficient evidence to have authorized the submission of the question to the jury, with no opportunity of judging of the credibility of the witnesses by their appearance, conduct, or manner upon the witness stand, and the cause comes to this court, not only with the approval of the jury, but with the approval of the judge presiding at the trial; hence follows that well established rule by this court that where there is any substantial evidence tending to prove any essential fact embraced in the pleadings, this court will not undertake to disturb the action of the court in submitting such issuable fact to the jury upon proper instructions. The awarding of a new trial upon the ground that the verdict is against the weight of evidence is especially the province of the trial court; for as was said in *Ice Co. v. Tamm*, supra, the trial judge deals with and is largely concerned with the facts of every case that is tried before him. It is by no means, as has been repeatedly announced by this court, the province of a court of re-

view to undertake to weigh the testimony or to adjust the conflicting statements of the witnesses testifying in the cause; hence the ruling upon this contention must be adverse to appellant.

We have given expression to our views upon the record in this cause. There is nothing remaining to be done except to announce the conclusion, which is, that for the reasons indicated herein, the judgment should be reversed, and the cause remanded for a new trial, and it is so ordered. All concur.

CAPEN v. GARRISON et al.

(Supreme Court of Missouri, Division No. 1
Feb. 22, 1906.)

1. GUARDIAN AND WARD—POWER TO BORROW MONEY.

Under Rev. St. 1899, § 3504, prescribing the purposes for which a curator may mortgage his ward's land to obtain money, expressly authorizing such a proceeding to obtain money for the education and maintenance of a ward, but not authorizing it to obtain money to discharge a pre-existing incumbrance on the land, no power to borrow for this latter purpose can be implied from the statute.

2. SUBROGATION — FURNISHING MONEY TO PAY MORTGAGE — ACCEPTANCE OF NEW MORTGAGE.

Where a curator, with the sanction of the probate court, executed a mortgage on his ward's land to obtain money to satisfy a pre-existing incumbrance under which the land was about to be sold, and the lender expressly refused to accept a transfer of the old incumbrance, and insisted upon the making of a new mortgage, she was not entitled to be subrogated to the rights of the mortgagee in the first mortgage.

3. LIENS—EQUITABLE LIENS.

Neither was the mortgagee in the second mortgage entitled to an equitable lien upon the property.

Appeal from St. Louis Circuit Court; Jas. R. Kinealy, Judge.

Suit by Frances I. Capen against Mary B. Garrison and others. From a judgment for plaintiff, defendants appeal. Reversed.

T. Percy Carr, for appellants. Boyle & Priest and Geo. W. Easley, for respondent.

VALLIANT, J. This is a suit in equity in which plaintiff seeks to subject certain real estate belonging to minors to the payment of money loaned by the plaintiff to the curator of the minors for the purpose of paying off a pre-existing incumbrance on the property.

The main facts in the case are these: The property in question is a dwelling house and lot in St. Louis. Cornelius K. Garrison bought the property in 1893 and resided in it as his home until his death in 1895. He left a widow Mary B. Garrison and three minor children who, together with Daniel E. Garrison, the duly appointed curator of the children, are the defendants in this suit. When Cornelius K. Garrison bought this property it was incumbered with a debt of \$5,200 principal, secured by deed of trust,

the payment of which he assumed, but which he left unpaid at his death. In March, 1899, there was due on this debt the whole of the principal and \$182 of interest, and the creditor was demanding payment; besides this there was due the state and city, for taxes, the sum of \$742.22, a portion of which was required to be paid at once to avoid suit. There was no personal property available to the curator for the payment of these incumbrances and he feared that the real estate of his wards would be sacrificed in the threatened foreclosure sales. Thereupon he petitioned the probate court, stating these facts and praying to be authorized to borrow \$5,500 with which to pay these incumbrances and to secure the loan by a deed of trust to be executed by himself as curator for the children and by the widow of Cornelius K. Garrison. The probate court made the order as requested, the curator borrowed the \$5,500 from the plaintiff in this suit, and he in his representative capacity and the widow executed a note for that amount due in three years with six semiannual 6 per cent. interest notes, and a deed of trust on the real estate mentioned to secure the same. The plaintiff was represented in the transaction by a real estate agent. The curator said to the agent that he desired to conduct the business with as little expense as possible, and therefore preferred to have the old deed of trust and notes transferred to the lender, but the agent said that his clients preferred to take new papers and accordingly, when the negotiations were ended and the agreement reached, the agent received from his client the \$5,500 and with it went to the bank where the old notes were, paid them, had the old deed of trust satisfied on the record, and presented to the curator an account of the expenditures one item of which was \$5,474.50, paid to the bank on the old notes and deed of trust, besides \$0.70 paid for releasing the old deed on record, expense of executing new deed of trust, the agent's own commissions and other items, the aggregate of all which exhausted the \$5,500 and showed a balance of \$62.74 as due the real estate agent, which balance Mr. Garrison, the curator, paid with his individual check. Mr. Garrison also paid the accumulated taxes. The old notes and deed of trust after being canceled and entered as satisfied on the record were delivered to the curator. The new deed of trust was duly recorded. A title examiner gave the certificate of title on which this transaction was based and which was delivered by the real estate agent to the plaintiff (or to her son who acted for her) along with the new deed of trust. In this certificate, referring to this new deed of trust, was this notation: "This is an equitable lien, and a decree of the circuit court will be necessary to foreclose as to all interest of minors." The interest notes on this loan were

paid as they matured except the last one, due when the principal fell due three years after date. At that time the curator was unable to renew the note or obtain a new loan, no lender could be found who would take a curator's deed and the curator having no means of his wards with which to pay the debt, this suit resulted. The prayer of the petition is, first, that the deed of trust be decreed to be a valid lien and that it be foreclosed as a mortgage; second, if that cannot be done, then that an account be taken to show the amount of plaintiff's money that was used to pay off the former incumbrances, that the entry of satisfaction of the old deed of trust be set aside and the plaintiff subrogated to the rights of that creditor; third, if that cannot be done, then that the debt due plaintiff be decreed to be an equitable lien on the property in question and a foreclosure accordingly. The trial court took the last named theory as the correct one, declared plaintiff's claim an equitable lien on the property and decreed a foreclosure. From that judgment the minors appeal.

Subrogation is a doctrine of equity jurisprudence: "It does not depend on privity or contract, express or implied, except in so far as the known equity may be supposed to be imported into the transaction and thus raise a contract by implication." 27 Am. & Eng. Ency. L. (2d Ed.) 208. It is a consequence which equity jurisprudence attaches to certain conditions. The parties may not have contracted for it either expressly or by legal implication, but if, in the performance of that contract which they did make, certain conditions have resulted which make it necessary for equity to interpose its authority in this respect it will do so, provided that in so doing it will violate no law and not alter the contract. Equity violates no law, and it does not assume to make a contract for the parties; it follows the law and upholds it, and when it comes to the relief of one to whom the law cannot afford adequate remedy it does not in so doing infringe the law or impair its force, nor does it reconstruct the contract between the parties. Whilst the right of subrogation as understood in equity jurisprudence is not the direct legal effect of a contract, yet parties may by express contract accomplish the same practical result, for example you may agree with a mortgagor to purchase and hold, on agreed terms, his outstanding mortgage obligation and when you have made the purchase you stand, as to the security, in the shoes of the original mortgagee, but that is the direct legal consequence of your purchase, it is not the equitable subrogation that we are now discussing. Whilst the right of subrogation, as imported into the transaction by equity jurisprudence, does not flow as a direct legal consequence from a contract expressed or legally implied, yet to this extent it is dependent on the contract; that is, it grows out of conditions resulting from the due observance of the contract and it must not be

inconsistent with the terms of the contract. As the law writer above quoted in effect says, subrogation is to this extent implied; that is, we will presume that the parties making the contract knew of this equity principle and contracted in reference to it, so if the contract will bear the importation and the conditions demand it, subrogation will be imported into it. The contract may be silent on the subject, yet its terms may leave it open to the introduction of this equitable principle and in such case the principle may be applied. But the terms of the contract, and the conditions arising from its performance, may be such as to show that the parties did not intend that subrogation should result and in such case it will not result. Equity will not engraft this doctrine on the transaction in the face of a contract that negatives the idea of subrogation. In other words, the contract may be silent on the subject yet not inconsistent with the idea of subrogation, or, on the other hand, it may be silent on the subject yet its terms expressly or by implication forbid the application of the doctrine. So it may be said that equity may apply the doctrine although the contract does not either expressly, or by legal implication, call for it, but it will not apply it if the contract either expressly or by legal implication forbids it. The parties may not have had subrogation in their minds at all when they made the contract, but that fact alone would not control in a question of application of the doctrine. Equity will apply it, though the parties may never have thought of it, if it is not inconsistent with the contract or in violation of any one's legal rights and if justice demands it. And the fact that the parties may, through ignorance of the legal consequence of their contract, have thought that they were providing adequate new security for the money advanced will furnish no foundation for the interposition of this equitable principle if the contract forbids it. Equity cannot reform the contract so as to make for them a contract which it may be conjectured the parties would have made for themselves if they had known what the law was. The usual application of this principle occurs where a person at the request of the debtor pays the mortgage debt or where one interested in the property pays an incumbrance to protect his own interest, or where he stands in the relation of surety to the debt. *Evans v. Halleck*, 83 Mo. 376; *Norton v. Highleyman*, 88 Mo. 621; *Bunn v. Lindsay*, 95 Mo. 258, 7 S. W. 473, 6 Am. St. Rep. 48; 27 Am. & Eng. Ency. L. (2d. Ed.) p. 203. The text last cited concludes the sentence with these words: "or wherever a denial of the right would be contrary to equity and good conscience." That of course is understood to mean equity as prescribed and circumscribed by the rules of equity jurisprudence and the dictates of good conscience within the same boundaries. To quote the language of Judge Scott in his dissenting opinion in *Valle's Heirs v. Fleming's*

Heirs, 29 Mo., loc. cit. 166, 77 Am. Dec. 557: "No man is wiser than the law; and miserable is that system of jurisprudence under which the rights of litigants depend on the notion of right or wrong entertained by any man or set of men."

The doctrine of subrogation has frequently been considered by this court. In the case last referred to (*Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152, 77 Am. Dec. 557) it was held that a purchaser of land at an administrator's sale who failed to get a title because of irregularity in the proceeding, but who had paid the purchase money and the administrator had applied it to the discharge of a pre-existing mortgage, was, as against the heir, entitled to be subrogated to the rights of the mortgagee. In that case the purpose for which the sale was ordered by the probate court was one for which the law authorized such sale to be made—that is, to pay debts; and the reason the administrator's deed was void was that he had not given the notice that the statute required. The court held that it would be inequitable to allow the heirs to repudiate the deed for irregularity in the proceeding, yet retain the advantage of a discharge of the mortgage by use of the plaintiff's money. The difference between that case and this is that the administrator's sale was for a purpose for which the law authorized a sale, and the only reason the sale was not valid was irregularities in the proceeding, whereas in this case the proceedings were in due form, but the purpose for which the probate court essayed to authorize the curator to execute the deed was not one for which the law authorized the curator to incumber his ward's land. In *Evans v. Halleck*, 83 Mo. 376, an administrator paid off a mortgage on the land with funds belonging to the estate under the belief that there was enough personal assets to pay the mortgage and also the debts allowed against the estate which proved to be a mistake; it was held in favor of the widow and heirs, that in paying off the mortgage the administrator was a mere volunteer and not entitled to subrogation. In *Norton v. Highleyman*, 88 Mo. 621, the defendant Highleyman owned the land subject to a mortgage given by a former owner to the county, on default in payment a sale to foreclose was advertised by the sheriff. On the day appointed, the plaintiff appeared and informed the sheriff and Highleyman that he was willing to bid the amount of the mortgage debt and costs for the land, but they told him that there would be no sale that day and thereupon he went away. After he left, however, the sale did occur and the land was struck off to Highleyman, but Highleyman did not then pay his bid, and had not done so seven days thereafter, when the plaintiff appeared before the county court and offered to pay the amount of the debt and costs for the land. His offer was accepted by the county court and he paid the amount into court, suppos-

ing that he was to have a deed; but he did not get a deed, and, failing to get what he expected, he brought suit against Highleyman, seeking to be subrogated to the rights of the mortgagee. It was held that he was a mere volunteer and entitled to nothing. In that case Highleyman was permitted to take the benefit of the plaintiff's payment of the mortgage and keep the land. It was a hard case, but the fact was the plaintiff through ignorance of the law had volunteered to pay another man's debt, and the court could not relieve him of the consequence of his own blunder. In *Bunn v. Lindsay*, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48, Lindsay, the owner of the land, executed a deed of trust on it to secure a debt to a building company which deed was duly recorded; after that a judgment was rendered against Lindsay, a transcript of which was filed in the office of the clerk of the circuit court of the county in which the land lay and it was duly entered on the judgment roll; after that Lindsay borrowed from Bunn money with which to pay the debt covered by the deed of trust to the building company, and executed a new deed of trust for the loan, which was recorded. In the application for the loan it was expressly stated that the money was to be used to pay off the debt covered by the then existing deed of trust, and Bunn's agent who conducted the business for him (like the real estate agent of the plaintiff in the case at bar) himself handled the money and with it paid the debt and attended to the releasing on the record of the former deed of trust. The negotiations for the new loan were begun before, but were not concluded until after the judgment creditor had had the transcript of his judgment filed and entered on the judgment roll. Bunn's agent had failed to examine the judgment roll and he had no actual notice of this judgment. The land was sold under the judgment and Bunn brought suit seeking to be subrogated to the rights of the first mortgagee. The court denied his prayer, saying, per Brace, J.: "The debt due by Lindsay to the building company and the lien given to secure it were absolutely extinguished by the payment. Such was the intention of all parties to the transaction. The plaintiff relied for security for the money he advanced solely upon the deed of trust which he took at the time, and the sole ground upon which a court of equity is asked to intervene in his behalf in this case is the assumption that he would not have parted with his money to make the loan and payments if he had known in January that Paramore's judgment lien had attached to the premises in December."

In the case at bar the only ground on which a court of equity is asked to intervene in the plaintiff's behalf is that she would not have parted with her money if she had known that a curator had no authority in law to make such a deed. The case

at bar is very much like that of *Kleimann v. Gieselmann*, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761 (same case, 45 Mo. App. 497), in its most important features. In that case the father died leaving his homestead incumbered with a mortgage, leaving also a widow and minor children; the new loan was obtained for the purpose of paying off the old mortgage, and the money so obtained was used for that purpose, the new mortgage (or deed of trust) was executed by the widow alone, she and the lender both believing at the time that under the terms of her husband's will she was the sole owner of the property, which was a mistake in their interpretation of the will. After the mistake was discovered it was sought to have the doctrine of subrogation applied to the transaction on the ground that the children had obtained the benefit of the new loan in the discharge of the mortgage which incumbered the property when it descended to them, and that equity and good conscience demanded that the new loan should be placed in the position of the old one. But the St. Louis Court of Appeals, in an opinion by Rombauer, J., which when the cause came here was, in an opinion by Burgess, J., adopted as the opinion of this court, held that in so far as the children were concerned the new lender was a mere volunteer and not entitled, as to them, to subrogation. This court said that the mistake under which the parties labored, though it was mutual, was a mistake of law and therefore no room for equity interference was found on the ground of mutual mistake. In the case at bar both parties doubtless thought that the deed of the curator, fortified with the express order of the probate court, was valid; in that they were mistaken, but it was a mistake of law.

There are other cases in our books in which this court has discussed this doctrine of subrogation, but the cases above referred to are sufficient to show the view that this court has from the first taken of this subject. The statute prescribes the only purposes for which a curator, even with the sanction of the probate court, may mortgage his ward's lands, and the borrowing of money to discharge a pre-existing incumbrance is not one of those purposes. Section 3504, Rev. St. 1899. If a power in the curator might be implied from the necessity of a case, surely no more important purpose could be imagined than the education and maintenance of the ward, therefore under such a theory there would have been no necessity for a statute expressly authorizing the curator to incumber the ward's property for his education and maintenance. The expression therefore of that particular purpose in the statute is in effect the exclusion of all other, and it means that the power to incumber the ward's property does not exist except for the purposes expressed in the statute and except that it be exercised in the manner prescribed by the statute.

It is urged in the argument that this trans-

action was manifestly for the interest of the children, that foreclosure was threatening and they had no means with which to discharge the incumbrance. It may or may not, as a matter of fact, have been for the best interest of the children. Whether it would have resulted more to their advantage to have allowed the property to go to sale at the time of the threatened foreclosure, than to postpone it three years until the new mortgage should mature depends on circumstances. There is nothing in this record that would justify us in saying that these children were any better off at the end of the three years limit of the new mortgage than they were before, and, on the other hand, if it is a fact that the property would have sold better under the old mortgage, either because the market was better then or the title was clearer, the children have been deprived of that advantage by this transaction. But this is said only in response to the suggestion that the new mortgage was manifestly to the interest of the minors, it is not on that ground that the decision must rest. We are not authorized to speculate on what may have been best for the minors in such a case; it is sufficient for us to know that the law does not authorize a curator to do what this curator attempted to do, and therefore his act was void. The evidence shows that the lender did not rely on the old mortgage, but the contrary; the lender's agent himself, with the money loaned, paid the old debt and saw to it that the satisfaction of the old deed of trust was entered on the record. In order to subrogate the plaintiff to the rights of the original mortgagee we would have to make a new contract for the parties and give a different interpretation to the equitable doctrine of subrogation from that given in the cases above referred to. The learned trial judge decided that this was not a case for the application of the doctrine of subrogation, and, in that respect, his conclusion was correct, but he held that the plaintiff was entitled to an equitable lien and under that theory gave the plaintiff practically the relief prayed.

The doctrine of equitable lien follows closely on that of subrogation. They both come under the maxim "Equality is equity," and they are applied only in cases where the law fails to give relief and justice would suffer without them. But the doctrine of equitable lien has its prescribed boundaries as well as that of subrogation; it is not a limitless remedy to be applied according to the measure of the conscience of the particular chancellor any more than, as an illustrious law writer said, to the measure of his foot. The right to an equitable lien arises when a party at the request of another advances him money to be applied, and which is applied, to the discharge of a legal obligation of that other but when, owing to the disability of the person to whom the money is advanced, no valid contract is made for its repayment.

For example if money is advanced to a minor to pay a debt which he has incurred for necessities furnished him, no action at law lies to recover of the minor on a contract express or implied for the repayment of the money loaned, yet as the money was loaned to discharge a debt for which the minor was liable at law and it was used for that purpose a court of equity will charge a lien on the minor's property to repay the sum advanced. 3 Pomeroy, Eq. Juris. § 1300. The doctrine of equitable lien is not limited to an advancement to a minor, but it is limited to cases where the same principle applies as is illustrated in the above supposed case. In the case at bar there was no legal obligation on these minors to pay this debt, and therefore there was no foundation on which to build an equitable lien. The doctrine of equitable lien applies no more in favor of a mere volunteer than does the doctrine of subrogation. In vain would a statute prescribe the limit of a curator's power to mortgage his ward's property if a court of equity should, by giving it another name, whether it be subrogation or equitable lien, invest an unauthorized deed with substantially the same effect it would have had if it had been expressly authorized by the statute.

The court erred in holding that the plaintiff was entitled to an equitable lien. The judgment is reversed, and the cause remanded, to the circuit court with directions to enter judgment for defendants, and dismissing the plaintiff's bill, without prejudice however to the plaintiff's right to foreclose her deed of trust as to the interest of Mrs. Mary B. Garrison.

BRACE, C. J., and MARSHALL, J., concur.
LAMM, J., dubitante.

EVARTS et al. v. MISSOURI LUMBER & MINING CO.

(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

1. TAXATION—TAX SALES—BONA FIDE PURCHASER—HOLDER OF UNRECORDED DEED.

A purchaser at a tax sale under a judgment for taxes, where the record owner was made a party defendant, acquired a good title as against the holder of an unrecorded deed from such apparent owner.

2. SAME—COLLATERAL ATTACK—PARTIES.

A judgment in a tax suit cannot be collaterally attacked by one who was defendant therein and who was properly served, either personally or by publication.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1816.]

3. SAME—TAX SALES—TITLE OF PURCHASER—VALIDITY—PAYMENT OF TAXES.

The title of a purchaser under a tax judgment cannot be defeated by proof that taxes for which the judgment was rendered had been paid either before the institution suit, before judgment, or before sale.

4. SAME—ACTIONS—SERVICE—ORDER OF PUBLICATION—NONRESIDENCE.

Rev. St. 1899, § 9303, provides that notice and summons in back tax cases shall be sued

out and served in the same manner as in ordinary civil actions, and that the general laws of the state as to practice and proceedings in civil cases shall apply to tax cases. Section 575 declares that in suits to enforce liens against real property, if complainant shall allege in his petition or by affidavit thereafter filed that part or all of the defendants are nonresidents, the court shall make an order directed to such nonresidents, which may be served by publication. *Held*, that an unverified petition in a back tax suit alleging that the defendant owner was a nonresident was sufficient to sustain an order for publication of process.

5. SAME — DESIGNATION OF DEFENDANTS — NAMES.

Land sold for taxes under a tax judgment was assessed to "H. E. Evarts." The tax attorney who brought the suit knew that the plaintiffs "Henry E. Evarts" and another were the owners. Henry E. Evarts was a nonresident and did nothing to induce any one to believe that his name was H. E. Evarts. *Held*, that an order for publication of process directed to "H. E. Evarts" was insufficient to sustain a judgment and sale divesting plaintiff's title in the land.

6. SAME—JUDGMENT—FRAUD OF ATTORNEY — EFFECT—BONA FIDE PURCHASERS.

The misconduct and fraud of a back tax attorney in bringing suit against a nonresident owner of certain land for whom the attorney had acted as agent, after he knew that the taxes had been paid, did not prevent such owner from interposing a defense of payment to the suit, and was therefore not available to vacate the title of a bona fide purchaser of the land under a tax judgment recovered in such proceedings.

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by Henry E. Evarts and others against the Missouri Lumber & Mining Company. From a judgment for defendant, plaintiffs appeal. Reversed.

J. W. Chilton, for appellants. John C. Brown, for respondent.

MARSHALL, J. This is an action under section 650, Rev. St. 1899, to ascertain and declare the rights of the parties hereto to lot 3 and the W. $\frac{1}{2}$ of lots 1 and 2, and the E. $\frac{1}{4}$ of lot 4 of the N. E. $\frac{1}{4}$ of section 3, and the W. $\frac{1}{2}$ of lots 2, 3, and 4 of the N. W. $\frac{1}{4}$ of section 2, all in township 29, range 6 W., in Shannon county, Mo. There was a judgment for the defendant in the trial court, and the plaintiffs appealed.

The issues: The petition alleges the corporate capacity of the defendant, and that the plaintiffs own and claim the fee-simple title to the land in controversy, and that the defendant claims an interest therein by virtue of a sheriff's deed purporting to convey the land to one A. E. McGlashen, made in 1896, for alleged delinquent taxes, for the year 1892, and that the sheriff's deed, under the tax judgment, is null and void, because the judgment in the tax case was obtained by fraud, and because the court rendering the judgment had no jurisdiction to render the same. The petition further alleges that the plaintiffs have owned the land since 1885, and have paid the taxes thereon ever since then, including the year 1892, which last were paid in the year 1894; that prior to the payment

thereof, in 1894, the land had been returned delinquent by the collector; that in the year 1895 the collector employed one L. L. Munsell to bring suit to enforce the state's lien for back taxes, in Shannon county, and that, when the collector delivered to Munsell the back-tax book of said county, he noted thereon the fact of plaintiffs' payment of said delinquent taxes on said land, and cautioned Munsell not to bring the action against the plaintiffs' land, for the reason that all taxes had been duly paid thereon; that Munsell, being so employed to bring the back-tax suits, entered into an unlawful agreement with the publisher of a certain newspaper in Shannon county, to the effect that Munsell procured orders of publication in cases pending for the enforcement of taxes to be published in said newspaper, and that in consideration thereof the publisher of the newspaper agreed to pay Munsell one-half of all fees realized by him for publishing such notices; that in order to make money unlawfully for himself, and in pursuance of said unlawful agreement, and without letting the back-tax book show the filing of a suit against the plaintiffs, Munsell fraudulently brought suit against the plaintiffs' land for the taxes for the year 1892, and obtained a judgment for said taxes, and caused the land to be sold therefor; that plaintiffs were then, and are now, nonresidents of the state of Missouri, and knew nothing of the tax suit, or of the sale under the judgment therein, until five months next before the beginning of this suit, and that the collector and tax attorney knew that the taxes for that year on this land had been paid, and knew that the plaintiffs owned the land, but never caused a process to be served on them notifying them of the pendency of said suit; that the payment by them of the taxes extinguished the lien of the state for taxes, and that the procurement of the judgment, in manner aforesaid, was a fraud upon the court, and that the judgment and sale were void, and passed no title to the purchaser. The answer is a general denial, except an admission that the defendant claims title to the land.

The case made is this: It was agreed that Peter Duffield, the patentee from the government, is the common source of title, and the plaintiffs introduced a warranty deed from said Duffield to one John M. Stull, dated August 11, 1858, recorded February 12, 1859; also a deed from said Stull to Julius King and T. J. McLain, dated August 6, 1869, recorded August 20, 1869; also a quitclaim deed from said King to said McLain, dated March 10, 1869; recorded November 14, 1869; also an assignment by McLain to Washington Hyde, as assignee, dated May 27, 1876, recorded June 30, 1876; also a deed from said Hyde, as assignee and trustee of McLain, to Isaac Smith and Job J. Holliday, dated December 27, 1879, recorded January 10, 1880; also a quitclaim deed from said Smith to Holliday, dated January 9, 1880, recorded February 24,

1880; also a quitclaim deed from Holliday to Henry E. Evarts and Mary Everts, dated July 17, 1885, and recorded April 7, 1900. Thereupon the plaintiffs rested.

The defendant then offered a sheriff's deed purporting to convey the interest of David Wilson, Job J. Holliday, and H. E. Evarts in the land to A. E. McGlashen, dated September 17, 1896, and recorded September 17, 1896, and said deed recited a judgment for back taxes for the year 1892 against said land amounting to \$8.85, and a sale under said judgment by the sheriff to said McGlashen. The plaintiffs objected to the introduction of said deed because the court had no jurisdiction of the plaintiffs in this case, the defendants in that case, they not having been served with process; also because the court had no jurisdiction of the land, because the taxes on the land for the year 1892 were paid before the suit was instituted, the judgment rendered, or the sale made; also because the judgment in the tax suit was obtained by the fraudulent contrivance of the tax attorney representing the state. In support of those objections the plaintiffs introduced the files in the tax suit. That suit was entitled the State of Missouri, at the Relation and to the Use of F. M. Chilton, Collector of the Revenue, etc., Plaintiff, v. David Wilson, Job J. Holliday, and H. E. Evarts, Defendants. Mary E. Evarts, the other plaintiff herein, was not made a party to that suit. The files in the tax case further showed that there was no service of process on any of the defendants, and that the defendants were brought in by an order of publication based upon the allegation in the petition that the defendants in said suit were nonresidents of the state, and that no affidavit showing that the defendants were nonresidents was filed at any time in that case. It nowhere appears, from the abstract of the record, that the petition in the tax case was verified. In further support of the objection the plaintiff called as a witness, F. M. Chilton, who testified that from 1891 until March, 1897, he was the collector of the revenue of Shannon county. He identified the delinquent tax book for the year 1893 and all prior years, called the "Consolidated Delinquent Tax Book," and further testified that the land in question was entered on that book as delinquent for the year 1892, but that subsequent to his receiving the book the taxes were paid, and that he marked them paid on the book, and that they were paid to him, and that he accounted for them in his settlements as collector, and that he instructed the tax attorney not to bring suit therefor. He further testified that on the delinquent tax book for 1893 H. E. Evarts was entered as the owner of this land by the county clerk; that, as collector, he had previously had correspondence with Mr. Evarts about the payment of his taxes, but that Mr. Evarts had an agent in the county who generally paid the taxes; that L. L. Munsell was the tax attorney employed by

him to bring tax suits, and that he was engaged in the abstract of title business and in paying taxes for owners of land; that the consolidated back-tax book for 1895 again showed the land to be delinquent for the year 1892, and that said book further showed that suit was filed for the collection of said taxes, and on the 10th of January, 1896, against David Wilson and others; that said delinquent tax book was made out in 1895, after the plaintiff had paid the taxes for 1892, to wit, in 1894; that, when taxes were paid, he indicated the same on the delinquent tax book by marking opposite the tract a circular with three cross-marks therein; that the delinquent tax book for 1895 did not show who "the others" were who were joined with David Wilson as the defendants in the tax suit. The witness further identified a tax receipt for the year 1892, showing that it had been paid to him by the plaintiff on the 8th of June, 1894, covering taxes for that year on the land in question. The plaintiffs then introduced said tax receipt in evidence. The defendant objected thereto, because it was no defense to its title or to the tax sale; that it might have been defensive matter to the original tax suit if it had been pleaded, but that after judgment it was not competent evidence to impeach the tax deed to the defendant. The court overruled the objection and admitted the tax receipt. Plaintiffs also offered in evidence an abstract of title to the land, which was examined and recertified by L. L. Munsell in 1889 for the purpose of showing that said Munsell, as tax attorney, knew that the plaintiffs were the owners of this land at the time he instituted the tax suit. The court admitted the abstract and found that it was in the handwriting of said Munsell, but that the indorsements on the back thereof of the plaintiffs' names was not, in the court's opinion, in the handwriting of said Munsell. Plaintiffs then called Joshua Sholar, who testified that during the year 1896, and until December of that year, he was the editor of the Current Wave, a newspaper published in Shannon county, and that he had an arrangement with Munsell whereby he was to pay Munsell from 10 to 25 per cent. on all amounts received by him for the publication of notices to defendants in tax suits, and that he did so pay such amounts to him. Plaintiff then called S. A. Cunningham as a witness, who identified a letter, dated December 23, 1901, to Mrs. Evarts, which informed him that the land in question had been sold in 1896 for the taxes of 1892. This was for the purpose of showing that this was the first information the plaintiff had of the tax sale. The defendant then admitted that plaintiffs had paid the taxes on the land for the years 1893 to 1900, inclusive, and that they had offered to pay the taxes for 1901, but found that defendant herein had paid them. Thereupon the court overruled the plaintiffs' objection to the sheriff's tax deed to McGlashen. The defendant then in-

troduced deeds showing a conveyance of the land from McGlashen to Rainey, and from Rainey to Weaver, and from Weaver to Corcoran, and from Corcoran to Pollard and from Pollard to the defendant; the last deed being dated October 22, 1901, and recorded November 6, 1901. The defendants then admitted that Munsell had brought tax suits during the years 1893 and 1895, and that he had never brought suits where the mark, heretofore set out, appeared opposite the tract of land, which mark was the method employed by the tax collector to indicate that the taxes had been paid. This was all the evidence in the case. Thereupon the court entered judgment for the defendant, stating in the judgment that it did so upon the authority of *Hill v. Sherwood*, 96 Mo. 125, 8 S. W. 781. After proper steps the plaintiffs appealed.

1. At the date of the institution of the tax suit in 1895 Job J. Holliday was the apparent owner of the land, as shown by the records in the office of the recorder of deeds of Shannon county. The tax suit was instituted against David Wilson, Job J. Holliday, and H. E. Evarts. It nowhere appears that Wilson ever had any title to or interest in the land. At that time, the books in the office of the recorder of deeds did not show that H. E. Evarts had any interest in the land. The plaintiffs had purchased the land in 1885, and had been paying taxes thereon, either directly to the collector or more usually through their local agent, L. L. Munsell. The taxes for the year 1892 were assessed against H. E. Evarts as owner. Neither Holliday nor Wilson, nor any one else, appeared on the delinquent tax book of 1893 or of 1895 as having any interest in the land. The delinquent tax book for the year 1893 showed that the taxes for the year 1892 were paid by Evarts on June 28, 1894. In making up the consolidated tax book for the year 1895 and prior years, the county clerk entered these lands as delinquent for the year 1892, and named H. E. Evarts as owner. In 1893 the collector of the revenue employed Munsell as the tax attorney. Munsell had previously examined the title to these lands, in 1889, and knew that the plaintiffs were the owners thereof, and had made an abstract of title showing such to be the fact. Before the suit for back taxes was instituted the plaintiffs had paid the back taxes to the collector, and the collector had instructed the tax attorney not to bring suit for these back taxes. When the delinquent tax book for 1895 and prior years was placed in the hands of the collector by the county clerk, and when, by mistake, the county clerk had entered therein that these lands were delinquent for the year 1892, the tax attorney, contrary to the previous instructions of the collector, and with knowledge that the taxes for 1892 had been paid in 1894, instituted a tax suit and entered a note of that fact on the delinquent tax book opposite the descrip-

tion of the land, showing that the suit had been brought against David Wilson and others, and without specifying who the others were. The petition in the back-tax suit alleged that the defendants were non-residents of the state, and upon this showing, and without any affidavit as to that fact, an order of publication was made by the court and published in the *Current Wave*, a newspaper published in Shannon county. The defendants did not appear, and the land was sold on the 10th of September, 1896, by the sheriff to satisfy the tax judgment, and A. E. McGlashen, a third party, became the purchaser, and thereafter the plaintiffs continued to pay the taxes up to and including the year 1900, and offered to pay up the taxes for 1901, but ascertained that the defendant had paid them. The defendant became the purchaser by mesne conveyances from McGlashen by deed recorded November 6, 1901. Thereafter, on the 28th of July, 1902, this action was brought.

The first question, therefore, that arises on this record for adjudication is whether evidence was admissible in this case to show that the taxes for the year 1892 were paid before the institution of the tax suit, or judgment therein, or the sale thereunder, and thereby to defeat the defendant's title acquired by the tax sale to McGlashen, a third, innocent party. It will be remembered that although the plaintiffs acquired title to the land on the 17th of July, 1885, and although they paid the taxes on the land every year thereafter until and including the year 1900, and although the land, during all these years, was assessed to H. E. Evarts, nevertheless the plaintiffs never recorded their deed until the 7th of April, 1900. "The doctrine in this state is that a purchaser at a tax sale, under a judgment for taxes, where the record owner is made the party defendant, acquires good title as against the holder of an unrecorded deed from such apparent owner." *Vance v. Corrigan*, 78 Mo. 94; *Allen v. Ray*, 96 Mo. 542, 10 S. W. 153; *Payne v. Lott*, 90 Mo. 676; 3 S. W. 402; *Crane v. Dameron*, 98 Mo. 567, 12 S. W. 251; *Lucas v. Land Co.*, 186 Mo. 448, 85 S. W. 359. The rule in this state, also, is that a judgment in a tax suit cannot be collaterally attacked by one who was a defendant in that suit, and who was properly brought in by personal service or by publication, nor can the title of a purchaser under such a judgment be defeated by showing that the taxes for which the judgment was rendered had been paid before the institution of the suit, before the judgment was rendered, or before the sale under the judgment. *Hill v. Sherwood*, 96 Mo. 125, 8 S. W. 781; *Jones v. Driskill*, 94 Mo. 191, 7 S. W. 111; *Gibbs v. Southern*, 116 Mo. 204, 22 S. W. 713. Under the law as it existed prior to 1877, when the land was sold by the collector, the law expressly provided that the deed might be invalidated by showing, "first, that the land conveyed by such deed was not sub-

ject to taxation at the time of the assessment thereof, under which assessment such sale was made; second, that taxes due thereon had been paid, according to law, before the sale; third, that such land had been duly redeemed, according to law, or that tender of the redemption money had been made before the execution of such deed." 2 Wag. St. p. 1207, c. 118, § 219. In 1877 the law in reference to the collection of taxes was entirely changed, and, instead of having the county court order the sale of the land, and the collector conduct the sale and make the deed, the act of April 12, 1877, required that suits should be brought in courts of competent jurisdiction for the collection of delinquent taxes, and that parties should be brought in in the same manner as was provided by law in ordinary civil actions affecting real or personal property, and that the general laws of the state as to practice and proceedings in civil cases should apply to tax suits as far as applicable. Acts 1877, p. 386, § 6 (now section 9303, Rev. St. 1899). Thus the whole tax-collecting system was changed in this state, and now it is no more competent to impeach a judgment or a title obtained by a sale thereunder, on the ground that the taxes for which the judgment was entered had been paid, or that the land was not subject to assessment, or that it had been redeemed, than it be competent for an ordinary litigant to defeat a judgment, based on a note or other obligation, on the ground that it had been paid before the suit was brought or the judgment entered or the sale thereunder had. These considerations clearly show the theory of the cases cited which establish the rule above stated. This rule, however, is based upon the predicate that the party seeking to attack the judgment or the title acquired under it was properly brought in as a party in the tax suit. Of course, if the attacking party was not a party to that suit, either by not having been made a party thereto or because the steps taken to bring him in were insufficient to accomplish that end, then the judgment is not binding on him. The question, therefore, always is whether or not the attacking party was a party to the tax suit.

In the case at bar the contention of the plaintiffs is that Evarts was not properly brought in as a party defendant in the tax suit, because, although the petition alleged that he was a nonresident of Missouri, there was no affidavit showing such to be the fact. This raises the question, therefore, whether the mere averment or allegation of nonresidence in the petition is sufficient to base an order of publication upon as to the nonresident, or whether there must also be, in addition thereto, an affidavit showing such to be the fact. It has been above pointed out that section 9303 provides that notices and summons in back-tax cases shall be sued out and served in the same manner as in ordinary civil actions, and that the general laws of the state as to practice and proceedings in civil

cases shall apply to tax cases as far as applicable. Section 575, Rev. St. 1899, being the provision of the Code in reference to orders of publication in suits, *inter alia*, for the enforcement of liens against real or personal property, provides that "if the plaintiff or other persons for him shall allege in his petition, or at the time of the filing of the same, or at any time thereafter shall file an affidavit stating that part or all of the defendants are non-residents of the state, * * * the court in which said suit is brought, or in vacation the clerk thereof, shall make an order directed to the non-resident," etc., notifying them of the commencement of the suit, etc. In some of the cases may be found language which seems to indicate that there must be an affidavit stating the facts of the nonresidence of the defendant, or that the petition which alleges such nonresidence must be verified. A critical analysis of the origin and development of the law in this respect in this state shows, however, that if the petition contains an allegation of nonresidence, although the petition is not verified, or if the petition be silent on the subject and an affidavit is afterwards filed showing the nonresidence of a defendant, the order of publication must be issued by the court, or clerk in vacation, and that either the allegation in the petition, or the affidavit, is sufficient to authorize the order of publication. Prior to the act of February 24, 1849 (Acts 1849, p. 73), there was no such thing known to the laws of this state as bringing in the defendant in a civil action by an order of publication. The practice act of 1835 (Rev. St. 1835, p. 450, et seq.) contemplated bringing in a defendant by a summons, to be personally served on him, or by a *capias*, and the latter could only be issued where the petition was verified. Thus the law stood until 1849, when, by section 8 of article 5 of that act (Acts 1849, p. 78), it was provided that "if any plaintiff or other person for him, shall file with his petition an affidavit stating that part or all of the defendants are non-residents of the state, the court, or clerk in vacation, shall make an order directed to the non-residents, notifying them of the commencement of the suit," etc. Thus the law stood until the Revision of 1855, when it was changed so as to read as follows: "If any plaintiff, or other person for him, shall allege in his petition, or file an affidavit stating, that part or all of the defendants are non-residents of the state, the court, or clerk in vacation, shall make an order directed to the non-residents, notifying them of the commencement of the suit," etc. Section 13, art. 5, c. 128, p. 1224, Rev. St. 1855. In the Revision of 1865 the order of publication was authorized in particular classes of cases, but there was no change from the Revision of 1855 as to the allegation in the petition or in the affidavit as to the nonresidence. Section 13, c. 164, p. 655, Rev. St. 1865. In the Revision of 1879 there was no change. Section 3494, art. 4, c. 59, p. 597, Rev. St. 1879. The

Revision of 1899 was the same except the language in reference to the allegation of nonresidence was changed so as to read: "If the plaintiff, or other person for him, shall allege in his petition, or at the time of filing the same, or at any time thereafter shall file an affidavit stating," etc., and such is the language of section 575, art. 4, c. 8, p. 244, Rev. St. 1899. Thus it appears that from 1849 to 1855, in order to obtain an order of publication, it was necessary for the plaintiff or some person for him to file with the petition an affidavit of nonresidence, but since 1855 it has been sufficient for the plaintiff, or some person for him, to allege in the petition, or file an affidavit at the time of filing the petition (and since 1889 to file such affidavit at any time after the petition is filed), alleging nonresidence. Pleadings in this state are not now required ordinarily to be verified, and such is the fact in reference to tax suits. There is, therefore, nothing in the contention of the plaintiff that the order of publication in this case was issued upon the mere allegation of nonresidence in the petition, without the petition being sworn to, and without any affidavit of the fact of nonresidence being filed. When the party is properly brought in by an order of publication in a tax suit, the judgment in that suit is as impervious to collateral attack for any defect or imperfection in the service that is not apparent upon the face of the record in the tax case, as in any other kind of a judgment. *Tooker v. Leake*, 146 Mo., loc. cit. 430, 48 S. W. 638, and cases cited; *Crossland v. Admlre*, 149 Mo., loc. cit. 656, 51 S. W. 463; *Parker v. Burton*, 172 Mo. 85, 72 S. W. 663; *Cummings v. Brown*, 181 Mo. 711, 81 S. W. 158; *Kelly v. Murdagh*, 184 Mo. 377, 83 S. W. 437; *Land Co. v. Land & Cattle Co.*, 187 Mo., loc. cit. 435, 86 S. W. 145. As was well said by *Vaillant, J.*, in the case last cited: "The order of publication serves, as far as it can, the office of the summons; but, though a summons may be altogether correct in form, it does not avail to bring the defendant into court unless it is served on him according to law. When the law is driven, from the necessity of the case, to authorize a judgment that will affect the property rights of an absent or unknown defendant, on a notice by mere publication in a newspaper, it demands of the plaintiff a strict compliance with the terms of the statute under which the publication purports to have been made." In fact, all through the cases, especially tax cases, runs the thread that a strict compliance with the statute is demanded, and that the court will critically examine every step and feature of the proceeding in order to determine whether the owner of the property has lost his right thereto, and the purchaser at the tax sale has acquired it. In the case at bar no essential requirement of the law has been neglected, with respect to basing the order of publication upon the allegation of

nonresidence in the petition, and in not requiring an affidavit to that effect.

2. The plaintiffs contend that the order of publication was wholly insufficient, and that the title of the purchaser acquired at the tax sale is a nullity, because the order of publication was to "H. E. Evarts," whereas his name was "Henry E. Evarts." The court, following the strict rules of interpretation, especially in tax cases, above indicated, has held that while the general rule of law is that in a notice or process the first Christian name is necessary to a valid judgment, and the middle name is no part of defendant's name, still in tax cases, if the suit is against a nonresident, in the name by which he has described himself in deeds, even though that be simply initials in place of a full Christian name, the notice is sufficient, but that where the nonresident defendant was simply known as "Vaughan Turner," and was so described in the tax assessment, notice of publication and judgment, when his full name was 'Singleton Vaughan Turner,' by which full name he had been described in a conveyance to him of the land charged with the taxes, the sheriff's deed under the judgment, in the suit where he was simply described as 'Vaughan Turner,' was insufficient to convey the title." *Turner v. Gregory*, 151 Mo. 100, 52 S. W. 284. In *Vincent v. Means*, 184 Mo. 327, 82 S. W. 96, it was held that a judgment against "M. C. Vincent," under an order of publication, in a suit wherein he was notified by publication under the name of "M. O. Vincent," was void, as against "Minos C. Vincent," there being no evidence to show that the defendant had ever received deeds to the land or conveyed the land in the name of "M. C. Vincent," and the general rule was announced "that the first Christian name of both the plaintiff or defendant in all judicial proceedings should be set forth in full. 'Initials are not a legal part of the name, the authorities holding the full Christian name to be essential.'" But that this rule was subject to exception in cases where the party defendant received deeds or made deeds using only his initials. In *Spore v. Ozark Land Co.* (Mo. Sup.) 85 S. W. 556, which was a proceeding like this, under section 650, it was held that the judgment for taxes, where the owner was brought in by publication against "W. D. Spore," was void, and the purchaser at the sale thereunder acquired no title as against "William D. Spore," the deed to the land sold for taxes having described the defendant as "William D. Spore." *Gillingham v. Brown* (Mo. Sup.) 85 S. W. 1118, was an action under section 650. It was held that a judgment in a tax suit against "A. H. Gillingham," and a sale under that judgment, were void as against "Aubrey H. Gillingham," where the deed which originally conveyed the land to Gillingham described him as "Aubrey H. Gillingham." In the case at bar the deed to the plaintiffs had not been recorded at the date of the institution of the

back-tax suit. The land was assessed to "H. E. Evarts," but the tax attorney who brought the suit knew that the plaintiffs, Henry E. Evarts and Mary Evarts, were the owners. Henry E. Evarts had done nothing to induce any one to believe that his name was "H. E. Evarts." He was a nonresident of the state. The ordinary rules of law, therefore, obtain in this case, that, in order to bring him legally into court by an order of publication, he was entitled to be sued and notified according to his full Christian name and surname. Following the principle announced in the cases cited, the judgment and sheriff's deed following the judgment must be held to be void, and to confer no title upon the purchaser at the tax sale.

3. It is next contended that the tax judgment is void because of fraud in the very concoction thereof. The fraud relied on consists in the fact that the tax attorney who brought the tax suit had formerly been the agent of these nonresident plaintiffs for the payment of the taxes on the land in question, and that he knew before he brought the suit that the taxes for the year 1892 had been paid (counsel in the briefs say by the tax attorney himself, as agent of the plaintiffs, but the abstract of the record does not show that to be the fact), and in addition thereto said tax attorney had been ordered by the tax collector not to bring suit for the taxes for the year 1892 against the land in question, because they had been paid. Yet, in spite thereof, he instituted the suit, and entered on the delinquent tax book that the suit was against David Wilson, and others, thereby not disclosing to the collector, or any one else, who the others were; and that he did so for the purpose of sharing in the fees that would accrue from the publication of the notice of the suit, and that he did share therein. There can be no question about the bad faith of the tax attorney in so doing, and in *Harness v. Cravens*, 128 Mo. 233, 28 S. W. 971, a conveyance to the attorney in a back-tax case who became the purchaser at the tax sale, under a judgment for taxes that had been paid before the suit was instituted, was held to be void. That case is not here referred to as establishing the general rule in this state; for, as herein pointed out, the mere fact that the tax had been paid before the suit was instituted or the judgment entered or the sale made would not defeat the title of the purchaser, or render the judgment void, if the defendant had been properly brought into court, but it is referred to for the purpose of showing that, if the tax attorney in this case had been the purchaser at this sale, no court of conscience would hesitate to declare his title void, because of his actions in the premises, but a third, and so far as the record shows an innocent party became the purchaser at that sale. This puts a different phase on the case, and distin-

guishes this case from the case of *Harness v. Cravens*, where the attorney became the purchaser. Here one of two innocent parties must suffer, and the guilty party is not before the court to receive the punishment he deserves. The plaintiffs were negligent of their rights by not recording their deed to the land until after the tax sale. The purchaser at the tax sale, therefore, had a right to rely upon obtaining the title of the apparent owner, and of getting a better title than that acquired under an unrecorded deed from the apparent owner. The suppression of the fact from the knowledge of the court that the taxes had been paid was not such a fraud in the very concoction of the judgment as made the judgment void. In *Hamilton v. McLean*, 139 Mo. 678, 41 S. W. 224, speaking to this point, Burgess, J., said: "The fraud must be in the procurement of the judgment, and not simply in the cause of action on which the judgment is founded, and which could have been interposed as a defense, unless its interposition as a defense was prevented by fraud of the adverse party." See, also, *Bates v. Hamilton*, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407. The conduct of the tax attorney in bringing the suit after he knew the taxes had been paid did not prevent the defendant from interposing a defense of payment to the suit, and did not of itself constitute a fraud in the procurement of the judgment; there being nothing here to show that there was any fraud practiced upon the defendant to prevent his interposing that defense.

For the foregoing reasons, the judgment of the circuit court is reversed, and the cause remanded, with directions to the circuit court to enter a decree in favor of the plaintiffs. All concur.

OHRISMER et al. v. BELL TELEPHONE CO.

(Supreme Court of Missouri, Division No. 1.
Feb. 26, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—METHODS OF WORK.

In an action for the death of defendant's servant, it appeared that deceased was employed with other workmen in repairing defendant's cable crossing beneath the Missouri river. A barge floated a distance amid stream was located broadside to the current, and the cable was hoisted from the river bed and, being elevated over, rested upon the barge, which thereby performed the several offices of a platform for the men to stand on, workshop and a place to hold the cable in view. The cable elevated on the barge slackened and disappeared in the water about 15 feet from the barge and in addition thereto was a strand of wire extending to the shore, which also slackened when not in use, disappearing in the water at about the same place. Deceased was drowned while being rowed from the shore to the boat by reason of the oar coming in contact with the cable or strand, whereby the boat was overturned. *Held*, that defendant was not guilty of negligence in connection with the use of the barge and the plan of work adopted.

2. SAME—TRANSPORTATION OF SERVANT—SAFETY OF BOAT.

Where an employer furnished a safe boat with which to row its employes to their place of work, the fact that the boat was provided with tight oars did not render the employer liable for the death of a servant who was drowned by the overturning of the boat.

3. SAME—FELLOW SERVANTS.

Where it was necessary for a master to transport its servants in a rowboat to their place of work, and it used proper care in furnishing a suitable boat and competent oarsmen, it was not liable for the death of one of such servants caused by the overturning of the boat, where in the absence of its foremen, and unknown and unsanctioned by them, the workmen substituted an incompetent oarsman in place of the one furnished by defendant.

4. SAME—RISKS ASSUMED.

Where the work of repairing a cable which crossed beneath the waters of a river made it necessary for the workmen to go back and forth between the shore and a barge in a rowboat, a servant who knew the whole plan of the work and had taken part in putting all the appliances in position assumed the dangers attending the navigation in question.

5. SAME—FELLOW SERVANTS—VICE PRINCIPAL.

Defendant employed workmen to repair its cable crossing the Missouri river. The mode of work required a barge, which was floated amid stream, and the workmen were required to go back and forth between the barge and the shore in a rowboat. For this purpose defendant employed a suitable person, who was the owner of the boat. *Held*, that such boatman was not a vice principal of defendant so as to render it liable for his act in permitting an inexperienced person to row.

Valliant, Gantt, and Burgess, JJ., dissenting.

Appeal from Circuit Court, Franklin County; John W. McElhinney, Judge.

Action by Mamie Chrismer and others, by their next friend, against the Bell Telephone Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Seddon & Holland, for appellant. Chas. E. Peers, Jesse H. Schaper, and John W. Booth, for respondents.

LAMM, J. This action was brought by the three minor children of Edward L. Chrismer, for the death of said Edward by the alleged negligence of defendant corporation. The trial resulted in a judgment in their favor for \$3,200, signed by 10 out of 12 jurors, and defendant appealed to this court on assignments of error, one of which challenges the constitutionality of the law permitting less than 12 jurors to render a verdict. As such constitutional question, since *Gabbert v. Ry. Co.*, 171 Mo. 84, 70 S. W. 894, decided December 24, 1902, is no longer considered an open one, it is not deserving of, and therefore will not receive, attention; but as the appeal in this case was taken prior to the date the opinion in the *Gabbert* case was handed down, the cause will be considered on its merits.

Attending to the case made on the facts, it is as follows: Edward L. Chrismer was the rise of 35 years of age, and was an employe of appellant corporation from March

18, 1901, to July 13th of the same year. Prior to his taking service with appellant, he was a lineman and had worked for railroad companies and in "building artesian wells," but was a novice as a river waterman. After becoming appellant's servant, he worked in a construction gang and part of the time on cable work, so that, on July 13, 1901, it befell that he was one of a construction and repair gang of 12 men engaged on the repair of appellant's submarine cable crossing the Missouri river from Washington in Franklin county to the north shore of said river in Warren county. This gang was under Thompson, a general foreman, and Caesar, a subforeman. It seems that appellant's cable was connected with the aerial wires and poles on either shore and consisted of a bundle of wires compressed in a jacket or otherwise held together in a cable form two inches thick. As it lay on the river bed it got out of repair, and about five days prior to the date in question, said construction and repair gang came from St. Louis to raise and repair the cable. The plan and modus operandi adopted for the work were as follows: A water craft was chartered. This craft, called a flatboat or barge, was a craft with rake ends, standing, as laden at the times in hand, about three feet from the gunwale to the water line, was about 35 or 40 feet long by 15 feet wide, and was such a craft as was generally used for carrying material, freight, ferrying, etc., on river waters. It was equipped with pulleys and certain mechanical appliances, among others, those appurtenant to bringing material from the shore on a steel wire. As the said cable is distinguished in the evidence from said steel wire, the latter being called a "strand," and as the witnesses do not always discriminate in their testimony between the cable and the strand, hereinafter, to aid in clearness of statement, said cable will be referred to as the "cable," and "strand" will be used to designate the steel wire aforesaid, which wire was $\frac{3}{16}$ of an inch in diameter and extended from the barge as it lay in the river to the south or Washington shore, where it was fastened to a stake close to where the cable emerged from the water. The Missouri river at this point was about one-half a mile wide, and runs from the west to the east. Its current lay toward the south shore and ran swiftly at from 6 to 10 miles per hour, because of being deflected by a bar or reef and a point of rocks near by, and it was further accelerated at the north and south rake ends of the barge as it lay anchored broadside to the current, as will be presently shown, and the muddy waters concealed from the eye objects lying beneath their surface. This barge, floated a distance amid stream, was located broadside to the current, and the cable was hoisted from the river bed and, being elevated over, rested upon the barge, which thereby and afterwards performed

the several offices of a platform for the men to stand and work on, a workshop, and a place to hold the cable in view and in place for repair. As the work progressed the barge was from time to time worked or moved from the north towards the south, the cable still lying thereon, and the defects thus exposed to view were repaired. The repairs consisted in cutting out defective portions of the cable and splicing in new pieces and in incasing certain portions of the cable with iron pipe. In addition to said strand extending from the barge to the south shore and there fastened to a stake, certain wires were stretched from the barge up stream to a dock, and the primary office of these latter wires was to hold the barge in place against the current. When necessary to move the barge towards the south shore, as we understand the record, the said strand was called in play and manipulated by appliances operated in connection therewith, and which strand, as said, was otherwise used in transporting material from the shore. When so used in either capacity, it was elevated over the surface of the water, held taut and the material brought to the barge from the shore by means of a rope and pulley on the strand, or the barge was moved toward the shore in line with the cable, as the case might be. When not in use, the strand was permitted to slacken into the water, and when so slack it entered the water about 15 feet from the barge and reappeared a short distance from the south shore, and the evidence shows that continuously for two days before the 13th of July the strand lay slack in the water, subject, maybe, to some deflection by force of the current. The cable, elevated on the barge, returned to and disappeared in the water about the same distance from the barge as did the strand. The portions of the cable and strand elevated over the barge were in plain view from the south shore, and they could be seen from the points where they left the barge to the points where they entered the water, but the rolled condition of the water, as said, concealed both cable and strand at once upon their striking its surface. The work had progressed for five days or so and the barge had been moved south from time to time until it was within 150 feet or thereabouts of the south shore, and there it remained in position over the night of July 12th. The construction gang lodged and ate in the town of Washington, and the plan adopted for getting the men to and from their work was this: A skiff was hired from one Hugo Lambke, and with it he was hired as an oarsman. He and his boat were paid for at \$2 per day. Lambke was within a month or so of 20 years of age. His regular employment was a cob-pipe maker in a cob-pipe factory in Washington, but he was a water-man; had been for years skilled in the use of oars and in rowing skiffs on the Missouri river, in fishing, in catching drift and ferry-

ing people (principally his own kin) over the river and rowing them to and fro thereon. While some comment is made by respondents' counsel on his age, yet the case is presented to us substantially on the theory that he was an adept and, hence, a competent riverman. His skiff was 15 feet 10 inches long, 16 inches deep, 4 feet 4 inches wide at the top and 2 feet 5 inches wide at the bottom, and was such a skiff as was usually employed in navigating the Missouri river and other like waters. It was equipped with two pairs of oars, and these oars were "tight oars," otherwise known as swivel oars—that is to say, the oarlock was so arranged that when the oar was in position it was tight; the oarlock being fastened to the oar by an iron pin about the size of an eight-penny nail transversing it and the lips of the oarlock. The oarlock had a circular iron pin as thick as one's finger and about two or three inches long, dropping therefrom, and which pin fitted into a hole or socket in the gunwale and revolved there as a pivot with each oar stroke. While this was the usual oar and oarlock used on boats of this character in navigating this stream and like waters, yet there was evidence that a different sort of oarlock was sometimes, but rarely, used. For instance, a cut was made in the gunwale of a boat in the form of the letter "U" and the oar was loosely placed in this cut. Another device was to insert pegs in the upper edge or gunwale of the boat, and the oar would be placed in and worked between these pegs, but neither of the latter appliances was shown to be in usual use. In fact, of all the boats known to the witnesses and used on these or similar waters, there was but one that was shown to be equipped with any oarlock appliances or oars differing from those used on Lambke's boat, and that was a light pleasure boat known as a clinker-built boat, i. e., a lap-streak boat, so designated because of the exterior boards' overlapping like the weather-boarding on a house. Sundry dangers were indicated by the evidence pertinent to the use of tight oars or swivel oarlocks. For instance, in the turbid Missouri river water, where submerged snags and other obstructions abound and are not discoverable, to dip a tight oar too deeply in a swift current might cause the blade of the oar to catch on a sunken obstruction, whereat the pressure of the current might lock the oar in position and tighten it so that the oarlock pin could not be, in such emergency, pulled out of its socket in the gunwale and this might either result in breaking the oar or overturning the boat; whereas it was shown that the loose oar, on meeting such obstruction, would automatically adjust itself to the circumstances, or could be unshipped by a twist of the wrist.

In this connection the following occurred at the trial, referring to Lambke's skiff: By appellant's counsel: "Will counsel ad-

mit that this was a suitable boat and suitable appliances for crossing this river at this point?" By Judge Booth, one of respondents' counsel: "It would be if those obstructions were not there." By Mr. Holland: "Apart from obstructions and dangers you admit that this was a proper boat to cross this river at that place?" By Judge Booth: "Except for these appliances and obstructions, yes." From which it would appear that, the oarlocks and the method of fastening the oars therein and to the boat excepted, it was admitted that Lambke's boat was a suitable craft for transporting the men to and fro. Lambke's duty was to row the men back and forth from the south shore to their work, and between times to fetch and carry from the town ice and water and buy ice for the men. He generally took the men in two cargoes—once in the morning in two trips, back and forth at noon and back at night, making eight trips with men each day. While he could row his skiff with five or six men across the Missouri river and had done so prior to his employment, yet in the stiff current it was best to have an additional rower, and accordingly two of the construction gang, confessedly experienced oarsmen, Johnson and Haines, were assigned by appellant's foreman to assist him, and Caesar and Thompson also assisted somewhat once in a while. In this construction gang was one Byrnes. The evidence showed that while Lambke considered him a fair oarsman, yet that, in fact and in truth, he was unskilled and unfit for that work, and had a knack of using his oars too deeply in the water as if, to use the chimney-corner expression of one witness, he was "digging potatoes." The only instructions given to the oarsmen, including, Lambke, were to land on the down-stream side of the barge at a little distance from its southeast corner. Here the force of the current was broken by the barge and dead water existed, and it was the safest and the proper place to disembark and embark the men. The route this skiff took on its trips was left optional with the rowers; that is to say, no directions whatever were given by Thompson or Caesar. There was evidence, however, that in leaving the south shore advantage could be and was sometimes taken of a little dead water right at the shore to row west up stream and then strike the current and get up away farther and then drift across, aided by the current, slantwise, northeast to the barge landing, crossing the cable and strand en route. If such crossing were made, say 20 feet from the barge, there was no danger, but if the crossing was closer to the barge than that, there was danger of fouling an oar on the strand or cable. There was other evidence in the case that the usual course of the skiff was to keep east of the cable and strand, i. e., on the down-stream side, the whole way across, and that by heading the boat properly

and holding it skillfully with the oars, the force of the current could be used to drift the boat across quite to the barge landing to the east of the cable and strand. This course would not involve crossing the strand or cable at all; and the record shows the boat had made as many as 50 trips without accident up to the morning of July 18th. Shortly after 6 o'clock on the morning of July 18, 1901, before the foremen got to the levee, and at an unusual hour (though there is evidence that the men were instructed to get an early start that morning), five of the men, inclusive of Lambke, appeared at the levee when neither Johnson nor Haines were present, and boarded this boat, to wit, Chrismer, Byrnes, Pollard, and Couzzens, for the purpose of going to the barge to their work. Lambke held the bow oars—that is to say, he was next to the bow of the boat, and his back, when seated, was to the bow. The next seat was occupied by Byrnes, who took the second pair of oars. One of the men, Chrismer, took the stern seat. Pollard and Couzzens are not located by the testimony. As they were about to get under way and leave shore, Johnson appeared some distance away and demanded to be taken aboard, but Byrnes foolishly called to him that he (Byrnes) would take the oars, or that Johnson could go, or await the next trip, and there is some evidence that Lambke then and there permitted Byrnes to row, or said he might row, thinking him a competent oarsman. As the skiff left shore, the oarsmen rowed up stream getting west of the strand and cable, and, in undertaking to drift across and reach the barge landing, they came too close to the barge; Byrnes' starboard oar, plying too deep, fouled on the strand or cable three feet under water; the current drove the boat and locked oar against the strand or cable and overturned the boat in drowning water; two of the men, Chrismer and Byrnes, seized the strand when shipwrecked but were speedily washed off and drowned; the others floated down stream and were picked up alive. Lambke, having escaped drowning by the skin of his teeth, as it were, refused longer employment with appellant, but his boat was used after the accident to transport the men until the work was completed without further incident. There was evidence that the construction gang had placed this cable and strand in position and none to the contrary; so, too, that Chrismer took part in it; also indicating that he knew that the strand, as well as the cable, were slackened into the water, and made no objection thereto, and that he was familiar with the uses to which the strand was put. There was no evidence that he was invited to go or made any objections to going with Lambke and Byrnes as oarsman, or that he remonstrated when Johnson was refused admission to the boat, nor was there any evidence that appellant, through its foremen, had any notice of the plan adopted by the

men in crossing that morning or participated in any way in the arrangement then spontaneously made by the men. The record, furthermore, shows that Byrnes had helped row one or more times, but that the foremen did not know he had taken it upon himself to row at such times, and it is shown that neither of the foremen designated him as an oarsman. It was shown, too, that if Byrnes had not used a negligently deep stroke, the cable or strand could have been crossed safely even as close to the barge as the boat had been steered or drifted.

On March 6, 1902, the widow of Chrismer brought suit against appellant, but having been instituted later than by statute permitted, it was dismissed, and in lieu thereof, and within the year, his minor children brought this action, with the result aforesaid. The cause was tried on a second amended petition and the gist of the complaint, omitting the general allegations by way of inducement and descriptive of the situation, plan of procedure, appliances used, etc., is shown by the following excerpt therefrom: "That the making and maintaining of said obstruction to navigation in said river by defendant was wrongful, careless, and negligent. That with the said obstructions in said river, the said skiff, of the dimensions aforesaid, and with oars, pins, and sockets, together operable as aforesaid, was unsuitable, defective, and dangerous for use as the same was so provided to be used, and actually used by defendant as aforesaid; and that the providing of the same, and the using of the same as aforesaid was wrongful, careless, and negligent. That the failure of defendant to provide and furnish a sufficient number of oarsmen competent to safely row and run said skiff was wrongful, careless, and negligent. That the conduct of defendant in transporting its said servants in said skiff as aforesaid with one of two oarsmen rowing the same being unskilled and incompetent was wrongful, careless, and negligent. That the conduct of defendant in suffering and causing the transportation of said Edward to said barge to be as aforesaid, with said Lambke and said Byrnes acting as oarsmen of said skiff, to be begun and continued to the overturning of said skiff as aforesaid, was wrongful, careless, and negligent. That the adoption and execution by the defendant of the plan on and according to which the defendant caused the said work to be done, and its servants to be transported to and from said barge, was wrongful, careless, and negligent. That by each and every of its said wrongful, careless, and negligent acts and proceedings the defendant wrongfully, carelessly, and negligently, during the entire time of the prosecution of said work, put each of its said servants in imminent danger of being drowned in the waters of said river. That the said death of said Edward was caused by the wrongful acts,

neglects, and defaults of defendant, hereinbefore stated and alleged."

It will be seen that the liability of appellant is predicated, in the petition (1) of negligence in making and maintaining an obstruction to navigation; (2) of failure to provide a sufficient number of competent oarsmen, and of transporting decedent in a skiff with one of two oarsmen incompetent, and of suffering and causing the transportation of Chrismer to be begun and continued under such circumstances; and (3) that the whole plan of procedure, together with the appliances used, the tout ensemble, to wit, the obstructions in the river (the barge, cable, and strand), the skiff of the dimensions aforesaid, plying back and forth, the oars, pins, and sockets, etc., were dangerous and defective when used together as indicated. Appellant stood on a general denial, coupled with a plea of contributory negligence, and coupled with a further plea of full knowledge in Chrismer of the plan, procedure, and appliances aforesaid, or that, by the exercise of ordinary care, these things might have been known to him, and that the dangers were open and obvious, and that Chrismer knew the qualifications of his co-workers, etc., and assumed the risk incident to the work. In an elaborate brief appellant's counsel present a formidable aggregation of assignments of error touching many rulings of the trial judge in giving as well as in refusing instructions, in modifying instructions asked, and in excluding as well as in permitting evidence, none of which need consideration until such time as it is first determined whether or not other existing assignments of error, based on the refusal of mandatory instructions to find for defendant on the several specifications of negligence pleaded in the petition, and pressed upon us on review, are allowed; for, if there was error in refusing such mandatory instructions, any other errors become of no controlling importance in the case. In other words, if the case was not entitled to go to the jury at all on any of the specifications of negligence, then the way it was put to the jury by the court in other instructions, and errors, if any, against appellant relating to the admission or exclusion of testimony, become one and all academic matters and in the air.

1. Appellant prayed the court to give an instruction (No. 9) to the effect that there was no evidence of negligence in connection with the barge used by defendant, which instruction was refused. We think it should have been given, because respondents complain of an "obstruction to navigation" in the river and of the "plan" adopted. Now, the barge was an obstruction, and it was a principal element in the "plan." Its use under the evidence was either negligent or not. As no conceivable and reasonable plan for raising the heavy submarine cable and holding it up for repair, except by some raft

or float or other craft of sufficient capacity and buoyancy to hold the men, together with their tools and appliances, is suggested or occurs to us, and as such craft must needs be stayed or anchored to fill its office and thus become some "obstruction to navigation," and as the barge is in no wise assailed by respondent as unsuited to the problem to be solved in repairing the cable, we cannot see why the jury were not told that no negligence could be predicated of its use. And this is so for other reasons, viz.: The chief offender, the one really struck at as an obstruction, is the cable and strand. Not only so, but there is no proof that the barge itself caused the accident or contributed thereto. If such barge in a hypothetical case, say, for instance in the nighttime, should be anchored out in a navigable stream, with no signal lights displayed, and thereby cause damage to some craft or person lawfully navigating the stream, a different case might arise, but under the facts disclosed in this record, as respondents complain of the elements of the plan as well as of the plan itself, the appellant was entitled to analyze the negligence into its constituent elements, and eliminate those elements one by one from the consideration of the jury if unsupported by evidence.

2. Appellant asked and was refused an instruction (No. 11) to the effect that there was no evidence in the case that the skiff in question was not reasonably safe for the purposes for which it was being used by appellant at the time of the accident. To the same ultimate effect was a refused instruction (No. 16) relating to the oarlocks. In our opinion the jury should have been given these instructions, and this for the reasons last above and for others to be presently considered. It must not be forgotten that by an admission, the suitability of the boat to the particular use, its general health, so to speak, in soundness, depth, length, and width, together with the fact that it was laid down and built on proper lines, were each and all, by necessary inference, put out of the case as elements of negligence. The only reservation made by respondents' counsel in said admission (q. v.) as we construe the record, was that the oarlocks and the method of fastening the oars therein and to the boat were excepted from the scope and tenor of the admission, so far as the boat itself and its appliances are concerned. In considering these oarlocks and the method of fastening them to the oar and to the gunwale, we are met by the fact that, under the evidence, they were the usual appliances in use on boats on like waters. To this condition of things the law applies several rules, viz.: The master does not insure against danger, but against negligence. He is bound to use ordinary care in supplying reasonably safe tools and appliances to his servants. But this does not mean that he is to conform to every new invention, nor yet that he

must use the best tools and newest appliances obtainable. The test of negligence is the ordinary use of the business. The standard of ordinary care is the conduct of ordinary prudent persons under like circumstances. The rules of law applicable to the facts of this case are, in matter and style, formulated in a way soothing to the legal mind in *Titus v. Railroad*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944, quoted approvingly by this court in *Minnier v. Ry. Co.*, 167 Mo., loc. cit. 119, 66 S. W. 1078, thus: "Some employments are essentially hazardous, * * * and it by no means follows that an employer is liable 'because a particular accident might have been prevented by some special device or precaution not in common use.' All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the ordinary prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community." To the same effect is Missouri case law. See, for example, *Bohn v. Railroad*, 106 Mo., loc. cit. 433, 434, 17 S. W. 580; *Steinhauser v. Spraul*, 127 Mo., loc. cit. 562, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441; *Blanton v. Dold*, 100 Mo., loc. cit. 74, 18 S. W. 1149; *Blundell v. Miller Mfg. Co.* (decided this term and not yet officially reported) 88 S. W. 108. The only evidence tending to show the want of due care in the selection of oarlocks is based on the showing that, in a certain contingency, a tight oar cannot be unshipped, nor can the oarlock be withdrawn from the gunwale of the boat. But due care cannot be settled by one incident or a single hypothesis. No oarsman would select an oarlock appliance with reference to one possible incident or one fortuitous combination of circumstances in rowing. Such selection would be determined by considering the

greatest average merit of the oarlock appliance in the long run and for general use, and this is, broadly speaking, in line with the philosophy of Bentham's famous dictum, viz.: That the right end of all human action is the creation of the largest balance of happiness. A method of determining the merits of a "U" oarlock, or "peg" oarlock and a loose oar, wherein one possible contingency would be allowed to control, would lead to the rejection of such appliances out of hand as unsuitable. For instance, loose oars are easily lost overboard, and such an accident might leave the boat occupants helpless in choppy or in insidious waters. Again, in mechanics an oar is but a lever; the oarlock is the fulcrum, so that, given a loose oar, the distance from the fulcrum to the power or weight is liable to shift or vary between the oars and result in an uneven or unsteady stroke and prevent, in such contingency, true and safe rowing. In summing up the comparative merits of a tight oar and a loose oar, considering the general use of the oar and the variety of incidents to be met with in rowing, it would not appear that the merits in favor of one and against the other are appreciable; and when the rules of law aforesaid are applied to the conceded record facts here, it seems to us that appellant was entitled to the instructions now under consideration.

3. If we are right in our holdings, aforesaid, then appellant was entitled to its instruction No. 12, to the effect that there was no evidence upon which any negligence could be predicated of the use of the skiff in connection with the barge; for, conceding that the barge, anchored as it was in the stream, was a proper craft to be used in the plan for repairing the cable, and conceding that the skiff and oarlocks were those in ordinary use by ordinary prudent persons in navigating the Missouri river and like waters, the principle invoked in this instruction results as a matter of inexorable logic and proves itself.

4. One of the charges made against defendant is "that the failure of defendant to provide and furnish a sufficient number of oarsmen competent to safely row and run said skiff was wrongful, careless, and negligent." Another is "that the conduct of defendant in transporting its said servants in said skiff as aforesaid with one of the two oarsmen rowing the same being unskilled and incompetent was wrongful, careless, and negligent." The same charge, by other words, is made against defendant in another paragraph of the petition. In this condition of the pleadings appellant asked and was refused certain instructions which told the jury, in effect, that there was no evidence of the negligence complained of in the aforesaid specifications. In our opinion appellant was entitled to these declarations of law, because: (1) it is conceded that Lambke was a competent oarsman; (2) it is conceded that there were two other competent oarsmen in appel-

lants' employ, viz., Haynes and Johnson; (3) it is uncontradicted that these men were assigned by appellant to assist Lambke in rowing, and (4) it is not pretended that more than two competent oarsmen were necessary. So that the record before us established quite beyond cavil that appellant came up to high-water mark in the performance of the duty it owed its servants in this particular. If, then, in spite of the due care of appellant, its servants sought to follow a plan of their own, hatched on the spur of the moment and in the absence of appellant's foremen, unknown to them and therefore unsanctioned by them, and substituted an incompetent oarsman in the person of Byrnes, or, if Byrnes obtruded himself without the knowledge of appellant in the office of oarsman with the permission of those in the skiff, and refused Johnson permission to take the oars, the non-liability of appellant for this substituted and negligent plan of procedure and the results following its adoption is shown by a mere colorless and bald statement of the facts. The master is not required to be present at every precise instant of time to anticipate and guard against whimsical negligence of those of his servants who are fellow servants to each other, but he has the right to assume in such class of business as this, in the present state of the law, that his servants will act with good sense and discretion toward each other.

5. This brings us to the consideration of the only remaining feature of the plan adopted, to wit, the cable and the strand—the one going over, and the other attached to, the barge, and from thence both disappearing in the water and continuing thereunder to the shore. It is contended by respondents that this condition of things constituted actionable negligence, and in reply to this contention appellant insists (1) that it was not negligent, and that (2) the danger was incident to the work, and that it was obvious to decedent and, hence, that he assumed the risk. At the threshold it may be said that in repairing a cable elevated on a ship, certain portions thereof would necessarily appear above the surface, and other portions would be beneath. In this particular the thing speaks for itself, and it is not contended that any recognized plan for repairing a cable would omit or obviate this condition of things. Nor is it contended by respondents that the strand was an unnecessary element in the plan. The contention of respondents is that (1) it was allowed to sag in the water, and (2) that it not only sagged into the water but that the force of the current deflected it downstream, so that its exact position could not be calculated by an oarsman. If the boat had undertaken and pursued a course wholly east of the strand and an oar had fouled on that portion of the strand deflected down stream and lying in the course of the skiff, a different problem might possibly be pre-

sented to us for consideration. But the case made on the evidence is that the boat got west of the strand, and, as the strand was attached to the south end of the barge, it must necessarily cross back to the east of the strand in reaching the landing at the east side of the barge, and, in doing so, Byrnes fouled his oar on the sunken strand or cable. So that, so far as the human eye can see, the same result would have followed whether the strand had been deflected down stream or whether it had pursued a course directly towards the shore from where it disappeared in the water. Assuming that appellant was not responsible for Byrnes' acting as oarsman, and assuming further that his negligent use of the oar too deeply under water caused the disaster, and that the boat with proper rowing would have safely crossed the strand at that spot, it would seem that the case on this head is disposed of before the question of the assumption of risks is reached. But if not so disposed of, the question is in the case and the contention of appellant that a mandatory instruction, to the effect that Chrismer assumed the risk, should not have been refused, as it was, bespeaks consideration. Held against the current by wires fastened at one end to a dock upstream and to the barge at the other, it is self-evident that a barge so riding on the water would not of itself hold taut a strand at right angles to such wires, fastened to the south end of the barge and to the south shore. If such strand were kept taut above the water by other means, its constant tendency would be to drag the barge shoreward and interfere with the work. The strand being put to the use of (1) working the barge shoreward, when such movement was necessary, and (2) to bringing material from land, no reason is apparent why it might not be properly slackened into the water when out of use. That it was so slackened for two days prior to the accident was known to decedent. The fact of the cable being in the water was also known to him. The whole plan of procedure was known to him, and he had taken part in putting all the appliances in position. That dangers attend all navigation and that peculiar dangers attended the navigation in question must be admitted, but these dangers of strand, cable, skiff, oars, oarlocks, barge, current, and depth of water were all open and obvious to Chrismer; were incidental to the business in hand, and therefore were assumed by him, as a matter of law, in the absence of the active negligence of the master producing the injury. *Fugler v. Bothe*, 117 Mo. 475, 22 S. W. 1113; *Holman v. Union Iron & Foundry Company*, 133 Mo. 470, 35 S. W. 280; 2 *Current Law*, p. 823, and cases cited; 1 *Labatt, Master & Servant*, § 3. Appellant, therefore, was entitled to its mandatory instruction covering the risks indicated by the record.

As the result of the oral argument the writer of this opinion differed with his Brethren

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on the theory that appellant was liable for the negligence of Lambke in permitting Byrnes to row. He was inclined to the view that, in navigating the boat, Lambke was captain of the craft and stood in the shoes of the master as a vice principal, but a patient examination of the record shows such view fanciful and unsound under the pleadings in this cause. Under the view entertained by us it will not be necessary to pass upon the other assignments of error.

Respondents' case should have been taken from the jury, and the judgment is therefore reversed.

PER CURIAM. On a rehearing in banc the foregoing opinion of LAMM, J., was adopted as the opinion of the court.

BRACE, C. J., and FOX and MARSHALL, JJ., concur. VALLIANT, GANTT, and BURGESS, JJ., dissent.

The judgment of the circuit court is accordingly reversed.

VALLIANT, J. (dissenting). Plaintiffs are the minor children of Edward L. Chrismer, deceased, who, while in the service of the defendant, was drowned in the Missouri river in consequence of the capsizing of a skiff through, as the petition alleges, the negligence of the defendant.

The plaintiffs' testimony tended to show as follows: Defendant's telephone line crosses the Missouri river by a submerged cable at a point opposite Washington in Franklin county. The cable got out of repair, and defendant sent a party of men to repair it. The party consisted of 12 men and was under the command of one Thompson as foreman, and one Caesar as subforeman. Thompson was first and Caesar was next; the rest of the party were mere linemen, subject to the orders of those two. The plan of operation adopted by Thompson was as follows: A barge, or common flatboat, was located in the river over or near the submerged cable, crosswise the current, and held in position by wire strands reaching to the shore. The cable was fished up from the bottom of the river and laid cross the barge so that it could be handled and repaired; as one part would be repaired the barge would be moved so as to bring up and expose to view another part to be repaired and so on until the whole cable should be examined and repaired. In addition to the wires that held the barge in position was another strand that was used as a means of conveyance by aid of a pulley to bring materials from the shore to the barge; this will be hereinafter called "the strand." When this strand was in use for this purpose it was all above water, but when not in use it was allowed to sag beneath the surface of the water; the ends, one fastened on the shore, the other on the barge remaining above the water. The strand extended out about 15 feet from the

end of the barge before dipping into the water. This strand had not been in use for two days before the accident, and had remained sagged in that manner. For the purpose of transporting the men from the shore to the barge where they were to do their work, the foreman, Thompson, hired one Hugo Lambke with his skiff. The skiff was 15 feet 10 inches long, 16 inches deep, and 4 feet 4 inches wide; its normal capacity was to carry five men; it was designed for two sets of oars—swivel oars. A swivel oar was explained to be one in which a pin was fastened which, when in use, fitted into a socket in the gunwale of the boat, and formed the pivot on which the oar turned. The significance of this form of oarlock was that if the oar should get fastened to an obstruction in the water it could not be released from the oarlock and the boat was liable to capsize. Lambke, who owned the skiff, was also employed by Thompson to row it. The substance of what was said in the hiring of Lambke was that Thompson told him he wanted to hire him and his skiff to carry the men to and from the barge as occasion required and bring them ice and water, to which Lambke agreed and entered on the work; the amount of wages was not mentioned, but when Lambke quit, which he did immediately after this accident, Thompson paid him at the rate of \$2 a day, which was satisfactory. Caesar knew nothing of the agreement made by Thompson with Lambke, and gave him no orders except to land at the down-stream side of the barge. Lambke was 19 years and 10 months old; his occupation was that of a laborer in a copipe manufactory; he had never followed boating for an occupation, but had owned this skiff about two years, and had often gone in it fishing, rowing it himself, catching driftwood, and had taken members of his own family across the river in it. He was the only man employed by the defendant to row this skiff. He testified that he had two sets of oars, one his own and one borrowed from a friend. "Q. Who, besides you, was employed to row that boat? A. They helped me out, that is all. One day one man and the next day another. They did not help me regularly—any special one. * * * Q. There was no regular man provided to pull the other set of oars? A. No, sir." On cross-examination he said that Johnson generally rowed with him, and when he did not, then Haynes generally did. Sometimes Byrnes also rowed. He did so "once, twice, yes sir, maybe more. I don't know just exactly." He considered Johnson and Haynes very good oarsmen; he also considered Byrnes a pretty good oarsman. (Byrnes was the man whose awkward stroke caused the skiff to be capsized.) Sometimes, also, Thompson and Caesar helped to row. The men boarded at a hotel in Washington. They were carried in the skiff every morning to the barge, back to shore at noon for dinner,

returned to the barge after dinner, and back again to shore at the end of the day's work. In this way the skiff, carrying half the party in one trip, made eight trips a day carrying the men, and two or three extra trips carrying ice and water, in which last-named trips Lambke rowed the boat alone. No instructions were given to Lambke except to approach the barge at the down-stream side. The work had thus been going on four or five days and was approaching conclusion; the foreman had notified the men at the close of the day that he desired to get an early start next morning, and accordingly, about 6 o'clock or shortly after, the skiff was loaded with Lambke and four of the men ready to start. Lambke had the bow oars, Byrnes the other pair, Chrimer was in the stern, and the two other men in the next seat. Neither Thompson nor Caesar was present. The point from which they started was a few feet above the shore end of the strand. They rowed up stream on that side of the river for some distance where the current was not so strong, aiming to drift with it when they should turn across stream and so effect an easier landing on the down-stream side of the barge, which course would necessitate the crossing of the strand. But when they were approaching the barge and close to the strand Byrnes made an awkward dip with his oar on the down-stream side of the skiff, and it caught on the strand, and, being a swivel oar, he could not release it, and the consequence was the force of the current came against the imprisoned skiff and capsized it, throwing the men into the river, two of whom, Lambke being one, were rescued, but the three others, of whom the plaintiffs' father was one, were drowned. The current of the river at that point was from 7 to 10 miles an hour.

The testimony on the part of defendant was not materially different from that of the plaintiffs on the points above mentioned, but it brought out some other points. The foreman, Thompson, testified that Chrimer and Byrnes had assisted in the work of putting the barge and strand in position, and knew how they were located. That ordinarily the skiff carrying the men started below the strand and did not cross it; that if they should go above the strand there would be danger of fouling with it if they attempted to cross it too near the barge. The barge was stationed about 250 or 275 feet from the shore and crosswise the stream. "Q. What arrangement did you make with Mr. Lambke about transporting the men? A. I told him I would like to have him and his skiff to transport the men from the shore to the barge as the work required." On cross-examination: "Q. And when you came to Washington you needed another man and so you hired Lambke? A. Needed the boat. Q. And the man too? A. Yes, sir. Q. So you hired Lambke? A. Yes, sir. * * * Q. What did you say to Lambke? A. That I should

like to hire him and his boat. Q. For the company—you were not doing that on your own hook, you were acting for the company? A. Yes, sir. Q. What did you say to him about his wages? A. I don't think I said anything to him at all about it." He also testified that he gave Lambke no orders, and that no one was authorized to give him orders except Mr. Caesar and himself. Caesar testified that he did not know anything of the agreement between Thompson and Lambke; that he gave Lambke no orders except to land on the down-stream side of the barge; that he ordered Johnson and Haynes to help Lambke row the boat; he did that because he knew them to be expert oarsmen; had never seen any one except Johnson and Haynes helping to row, except when Thompson or himself did so. The defendant's testimony also tended to show that just as the skiff was starting off Johnson came in sight and called to them to stop the skiff and let him let him get in, but Byrnes answered "wait till next trip," and the boat went on. Also that Byrnes was awkward in handling the oars; dipped them too deep. Also that the most of the skiffs in use at Washington were equipped with swivel oars. During the cross-examination of one of plaintiffs' witnesses the following colloquy between counsel occurred: Counsel for defendant: "Will counsel admit that this was a suitable boat and suitable appliances for crossing this river at this place?" Counsel for plaintiff: "It would be if those obstructions were not there? Q. Apart from obstructions and danger, you admit that this was a proper boat to cross this river at that place? A. Except for those appliances and obstructions, yes." The summary of the charges of negligence in the petition is that the skiff, equipped and manned as it was under the circumstances to be operated in the presence of the submerged wires, was not reasonably safe for the carrying of the men, and that defendant was negligent in attempting to do so.

At the close of the plaintiffs' evidence, and again at the close of all the evidence, the defendant asked the court to instruct the jury that the plaintiffs were not entitled to recover. The court refused the instruction, and defendant excepted. There was a verdict by 10 of the jury for the plaintiffs for \$3,200, and judgment accordingly from which defendant has appealed. The appeal was allowed to this court because, at that time, the constitutionality of the law authorizing a verdict of three-fourths of a jury had not been settled.

1. The question for our first consideration is. Should the court have given the peremptory instruction asked by the defendant, to the effect that the plaintiffs were not entitled to recover? The deceased Chrismer, plaintiffs' father, was an electric wire lineman, and, so far as we know from the record, he had no knowledge whatever of skiffs or other boats or of the hazards of river navigation,

and so were all the other men in the gang, except that it is said of Johnson and Haynes that they were good oarsmen and of the ill-fated Byrnes that he, too, was a pretty good oarsman—as oarsmen seem to have been accounted then and there. But whatever may be said of the others, Chrismer was ignorant of boating and exhibited no ambition to experiment in that line. He confided in his master to furnish him the necessary transportation, put himself in the vessel his master furnished him for that purpose, and lost his life through the negligence of some one. Was it his master's negligence? It was the defendant's duty to furnish a reasonably safe boat, and to see that it was managed with reasonable care and skill, to carry its servants across the water. The transporting of these men back and forth across the river, at this point, though capable of being accomplished with safety by the observance of due care, was, nevertheless, attended with danger, and the care that was necessary to render it reasonably safe was the care that would be exercised by an ordinarily prudent person whose experience gave him knowledge of the conditions. The situation demanded of the master knowledge of the danger reasonably to be anticipated; knowledge of means reasonably calculated to avoid it, and ordinary care to use such means. Before sending his servants into a field where danger is reasonably to be expected, it is the duty of the master to know what the danger is and to know what precautions are reasonably necessary to take to avoid it. He cannot hide his liability behind ignorance of the situation. The duty of the master in this respect is an imperative and continuing one. It may be delegated, but the person to whom it is delegated becomes, in respect of it, the master's alter ego, and his neglect is the neglect of the master. *Rodney v. Railway*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150. This duty is unending while the service continues. Therefore, when the master in this case provided this boat, it became his boat, and when he provided a man to row it the man was his vice principal. In contemplation of law, the master was or should have been, in person or by representative, ever present, observing and directing the operation of the boat. If he was present, and permitted the negligent operation, he was liable for permitting it; if he was not present, in person or by representative, he was liable because he was negligently absent from his post of duty. When Chrismer saw this boat in the hands of the man, ostensibly, at least, employed by the master to manage it, he had a right to trust both the boat and the man as the providence of his master. Can we, in the light of the evidence in this case, say, as a matter of law, that this master so faithfully performed its duty that there can in reason be no two opinions about it? What did the master do? He hired Lambke and his skiff, and thereafter trusted everything to his judgment and man-

agement. Thompson, the foreman, himself testified that he gave Lambke no orders, and Caesar said that the only order he gave him was to land against the barge on the downstream side. Lambke was therefore permitted to take his own head for it and navigate the boat as to him seemed proper, and so he had been doing for five days in view of the foremen and in view of the men; in view of the master and in view of the servant. Under those circumstances, can the servant be blamed if he looked upon Lambke as the man intrusted by the master to observe the care required in the safe handling of the boat? So far as appears from the plaintiff's evidence, the hiring of Lambke and his skiff is all that the master did; the assistance in rowing that Lambke received was voluntary and as might happen to be convenient from first one of the linemen and then another. Even the defendant's evidence on this point does not help its case much. Caesar testified that he ordered Johnson and Haynes to help Lambke because, he said, he knew them to be good oarsmen. Just what Caesar's own experience was or his ability for judging the capacity of these men in this particular does not appear. But there was no evidence that Chrismer or any of the other men knew that any one was detailed to help Lambke, or that Lambke himself knew it. Chrismer saw sometimes one and sometimes another helping to row without any notice that any one was designated by the foreman for that purpose, therefore he had a right to judge from what he saw that Lambke availed himself of the help of any one who was willing to help, and when he saw Byrnes in the place of the helping oarsmen he had as much right to think that he was there by authority as if he had seen Johnson there.

But, aside from the question of an efficient helper, is it so clear that that skiff and Lambke constituted such an all-sufficient means of transportation that there was no question in that respect to submit to the jury? This court might perhaps be pardoned if it assumed to know something of the nature of the Missouri river, its swift current, its changing banks, its shifting sand bars, its muddy water hiding obstructions, its eddies and its whirlpools, but without judicial cognizance of that, the evidence shows sufficient of the nature of the river to indicate that the transporting of those men to and fro as was done was a dangerous act, demanding that great care should be observed by the master in guarding the lives of his servants who were trusting their lives to him. Lambke was no skilled waterman; he was a landman, a cob-pipe maker, who took to the river only occasionally, for pleasure or an odd job. He was only 19 years and 10 months old. Can we say, as a matter of law, that he was so mature in years, so experienced and skillful in the handling of a boat that there is no question on that point to go to the jury? We sometimes read of skillful amateur oarsman

in college teams who are not older than this young man, but we do not find them giving specimens of skill in rowing a boat freighted with human life in the waters of a turbid river, and, anyway, if we were seeking to find a man possessed of that care and prudence and experience that is required for the dangerous work to which this young man was assigned, we would not go to a team of college boys to find such an one. Blame is chiefly laid on Byrnes, whose awkward stroke caused his oar to foul, but we must remember that Byrnes was only a helper; he was not the chief oarsman; he did not direct the course of the boat; he was not responsible for its going above the strand, necessitating the crossing of the strand to reach the downstream side of the barge, nor was he responsible for approaching too close to the end of the barge at the point when the strand dipped into the water, before attempting to cross. And if it be conceded that Byrnes was unfit to handle the oars, Lambke, if he was himself fit to judge of his capacity in that respect, knew he was deficient, for he had rowed with him before. If, therefore, Byrnes was the cause of the accident and was unfit to handle the oars, somebody was to blame for allowing him to attempt it. Who was to blame? Certainly not Chrismer, for he was no judge of such matters. Lambke testified that on this occasion he took the course he usually took—that is, he first went above the strand, aiming to come down across it to reach the downstream side of the barge. Thompson, the foreman, testified that the skiff ordinarily started below the strand and did not cross it; he also testified that it was dangerous to cross it. Yet seeing, if he was paying any attention to it, that the skiff did, sometimes, at least, go above the strand and come back across it, and knowing, as he said he did, that there was danger of the occurring of the very thing that did occur in this instance, he said he gave Lambke no order at all, and Caesar gave none except to land at the downstream side. That testimony seems to have been adduced by the defendant to support its theory, advanced in its brief, that Lambke was an independent contractor. In the brief for appellant, at page 49, it is said: "They therefore employed a ferryman who owned a skiff. His name was Hugo Lambke. He did not become in any sense a servant of defendant, nor did he in any way fall under the direction or control of defendant. * * * In this case, instead of using a steam ferry, they contracted with the owner of a skiff to do the ferrying, and Hugo Lambke, in furnishing his skiff to transport the men back and forth, was clearly an independent contractor." If that was the case, then Lambke was not there in a representative capacity; he was the captain of the vessel and he took orders from no one; he employed for his crew whom he chose; the foreman of the gang had no right to impose Johnson or Haynes or any one else on him; he had a right to select Byrnes if

he chose, and, by acquiescence at least, on this occasion he did choose to let Byrnes take the oars. And if the master esteemed Lambke worthy of this trust and confided to his skill and judgment the lives of his servants, was it for the servant to question his master's providence?

Lambke was either the servant of the defendant and subject to its orders, or he was an independent contractor. If he was a servant, he was a servant to discharge the duty the master owed to these other servants, and in that respect was the master's vice principal, and if he was negligent it was the master's negligence. If he was a servant, then, though as to others he was the master's vice principal, yet as to the master he was subject to orders, and if he needed orders or direction the master was negligent if orders or directions were not given. If, on the other hand, he was an independent contractor, then he was master of the boat, and Thompson and Caesar were right when they saw him going and coming the course he chose and gave him no orders. The defendant having, for the purpose of shifting its liability, asserted that Lambke was an independent contractor, cannot with consistency treat him also as one whom the other servants were to regard only as a servant without authority to act except under orders of the foreman, and without authority to row the boat with the help of any one except one appointed for that purpose by the foreman. Whether the defendant can take shelter behind the independent contractor theory or not it has assumed in its brief to say, in effect, that Lambke was in command of that boat by virtue of his employment, and in that respect we think the defendant is correct; that at least was what Chrismer and the other men had a right to suppose from what they saw of the management.

But even in the employment of an independent contractor the employer does not lay aside all responsibility. He is bound to use care to employ a competent man, and, if he would take shelter behind him, he must be prepared to show that the man employed was a competent person in that line of work. In Thompson on Negligence, vol. 1, § 621, it is said: "It is a general rule that one who has contracted with a competent and fit person, exercising an independent employment to do a piece of work * * * will not be answerable for the wrongs of such contractor, his subcontractors or his servants, committed in the prosecution of such work." In the next section the author says: "In every case the decisive question is: Had the defendant the right to control, in the given particular, the conduct of the person injured?" The author then proceeds, in pages following, to point out many exceptions or qualifications to the general rule which it is unnecessary now to consider, because the facts in this case do not, in our opinion, bring Lambke in the category of an independent contractor.

There is no evidence that he was engaged in the ferry business or boating of any kind; such was not his avocation; he followed the business of making cob-pipes for a living; he was not known as and did not profess to be a contractor in river transportation of any kind. There was evidence tending to show that he knew how to row a skiff, but in the light of the evidence and of the undisputed facts of the case his fitness for this work was a subject on which, to state it most strongly for the defendant, there might be two opinions. There was nothing in the act of hiring that indicated an intention to constitute Lambke an independent contractor. Thompson said that he hired Lambke and his skiff, and in the end paid him \$2 a day; that is all that is shown by the record on the subject. The fact that he gave him no orders indicates only neglect of duty. It is said as a defense that when the skiff started that morning neither Thompson nor Caesar were present, but what good would it have done if they had both been there, since they would give no order? This was not the first time Byrnes had assisted Lambke in rowing and Thompson and Caesar either saw him doing so or would have seen him if they had paid attention or had cared to observe the movements of the boat. But their whole conduct shows that they treated Lambke as a competent person to man and manage the boat, and trusted to his judgment—put him, as it were, at the head of the transportation department. If they treated him so, and held him out to Chrismer and the other men in that capacity, how can Chrismer and the others be blamed for putting the same trust and confidence in him?

The evidence points to the facts that Lambke was the master's accredited manager of that boat, and the master's vice principal; it also tends to show that it was Lambke's negligence that caused the accident. That negligence consisted in allowing Byrnes to take the oars, in selecting the more dangerous course which necessitated the crossing of the strand, and in so directing the course of the boat as to attempt the crossing of the strand too close to the end of the barge where the strand was not deep in the water. These were all matters under Lambke's control, and they combined to produce the accident. There was evidence tending to show that Lambke could row a skiff, but ability to row a skiff under some conditions does not demonstrate ability to do so under other conditions, or prove one to be of sufficient judgment and skill to be intrusted with the lives of men under the circumstances shown in this case. Whether Lambke possessed such skill and judgment was, under the evidence, and in the light of the skill and judgment displayed by him on this occasion, a question for the jury. And though a skiff of the size, capacity, and equipment of the one in evidence in this case may be a safe means of crossing the river under some conditions,

yet it may not be so under other conditions, and whether the skiff in evidence in this case, taken with the provisions for its management and the peculiar circumstances shown in evidence, was a reasonably safe boat for the purpose, was also a question for the jury.

On the whole case there was a showing of loose management, indicating either that the danger had not been appreciated, or proper care had not been taken to avoid it. The court did not err in refusing the peremptory instruction asked by the defendant.

GANTT and BURGESS, JJ., concur with the writer in the views expressed in this opinion.

MOORE v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri. Feb. 26, 1906.)

1. TRIAL—DEMURRER TO EVIDENCE—EFFECT.

A demurrer to the evidence admits every fact which the jurors might infer if the evidence was submitted to them.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 356.]

2. STREET RAILROADS—INJURIES TO PEDESTRIANS—SPEED ORDINANCE—VIOLATION—NEGLIGENCE.

The operation of a street car by which plaintiff was struck at a street crossing at a speed of from 18 to 20 miles an hour, in violation of a speed ordinance limiting the rate of speed to 8 miles an hour, constituted negligence per se on the part of the street car company.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 201.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where plaintiff was struck by a street car following closely after a car that plaintiff permitted to pass him before attempting to cross the street, and plaintiff did not look in the direction from which the car approached after the first car passed him, but merely assumed that no other car would follow so closely the car which had passed, he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 208.]

4. SAME—PROXIMATE CAUSE.

Plaintiff was struck and injured by a street car following but 120 feet behind a car which plaintiff permitted to pass before stepping on the track. The car was being operated at a negligent rate of speed, and though plaintiff had to take only two steps to bring himself to the track, and was in the full glare of an electric light, with nothing to obstruct the view of the motorman, if he had been observing a careful lookout, as he was required by a "vigilant watch ordinance," he neither sounded his gong nor slackened his speed, but merely hallooed to plaintiff as he was about to strike him. An eyewitness also testified that she walked the width of four houses in the interval between the passing of the two cars, and that plaintiff stepped immediately on the track after the first car passed him. *Held*, that such evidence warranted a finding that the proximate cause of plaintiff's injury was the negligence of the motorman in either recklessly running plaintiff down or failing to keep a vigilant lookout for pedestrians, and not plaintiff's contributory negligence in failing to lookout for the approach of the car.

In Banc. Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Michael Moore against the St. Louis Transit Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. O. More, T. J. Field, and Bert Feen. for appellants. Boyle, Priest & Lehmann and Lon O. Hocker, for respondent.

GANTT, J. This is an action for damages arising from personal injuries alleged to have been caused by the negligent conduct of the defendant in running its street cars over the plaintiff at the intersection of Thomas street by Jefferson avenue, in the city of St. Louis. The cause was tried in the circuit court of the city of St. Louis, and at the close of the plaintiff's evidence the court gave an instruction in the nature of a demurrer to the evidence, whereupon plaintiff took a nonsuit, with leave to move to set the same aside and grant a new trial. His motion was duly filed and overruled, and thereupon in due time he perfected his appeal to the St. Louis Court of Appeals. Owing to a dissent of one of the judges of the court of Appeals, the cause was certified to this court.

The following facts were developed on the trial: Jefferson avenue runs north and south, and in it defendant has a double track street railway on which its cars are propelled by electricity. Thomas street intersects Jefferson avenue and runs east and west.

At the time of the injuries of which he complains, the plaintiff resided on Thomas street, two or three blocks west of Jefferson avenue. Between 7:30 and 8 o'clock on the evening of September 26, 1900, plaintiff left his residence and started to the grocery store on the east side of Jefferson avenue, and across from Thomas street. He walked on the north side of Thomas street to Jefferson avenue, when he looked north and saw a street car coming south, 150 feet from Thomas street; and then turned south over the crossing on which he walked until a little north of the center of Thomas street, when he left it and walked diagonally southeasterly to the crossing of Jefferson avenue, on the south side of Thomas street. At this point he stopped until the car passed him going south. What transpired immediately after this is told by plaintiff in his own words as follows: "Well, I was after washing my feet, and I was in the house, and I goes to take hold of my pipe. I wanted to get a smoke and I had no tobacco, and I run my shoes on without stockings, and I started to go and get me some tobacco, and I took hold of a little pitcher that was there to get me a little beer, so at the same time I would have a cold drink. I started out, and when I got down to the corner I stepped off of the sidewalk on the crossing. The car was coming down. I see a car coming

down from the alleys as I was passing along. I walked across the street and that car passed me by, and he was ringing his bell and going as fast as he could go. There is no mistake in that. Well, I was within three, or maybe I had three steps to make before I got into the track, and as soon as I got into the track the fellow hallooed, 'Get out of there! Get out of there!' and I looked and I jumped, and that was the last of me. I could not tell any more. Q. When did you see the car? You said you saw a car. Ans. I see the car that passed me. I see this car ahead of it just before it struck me that way [striking his hands together], and no more. Q. Did you see that car before it struck you? A. No, sir; well, I seen it just as it was going to strike me when the fellow was hallooing at me 'Get out of there! Get out of there!' and I gave a jump, and I jumped high enough to get out of his way, and that is all I know when this happened. Q. When you came to the corner, did you look one way or the other to see whether the car was coming down? A. When I came to the corner and I stepped out into the street, I looked up. Q. Which way did you look. A. I looked up north, and I was looking south. I was going south to get across the track, and I would see anything that would be coming to me there, but I looked to the north that way, and the car was coming down well from the alley, from this side of the alley, and, just as I went across about four or five feet of the crossing, the car passed, and I was along side of the car out in the street there was room enough for me to keep out of the car's way as it was passing, and as soon as I turned to go across on the crossing the fellow hallooed, 'Get out of there! Get out of there!' and with that I jumped off the track, and I know no more after that."

On cross-examination he testified: Q. "You kept walking down towards the south walk of Jefferson avenue? A. Yes, sir. Q. And where were you when the car passed you by? A. I was about in here [indicating on the map]. Q. Walking south? A. Yes, sir. Q. To let the car pass you by? A. Yes, sir. Q. You did not have to stop in order to let the car pass you by? A. No, sir; I did not have to stop. Q. When the car was passing and left the crossing clear, how far were you away from the near rail of the track? A. I had two or three steps to make until I got in the middle of that track there, just two or three steps. Q. About six or eight feet, something of that sort? A. No, sir; two steps from me would amount to five feet—that is what I calculate—a step is two feet and a half. Q. Two would be five feet, and three would be 7½ feet, so you were five to 7½ feet away? A. Yes, sir. Q. When this car passed you by? A. Yes, sir. Q. And, as soon as this car passed you by, you started right on crossing the track? A. Yes, sir. Q. And you did not

look any more after you looked in here for the car? A. No. Q. And you did not listen or pay any attention any more after this car had passed you by? A. No; of course not. Q. And you could see up and down the street a good ways, could you not? A. If it was not dark, you could see a good ways down, but the trouble was you could not see where there was two cars, one behind the other. You could not see if there be two; one following the other. You could see only the one car coming, and then I expected no other one behind it. Q. In other words, you did not expect two to be so close together, and therefore did not look? A. Exactly. Q. You could see a block away at that time of night on that day could you not? A. I do not know as I could see a block away at that time of night. I am not so sure. Q. You could see a light a long ways? A. Yes. Q. And you could see an object not lighted over a hundred feet away, could you not, on that evening? A. Yes, sir. Q. Now, in order to look south to see whether the car comes and to look north, you merely had to turn your neck, just a glance? A. Yes. Q. You did not have to turn your whole body? A. Yes, sir. Q. And you can look in both directions, can you not, the space of a second, both north and south? A. I could look both north and south, and I looked north because my back was to the north, and, as I was going across, I looked north and I saw a car coming. Q. You were looking north when the first car passed, and before you reached the cross-walk? A. Yes, sir. Q. After the car passed you, you did not look north any more; that is, what you say? A. No, sir; I did not."

The evidence further tended to prove that there was no headlight on the car, no gong or bell was rung, and the car was running at a speed from 18 to 20 miles an hour. It further appears that there was a bright street lamp burning at the time, which lighted up the crossing, so that plaintiff could have been readily seen by the motorman when he started to cross the track, had the motorman exercised ordinary care to see him. The evidence also shows the cars to have been about 120 feet apart. The car which struck the plaintiff did not stop after it struck him until it had run from 150 to 170 feet south. Mr. McCarthy, an expert motorman, testified that the hardest kind of an electric car could be stopped while running eight miles an hour in 70 to 80 feet at the highest. Mrs. Foster testified that she saw the old gentleman, the plaintiff, go across the street, and she happened to notice the car was coming very swift and that she did not know he was going to go right in front of it, but, when he stepped in the track, she hallooed, but it did not seem to do him any good, the car was right on him at the time. She testified that in the interval between the passage of the first car and the approach of the second, the

one which struck the plaintiff, she walked from 2613 Thomas street passed 2610, 2608, and 2606 and was in front of 2604 at the time of the accident. She testified, further, that she did not see the motorman do anything until he got about a half block beyond the crossing, when he stopped his car and came back. All the witnesses concurred in saying that the car was going very fast, from 18 to 20 miles an hour. The plaintiff also offered and read in evidence Ordinance No. 19,738, the fourth section of which provides: "The conductor, motorman, gripman, driver or any other person in charge of each car shall keep a vigilant watch for all vehicles, and persons on foot especially children, either on the track or moving towards the track, and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible." The same ordinance provides: "No car shall be drawn at a greater speed than 8 miles per hour." As already said, the defendant offered no evidence, and the circuit court sustained a demurrer to the evidence.

The question for our determination at this time is the propriety of the action of the circuit court in sustaining the demurrer to the evidence. Under our system of practice a demurrer to the evidence admits every fact which the jurors may infer if the evidence was before them. *Bender v. Railway Co.*, 137 Mo. 240, 37 S. W. 132; *Franke v. St. Louis*, 110 Mo. 516, 19 S. W. 938; *Patton v. Bragg*, 113 Mo. 595, 20 S. W. 1059, 35 Am. St. Rep. 730. Conceding, then, to the plaintiff the benefit of the rule just announced, it must be admitted that the plaintiff was not a trespasser, but had the right equally with the defendant to the use of the street on which he was injured by the defendant's car, and that defendant was running its car at an unlawful rate of speed at the time the plaintiff was struck by it, and that the motorman in charge of the said car did not sound the gong or give plaintiff any other warning of its approach, save by hallooing to him immediately before he was struck, and too late for him to escape the injury. The testimony further establishes that the car which struck plaintiff was following another car at the distance of about 120 feet, and that the crossing on which plaintiff was injured was brilliantly lighted by an electric light, and that by the observance of ordinary care, or by keeping a vigilant watch for vehicles and persons on foot, either on the track or moving towards it, the motorman could have discovered the danger to which plaintiff was about to subject himself, because the evidence shows that the plaintiff stood not exceeding 7 feet off from the west rail of the track on which the car was moving and began or continued to step immediately upon the track for the purpose of crossing the street as soon as the first car passed him, going south, but

the motorman neither sounded the gong to warn the plaintiff of the approach of the car and the danger that he was in, nor slackened the speed of his car, but recklessly ran over the crossing at the rate of 18 or 20 miles an hour, and did not stop the car until he had passed Thomas street, from 150 to 170 feet south. The evidence further shows that in the interval between the passing of the first car which plaintiff saw and waited to enable it to pass before attempting to cross the street, and the approach of the second car, which struck the plaintiff, Mrs. Foster, an eyewitness to the accident, walked from in front of No. 2,612 to No. 2,604 before he was struck, the width of four houses. That the defendant was guilty of negligence *per se* in running the car which struck plaintiff at a rate of speed prohibited by the ordinance, to wit, in excess of eight miles per hour, is too plain for doubt. *Riaska v. Railroad Co.*, 180 Mo. 168, 79 S. W. 445; *Karle v. Railroad*, 55 Mo. 476; *Sluder v. Transit Co.*, 189 Mo. 185, 88 S. W. 648.

On the other hand, while the plaintiff was not a trespasser and had a perfect right to walk on the street, it was his duty, when about to cross the street railway of the defendant, to listen and look both ways for cars which the defendant had the right to run on said street, before attempting to cross its tracks, and, as he himself testified he did not look north after the first car passed him, but simply assumed that no other car would follow so closely after the car which had passed, it must be held that he was guilty of negligence in not looking in the direction from which the car came before stepping upon the track. In *Bunyan v. Citizens' Railway*, 127 Mo., loc. cit. 18, 29 S. W. 844, it was said: "The duty of one approaching the track of a railroad, whether cars are operated thereon by steam, cable, or electricity, to use reasonable precaution to ascertain the approach of cars and to avoid injury therefrom, is so well settled in this state that further consideration is deemed unnecessary. *Boyd v. Railroad Company*, 105 Mo. 371, 16 S. W. 909; *Hicks v. Railroad Co.*, 124 Mo. 115, 27 S. W. 342, 25 L. R. A. 508, and cases cited." But granting that the plaintiff was negligent in stepping upon the track of the defendant without looking north to see whether another car was approaching does it follow that his negligence was the proximate cause of his injury, or did that fact alone debar him of a recovery in the light of all of the testimony in the case?

It is insisted by counsel for the defendant that his stepping upon the track was so shortly before the car struck him that the motorman could not have avoided injuring him by the exercise of ordinary care after he discovered the danger in which plaintiff had negligently put himself. Giving full credence to the testimony in behalf of the plaintiff, we do not think the court was justifi-

fied in sustaining the demurrer to the evidence. When it is considered that the car which struck plaintiff was 120 feet behind the car which passed him, and that plaintiff only had to take two steps to bring him to the track, and that he was in the full glare of an electric light, with nothing to obstruct the view of the motorman, if he had been observing that careful lookout, which not only the "vigilant watch ordinance" requires, but which ordinary prudence demands at the hands of those who use powerful and dangerous agencies on our public thoroughfares in order that they shall not injure others who have an equal right to the use of the highway, the injury to plaintiff could have been avoided if the motorman had sounded his gong and slackened the speed of his car. It is true there is evidence from the plaintiff that he was struck almost immediately after stepping into the track, but it must be remembered that the plaintiff was naturally excited, and that he was knocked senseless by the car, and the triors of the fact could have made due allowance for the inability of the plaintiff to measure the exact time he was on the track before he was struck when the evidence of the disinterested witness Mrs. Foster is taken into consideration, to wit, that she had walked along the front of four houses in the interval between the passing of the two cars, and that the evidence showed that the car which struck the plaintiff was 120 feet behind the first car and the plaintiff stepped immediately upon the track after the first car passed him.

We think it was a question of fact for the jury to have found whether the motorman could not by the exercise of ordinary care have seen the plaintiff on the track or going upon it in ample time to have avoided running over him. The evidence tends to show that, if the motorman had been running his car at a rate not exceeding eight miles an hour, he could have stopped within the space of 70 feet. That in the present state of the evidence the motorman made no effort whatever to check his car or to warn the plaintiff of his impending danger growing out of the excessive or unlawful rate at which he was running, there cannot be two opinions on the face of the record, nor was the motorman justified in disregarding all the laws of prudence merely because plaintiff was not between the tracks. The ordinance required him to keep an outlook, not merely for those persons who were on the track, but for those moving toward it with the evident purpose of going upon it, and the evidence shows that

the plaintiff was constantly moving in the direction of the track even before he started upon it, and he was in the clear light of an electric lamp at the crossing. Under these circumstances, in our opinion, it was the duty of the circuit court to have sent the case to the jury, with the instruction that even though the jury found that the plaintiff was guilty of negligence in not looking north for the car which struck him, before stepping upon the track, yet, if they further found from the evidence that after the plaintiff was guilty of said negligence, the agents, servants, and employes of defendant in charge of the car discovered or could have discovered, by the use of ordinary care, his condition, and the danger of the same, if it was dangerous, and could have avoided injuring him by the use of ordinary care, and failed to do so, then such negligence of such plaintiff is no defense in this action. *Koenig v. Union Depot Ry.*, 173 Mo. 723, 724, 73 S. W. 637; *Sullivan v. Railroad Co.*, 117 Mo. 214, 23 S. W. 149; *Railroad Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218; *Guenther v. Railway Co.*, 95 Mo. 286, 8 S. W. 371; *Reardon v. Railway Co.*, 114 Mo. 384, 21 S. W. 731; *Bluedorn v. Railway Co.*, 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615. From the evidence in this case we think it is plain that the motorman either saw the plaintiff and recklessly disregarded all the rules of prudence and humanity in running him down, or, if he did not see him, his failure to do so was owing to a reckless disregard of ordinary care in keeping a lookout for pedestrians who had a right to use the street as well as the railway.

We agree with the majority of the Court of Appeals that it cannot be said upon the testimony in this case as a matter of law that plaintiff's negligence was the direct cause of his injury, and that there was abundant evidence from which the jury, under proper instructions, might well have found that the plaintiff's injury was the direct result of the excessive and unlawful rate of speed at which the car was being run, and the negligence of the motorman in making no effort to warn the plaintiff by sounding the gong or check the car after he saw, or, by the exercise of ordinary care, might have seen, him in peril.

Accordingly the judgment of the circuit court is reversed, and the cause remanded for a new trial.

BRACE, C. J. and BURGESS, FOX, and LAMM, J. J., concur. MARSHALL and VALLIANT, J. J., concur in the result.

SMITH v. FORRESTER-NACE BOX CO.

(Supreme Court of Missouri. Feb. 26, 1906.)

1. APPEAL—THEORY OF CAUSE.

Where, in an action for injuries to a servant, the crankiness of the machine at which plaintiff was employed and its propensity to shoot a plank toward the rear rollers was not charged in the petition as a defect in the machine, and the case was submitted to the jury by plaintiff's instructions solely on the ground that the defect in the machinery consisted in the fact that it was clogged and required cleaning, and that, in the absence of a shield, it was liable to and did catch plaintiff's hand and injured him, plaintiff could not avail himself on appeal of the crankiness of the machine.

2. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—WARNING—OBVIOUS DANGER.

Plaintiff, a man 45 years of age and of ordinary intelligence, was injured by a piece of board striking his hand as it was being run through a planer in front of the back rollers. He saw when he began to work on the planer that it had no shield over such rollers, and knew that the board, in passing through the planer, passed under a presser bar and through such rollers. The bar was within six or eight inches of the back rollers, and at the time of the accident was running at a speed of 15 feet per second. There was a space of about 5 inches between the end of the board and the back rollers and plaintiff testified that he put his hand into the space for the purpose of lifting the board out of the planer. *Held*, that defendant was not negligent in failing to warn plaintiff against such an act, the danger of which was obvious.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 308-313.]

3. SAME—CONTRIBUTORY NEGLIGENCE—EXCUSE—CUSTOM.

Plaintiff was not relieved from contributory negligence by a custom on the part of employes in case the planer become clogged with shavings or sticks to remove the same from the space in question with their hands.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 747-750.]

4. SAME.

Where there was only 8 inches of space between the presser bar and back rollers of a planer, it was negligence for plaintiff to attempt to so bend a $\frac{3}{4}$ -inch board $3\frac{1}{2}$ to 4 feet long as to cause it to pass out over the back rollers instead of through them.

5. SAME.

Where plaintiff could have stopped a planer in order to have unclogged it without danger of injury by merely throwing a lever and shifting the belt, but attempted to do so while the machine was in operation and was injured, he was guilty of contributory negligence precluding a recovery.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, '§ 745-750.]

6. SAME—STATUTES.

Rev. St 1890, § 6433, providing that the belting, shafting, gearing, and drums in all manufacturing establishments, when so placed as to be dangerous to persons employed therein shall be safely and securely guarded when possible, and if not possible that notice shall be posted, has no application to a planer which defendant permitted its employes to operate without a hood.

7. SAME—PROXIMATE CAUSE.

Where plaintiff's act in placing his hand in a planer between the presser bar and the

back rollers while the machine was in motion would have resulted in injury to his hand to some extent regardless of whether the back of the machine was covered with a shield or not, the fact that a shield originally provided in front of the rollers had been broken off and defendant's servants had been permitted to operate the machine in such condition for two months prior to the accident, was insufficient to justify a recovery, since, if the absence of the shield increased the danger, it also increased plaintiff's contributory negligence in putting his hand in the machine.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 795-800.]

Valliant, J., dissenting.

In Banc. Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Samuel B. Smith against the Forrester-Nace Box Company. Judgment for plaintiff, and defendant appeals. Reversed.

Harkless, Cryslar & Histed, for appellant. L. B. Sawyer and Porterfield & Conrad, for respondent.

MARSHALL, J. This is an action for \$10,000 damages for personal injuries received by the plaintiff on the 31st of December 1901, while in the employ of the defendant as a helper in operating a planer used by the defendant in manufacturing boxes. The plaintiff recovered a judgment of \$7,000, from which the defendant, after proper steps, appealed.

The issues: The petition after alleging the corporate capacity of the defendant and the fact that the plaintiff was engaged as a helper in operating a planer in the defendant's factory charges, "That the said planer was defective and out of repair in this, to wit, the shield which acts as a protection to the operator and helper was broken off, and had been off, for at least two months prior thereto; that said machine was so defectively constructed and out of repair that it would clog up when used in planing short, thin lumber, which condition of said machinery was unknown to plaintiff;" that on the day of the accident by reason of its defective condition, the planer became clogged up with the short, thin lumber, and it was the duty of the plaintiff, in the exercise of his employment, to clean out the same; that in doing so, plaintiff, in the exercise of ordinary care, and with no fault on his part, took hold of a piece of lumber, and by reason of the defective condition of said planer and the absence of the aforesaid shield, plaintiff's left hand came in contact with the said planer, and was greatly injured. The negligence charged in the petition is, "First, that defendant was careless and negligent in furnishing plaintiff with machinery, which was, on December 31, 1901, and had been for a long time prior thereto, in a dangerous and defective condition as hereinbefore stated, which defects were known, or by the exercise of ordinary care might have been known, to defendant. Second, that defendant was

negligent and careless in not warning plaintiff of the danger in connection with said work and said defective machine, knowing plaintiff to be inexperienced in such work, and that plaintiff did not know of said defect in said machinery. Plaintiff says that he is not able to state more definitely or with more certainty than is hereinbefore stated, the defective condition of said planer, or the time, place, and circumstances, when, where and how he received the said injuries." The petition then sets out the nature and character of the injuries received, and asks judgment for \$10,000. The answer is a general denial, coupled with a plea of contributory negligence and assumption of risks. The reply is a general denial.

The case made is this: About the 1st of December, 1901, the plaintiff entered into the employment of the defendant and worked in the yard handling lumber. Two or three days before the date of the accident he was assigned to duty as helper to the operator who was running the planer, his duties being to carry off the lumber from the machine, and to help clean it out when it got clogged. The planer could be so adjusted as to plane lumber varying in thickness from $\frac{1}{4}$ of an inch to 6 inches. During the time the plaintiff was engaged as such helper the machine clogged quite frequently. Two or three times the plaintiff and the operator stopped the planer to clean it out. At other times they cleaned it while it was running. No instructions had been given to the plaintiff or the operator as to stopping or not stopping the machine when unclogging or cleaning it. That was a matter that was left entirely to the discretion and judgment of the operators and they stopped it or not as they chose and as they deemed best. Plaintiff thus describes the planer, and for the purposes of this case the description will be accepted as correct: "The planer was about hip high. At the front of the planer there was a pair of rollers, one above the other to lift the boards into the machine. A little further back was another pair of rollers to start the boards under the knives—then the knives. There was a space of 18 inches between the knives and another pair of rollers at the back end of the planer. In this 18-inch space there was an iron bar, called the presser bar, crossing the planer. The presser bar did not in any way interfere with any one working about the machine as plaintiff was when injured. From the presser bar to the back rollers there was a space of from 6 to 8 inches. The back rollers carried off the finished boards to the plaintiff, who bore them to their place in the factory. The planer was constructed with a shield made of cast iron, oval in shape to conform to the shape of the top roller, and fitted down over the front part of the top of the back rollers. The shield was fastened to the roller so that when the roller was raised by a thick board passing under it, the

shield raised with it. The shield came down over the front roller so that the lower edge of the shield nearly touched upon the boards as they passed between the back rollers no matter what their thickness was." In addition to the foregoing description, it is only necessary to say that the presser bar, which crossed the roller in the 18-inch space between the knives and the back roller and which was within 6 to 8 inches from the back rollers, was simply a piece of round iron or steel, the purpose of which is not very definitely stated in the testimony, but the object of which could only have been to hold the board in place while passing through the machine so as to conduct it to the back rollers, and to prevent it from rising out of the machine before it reached the back rollers. And further to say, that the shield that had formerly been over the back rollers extended to within a fraction of an inch of the board that passed through the back rollers and had a piece of leather at its lower end which touched the board as it passed through the roller. The knives were covered so as to prevent any one working around the machine from coming in contact with them, and did not cause the accident in question, nor were they charged or shown to have been defective.

The gravamen of the negligence charged in the petition is the failure of the defendant to provide a shield over the back rollers and the failure to warn the plaintiff of the danger arising from the absence of such shield. Originally the machine had such a shield over the back rollers, but about two months prior to the accident it was broken and had not been replaced at the time of the accident. There is a sharp conflict in the evidence as to the purpose of the shield. The testimony for the plaintiff tends to show that the shield was intended to prevent the hand of the operator when placed in the 18-inch space, aforesaid, to take hold of a board or other obstruction that clogged the machine, from being carried into and crushed by the back rollers, and that this was its only purpose. On the other hand, the testimony for the defendant tends to show that the purpose of the shield was to sweep off the shavings that remained on the board and prevent them from scarring or scratching the planed or finished surface of the board as it passed through the back rollers. The planer was run by machinery and the machinery could be stopped or started by a lever attached to the planer and in close proximity to the operator, which would throw off the belt that ran the planer without stopping the running of the other machinery. As before stated it was discretionary with the workmen whether they would stop the planer while unclogging it or whether they would unclog and clean it while it was running, and it was customary for the workmen to do the one or the other as they saw fit. The plaintiff had done the

work both ways during the time he was so employed, but generally cleaned it out while it was running. Sometimes the machine would run quite a while without being clogged and at other times it would clog every few minutes. The defendant's foreman testified, and his testimony is uncontradicted in this regard, that whether it clogged or not depended largely upon the character of the lumber that was being planed, and somewhat upon the manner of handling the machine. On the day of the accident the plaintiff, and the operator were engaged in planing short, thin lumber about $\frac{3}{4}$ of an inch thick and from $3\frac{1}{2}$ to 4 feet long. It was what is called rough lumber. The machine became frequently clogged or choked that day. Some witnesses say it had choked every 5, 10, or 15 minutes. About 11 o'clock on the morning of the accident the machine became clogged again. Without stopping the machine the plaintiff and the operator undertook to unclog it. They were engaged in so doing about five minutes and supposed they had unclogged it when the plaintiff discovered a board in the machine which had not passed out through the back rollers. The end of the board extended to within 4 or 5 inches of the back rollers. The plaintiff stood on the right-hand side of the planer and the operator on the left. With his left hand the plaintiff reached into the space of 4 or 5 inches, aforesaid, between the end of the board and the back rollers, and between the presser and the back rollers, and took hold of the board and attempted to raise the end so as to take it out of the planer without having it pass through the back rollers, as he claims was his purpose. The evidence does not disclose whether he took hold of the end of the board or of the side of the board near the end. In the briefs of counsel for plaintiff it is stated that he took hold of the loose end of the board. In oral argument counsel stated that he took hold of the side of the board near its end. The materiality of the manner in which he so took hold of the board will appear later. Just as the plaintiff got hold of the board it started suddenly and rapidly toward the back rollers and carried plaintiff's hand into the rollers and injured it. The only evidence in the record as to the speed of the planer was that introduced by the defendant which showed that "the speed is 85 lineal feet per minute;" that is, it would plane 85 feet of board per minute or 15 inches per second.

The plaintiff was 45 years of age and a man of ordinary intelligence. He had formerly worked in lumber yards but had no experience with planers or machinery although he had frequently seen them at work. He says he knew that if he put his hand in the rollers he would get hurt but that he did not intend to place his hand where it would get hurt. He says he intended to put his hand in the six or eight inches of space between the presser and the rollers and to lift up the

board and pull it out of the planer and not for the purpose of pulling it through the back rollers. The plaintiff says he does not know what caused the board to start unless it was that as he raised it the knives got a little more hold on to the board and started it towards the back rollers and thus carried his hand between them. Over the objection of the defendant the plaintiff was permitted to testify that the defendant did not warn him of the danger to be incurred by running or helping to operate the machine. There was some testimony to the effect that the lever did not always stop the running of the machine promptly, but no evidence that there was any other method of stopping the planer without stopping the machinery, and the undisputed evidence was that when the planer got too badly choked it was stopped and an attempt was made to clean it; and the evidence is further undisputed that although the lever did not always stop the running of the planer immediately upon being applied and that it sometimes would make two or three revolutions before it stopped, still the evidence is uncontradicted that by the application of the lever and the throwing of the belt the planer would stop. Inasmuch as counsel differ as to whether the plaintiff took hold of the end of the board or the side of the board near the end, it is necessary to state fully all that is disclosed by the evidence in this regard. The testimony of the plaintiff was as follows: "I had reached over and took hold of this board to pull it out, and just as I took hold of the board and started to raise up the board, the board started in, drawing my hand between the rollers of the machine." Plaintiff's witness, Elmer Trewell, the operator of the machine, testified as follows: "Q. Now, did you see Smith take hold of this piece of board that was stuck in the machine? A. Yes, sir." This is all Trewell said in reference to the manner in which plaintiff took hold of the board, and this is all the evidence in the record upon that question.

It is contended for the plaintiff that the evidence discloses that the plaintiff in putting his hand into the machine as aforesaid pursued the usual and customary manner of unclogging the machine that obtained in the defendant's factory. The evidence in reference to the manner in which the machine had previously been unclogged, as disclosed by the record, was as follows: The plaintiff testified: "Q. Now, you tell us you had been doing this before? A. Yes, sir. Q. How long had you been doing it? A. Two or three days." Trewell testified: "Q. Was it customary there to clean out the planer when it was running?" This was objected to. The objection was not passed upon and the question was not answered. He was then asked. "Q. What did you do about cleaning it out when running?" This

was objected to and the court said: "You can ask him whether it was running or standing still." The plaintiff then asked: "Q. You say it was running when you cleaned it out? A. Yes, sir. Q. Every time that morning? A. I think so; but I do not remember whether I stopped it at any time or not but I do not think I did." He further testified: "Q. Did you see Smith take hold of this piece of board that was stuck in the machine? A. Yes, sir. Q. Did you have it all cleaned out except that? A. I think so. We thought it was all cleaned out when he found this board. Q. And that piece when he took hold of, it drew his hand into the rollers? A. Yes, sir. Q. How long had you been cleaning it, this machine, in that way? A. Ever since we had been running it; all the time." He further testified: "Q. There were other times when you attempted to clean it out while it was running? A. Yes, sir. Q. Now, you never stopped it? A. Yes, sir; I have stopped it lots of times. Q. For what purpose? A. To oil it or fix it or do anything around it. Q. Did you ever stop it to get it cleaned out when it was choked up? A. Once in a while but not often. Q. Did you ever do it? A. Yes, sir. I have stopped it. Q. To clean it? A. Yes, sir. Q. When you stopped it to clean it you cleaned it with your hands? A. Yes, sir. Q. Sometimes cleaned it while it was running with your hands? A. Yes, sir. I have cleaned it many times with my hands while it was running. Q. So the question of whether the machine would be stopped to clean it or whether or not you would clean it while it was running was a question that you decided? A. Yes, sir. Q. The workmen decide that? A. Yes, sir. Q. If you thought you ought to stop it before you cleaned it with your hands, it was your right to do so? A. Yes, sir. Q. And you would do so? A. How is that? Q. Whenever you found it was choked up so you thought it ought to be stopped to clean if you did so? A. Whenever it was choked up so I could not clean it any other way. Q. But you, yourself, determined the question whether it should be stopped or not? A. I used my own judgment about that." On being recalled the plaintiff testified as follows: "Q. Mr. Smith, when this machine would sometimes be clogged up you would use a stick to unclog it? A. Sometimes when it was under the rollers so tight that we could not pull it out we would push it on the other side to the other man to get hold of it. Q. Why did you use a stick? A. Because we could not reach it with the hand. Q. If it was close enough you would do it with your hand and it was safe enough? A. Certainly. Q. Why didn't you use a stick when it was close to you? A. Because I could not get hold of it. Q. Is that the only reason why? A. Certainly. Q. Your deposition was taken in this case at one time, wasn't it? A.

Yes, sir. Q. Was this question asked you in your deposition? Q. When was it you used a stick? A. Sometimes we would use a stick when the stuff would be broken up and piled between the middle rollers of the machine and then we would have to take our hands and reach over there and pull it out. Q. Did you say that? A. Yes, sir."

Kline, a witness for plaintiff, testified as follows: "Q. When it clogged up what would you do? A. Clean it out—take our hands and clean it out. Q. I will ask you what you did when you found it clogged up? A. Why, we cleaned it out. Q. Tell how you cleaned it out. A. With our hands—pulled the sticks out. Q. Was the machine at these times running or stopped? A. Well, it was running most of the time." Trewell testified on cross-examination as follows: "Q. Had you been in the habit during the time you were operating this machine of putting in your hand and pulling out the choke up? A. Yes, sir. Q. That had been your habit and practice always? A. Yes, sir."

At the close of the plaintiff's case and again at the close of the whole case, the defendant demurred to the evidence. The court overruled the demurrer, and the defendant excepted, and that ruling is now assigned as the chief error. At the request of the plaintiff the court instructed the jury that if the machine was defectively constructed and out of repair and dangerous, in that it would clog up and require cleaning out, and that, in the absence of the shield spoken of in the evidence, it was liable to catch the hand of the person so cleaning it out and injure him, and that the defendant knew, or by the exercise of ordinary care could have known, of such defect and danger, then the plaintiff was entitled to recover unless he was himself guilty of negligence, or that he assumed the risk of doing the work as defined in the other instructions. The court also instructed the jury upon what constituted negligence and upon the assumption of risks. In addition to the demurrers to the evidence, the defendant asked the court to instruct the jury that if the plaintiff had the option to turn the lever and stop the machine before undertaking to remove the piece of board that clogged the machine, and did not do so, then he could not recover. The court refused the instruction in this form but modified it by saying that if he negligently failed to do so he could not recover, and gave it in the modified form. The defendant further asked the court to instruct the jury that if the plaintiff put his hand between the pieces of machinery and near the rollers while they were in full operation and with full knowledge of what he was doing and of the surrounding conditions, and that the same was a dangerous thing to do, and that injury might have reasonably been expected to result from such act,

then their verdict should be for the defendant. This instruction the court refused to give. Although the petition assigned as negligence the inexperience of the plaintiff and the failure of the defendant to warn the plaintiff of the dangers to be apprehended, and the failure to instruct him how to operate the planer, and although over the defendant's objection the plaintiff was permitted to show that the defendant had not instructed the plaintiff as aforesaid, the plaintiff did not ask any instruction and the court did not instruct the jury on this feature of the case. As before stated, the plaintiff recovered a judgment for \$7,000, and, after proper steps, the defendant appealed.

1. The second ground of negligence assigned by the plaintiff is the failure of the defendant to notify the plaintiff of the danger incident to the operation of the planer. As hereinbefore noted, this feature of the case was not submitted to the jury at all, and except for the fact that the evidence offered by the plaintiff in support of this allegation of negligence was admitted by the court over the objection of the defendant, and except for the further fact that in oral argument and in brief plaintiff's counsel now lay great stress upon what they designate as the crankiness of the planer in its erratic way of suddenly impelling a board to pass through it and shooting unexpectedly toward the back rollers, which constituted a hidden danger that was not known to the plaintiff and which is now said to be the proximate cause of the injury, or at least one of the proximate causes of the injury, it would not be necessary to further consider this assignment of negligence. The crankiness of the machine and its propensity to suddenly shoot a plank toward the back rollers is not charged in the petition as a defect in the machine, nor was it made an issue in the pleading. The sole defect alleged in the petition was the absence of the shield aforesaid. The case was put to the jury by the instructions of the plaintiff solely upon the ground that the defect in the machinery consisted in the fact that it would clog up and required cleaning, and that, in the absence of the shield, it was liable to catch the hand of a person and injure him. The argument now made that the crankiness of the machine is the proximate cause, or one of the proximate causes, of the injury, cannot be allowed to avail the plaintiff in this court, for neither by petition nor by instruction was any such theory submitted to or tried in the lower court. The same is true as to the second ground of negligence alleged in the petition, for there the warning, which it was alleged the defendant failed to give the plaintiff, referred solely to "said defective machine," and the petition contained no averment of any other defect than the absence of the shield. This contention, therefore, need not be further referred to, and the failure to warn the plaintiff need

only be considered with reference to the dangers to be apprehended from the failure to have the shield over the back rollers. It is true the plaintiff had no prior experience in the operation of machinery, but he was a man 45 years of age and possessed of ordinary intelligence. He was certain that if he put his hand into the machine so that it would come in contact with the back rollers the result would be that he would be hurt. Whether he made this admission or not, the danger resulting from allowing one's hand to come in contact with those rollers was perfectly obvious and it needed no warning to advise the plaintiff, or any one of ordinary common sense, of such danger. The plaintiff saw when he first began to work on the planer that it had no shield over the back rollers. He also saw and knew that the board in passing through the planer passed under the presser bar and through the back rollers. The presser bar was within six or eight inches of the back rollers. The speed of the planer was 15 feet per second. At the time of the accident it was running at full speed. There was a space of about five inches between the end of the board and the back rollers. The plaintiff put his hand into the space between the presser bar and the back rollers while the machine was running at full speed, for the purpose, as he says, of lifting the board out of the planer and not for the purpose of pulling it through the back rollers. Whether he took hold of the end of the board, as his counsel state in the brief, or the side of the board near the end, as counsel state in oral argument, the fact remains that it needed no warning from any one to tell him that if the knives engaged the plank it would drive the plank the distance of five to eight inches and against or between the back rollers in about one-half of a second. No warning that could have been given by any one could have served to instruct any man of the danger of so doing any more effectually than the object lesson presented to the eye of the plaintiff at the time he put his hand into the planer.

The fact that other operatives and the plaintiff had previously so done did not, in any way, make the act any the less a negligent act, and it is inconceivable that any man possessed of ordinary intelligence would have attempted to do such a thing. Moreover, while there is evidence that the customary way of cleaning the machine when it was clogged was to put the hand in this 18-inch space and take out the shavings or sticks therein that clogged the machine, nevertheless there is absolutely no evidence in the case that any one had ever before placed his hand in the space between the presser and the back rollers for the purpose of taking hold of a board that was clogged there and attempting to lift it out of the planer without having it pass through the back rollers. It is manifest that there is a great

difference between taking hold of shavings or sticks that were in that space and taking hold of a plank that was in that space. Shavings or sticks could not be propelled forward by the movement of the knives, for the knives did not engage or touch them, whereas when a plank was caught between the knives, the instant the obstruction was removed the knives would force the plank forward. In short, the custom to which the evidence relates does not cover conditions such as are here presented, and even if a negligent custom could be accepted as a good excuse, no such negligent custom is shown in this cause as to taking hold of boards. As was well and aptly said by Brace, J., speaking for this court, in *Doerr v. Brewing Ass'n*, 176 Mo., loc. cit. 556, 75 S. W. 601: "That pit was a dangerous place for a human arm to be in at any time while the shaft was in motion, whether moving at the rate of one revolution per one, two or three seconds. No man has the moral or legal right to put his life or limb to the hazard of a second unless duty and the exigencies of his situation imperatively demand it. No man of ordinary prudence will do so. There was no such demand in this instance. The plaintiff was a man of mature years. He had been oiling this machine for four months. He knew the danger of thrusting his arm into this pit, when the shaft was in motion. The risk was manifest, the danger imminent. The discharge of no duty within the scope of his employment called for the assumption of such risk. The recovery of the funnel was a matter of little or no importance, and could have been easily effected without incurring risk. The fact that the plaintiff had, before this, accomplished the feat of recovering the funnel by hand when the shaft was in motion, or that others may have done so, offers no excuse for his action, nor furnishes any reason for charging his employer with the consequences of his folly. Hence, conceding that the marvelous instantaneous acceleration of the speed of the shaft took place as testified to by the plaintiff, this eccentric movement could at most have been no more than a cause contributing with his own negligence and want of ordinary care to his injury. The court erred in refusing to sustain the demurrer to the evidence, and for this error the judgment will be reversed." What is there said applies with full force to the case at bar. The only difference between the two cases being that in the one instance the man had had four months' experience, while in the case at bar, he had had only three days' experience, which considering the obvious character of the danger to be incurred and the fact that such danger was imminent makes the difference in the experience of the operatives in the two cases wholly immaterial.

The case at bar also falls within the principles announced in *George v. Manu-*

facturing Co., 159 Mo. 333, 59 S. W. 1097, where it was said: "The machine was in perfect running order; reasonably safe of its character for the purposes for which it was being used. The plaintiff was familiar with its construction and operation. He was furnished a safe place for the discharge of the duties of his employment in connection with the machine. In the discharge of those duties with ordinary care it at no time became necessary that his arm should be placed in dangerous proximity to the edge of the rapidly revolving knives from which he received the injury. Even if the holes into which the shavings fell did become clogged, they could have been easily removed with ordinary care without exposing plaintiff to any risk or injury. The use of a longer stick even for the purpose of punching the shavings through the hole would have obviated any possible danger on this occasion. It is so evident upon the face of the plaintiff's own statement that his misfortune was the result of his own want of care and of no failure upon the part of his employer to discharge any of its duties to him that argument in the case would be superfluous." And in *Nugent v. Milling Co.*, 131 Mo., loc. cit. 256, 33 S. W. 432, a case very analogous to the case at bar, it was held that the failure of a master to instruct his servant as to the danger of a machine which was obvious does not constitute negligence, the court saying: "He knew as well as any one connected with the mill that if his hand came in contact with the revolving cylinders they would be crushed to pieces, and it is a matter of no concern that he was not so informed by the manager of the defendant's mill. Whatever there was of danger or risk he could see and appreciate as well as any one, and as it was known to him he was as legally responsible for his own protection as was the foreman in charge of the mill for his protection—he needed no special instruction as to the danger."

Plaintiff admits that he knew if his hand came in contact with the rollers it would be injured. His only excuse for putting his hand into that small space between the presser and the back rollers is that he did not intend to put his hand where it would come in contact with the back rollers. But any man of ordinary intelligence would know that if he did so, the danger of injury was imminent, for the danger was obvious. Such an act itself suggests the inevitable consequences. If he took hold of the end of the board and the board started with the speed of the planer, his hand would be hurt whether there was a shield on the back roller or not, for whilst with the shield the hand would not be carried between the rollers, possibly, still his hand would be crushed between the end of the board and the shield. If he took hold of the side of the board near the end, and there was only eight inches of space between the presser and the back rollers, he

would have taken hold of the side of the board within eight inches of the back rollers, and he must have known that when the plank was propelled forward by the knives, his hand would come in contact with the shield if there was a shield or with the back rollers if there was no shield. Having hold of the side of the plank, the effect might have been to break his hold on the plank and loosen his hand from the plank, and thus his injury would not have been as serious as if he had hold of the end of the board; but in either event some injury would have ensued. And, therefore, whether he had hold of the end of the plank or the side of it, the injury to be apprehended was certain and the extent only one of degree. This, therefore, is not a case where the master can be adjudged guilty of negligence in not having warned the servant of the dangers to be incurred, for such dangers were perfectly obvious and imminent.

2. The plaintiff says he intended to take hold of the plank and lift it out of the planer and not to pull it through the back rollers. How this could have been accomplished surpasses comprehension. The plank was $\frac{3}{4}$ of an inch in thickness and $3\frac{1}{2}$ to 4 feet long. The distance the plank was below the top of the planer does not accurately appear from the evidence, but at any rate it was lower than the top of the planer, for it was intended to pass under the presser and between the back rollers. Upon the principles of applied mechanics it is impossible to conceive that any one of even the most ordinary intelligence could have expected to take hold of the end of the plank between the presser and the back rollers where only 8 inches of the plank at most was exposed, and lift it out of the planer. A plank of the length described and $\frac{3}{4}$ of an inch in thickness could not be bent by hand in that way, but whether it could or not have been accomplished, the danger of attempting so to do was perfectly obvious, and it was negligence for the plaintiff to attempt to do so.

3. The evidence clearly shows that the plaintiff could have stopped the planer by merely throwing the lever, which was provided for that purpose and was easily within reach, and could have thus safely unclogged or cleaned the machine while it was at rest. Instead of so doing he undertook to unclog it while it was in motion. In *Moore v. Railroad*, 146 Mo., loc. cit. 582, 48 S. W. 488, this court quoted with approval the rule laid down in *Bailey on Personal Injuries Relating to Master and Servant*, vol. 1, § 1121, where it is said: "It is a familiar principle, which common sense as well as the rules of law ought to teach any one, that where an employé of a railroad knowingly selects a dangerous way when a safer one is apparent to him and is thereby injured, he is guilty of contributory negligence." And in section

1123 the same authority says: "Where a person having a choice of two ways, one of which is perfectly safe, and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence and cannot recover." The plaintiff here selected an obviously dangerous method when a perfectly safe one was available to him, and when it was a matter entirely for his determination which course he would adopt, and must be held to the consequences of his own act.

4. The plaintiff, however, contends that this case falls within the rule prescribed by section 6433, Rev. St. 1899. That section is as follows: "The belting, shafting, gearing and drums in all manufacturing, mechanical and other establishments in this state, when so placed as to be dangerous to persons employed therein or thereabout while engaged in their ordinary duties, shall be safely and securely guarded when possible; if not possible then notice of this danger shall be conspicuously posted in such establishments." In *Lore v. American Manufacturing Co.*, 160 Mo. 608, 61 S. W. 678, it was held that it was not necessary for a pleader to invoke the aid of the statute by any special reference thereto, but that it is sufficient to state the facts which bring his case clearly within the law; and that case correctly stated the rule of law. But the most casual reading of the statute demonstrates that it has no application whatever to the case at bar. The statute is confined to belting, shafting, gearing, and drums in manufacturing establishments. Neither the allegations of the petition nor the evidence in this case bring this case within the letter or spirit of the statute. The injury complained of was not caused by any belting, shafting, gearing, or drums of the machine. And there is nothing in the case to show whether or not those features of the establishment were or were not properly safeguarded as the statute requires. The statute does not, either in letter or spirit, cover a case like the case at bar, and especially does not require rollers of a planer to have a shield or guard to prevent the hand of an operative from being injured by being thrust into it when the operative had taken hold of an obstruction in the planer as the plaintiff did in this case. Moreover, as hereinbefore pointed out, the plaintiff's hand would necessarily have been injured in some degree even if there had been a shield over the back rollers.

5. The remaining negligence of the defendant complained of is that originally there was a shield in front of the back rollers, which had been broken off about two months before the accident, and that in consequence thereof the machine was defective, and that the plaintiff did not know of such defect, and in consequence of the defect was injured. The shield was broken off at the time the plaintiff was assigned to duty as helper. The

fact that there was no such shield was obvious to the plaintiff, and he admits that he knew there was no shield there during the time he worked with the planer. As before pointed out, if there had been a shield there the plaintiff would have been necessarily injured in some degree, perhaps less than if there was no shield; but whether the shield was originally intended to prevent the hand of the operator from coming in contact with the back rollers, as the plaintiff's testimony tends to show, or whether its purpose was to sweep off the shavings from the board and prevent them from marring the planed surface of the board, as the defendant's testimony tends to show was the purpose of the shield, is not for this court to decide, nor is it at all material to the ultimate determination of this case. The fact that without a shield made it more dangerous to put a hand into the space between the presser and the back rollers was a fact which was obvious to the plaintiff, and, therefore, if it was negligence for the master not to have such a shield, it was equally contributory negligence for the servant to so place his hand in that space when there was no shield. So

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that the absence of the shield cuts both ways. Upon the whole case, it is plain that even if there had been a shield over the back rollers the plaintiff would have been injured in some degree by placing his hand in the space between the presser and the back rollers while the machine was in motion, and the fact that others had placed their hands in that space for the purpose of taking out shavings and sticks was no excuse for the plaintiff or such others to do so, and especially was no excuse for the plaintiff so to do in order to raise the board out of the planer as he said he expected to do. Upon the case made, therefore, whether considered from the standpoint of the plaintiff or of the defendant, the conclusion is irresistible that no case of actionable negligence has been made out against the defendant, but that the plaintiff's misfortune must be attributed solely to his own negligence.

For these reasons the judgment of the circuit court is reversed.

BRACE, C. J., and GANTT, BURGESS, FOX, and LAMM, JJ., concur. VALLIANT, J., dissents.

HALL & HAWKINS v. NATIONAL FIRE INS. CO.

(Supreme Court of Tennessee. Jan. 20, 1906.)

1. INSURANCE — CAUSE OF LOSS — FIRE — EXPLOSION.

Where a fire occurs on property insured, and an explosion takes place therein during the progress of the fire, and the explosion is a mere incident of the preceding fire, the fire is the efficient cause of the whole loss, though the policy in terms excludes liability for loss by explosion.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1128, 1134, 1139, 1141.]

2. SAME — FIRE IN ADJOINING BUILDING — LOSS BY EXPLOSION.

A fire policy insuring plaintiffs' goods excepted insurer from liability for loss by explosion of any kind unless fire ensued, and in that event by fire only. Plaintiffs' goods were damaged solely by an explosion in an adjoining building, caused by a fire therein, but without any fire having occurred in the building containing plaintiffs' goods. *Held*, that such damage was within the exception of the policy, and that the insurer was not liable.

Appeal from Chancery Court, Knox County; Jos. W. Sneed, Chancellor.

Action by Hall & Hawkins against the National Fire Insurance Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Webb, McClung & Baker and Cornick, Wright & Frantz, for appellant. John W. Green, for appellees.

NEIL, J. Complainants' bill states the following case:

On the 6th day of September, 1904, the defendant company issued to the complainants a policy containing, among other things, the following provisions:

"The National Fire Insurance Company of Hartford, Conn., in consideration of the stipulations herein named, and of \$19.38 premium, does insure Hall & Hawkins, for the term of one year from the 6th day of September, 1904, at noon, to the 6th day of September, 1905, at noon, against all direct loss or damage by fire, except as herein provided, to an amount not exceeding \$1,000, to the following described property, located and contained as described herein [describing property]. This company shall not be liable for loss occasioned directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

The property insured consisted of a stock of furniture, house furnishing goods, rugs, carpets, linoleum, oilcloth, curtains, and other

merchandise which the complainants kept for sale in their place of business at Nos. 418-420 Gay street, Knoxville, Tenn.

On November 12, 1904, between 2 and 3 o'clock in the morning, a fire, originating from an unknown cause, broke out in the second building south of complainants' storehouse on the same side of the street, and between 30 and 40 feet distant, occupied by the Woodruff Hardware Company. After this fire had been in progress for the space of one hour, and while it was raging fiercely and beyond control, a terrific explosion, following as an incident of the fire, and shaking the whole city and the country for miles around, occurred in said storehouse of the Woodruff Hardware Company; this explosion having been caused by the fire igniting powder and dynamite stored in the building of the Woodruff Hardware Company. The fire itself did not reach the store occupied by complainants, but it produced the explosion, which resulted in breaking, injuring, and damaging complainants' stock to the extent of more than \$5,000. The explosion referred to was wholly due to the preceding fire.

The other allegations of this bill need not be noticed, as they are not drawn in question.

The demurrer, so far as it is necessary to notice the defenses made therein, makes two points: Firstly, that the facts stated in the bill fall to show any direct loss by fire; secondly, that it is shown in the bill that an explosion occurring in a building 40 feet distant caused the injury to complainants' goods, and that no fire ensued upon the explosion, and that such loss was not within the terms of the policy.

The chancellor overruled the demurrer, whereupon the defendant, by leave of the court, prosecuted an appeal to this court, and has here assigned errors.

We shall not dispose of the two grounds of demurrer in the exact form in which they are stated, but shall consider, so far as may be necessary, the substance of each of them.

1. There is some controversy in the authorities upon the question whether, under a policy framed like the one in suit here, an explosion occurring during the progress of a fire should be treated as a mere incident of the fire, the latter being regarded as the efficient cause of the injury, or whether it should be excepted out of the operation of the policy.

The weight of the authority is to the effect that where the fire occurs in the property insured, and an explosion takes place therein during the progress of the fire, the effects of which are covered by the policy, and such explosion is a mere incident of the preceding fire, the latter is treated as the efficient cause, and the whole loss is within the risk insured, although the policy in terms excludes liability for loss by explosion. *Mitchell v. Potomac Ins. Co.*, 183 U. S. 51, 52, 53, 22 Sup. Ct. 22, 46 L. Ed. 74; *Waters v. Ins. Co.*, 11 Pet. (U. S.) 213, 218, 9 L. Ed. 69; *Amer.*

Steam Boiler Ins. Co. v. Chicago Sugar Refining Co., 57 Fed. 294, 6 C. C. A. 886, 21 L. R. A. 572; Washburn v. Farmers' Ins. Co. (C. C.) 2 Fed. 304; Washburn v. Miami Valley Ins. Co. (C. C.) 2 Fed. 633; Washburn v. Insurance Co., Fed. Cas. No. 17,218; Washburn v. Insurance Co., Fed. Cas. No. 17,212; Renshaw v. Insurance Co., 33 Mo. App. 394; Renshaw v. Insurance Co. (Mo. Sup.) 15 S. W. 945, 23 Am. St. Rep. 910; Insurance Co. v. Dorsey, 56 Md. 70, 40 Am. Rep. 403; Insurance Co. v. Foote, 22 Ohio St. 340, 348, 10 Am. Rep. 735; Scripture v. Lowell Mut. Fire Ins. Co., 10 Cush. (Mass.) 357, 57 Am. Dec. 111; La Force v. Williams City F. Ins. Co., 43 Mo. App. 518. And see Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co. (Mass.) 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540.

In May on Insurance it is said: "Where the policy excluded liability 'for loss by lightning or explosion of any kind, unless fire ensues, and then for damages by fire only,' it was held, in a case where it appeared that vapor evolved from material in process of manufacture, coming in contact with a burning lamp, exploded, tearing off the roof, shattering the walls, and damaging the machinery, upon which a fire supervened, that the insurers were liable for the damage done by fire, but not for that done by the explosion. If, under such a policy, fire precedes the explosion, the entire loss is to be attributed to the fire, though the explosion is destructive." Volume 2 (4th Ed.) p. 956. In a note upon the same page it is said: "If a fire occurs by a cause within the policy, and an explosion takes place as an incident to the fire, so as to increase the loss, the whole damage is within the policy, although it contains an exemption from liability for the explosion"—citing Insurance Co. v. Dorsey, *supra*.

In Clement on Insurance it is said: "When explosions or explosive effects occur after the commencement of a fire, or during its progress, and as an incident of a fire or a result of it, the whole loss is a loss by fire within the meaning and protection of the policy, notwithstanding the destructive effect of the explosion. It is ordinarily a question of fact. If the explosion precedes the fire, the company is liable for the damage by fire only and not for that caused by the explosion." Page 123.

In Elliott on Insurance it is said: "The standard form provides for liability for damage occasioned by fire which results from an explosion, and exempts the insurer from liability for damages caused by the explosion itself. The loss by explosion must be distinguished from that caused by the subsequent fire. Under this provision the insurer is liable for the loss when the explosion is the result of an antecedent fire." Page 212.

In Joyce on Insurance it is said: "Insurers are liable upon a policy which contains a condition of this nature [i. e., excepting liability for damages by explosions of any kind] where fire originates in the insured

premises and the fire produces an explosion which destroys the property. The entire loss in such a case is held to be a loss by fire." Volume 3, p. 2532, par. 2593.

Again, this author says: "If the combustion and explosion are inseparably connected, if a combustible substance in the process of combustion produces explosion also, and fire is the agent throughout, and there is a loss by both fire and explosion, it is held that the whole damage is covered by a policy insuring against loss by fire." Id. p. 2707, par. 2771.

It is insisted for defendant, following the case of *Hustace v. Phenix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592, 62 L. R. A. 651, that this view of the matter is erroneous, since it practically nullifies the exception made in the policy against liability for losses occurring by explosions; that there would be no use in excepting losses caused by explosions, unless such explosions were understood to be those caused by fire, since the company would not in any event be liable under a fire policy for an explosion not produced by fire.

Thus stated, the objection is a very plausible one. However, the cases which we have cited go upon the theory that, in order to satisfy the terms of a policy insuring against direct loss by fire, the latter must always be regarded as the efficient cause, where its effects are produced in direct sequence, though one of the incidents of that sequence may be an explosion, and that it could not have been intended to nullify such predominant cause. There is room for the exception in favor of losses produced by explosion, notwithstanding this construction, in view of the fact that explosions are frequently produced by flame, as by a lighted match, a gas jet, a lighted lamp, fire from a furnace, and the like, as shown in *Insurance Co. v. Foote*, 22 Ohio St. 348, 10 Am. Rep. 735, *Heuer v. Northwestern Nat. Ins. Co.*, 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594, *Cohn v. Nat. F. Ins. Co.* (Mo. App.) 70 S. W. 259, and *Heffron v. Kittanning Ins. Co.*, 132 Pa. 580, 20 Atl. 698, which, although in fact forms or manifestations of fire, yet do not fall within the meaning of the latter expression as used in the rule above stated. The foregoing instances and others had been the occasion of sufficient doubt to render necessary the introduction of the clause referred to.

2. It is insisted by counsel for complainants that since an explosion produced in progress of a precedent fire is held to be the result of the fire, and the loss by such explosion a loss by fire, damage produced thereby in neighboring buildings should be treated like damage by smoke and water, destruction by the falling of buildings, or other injuries by fire agencies without actual ignition, in their operation upon adjoining buildings, and that the element of distance is unimportant. Abstractly speaking, the deduction seems sound; but legal conclusions cannot always be safely

reached by pressing the processes of logical illation to their ultimate results. The weight of authority is against complainants' contention. *Caballero v. Home Ins. Co.*, 15 La. Ann. 217; *German Fire Ins. Co. v. Roost* (Ohio) 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; *Everett v. London Assurance Society*, 115 E. C. (19 C. B. N. S.) 126; *Clement on Fire Ins.* p. 123; *Joyce on Ins.* vol. 3, §§ 2586, 2587.

In the case of *Caballero* it appeared that the company had issued to the plaintiffs a fire policy agreeing to make good to them all such loss or damage as should happen by fire to a building in Brownsville, Tex., during the period of one year; that a fire broke out about 180 or 200 feet distant in a building containing a quantity of gunpowder, and in about 30 minutes the gunpowder exploded; that this explosion produced such concussion of the air as to crack the walls of the plaintiffs' building, and brick arches, drive in the windows and blinds, loosen the plastering and slates, resulting in an injury of \$960. The fire continued in the town for 48 hours, but did not reach the building in question; this being entirely unharmed, except from the concussion.

After stating these facts, and conceding that, where a fire occurs upon the premises insured by which an explosion of gunpowder takes place, the insurer is responsible, on the ground that the loss is the direct consequence of the combustion, the court continues:

"If now the question were to be asked any one acquainted with the law of insurance whether an injury could be considered as occasioned by fire, where it had only been affected by the air put in motion by the explosion of gunpowder, and the fire itself had not touched the building, we think the answer would be 'No,' because the insurance company only bound itself to answer for damage done by the element of fire, and not by injury done by any other element. But it is replied by the jurist that the law looks upon the question in a different light. It seeks for the first effect, the cause of the loss, and that is the causa proxima, however many other agencies may have intervened. Here there would have been no concussion of the air without the explosion of gunpowder, and the gunpowder would not have exploded without taking fire, and producing instantaneous explosion, by which gases were evolved and expanded to set air in motion. * * *

"Perhaps, after all, it might be safe here, as in other contracts, to inquire whether the loss was within the reasonable intentment of the parties when they made the contract. Did they intend by an insurance against fire to cover losses arising from the concussion of the air, produced by an explosion of gunpowder upon the premises of other persons than the insured? We think such an extraordinary result could not have been contemplated by the parties. We do not think insurance companies can be con-

sidered responsible for the consequences of the combustion of gunpowder, unless that combustion has happened in the premises insured, or the gunpowder is itself, with other merchandise, covered by the policy."

In the Case of *Roost* it appeared that the house which was the subject of the insurance stood on the west side of a street 40 feet wide and 21 feet from the street; that on the east side of the street, and opposite this house, was located a powder house; that neither plaintiff nor defendant had any interest in or control over this powder house; that before the day on which the fire occurred, which was January 3, 1890, there were stored in the powder house two tons of powder, and on January 3d, the powder house was struck by lightning, causing an explosion, which destroyed the property of *Roost*. The policy contained a clause insuring "against any loss or damage caused by lightning to the interest of the assured in the property described." The policy also contained a written provision that it did not "apply to or cover any loss occasioned by explosion, unless fire ensued, and then the loss or damage by fire only." The question was whether the loss should be treated as one produced by lightning, within the terms of the policy upon that subject which we have quoted. After discussing the matter at some length and arriving at a conclusion adverse to the liability, the court continued:

"The conclusions stated are sustained by abundant authority. True it is that cases are to be found which declare principles of construction which, if applied here, would make the company liable for this loss, if its liability were measured wholly by the lightning clause. But in no case which has come within our observation, and we have examined a great many, has a liability been found to attach where there was a provision excluding liability for loss by explosion, and the loss was caused by fire, or, as here, by lightning, taking effect in a distant building, the damage being wrought to the insured property by an explosion produced by the fire, or lightning, without either of the latter agencies coming in contact with the insured property."

In *Everett's Case* it was held that no liability attached under the clause of a policy providing against "such loss or damage as shall or may be occasioned by fire to the property" insured, where it appeared that the damage which accrued to the premises of the plaintiff was occasioned by a concussion or disturbance of the atmosphere by an explosion of a large quantity of gunpowder at a magazine about a half mile distant from them.

In *Clement on Fire Insurance* it is said: "Damages caused by a concussion of air resulting from an explosion in another building is not covered, even though such explosion was caused by fire, but the company may be liable for the damage by fire when fire ensues." Page 123.

In *Joyce on Insurance* it is said: "If the

company excepts a loss by explosion, it is not liable for any loss or damage which the insured premises may sustain, which is the mere result of the concussion of an explosion upon other premises than those insured." Volume 3, § 2587.

On the grounds stated, we are of the opinion that the chancellor was in error in overruling the demurrer. His decree must therefore be reversed, and the bill dismissed, with costs.

HENRY v. STATE.

(Supreme Court of Arkansas. Jan. 13, 1906.)

1. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

Error in permitting the members of the grand jury to testify concerning statements made by defendant before that body is harmless, where defendant in testifying on his own behalf admits the facts testified to by the grand jurymen.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3139.]

2. INTOXICATING LIQUORS—ILLEGAL SALES—BLIND TIGERS.

Under Kirby's Dig. §§ 5140, 5141, declaring it a misdemeanor for any person owning, using, or controlling a house of any kind, to sell or give away liquor by such device as is known as "the blind tiger," or by any other name or device, the use or control of the house need not be habitual or permanent in order to constitute the offense defined by the statute; but it is sufficient if it be used or controlled by defendant at the time of the illegal sale of liquor therein.

3. SAME—PROSECUTIONS—INSTRUCTIONS.

In a prosecution for an illegal sale of liquor, under Kirby's Dig. §§ 5140, 5141, making it a misdemeanor for the owner or controller of a house to sell or give away liquor by the device known as "the blind tiger" or otherwise, a charge directing the jury to acquit defendant if they believed that he was using the house only for a storeroom, was properly refused in that it ignored other testimony in the case which tended to show defendant's participation in the sale independently of his use or control of the house.

Appeal from Circuit Court, Howard County; James S. Steel, Judge.

Dave Henry was convicted of selling liquor without a license, and appeals. Affirmed.

D. B. Sain, for appellant. Robert L. Rogers, Atty. Gen., for the State.

McCULLOCH, J. Appellant was convicted, under the "blind tiger statute," of selling whisky without license, and a fine of \$400 was adjudged against him. He was a distiller of ardent spirits in Howard county. The state proved the sale of a quart of whisky by a negro to the witness Bridgeman, at a house near defendant's distillery. Another witness introduced by the state testified that he had seen whisky in this house kept in a large white jug holding four or five gallons, that he had also seen the jug empty and had seen the defendant fill it at his distillery a great many times and carry it across the road to the house in question where the

negro made the sale to Bridgeman. Bridgeman testified that the negro drew the whisky sold to him from a large jug or demijohn holding four or five gallons.

The first grounds for reversal assigned by appellant is that the court erred in permitting the state to prove by members of the grand jury that he (appellant) had admitted in his testimony before the grand jury that he had used the house, where the whisky was sold to Bridgeman, as a storage room for boxes, barrels, and plunder. It is sufficient to dispose of this contention to say that appellant went upon the witness stand in his own behalf at the trial and testified to the same fact attributed to him in his statement before the grand jury. If it was error to permit members of the grand jury to testify concerning his statements before that body, the error was rendered harmless by the admissions of defendant, as to the identical facts testified to made on the trial of the case. His admission as to the truth of the facts cured any error made by the state in the method of proving those facts.

Appellant also assigns error of the court in refusing to give two instructions asked by him. The substance of the first was fully covered by another instruction given by the court wherein the jury were told that: "The burden of proof rests upon the state to prove that the defendant did in the county of Howard, and state of Arkansas, within 12 months before the finding of the indictment, sell vinous, malt, fermented, or intoxicating liquors, and unless this has been done to your satisfaction, beyond a reasonable doubt, you will find the defendant not guilty." The second instruction asked by appellant was erroneous in that it told the jury that "the word 'used' in the statute has reference to the habitual or permanent use of the house for a purpose and that this purpose must be the utilization of the said house for the purpose of the illegal sale of whisky."

This is not the law. Under the statute, the use or control of the house need not be "habitual or permanent." It is sufficient to convict, if the proof shows that it was used or controlled by the defendant at the time of the illegal sale of liquor therein. That raises a presumption of the defendant's guilty participation in the illegal sale. Kirby's Dig. §§ 5140, 5141. The second instruction was properly refused for the additional reason that it disregarded the other testimony, aside from the proof of his use of the house, tending to show defendant's participation in the illegal sale, and told the jury that they should acquit him if they believed that he "was using said house only for a storeroom for barrels and other plunder." There was sufficient evidence to warrant the jury in finding that defendant participated in the illegal sale, even though they did not find that he was using or controlling the house.

We find no error in the proceedings, and the judgment is affirmed.

OSBORNE v. STATE.

(Supreme Court of Arkansas. Jan. 13, 1906.)

1. INTOXICATING LIQUORS—DESTRUCTION—INTENT OF OWNER.

Where a distiller shipped a quantity of liquor to his agent in a prohibited district for sale in legal quantities, but the agent sold a portion thereof in violation of law, the fact that it was so sold without the distiller's knowledge and against his will was no defense to a proceeding to destroy the same under Kirby's Dig. § 5137, authorizing the destruction of liquor "kept in or shipped into any prohibited district to be sold contrary to law."

2. SAME—NATURE OF PROCEEDING.

A proceeding under Kirby's Dig. § 5137, for the destruction of liquor kept in or shipped into any prohibited district to be sold contrary to law, is a proceeding in rem.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 364.]

Appeal from Marion Chancery Court; T. H. Humphreys, Chancellor.

Proceeding by the state for the destruction of certain liquor, in which G. T. Osborne intervened as claimant. From a judgment directing destruction of the liquor, claimant appeals. Affirmed.

Appellant, Osborne, was a distiller, and had the right under a government license to sell whisky in quantities of not less than five gallons. He shipped a quantity of whisky to his agent in a prohibited district, instructing him to sell the same in legal quantities. Said agent, without the knowledge or consent of appellant, was selling

same in violation of the law. Information having been filed, said liquor was seized to be destroyed, as authorized by section 5137, Kirby's Dig. Appellant interpleaded for the possession of the property, but the court below found against him and he appealed.

Pace & Pace and J. O. Floyd, for appellant.
Robert L. Rogers, for the State.

WOOD, J. (after stating the facts). The liquor in controversy was kept in a prohibited district and was being sold contrary to law. That brought it within the ban of section 5137 of Kirby's Digest. It was wholly immaterial as to who owned the liquor or what his purpose concerning it was. The statute is directed against the liquor itself that may be "kept in or shipped into any prohibited district to be sold contrary to law." When it is shown, as it is here, that the liquor in being sold contrary to law, the nuisance exists, and it boots not the owner to say that it was being sold without his knowledge and against his will. The fact remains that the agent, whom the owner intrusted with the liquor, was selling it contrary to law. The proceeding is in rem. The liquor is the offender, so to speak. It is contraband, and to be destroyed when it is being used, no matter by whom, contrary to law. Black on Int. Liq. § 352; Com. v. Certain Intoxicating Liquors, 107 Mass. 396; State v. Intoxicating Liquors et al., 55 Vt. 82.

Affirmed.

HORSTMAN et al. v. LITTLE.

(Supreme Court of Texas. April 2, 1906.)

On motion for rehearing. Overruled.
For former report, see 90 S. W. 1085.

BROWN, J. In preparing the opinion in this case the writer made two mistakes which are immaterial, yet they are corrected for the sake of accuracy. On the first page of the opinion, and in the fourth line from the bottom, it is said, in substance, that Newton & Lyons purchased the goods and accounts. They did not buy the accounts, and to correct the mistake the word is erased from the opinion. Also, on the second page of the opinion, and in the seventh line from the bottom, it is said, in substance, that judgment was rendered against Johnson, whereas Johnson was not a party to the proceeding, but was maker of the note about which the litigation was carried on. No judgment was rendered against Johnson, and that error is corrected by erasing his name from the opinion at that place.

The motions for rehearing by Newton & Lyons and Sam G. Little, trustee, are overruled.

ESTES v. TERRELL, Commissioner, et al.
(Supreme Court of Texas. April 11, 1906.)

PUBLIC LANDS—OFFERING FOR SALE—DATE FOR RECEPTION OF BIDS.

Rev. St. 1895, arts. 4218f, 4218g, provides that, when any portion of the public school land has been classified to the satisfaction of the Commissioner, he shall notify the county clerk of the valuation placed upon the land, and it shall be offered for sale. Act April 15, 1905 (Laws 1905, p. 159, c. 103), declares that where lands now leased, or which may be hereafter leased, shall come on the market by reason of the expiration of the lease, the Commissioner shall notify the county clerk 90 days before the expiration of the lease, and that when a lease is canceled the Commissioner shall fix a date, not less than 90 days thereafter, when applications to purchase the land shall be filed. Section 4 of this act provides that, when two or more applicants shall offer the same price for the land and such bids are the highest offered, a date for new bids shall be fixed; and section 5 provides that, when a purchase by a lessee lessee shall be forfeited, the Commissioner shall fix a date for placing the land on the market. *Held*, that the act of 1905 does not repeal or affect the provisions of Rev. St. 1895, arts. 4218f, 4218g, as to lands which have never been leased, but that, when the Commissioner has notified the county clerk of the appraisalment of such land, he has thereafter no authority to fix a date for the receiving of bids on the land different from the date when notice was received by the county clerk.

Mandamus, on relation of J. W. Estes against J. J. Terrell, as Commissioner of the General Land Office, and others. Writ awarded.

E. Cartledge, for relator. R. V. Davidson, Atty. Gen., and W. E. Hawkins, Asst. Atty. Gen., for respondents.

GAINES, C. J. This is a suit for a writ of mandamus to compel the Commissioner of the General Land Office to award to the relator as a purchaser a tract of school land in Menard county for which he had made application. J. H. Low, who had also made application to purchase the land, was made a party defendant. The facts alleged in the petition are not denied in any material particular. They are as follows: The tract in controversy is a part of the lands surveyed and set apart to the school fund, and has never been leased. Prior to relator's application to purchase the tract, the respondent Terrell, as Commissioner of the General Land Office, caused said land to be classified and appraised, and notified the county clerk of Menard county of the classification and appraisalment. The notice was received by the clerk, and was recorded as required by law, in the month of November, 1905. On the 1st day of December thereafter the relator mailed to the Commissioner his application to purchase the tract at the appraised value. This was the first application after notice of the valuation and appraisalment was received by the clerk. He was a qualified purchaser, and his application was in strict conformity to all requirements of the statute. It was received by the Commissioner on December 4th, and was not accepted, for the reason that the Commissioner had assumed to delay exposing the land for sale until the 1st day of January, 1906, and had advertised it as being upon the market on that day. The sole question presented is thus stated in the brief for the respondent Terrell: "Where the Commissioner of the General Land Office advertises that certain lands which have not been on the market will come on the market at a designated future date, and so states in the notice of classification, valuation, etc., which he transmits to the county clerk of the county in which such lands lie, under the provisions of the act of April 15, 1905 (Laws 1905, p. 159, c. 103), do such lands come on the market immediately upon the receipt by the clerk of such notice, or do they come upon the market upon the date so designated by the Commissioner therefor?"

We are of the opinion that, when notice of the classification and appraisalment was sent to the county clerk and was received by him, the tract was subject to sale, and that the Commissioner of the General Land Office was without authority to postpone the sale to some future date. The respondents rely upon the act of April 15, 1905, to show that he had that power. That act repeals the previous laws upon the same subject only in so far as they are in conflict with it. Under the former statutes (Rev. St. 1895, arts. 4218f, 4218g) the land was upon the market when the clerk of the county court received notice of the classification and appraisalment. *Ford v. Brown*, 96 Tex. 537, 74 S. W. 535; *Willoughby v. Townsend*, 98 Tex. 80, 53 S. W.

581. We find no express provision in the act of 1905 which empowers the Commissioner to fix the time at which lands which have never been leased shall come upon the market on a day other than that on which the classification and appraisal shall come to the hands of the county clerk; nor do we think that it contains any provision from which such power can be implied.

Section 2 of the act is as follows: "In cases where lands are now leased or may be hereafter leased and the same shall come on the market by reason of the expiration of such lease, it shall be the duty of the Commissioner to notify the county clerk ninety days, when practicable, before the expiration of such lease, of the date of such expiration. When the lease is for any cause canceled, he shall notify the county clerk of that fact and fix a date not less than ninety days thereafter on and after which applications to purchase may be filed. All notices of expiration and cancellation of leases shall be forthwith recorded as required for notices of classification and valuation. The Commissioner shall adopt such means as may be at his command that will give the widest publicity as to when land will be on the market for sale by reason of expiration of any lease. Such publicity shall, when practicable, be given ninety days in advance of such expiration. When a lease is canceled for any cause, the land shall not be for sale until ninety days thereafter. Immediately after the cancellation of a lease or leases the Commissioner shall proceed to give publicity to the fact, the same as is herein required with reference to publicity of expiring leases. If there are no other satisfactory or sufficient means at the command of the Commissioner that will give the necessary publicity, he shall have printed at the expense of the state, to be paid out of the appropriation for public printing, a list or lists of the lands and send them out in the mail and to every person requesting them. Such lists shall also contain a brief statement as to how one shall proceed to purchase the land." Some of the provisions of this section are worthy of notice: (1) When a lease is about to expire, the Commissioner is to notify the county clerk on what day on which it shall cease to exist, from which it seems to us it was contemplated that the land should be upon the market at the expiration of the lease. (2) When a lease is canceled, the clerk is also to be notified, and the Commissioner is required "to fix a date," not less than 90 days from the day of the cancellation, on which applications to purchase may be filed.

By section 4 of the act it is provided that, when two or more applicants shall offer the same price for the land and such bids are the highest offered, they shall be appraised of the fact, and that the Commissioner shall fix a date for new bids not less than 30 days thereafter. Section 5 provides that pur-

chases by lessees shall be forfeited, when the purchaser fails to file his affidavit and proof of settlement as required by the act, and that in such case it shall be the duty of the Commissioner to place the land upon the market not less than 30 days after the forfeiture. That section also provides that, should a purchaser of land under a lease attempt to sell the land before settlement, or should such purchaser fail to comply with the provisions of the act with respect to settlement and residence, the Commissioner shall cancel the sale and proceed to offer the land for sale, as is provided in case of canceled leases. If there be any other provision in the act which authorizes the Commissioner of the General Land Office to fix a date on which the land is to be subject to sale, it has escaped our notice.

It is argued that since it was a main purpose of the act of 1905 to secure competitive biddings for the school lands and thereby to benefit the school fund, and since in a case like the present one this could only be accomplished by fixing a future day for sale and giving publicity to the fact for the benefit of such as might desire to purchase, it is to be inferred that it was intended that the Commissioner should pursue the same course as in case of other lands which are expressly mentioned. The policy of selling the school lands to the highest bidder is a wise one, and it is probable that it did not occur to the Legislature, at the time that the act was passed, that a case like the present would arise. It is to be remembered that at that time nearly all of the surveyed school lands of the state which were not under lease had been surveyed, classified, and appraised, and were upon the market for sale. The act itself suspended the sale of these lands until the 1st day of September next after its passage, when they all came upon the market at the same time and were subject to competitive offers. So, in case of leased lands, where the lease was kept in good standing, they were left subject to sale on the day after the leases expired, which itself fixed a day for competitive applications to purchase. For lands leased, but which might come upon the market by a cancellation of the leases, rules to secure competition were provided; and it is probable that, if it had occurred to the makers of the law, there were other lands which would come upon the market at a time not fixed, they would have been included in the list of those in which the Commissioner is empowered to fix the day on which they should be subject to sale; but this the Legislature has not done. It is "*casus omissus*," and to it the maxim applies: "*A case omitted is to be held as intentionally omitted.*" 6 Cyc. 702. In reference to this, Broom in his *Legal Maxims* says: "Where, however, a *casus omissus* does really occur in a statute, * * * through the inadvertence of the Legislature,

* * * the rule is that the particular case thus left unprovided for must be disposed of according to the law as it existed prior to such statute. * * * 'A casus omissus,' observes Buller, J., 'can in no case be supplied by a court of law, for that would be to make laws.' Jones v. Smart, 1 T. R. 52.

For the reasons given, the writ of mandamus will be awarded as prayed for in the petition.

HOUSTON & T. C. RY. CO. v. O'DONNELL. (Supreme Court of Texas. April 18, 1906.)

1. RAILROADS — INJURIES TO PERSONS ON TRACK—TRESPASSERS.

A landowner who is charged with the repair of gates in the fences along a railroad right of way near a highway crossing, evidence that there were obstructions to the view of the right of way from the highway was erroneously admitted as calculated to lead the jury to believe that on account of the obstructions extra diligence was required in approaching the crossing, and that a failure to use such diligence would be negligence as to the plaintiff.

2. SAME—ACTION—EVIDENCE.

In an action for injuries to one who was struck by a train while walking on a railroad right of way near a highway crossing, evidence that there were obstructions to the view of the right of way from the highway was erroneously admitted as calculated to lead the jury to believe that on account of the obstructions extra diligence was required in approaching the crossing, and that a failure to use such diligence would be negligence as to the plaintiff.

3. SAME—CARE REQUIRED OF TRAIN OPERATIVES.

The operatives of a railroad train, who see one walking upon the right of way, have a right to treat him as a person in possession of his senses, and the fact that he is deaf charges them with no duty arising from the infirmity.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1283, 1284.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

In order to render a railroad company liable for injuries to one struck by a train while walking on the right of way, if the one injured was negligent, the railroad cannot be held liable, unless the plaintiff was in a place of danger, and the operatives saw him and realized that he was in a dangerous position, and that he either could not or would not probably extricate himself.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1324, 1325.]

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by W. F. O'Donnell against the Houston & Texas Central Railway Company. Judgment in favor of plaintiff was affirmed by the Court of Civil Appeals (90 S. W. 886), and defendant brings error. Reversed.

S. R. Fisher, Baker, Botts, Parker & Garwood, for plaintiff in error. Ike D. White and T. E. Hammond, for defendant in error.

BROWN, J. The petition in this case alleges in substance that O'Donnell lived in Burnet county, and owned a tract of land through which the railroad passed from east to west, dividing the plaintiff's tillable land so that a part lay on each side of the railroad track. The barns, lots, and houses were on the south side, just west of plaintiff's inclosure, and near to it was a public road which

crossed the railroad track near to the point where a cattle gap was placed in defendant's west fence. The railroad company fenced the right of way through the plaintiff's farm by placing on each side of it a five barbed-wire fence, but failed and refused to place in said fence any gate or passway, so that the plaintiff could pass from the land on the south side to his land on the north side of the track, and, after plaintiff had made many applications for a gate or passway through the said barbed-wire fence, the railroad company cut the wires loose, but refused to erect any gate, or anything which would prevent the plaintiff's stock from going in and upon the said right of way, whereby the plaintiff was compelled, for the protection of his stock, to erect and maintain a wire gate on each side of the said track, which, on account of the length and number of the wires, were difficult to handle. On the 21st day of November, 1903, plaintiff went to inspect the gates, and in order to do so was compelled to enter upon the inclosed right of way at the west end thereof, and to walk along the said right of way for about 48 yards to the point where the gates were; and, after he had inspected the gates, which required but a few moments, plaintiff looked to the east and to the west to see if any train was approaching, and also listened for the sound of any approaching train from either direction, but he neither saw nor heard a train, and proceeded along the said right of way on the south side of the track at the ends of the ties westward towards the public road, and when he had reached a point about 14 steps from the said public road a passenger train which came from the east and behind him struck the plaintiff, causing serious injury. At a point about 80 rods from the public road the defendant had a whistling post set up for the guidance of its employes in charge of trains, indicating that at that point the whistle must be blown; but on this occasion the defendant's train was running at a high rate of speed, alleged to be about 60 miles an hour, and there was no whistle blown nor bell rung. Plaintiff relied upon the blowing of the whistle at this point to give him warning of the approach of the train, and, if the whistle had been blown and the bell rung, he could and would have heard it, and would have stepped away from the track so as to be out of danger. Defendant's employes could have seen the plaintiff on the right of way, where he was walking, for a distance of 600 yards from the place where they struck him; and it was alleged that they did in fact see him and wholly failed to take any measures for his protection. It was alleged that the plaintiff was badly injured, with his arm broken and other serious injuries inflicted upon him; that he lived near by the place where he was injured, and started to go home, when the servants of the railroad company seized him, and over his protests and earnest appeals to them to let him go home, they forced him

upon the train and took him to Marble Falls and carried him to a hotel, where the railroad surgeon made an examination of his injuries. It was alleged that it was necessary for him to ride from Marble Falls to his home, a distance of eight miles, in order to receive proper care and attention, which greatly aggravated his sufferings and caused him much pain. The defendant filed a general demurrer and a number of special exceptions to the petition, also general denial and plea of contributory negligence. The honorable Court of Civil Appeals failed to make any findings of fact, and in order to dispose of the case we must assume that the evidence was sufficient to support the verdict rendered under the allegations in the petition. The trial court overruled the general demurrer and exceptions, and upon a trial before a jury verdict and judgment was rendered for the plaintiff below.

At the time that he received the injury, O'Donnell was not a trespasser upon the right of way of the plaintiff in error. He owned the fee in the land, and, having lands on both sides of the right of way, with gates for communication between his farms, O'Donnell had the right to enter upon the right of way for the purpose of inspecting and repairing the gates which the law charged him with keeping in repair. *T. & P. Ry. Co. v. Glenn* (Tex. Civ. App.) 30 S. W. 845; Rev. St. 1895, art. 4473; *Railway v. Rowland*, 70 Tex. 302, 7 S. W. 718. Over the objection of the railroad company, the plaintiff was permitted to prove by two witnesses that "north of the right of way I could not see the engine at that point [the whistling post]. It's high ground here, and brush. Standing in the Burnet and Marble Falls road north of the crossing, there is a timbered ridge about 80 feet east that would obstruct the view of a person coming from the north towards the crossing." The objection was duly preserved by bill of exceptions. If we assume that the existence of the timber and other obstructions to the view of the railroad's right of way from the direct road would impose upon the railroad company and its employes additional duty to those persons who might be traveling from the north on the Burnet and Marble Falls road across the railroad, and thereby extra diligence would be required as to such people in approaching the crossing of the railroad track, such duty did not arise in favor of the plaintiff, who was walking upon the right of way of the railroad, and whose view of the track was in no way obstructed by the existence of the timbered ridge or other obstructions testified to by the witnesses. The testimony was calculated to lead the jury to believe that, on account of the obstruction testified to, it devolved upon the railroad company to use extra diligence in approaching the crossing and that a failure to use such extra diligence would be negligence as to the plaintiff, as well as to persons who might

be traveling upon the dirt road. But such is not the law. The evidence was calculated to mislead the jury, and cause them to find against the railroad company upon the absence of some act of diligence which they might have imagined to be necessary and proper under the conditions testified to. The testimony was conflicting as to whether the whistle was blown and the bell rung, and under these conditions this testimony was material, and the admission of it was such error as requires a reversal of the judgments of the district court and Court of Civil Appeals.

Plaintiff in error presents in its application 36 grounds of error; but we think it unnecessary to discuss them in detail, as many of them present questions which will not probably arise on another trial. The charge of the court did not fully present to the jury the issue of discovered peril, and the attorneys for the railroad company requested a number of special charges which were refused. Instead of discussing the special charges separately, we will state the law applicable to the facts. The enginemen, being ignorant of O'Donnell's deafness, were charged with no duty which would arise from the existence of that infirmity; but they had the right to treat him as a person in full possession of his senses, and, seeing him near the track, might presume that he would make proper use of his faculties, and would get far enough away from the track to insure his own safety. They were not required to anticipate that he would be guilty of an act of negligence, either by remaining in danger, if he was so, or by putting himself in danger. If O'Donnell was negligent, to render the railroad company liable, the evidence must show that O'Donnell was in a place of danger when seen by the employes, that the men in charge of the engine saw him and realized that he was in a dangerous position, and also that he either could not or would not probably extricate himself from the dangerous situation, or that O'Donnell would probably put himself in danger. *Railway Co. v. Shetter*, 94 Tex. 199, 59 S. W. 533; *Sanches v. Railway Co.*, 88 Tex. 119, 30 S. W. 431. In *Ft. Worth & Denver City Ry. Co. v. Shetter*, above cited, this court said: "A person walking negligently along a railroad track in front of a moving train will surely be hurt, unless the train stops or he gets out of its way. In a sense he may be said to be in danger; but those controlling the train are not required to assume that, by his negligent failure to act, he will remain in danger. It is only when they have realized that he cannot or will not get out of the way that the duty of averting a collision arises. Certainly it is at least equally true that trainmen are not bound to assume that a person not on the track will get on it, where it would be negligent and dangerous for him to do so; and, as they would not be bound to assume it,

a jury could not properly find that they knew it would be done, in the absence of proof of knowledge."

For the error indicated, the judgments are reversed, and the cause is remanded.

BELTON OIL CO. v. GULF, C. & S. F. RY. CO.

(Court of Civil Appeals of Texas. Jan. 17, 1906.)

CARRIERS—SHIPMENT OF FREIGHT—CHARGES—CONSTRUCTION OF CONTRACT.

Where, under a written contract, a carrier was to accept and ship freight according to the shipper's scale of weights, with a proviso that the carrier could from time to time inspect the books of the shipper to verify the weights, and that the shipper would pay all undercharges found due, the carrier was not precluded from going behind bills of lading and freight bills signed by it and showing that the weights furnished by the defendant were incorrect, and recover shortage, though the carrier's agent knew of the shortage at the time the shipments were made.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 855.]

Error from Bell County Court; W. R. Butler, Judge.

Action by the Gulf, Colorado & Santa Fé Railway Company against the Belton Oil Company. From judgment in favor of the plaintiff, defendant brings error. Affirmed.

John B. Durrett, for plaintiff in error.
J. W. Terry and A. H. Culwell, for defendant in error.

KEY, J. The Gulf, Colorado & Santa Fé Railway Company brought this suit against the Belton Oil Company for the recovery of \$34.24, alleged to be owing by the defendant for a balance of freight charges on certain shipments of cotton-seed meal, cake, and hulls shipped over the plaintiff's railroad. The defendant pleaded a general denial, failure of consideration, breach of the contract by the plaintiff, and final settlement upon an account stated. The case was submitted to the county judge, who rendered judgment for the plaintiff for \$196.58, and the defendant has brought the case to this court by writ of error.

There is no statement of facts in the transcript, and the case is submitted in this court upon the trial judge's findings of fact. There is but one assignment of error, which asserts that the trial court erred in its conclusion of law that the facts found did not constitute an account stated such as would preclude the plaintiff from a recovery. The plaintiff pleaded a written contract, by the terms of which it was to accept and ship freight for the defendant according to the defendant's scale of weights, with the proviso that the "plaintiff, through its auditor, or other duly accredited representative, would be permitted, from time to time, to inspect the books and records of the defendant company, for the purpose of verifi-

ing the rendition of weights as made by said defendant company, and that should such inspection show incorrect returns, by clerical error or otherwise, which deprived the plaintiff company of its just revenue, the defendant company would, on presentation by the plaintiff of its bill covering same, promptly pay all undercharges found due." The findings of the trial court show that the contract was made as alleged in the plaintiff's petition.

In view of the provision of the contract just quoted, we hold that the railway company was not precluded from going behind the bills of lading and freight bills signed by it and showing that the weights furnished by the defendant were incorrect, and recovering for the shortage, although the plaintiff's agent who received the various shipments knew of the existence of the shortage at the time the shipments were made and the freights paid. We think the purpose of the stipulation referred to was to reserve the right for a reasonable time to correct errors in weights, and that such right was not destroyed by making out bills according to the weights furnished by the defendant and receiving payment therefor from the defendant. The stipulation that the plaintiff would accept the scale of weights of the defendant on all consignments in car load lots, and that inspections might be made by its auditor, or other duly accredited representative, and that same might be made from time to time, negated the idea that it was intended that the inspection should be made at the very time the several shipments were tendered, and not after they had been made and freight charges paid according to the weights furnished by the defendant.

No error has been pointed out, and the judgment is affirmed.

TEXAS & P. RY. CO. v. NICHOLS.

(Court of Civil Appeals of Texas. Dec. 9, 1905. On Rehearing, Jan. 27, 1906.)

1. MASTER AND SERVANT—FELLOW SERVANTS.

One working about a depot, under the employment of the local agent, and a porter on a passenger train, under employment from a different source, are not fellow servants within the fellow servant act.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 475-479, 499.]

2. SAME—ASSUMPTION OF RISK—COMPLAINT TO MASTER.

A depot employé, injured by slipping on the snow on the platform, cannot escape being held to have assumed the risk therefrom, because of his having complained thereof to the depot agent, and the latter having promised to have it removed; it appearing that he requested the removal of snow merely for the comfort of himself and the passengers, and not from apprehension of danger.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 636, 641-647.]

Appeal from District Court, Eastland County; D. K. Scott, Special Judge.

Action by J. S. Nichols against the Texas

& Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

H. C. Shropshire, for appellant. Earl Conner and B. W. Patterson, for appellee.

STEPHENS, J. Appellee was working for appellant at its freight and passenger depot at Cisco, Tex., under the direction of the local agent, and, while engaged in handling freight and baggage and assisting to load and unload the same, undertook, in connection with Will Gillis, a train porter, to lift a heavy trunk from the depot platform to the baggage car, when the trunk slipped out of the hands of the latter and fell on appellee, producing the injuries of which he complains.

The evidence warranted a finding that Will Gillis was guilty of negligence in not taking better hold of the trunk, and that this caused it to slip out of his hands and produced the injury complained of. The testimony also raised the issue of negligence alleged against appellant as to the condition of the depot platform. The testimony as to the character and extent of appellee's injuries was not altogether satisfactory, but we are not able to say that it clearly did not warrant the verdict.

The third paragraph of the charge, submitting these issues to the jury, is not subject to any of the numerous objections urged against it in appellant's brief. The last clause of the sixth paragraph answers all the objections urged to this paragraph of the charge, except the one stated in the fourth and fifth propositions under the second assignment, which is answered by the testimony of appellee, to the effect that he had called attention to the condition of the platform, and that the local agent had promised to have the ice removed therefrom.

The court did not err in refusing to give the numerous special charges submitted by appellant. One or two of them only will be noticed. The eighth special charge was properly refused because appellee, who was working about the depot under the employment and direction of the local agent, was not, within the meaning of our present fellow servant act, in the same grade of employment with Will Gillis, who was porter on the passenger train under employment from a different source. Such we understand to be the construction given that law in *Railway v. Elmore* (Tex. Civ. App.) 79 S. W. 891.

The nineteenth assignment, complaining of the refusal to give the seventh special charge, has given us more trouble than any other, but we have finally concluded that the evidence did not quite raise the issue as it was presented in that charge. While the testimony of the local agent tended to prove that the duty of making slight temporary repairs about the depot rested on appellee, it did not quite make it his duty to keep

a lookout for defects, as appellant sought by this charge to have the jury instructed.

The testimony complained of in the twentieth and twenty-first assignments was competent as impeaching testimony.

All issues being disposed of by the above conclusions, the judgment stands affirmed.

Motion for Rehearing.

On the original hearing, the conclusion was reached that the court did not err in refusing to give any of the dozen or more special charges requested by appellant, two of which only were discussed in the opinion then filed. We are now of the opinion, on reconsideration of the case, that the court should have given the fifth special charge, reading: "In this case you are instructed that you will disregard all testimony in regard to any promise made to plaintiff by defendant to remove the snow and sleet off of and to repair the platform in controversy unless you find and believe from the evidence before you that such promise was made to plaintiff by defendant in response to an objection by the plaintiff to further work and discharge his duties upon said platform and that such promise was made for the purpose of inducing plaintiff to remain in the employment of defendant." That this phase of the issue of assumed risk was raised by the evidence is shown by the following testimony of appellee given on cross-examination: "At the time of the accident the snow and sleet had been on the ground 8 or 10 days. In getting the baggage from the baggage room to the train I would turn the trunks over and over on the platform with my hands on the ice and snow, and the baggage from the train was just dumped out of the car onto the snow and mud. The first time I mentioned to the agent about having the snow removed from the platform must have been two or three days after the snow fell; I know I mentioned it to him five or six times prior to the time I got hurt. The reason I did not mention it to him the first day after the snow fell was because I kept thinking it would melt off. I don't remember the words I used the first time I mentioned it to him, but it was that I wished he would have the section hands clean it off; I suppose that is all I said to him about having the snow cleaned off. I told him that several times, and that we could not work on it. I was thinking about it making me sick and did not think about having any accident. Some times Mr. Langston would make no reply at all and some times he would say that as soon as he could see the section men he would have it cleaned off, but he never did. I also told him about passengers kicking about handling their trunks there in the snow and sleet. One time it was a drummer and another time a lady complained about it. When I told Mr. Langston that he said he would let them know that he was agent there and that he would have it cleaned off

when he got ready. I don't remember the date I told him that; it was during the time the snow was on the platform; I know it was not on the day the accident occurred. A lady had a new trunk and spoke to me about handling her trunk in the sleet and I told her that Mr. Langston was agent and that she could see him, and she saw him about it." It is unreasonable to suppose that appellee thought of giving up a permanent job on account of a Texas snow, which he "kept thinking" would soon "melt off." His testimony indicates rather that he requested the removal of the snow for the comfort of himself and passengers and not from apprehension of danger.

The law on this subject is very clearly stated by the Supreme Judicial Court of Massachusetts in *Lewis v. New York & New England R. R. Co.*, reported in 10 *Lavy. Rep. Ann.* 513, also in 26 *N. E.* 431, which was a case of personal injury caused by the rotten and defective condition of a pier in a drawbridge over Fort Point Channel in Boston of which condition the party complaining had knowledge before the accident and sought to escape the legal consequences of this fact on the ground that he had complained to the superintendent of the company owning the bridge of the condition of the pier, and that the superintendent had promised a few days before the accident to repair it. In disposing of this case the court say: "The plaintiff seems to have called the attention of the superintendent to the condition of the pier, and to have urged its repair, not on his own account, nor because the discharge of his duties was rendered more dangerous, nor because he had any intention of leaving if the pier was not repaired, but he seems to have acted in the interests of the company and in order to prevent strangers and others coming on to the pier, not knowing where to go, from getting hurt. The natural and reasonable inference from his conversation is that he expected to remain there, and, knowing the condition of the pier, expected to take the risk. His subsequent conduct in returning to the same position in the following September and remaining till the next summer without anything being done to the pier, and thus leaving, not for that, but for some other reason, is also a strong circumstance tending to show that he did not rely upon the superintendent's statements in regard to repairing the pier as a reason for continuing in the service of the defendant.

"Most, if not all, the cases to which our attention has been directed by the plaintiff's counsel go upon the ground that the servant was led to continue at his employment by the master's promise that the defect complained of should be remedied. In some of them there is a direct request to the servant by

the master or his representative to do so. No case, we think, has gone so far as to hold that where the servant does not complain on his own account and continues in his employment with full knowledge of the risk, he can recover of the master because the latter, when the defective condition was called to his attention by the servant, gave assurances which did not induce the servant to remain that the defect should be remedied." This decision, together with *Sweeney v. Envelop Co.*, 101 *N. Y.* 520, 5 *N. E.* 358, 54 *Am. Rep.* 722; and *Bodwell v. Manufacturing Co.* (*N. H.*) 47 *Atl.* 613, in line with it, is referred to with approval by the Supreme Court of this state in *G., C. & S. F. Ry. Co. v. Garren*, 74 *S. W.* 897, and undoubtedly states the law.

It seems at least doubtful whether the presence of snow and ice on the platform should have been submitted to the jury at all as a distinct ground of recovery, indeed, we think it should not have been, and consequently whether that feature of assumed risk should have been submitted to the jury, but both issues were submitted and the latter in a manner calculated to mislead the jury in the absence of further instructions, and for that reason the phase of the issue of assumed risk covered by the special charge quoted above, which was not included in the main charge, should have been submitted substantially as requested.

Because the court refused to give this special charge the rehearing is granted, the judgment reversed, and the cause remanded, for a new trial.

RYANS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

CRIMINAL LAW—APPEAL—RECORD—SHOWING APPROVAL OF STATEMENT OF FACTS.

Where the record on appeal does not show that the statement of facts was approved by the trial judge, such statement cannot be considered.

Appeal from Erath County Court; M. J. Thompson, Judge.

Henry Ryans was convicted of violating the local option law, and appeals. Affirmed.

Oxford & Carlton, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Conviction of violating the local option law; fine imposed being \$25 and 20 days in jail.

The record does not show that the statement of facts was approved by the trial judge. Without such approval the statement of facts cannot be considered. The questions presented in the record cannot be reviewed in the absence of the facts.

No error appearing, the judgment is affirmed.

FRANKLIN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

INFORMATION—FILE MARK—SUFFICIENCY.

A file mark on an information, as follows: "Filed August 15, 1905. R. L. R., County Clerk"—was sufficient, as the court could take judicial notice that R. was county clerk.

Appeal from Franklin County Court; R. F. Milam, Judge.

Cliff Franklin was convicted of violating the Sunday law, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the Sunday law, and fined \$40.

There is neither bill of exceptions nor statement of facts in the record. The complaint and information follow approved precedents. Appellant insists that the file mark on the information is not sufficient. It is as follows: "Filed August 15, 1905, R. L. Rogers, County Clerk." The county judge could take judicial cognizance of the fact that R. L. Rogers was county clerk of Tarrant county. Besides, appellant has not made it to appear that he was not the county clerk of Tarrant county, and presumptions will be indulged in favor of the record.

No error is presented, and the judgment is affirmed.

MARKS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

CRIMINAL LAW—EVIDENCE—CONVERSATIONS BETWEEN THIRD PERSONS.

Testimony of conversations between third persons, out of the presence and hearing of accused, and tending to incriminate him, are inadmissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 950.]

Appeal from Hill County Court; N. J. Smith, Judge.

S. Marks was convicted of violating the local option law, and appeals. Reversed.

W. E. Spell, Walter Collins, and Lewis & Phillips, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Conviction for violating the local option law.

Bill of exceptions No. 4 shows that the state placed Jim Simpson on the stand, "and asked witness, what he did with the whisky after witness Hooks asked him about it. And witness was permitted to answer, over objection of defendant: 'Mr. Hooks says I know you hid it and you get it; you are not into anything, but he says, if you go up and swear a lie, you will be into it, and they will send you to the penitentiary. He told me to go and get it, and I went and got it, and he says, you come and go to town, and he brought

me to the sheriff's office, and gave it to Mr. Satterfield.'"

Bill No. 3 shows, that while the same witness, Simpson, was on the stand, state's counsel asked, "If the witness Hooks called on him for anything down at the compress, and if so, what he called on him for." To which defendant objected, because immaterial, out of the presence of defendant, called for a conversation between the two witnesses. Which objections were overruled and witness answered, "That Mr. Hooks asked him what he did with that whisky he got from Marks." All of this testimony was elicited from the witness as a conversation out of the presence and hearing of defendant; was hearsay and highly prejudicial to the rights of defendant. The facts show that prosecutor, Jim Simpson, was seen coming out of defendant's store, and subsequently, while at the compress, witness Hooks had the conversations with him above detailed. It is never permissible to prove conversations between third parties out of the presence of defendant, which have a criminative effect upon defendant. We would not be understood as holding that each witness could not testify to what he saw; what he did, if the same had any pertinent bearing upon the identity of the whisky which is alleged to have been sold; or either of the witnesses can testify to any fact that goes to identify and connect appellant with the sale of the whisky.

Accordingly the judgment is reversed, and the cause remanded.

ABLES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

GAMING—EVIDENCE—SUFFICIENCY.

In a prosecution for gaming, evidence held not sufficient to support a conviction.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Albert Ables was convicted of gaming, and appeals. Reversed.

Baskin, Dodge & Baskin, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of gaming.

The contention is made that the evidence is not sufficient. The evidence of three witnesses is embodied in a short statement of agreed facts. When the parties approached the house, they found the door closed and heard the noise of several persons on the inside. They called to those on the inside, and asked that the door be opened. Some one asked from the inside who was at the door. From the outside the reply was that it was Will Snow. Some one on the inside says: "That is not Snow's voice." Just then one of the parties on the inside came to the door, where a tow sack was stretched

across in place of a glass that had been broken, and placed his ear against the sack as if trying to hear what was going on on the outside, when one of the officers caught him by the hair of his head. Then there commenced a loud rumbling noise on the inside as if persons were getting out. The officers were then admitted, and found defendant and other parties in the room. In this connection officer Balderbach testified that defendant was standing by the door. There was also a table covered with cloth. There was also three decks of cards in a stove and one deck under "a matting." The other parties broke out and were not arrested. None of these witnesses saw any card playing or betting. This is the case. We do not believe this evidence is sufficient to justify the conviction.

The judgment is reversed, and the cause remanded.

KINCAID v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

INTOXICATING LIQUORS — VIOLATING LOCAL OPTION LAW — EVIDENCE.

On a trial for violating the local option law, prosecutor testified that defendant sold him alcohol and put it in a bottle containing grated horse-radish. The evidence showed that the preparation was medicinal and could not be used as a beverage, though it would intoxicate. *Held* insufficient to show a sale in violation of the law.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 142-146, 316.]

Appeal from Eastland County Court; C. D. Spann, Judge.

J. R. Kincaid was convicted of violating the local option law, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Conviction of violating the local option law. This case was tried before the court, without a jury. The only question to be considered is the sufficiency of the evidence.

Prosecutor testified that he went to appellant's drug store with a bottle, which contained ten cents worth of grated horse-radish, and told appellant he wanted him to fill the remainder of the bottle by putting alcohol over the horse-radish. Appellant did this, for which he received from prosecutor 50 cents. Prosecutor further testified that his wife was suffering from neuralgia, and that this preparation was a good remedy therefor. J. J. Martin, a pharmacist, testified that this preparation is a household remedy, and is recognized by all druggists as purely a medicine, and is frequently prepared without prescription; that no more alcohol was used in the preparation than is prescribed by

formula laid down in the United States Pharmacopœia, which was not more than necessary to extract the strength of the drug in the bottle; that horse-radish is very strong and hot, and it would be impracticable for one to drink the mixture prepared by appellant for Taylor. Witness admitted, however, that a person could drink it, and it would intoxicate just as any other tincture containing alcohol, but that it could not be used as a beverage. Appellant's insistence is that the preparation, as prepared, is not intoxicating liquor within the meaning of the local option law, and that it was not capable of being practically used as a beverage. These facts were submitted to the court, and he found appellant guilty. We do not think the facts are sufficient to support the finding of the court. The mixture appears to have been used as a medicine, and could not have been drunk in reasonable quantities as would produce intoxication.

Accordingly the judgment is reversed, and the cause remanded.

BENNETT v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. SUNDAY—STATUTORY PROVISIONS—CONSTITUTIONALITY.

The Sunday law is not violative of Const. art. 16, § 20, known as the local option section of the Constitution.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Sunday, § 2.]

2. SAME—SUSPENSION OF STATUTE AS TO LIQUOR DEALER.

The Sunday law is not suspended as to a licensed liquor dealer by reason of his license.

3. INFORMATION — FILING — SIGNATURE OF CLERK.

Where a complaint showed that it was sworn to before the county attorney, and the information was presented by the same officer in the county court, and they were indorsed: "Filed August 15, 1905. R. L. R., County Clerk"—a motion to quash the complaint and information, on the ground that it did not appear with sufficient certainty that they were filed in the county court or by the clerk thereof, was properly denied, as it was not necessary that the signature should have been followed by "of the county court of _____ county, Texas"; the court of that county being authorized to take judicial notice of the identity of the clerk.

Appeal from Tarrant County Court; R. F. Milan, Judge.

J. A. Bennett was convicted of keeping his place of business open on Sunday, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with keeping open his place of business on Sunday; that he was following the business of a retail liquor dealer; that such place was kept open for the purpose of traffic on Sunday.

The record is without a statement of facts. Motion was made to quash: Because the Sunday law is in violation of article 16, § 20, of the Constitution, commonly known as the "local option section" of the Constitution. The decisions are all the other way in this state. And, second, because the Sunday law was suspended as to a licensed liquor dealer by reason of the fact that such license was granted. There is no reason shown why this proposition is legally correct. In fact, without going into a discussion of it, we hold there is no merit in the proposition.

Motion was further made to quash the information and complaint, because it does not appear with sufficient certainty that it was filed in the county court of Tarrant county, or by the clerk of the county court of Tarrant county. The filing is as follows: "Filed August 15, 1905. R. L. Rogers, County Clerk." The point sharply stated is that these two papers should be quashed because they do not appear to have been filed by the proper authority in the proper court. We do not think there is anything in this contention. The complaint shows to have been sworn to before Jeff D. McLean, county attorney of Tarrant county; and the information was presented by the same officer in the county court of Tarrant county. When these were presented to the clerk, the indorsement quoted above was placed on them. The statute does not require any particular form or language in which the filing shall be done. It simply requires that the paper shall be filed. This is usually done by the clerk noting the fact that it was filed, with the proper number and style of case, and signing his name officially. We are not cited to any authorities, nor have we been able to find any, which would require the county clerk after signing it, as done in this case, adding the further expression, "of the County Court of Tarrant County, Texas." If it is noted by the clerk that the paper is filed by him, signing his name as clerk, it is sufficient. Of course, the paper must be filed in the proper case, and should have the proper indorsements on it. We think that the law has been sufficiently complied with by the clerk noting on it: "Filed August 15, 1905," and signing his name as county clerk. It is not necessary to have rendered this a valid filing to have added, "Tarrant County, Texas." The court

of that county will take judicial cognizance that such clerk is the clerk of his court.

Finding no error in the record, the judgment is affirmed.

CRAIG v. STATE

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

CRIMINAL LAW—DEFENSES—CONVICTION OF ANOTHER.

The fact that another had been convicted of keeping a place open on Sunday, in violation of the Sunday law, was no bar to the prosecution of defendant for the same offense, since, if the facts showed that he participated in the crime, he would also be guilty.

Appeal from Tarrant County Court; R. F. Milan, Judge.

Kale Craig was convicted of violating the Sunday law, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for violating the Sunday law; fine imposed being \$35.

The question presented in regard to the motion in arrest of judgment and motion to quash are the same as in cause No. 3,564. J. A. Bennett v. State (just decided) 92 S. W. 415.

As a further ground of the motion to quash, it is alleged that Bennett, whose place is charged to have been kept open on the 13th day of August, 1905, has been convicted for having kept open said place on Sunday, in violation of the law, and that it is a valid and subsisting judgment against Bennett; and appellant urges that he cannot be convicted for having kept open the place for the purpose of traffic, because Bennett has been convicted for the same offense, as evidenced by copy of the information and judgment which are alleged to be attached to the motion. However, these are not found in the record. This is simply stated as a ground of the motion to quash, and is not well taken. Even if a proper plea had been filed in the case, it could not operate in favor of appellant if he violated the law. It is not a reason for his escaping punishment that another man had been convicted; for, if the facts show that he participated in the crime, both would be guilty.

The judgment is affirmed.

BENNETT v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. CRIMINAL LAW—JUDICIAL NOTICE—APPEAL—PRESUMPTIONS.

Where, in a prosecution for violating the Sunday law, the court took judicial notice of the fact that R. was county clerk of T. county when an information was filed, it would be presumed on appeal that he was such clerk, in the absence of a showing by defendant to the contrary.

2. SAME—FORMER CONVICTION—REVIEW—STATEMENT OF FACTS.

A plea of former conviction cannot be reviewed on appeal, in the absence of a statement of facts.

Appeal from Tarrant County Court; R. F. Milan. Judge.

J. A. Bennett was convicted of violating the Sunday law, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction was for violating the Sunday law, fine imposed being \$25.

There is no statement of facts in the record. There was a motion filed to quash the complaint and information, because not filed in the county court of Tarrant county. The record shows that they were "filed August 14, 1905. R. L. Rogers, County Clerk." The county court took judicial knowledge that R. L. Rogers was county clerk of Tarrant county. If this was not true, appellant should have so shown. The presumption is that he was.

Appellant also filed a plea of former conviction. This plea cannot be considered in the absence of the statement of facts. The record shows that the plea was presented to the court, and the court held it was not well taken. In the absence of the facts we cannot ascertain whether there was any error in the ruling of the court.

No error appearing, the judgment is affirmed.

O'NEAL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—VIOLATION—PROSECUTION—EVIDENCE—SUFFICIENCY.

On a prosecution for violation of the local option law, evidence considered, and held insufficient to connect defendant with the illegal sale.

Appeal from Grayson County Court; G. P. Webb, Judge.

Horace O'Neal was convicted of violating the local option law, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, fined \$75 and 50 days in jail.

Prosecuting witness, Everett Fairless, testified that he had been in the employ of Sam Rich (constable) as a spotter for local option violations; that about December 21, 1904, he, together with H. S. Rich, Pete Hasey, Joe Goode, and Munger were in Denison, Grayson county; that, while there, he went into Mike Sweeney's cold storage; that appellant was there behind the bar at the end of the bar near the door. At the other end of the bar was a negro porter, also behind the bar; that witness called on the negro for some "tea," and witness and Pete Hasey went back into the rear of the building, into a domino room; that the negro porter soon brought him two half-pints of whisky, wrapped up in a paper, and the witness paid the porter therefor; that he did not remember telling Sam Rich that witness bought this whisky from appellant; that he had been in Sweeney's place of business several times theretofore; that while in Denison, after the transaction here detailed, Pete Hasey brought this witness a paper to sign, to the effect that he had not purchased any whisky from defendant, which witness signed and swore to before a notary public; that some time thereafter Pete Hasey handed witness \$10 and said, "Here is a present for you;" that witness did not know where Pete Hasey got this money. Witness further stated that he did not purchase this whisky from appellant; that he had no conversation or transaction with appellant. Pete Hasey testified, substantially as did witness Fairless, and states he gave Fairless \$10, and the money was handed him to be given to Fairless by a man he did not know. Sam Rich, the constable, swore that Fairless and Hasey told him that they bought whisky from appellant. Joe Goode testified that said prosecuting witnesses told him that the whisky was purchased from appellant. Fred Munger testified, that he was deputy sheriff of Grayson county, and was in Mike Sweeney's place of business the night that Fairless got the whisky; that he was standing back by the stove near the rear end of the bar, where the negro porter referred to above, was standing. Fairless had a conversation with the negro. Defendant was up at the front end of the bar, towards the door. "I saw Fairless and Hasey go back into the domino room. The negro porter went back there with something wrapped in a paper. While witness was in the saloon he saw the negro porter hand appellant some money to make change, after he returned from the domino room. Don't know how much money. Don't know what this money was for, nor from where the porter got it." We do not think the evidence detailed authorizes an affirmance of the judgment and conviction.

Accordingly the judgment is reversed, and the cause remanded.

LEITO v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. HOMICIDE—THREATS—FACTS TO AUTHORIZE INSTRUCTION.

The fact that deceased was drinking in a saloon and vowing that he was going to kill some one in it does not carry with it a threat against defendant, who killed him, so as to authorize a charge on threats.

2. SAME—SELF-DEFENSE—FORFEITING RIGHT.

Defendant, by seeking deceased for the purpose of provoking a difficulty, did not forfeit his right of self-defense; he having done and said nothing at the time calculated to provoke a difficulty.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 143, 146, 149, 150.]

8. SAME—PROVOKING DIFFICULTY—INSTRUCTION.

In the absence of evidence that defendant provoked the difficulty, an instruction that he could not justify on the ground of self-defense if he did provoke it should not be given.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Frank Leito appeals from a conviction. Reversed.

Albert Walker, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment fixed at confinement in the penitentiary for 13 years.

Appellant's wife, Bertie Leito, testified that deceased was armed on the night of the homicide, was in and about Gables' saloon all night, drinking, cursing, and displaying a pistol. At one time, while displaying the pistol he announced "he was going to get some damn son of a bitch in that place before morning." The same witness testified, that deceased and appellant had been together a good deal that night, and for that reason she told appellant deceased was armed, and about the threats he made. George Warren, state's witness, corroborates the witness, Bertie Leito, as to the pistol and deceased's threat. Appellant testified that he wanted to get away from deceased, because his wife had told him that deceased was armed, and what deceased had said; and further, that at the time of the shooting deceased called him "a damn son of a bitch," turned towards him and started to pull his gun. Witnesses for the defense further testify that deceased at the time of the killing was endeavoring to draw his pistol. We do not think this evidence authorized the court to charge on threats. This is practically all the testimony that even remotely bears on threats. It is too general a declaration on which to predicate a charge on threats. The fact that deceased was drinking and vowing he was going to kill some one in the house would not carry with it a threat against appellant, such as authorized a charge on the line suggested.

Nor do we think the evidence suggests the issue of an accidental killing. Nor is the

evidence of that character as authorized the court to charge on negligent treatment of a physician.

Appellant complains of the charge of the court on provoking the difficulty, which is as follows: "If you believe that defendant committed the assault as a means of defense, believing at the time he did so (if he did do so) that he was in danger of losing his life or of serious bodily injury at the hands of the said Thomas Woosley, then you will acquit defendant, unless you further believe from the evidence, beyond a reasonable doubt, that the defendant sought the meeting with the said Thomas Woosley for the purpose of provoking a difficulty with said Thomas Woosley with intent to take the life of said Thomas Woosley or to do him such serious bodily injury as might probably end in the death of said Thomas Woosley, and if you so believe from the evidence beyond a reasonable doubt, then you are instructed that if the defendant sought such meeting for the said purpose and with such intent, defendant would not be permitted to justify on the ground of self-defense, even though he should thereafter have been compelled to act in his own self-defense; but, if he had no such purpose and intention in seeking to meet the said Thomas Woosley, then his right of self-defense would not be forfeited, and he could stand his ground and defend himself by the use of such means of defense as the facts and circumstances indicated to be necessary to protect himself from danger or what reasonably appeared to him at the time to be danger." This charge is erroneous. The mere fact that one seeks a party for the purpose of provoking a difficulty, would not forfeit his right of self-defense. He must do some act or utter some word at the time calculated to provoke a difficulty before his right of self-defense would be forfeited. The mere seeking of it for that purpose, without provoking it, would not forfeit that right. We have discussed this phase of the law of provoking the difficulty so often that we do not see fit to further elaborate on the proposition, but refer to the decisions. *McCandless v. State*, 42 Tex. Cr. R. 58, 57 S. W. 672; *Bearden v. State* (Tex. Cr. App.) 79 S. W. 37; *Dent v. State* (Tex. Cr. App.) 79 S. W. 525.

Furthermore, we do not believe that the evidence suggests the issue of provoking the difficulty at all. The bare presence of appellant would not be a predicate for such a charge. We have searched the records closely and find no overt act or statement of appellant, showing that he did provoke the difficulty. Appellant's testimony shows that deceased cursed him a short while before and immediately at the time of the shooting in which deceased lost his life. This being the condition of the record, it was error for the court to charge thereon at all.

In the absence of some malpractice on the part of the physicians, causing deceased to lose his life, and that such malpractice was the proximate cause of the death, we do not believe appellant was entitled to a charge on assault with intent to murder or aggravated assault. Upon another trial, if the evidence in reference to the death of deceased is the same as in this record, we would suggest that such charges be not given.

The judgment is accordingly reversed, and the cause remanded.

HUFFMAN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1908.)

OBSCENITY—OBSCENE LANGUAGE—INFORMATION.

A boarding house is not per se a "public place," nor named as such in the statute punishing the use of obscene, vulgar, and indecent language in public places, and hence an information charging the use of such language in "a public place, to wit, a boarding house," does not charge a violation of the statute, in the absence of any allegations of fact showing the house to have been a public place.

Appeal from Clay County Court; S. A. Denny, Judge.

J. O. Huffman was convicted of using obscene, vulgar, and indecent language in a public place, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Motion was made in arrest of judgment, because the complaint and information are not sufficient. It charges appellant with going into and near a public place, to wit, "the boarding house of Mrs. J. H. Richardson," and then follows the further statement that he disturbed the peace there by using obscene, vulgar, and indecent language in a manner calculated to disturb the inhabitants of said public place. We believe the motion should have been sustained. "A boarding house" is not per se a public place. It is not so named in the statute. *Dalley v. State*, 27 Tex. App. 569, 11 S. W. 636; *Metzer v. State*, 31 Tex. Cr. R. 11, 19 S. W. 254; *Nail v. State* (Tex. Cr. App.) 50 S. W. 705. A "boarding house" not being a public place per se, and not being named in the statute, it is not sufficient to aver that a boarding house is a public place. The facts must be stated or alleged which constitute it such public place. *Fossett v. State*, 16 Tex. App. 375; *Tummins v. State*, 18 Tex. App. 13; and cases cited supra. Mrs. Richardson testified that hers was a private boarding house. In *Com. v. Cuncannon*, 8 Brewst. (Pa.) 847, it was held that the proprietor of a private boarding house is a private housekeeper, and this irrespective of the numbers of boarders who may be kept. The court said in that case as follows: "It will hardly be contended that it is any the less a private house

because it contained one such person, and the moment that is admitted there is an end of this difficulty; for we cannot draw the line, and say one, two, or six persons may be lodged in the house, and it still be private, but that the moment it reaches seven it becomes a public house. The true distinction is perfectly well understood. A public house is for the entertainment of all who come lawfully and who pay regularly. The boarding house is for the accommodation only of those who are accepted as guests by the proprietor. Such an establishment is as much a private house as if there were no boarders." To the same effect is *Foster v. State*, 84 Ala. 452, 4 South. 833.

It is sometimes rather difficult to draw the line and distinction between what constitutes an inn and a boarding house. Generally speaking it may be said that a boarding house entertains guests under an express contract at a certain rate for a given period of time. In an inn, however, there is no express agreement. The guest is entertained from day to day, according to his business. An innkeeper is bound to receive all who apply, if in a fit condition to be entertained or received, while a boarding house keeper is not bound to receive anybody, except on special contract. *Cady v. McDowell*, 1 Lans. (N. Y.) 487; *Willard v. Reinhardt*, 3 E. D. Smith (N. Y.) 143, 2 Kent's Com. 595; *Thompson v. Lacy*, 3 B. & Ald. 285, 5 E. C. L. 285; *Holder v. Souby*, 8 C. B. N. S. 254; 98 E. C. L. 254; *Dansey v. Richardson*, 3 El. & Bl. 144, 77 E. C. L. 144. The term "boarding house" not having been named in the statute and not being per se a public place, sufficient facts must be alleged in the information to constitute it a public place. This has been held in regard to a gin, as in *Daley's Case*, supra, and in regard to a livery stable, in *Metzer's Case*, supra. We are of opinion that the authorities cited are sufficient to show beyond question that the information herein is not sufficient in regard to the matter which formed the basis of the motion in arrest of judgment.

Because the complaint and information are insufficient, the judgment is reversed, and the prosecution ordered dismissed.

MCNEELY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1908.)

1. INTOXICATING LIQUORS—WHAT CONSTITUTES SALE.

Where a package containing whisky was sent to the address of the accused, and he gave an order therefor on the express company to another, who paid the charges and took the package, this constituted a sale of the whisky.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 160-162.]

2. CRIMINAL LAW—OPINION EVIDENCE.

In a prosecution for violation of the local option law, testimony of an express company's agent that, in his opinion, the contents of a

package consigned to the accused, and which was procured by another on the order of the accused, was whisky was inadmissible.

3. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—EVIDENCE.

In a prosecution for violation of the local option law, in which it was alleged that the accused had given to another an order on an express company for the package of whisky consigned to him, evidence that the accused was told that the only way to get the package out was for him to give an order as he did was properly excluded.

Appeal from Fannin County Court; Tom C. Bradley, Judge.

Frank McNeely was convicted of violating the local option law, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment fixed at a fine of \$25 and 20 days' confinement in the county jail; hence this appeal.

As we gather from the record, more from inference than direct statement, a package was sent to appellant's address, through the express company, alleged to contain a gallon of whisky; that Brown (appellant's stepson) procured appellant to give Brown an order on the express company for the package. Appellant not being able to write, the order was written and signed with appellant's name by Bob Ross. Brown went to the express office, paid the express charges due, \$3.40, and took the package. Under the authorities this would constitute a sale. But the material question presented arises on the admission of testimony, which is presented by bill of exceptions, as follows: While witness Elbert Taylor was on the stand, testifying on behalf of the state, the county attorney propounded the following question: "What did the box or package that you delivered to Evans Brown on the order of this defendant, and which had been consigned to this defendant, contain?" To which question defendant objected, because it called for the conclusion of the witness; which objection the court overruled, and required witness to answer said question. Witness answered: "I do not know what was in the package. I have no way of knowing what it contained." The county attorney then asked the following question: "Don't you know that that package contained whisky?" To which defendant objected, because it called for the conclusion of the witness, without giving any fact or reason upon which to base such opinion, as he had already stated he had no way of knowing. Which was overruled, and the witness answered: "Yes my opinion is that it was whisky." Which answer defendant objected to, and asked that the jury be instructed not to consider the same for such reasons. We do not believe that said testimony as disclosed by the above bill of exceptions was admissible. It was a material

fact to be proved as to whether the article contained in the package was whisky, as the prosecution was predicated on a sale of whisky. We have examined the record to ascertain if, aside from this objectionable testimony, there was evidence showing the package did contain whisky, and we have failed to find such testimony. The express company book calls it a package, without disclosing what it contained. It might be, if there was testimony placing this matter beyond controversy, the admission of this evidence would not be error; but, if it was an issuable fact, this character of testimony might be calculated to influence the jury. True, appellant says that he knew it was whisky that Brown (his stepson) wanted. Still he did not know the contents of the package, much less did he know that it contained whisky. So far as we are advised he never saw the package. As heretofore suggested he did not order the package. It occurs to us that the admission of this character of testimony was error.

We do not believe it was error on the part of the court to exclude the testimony offered by appellant to the effect that he was told by others that the only way to get the package out was for him to give an order for it as was done. Of course, if he gave the order to his stepson and furnished the money to his stepson to pay the same out for himself (appellant) there would be no violation of the law on his part. But if he gave the order, as heretofore suggested, to enable his stepson to pay it out on his own account, it would be a sale. *Ashley v. State*, 80 S. W. 1015, 10 Tex. Ct. Rep. 271; *Ellington v. State*, 86 S. W. 330, 12 Tex. Ct. Rep. 800.

For the error pointed out, the judgment is reversed, and the cause remanded.

BREWIN v. STATE

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. LARCENY — INDICTMENT — DESCRIPTION OF MONEY.

An indictment for theft of money sufficiently describes it as "twenty-seven dollars in money, which passed current as money of the United States of America, of the value of twenty-seven dollars."

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 72-75.]

2. CRIMINAL LAW — HARMLESS ERROR — INSTRUCTIONS.

For the charge on a prosecution for theft from the person to state, giving part of the statutory definition, that "the theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away," is harmless, though the indictment merely charged that the theft was committed without the knowledge of the person from whom the property was taken, where, in applying the law to the facts, the court limited the jury "to privately taking the property without the knowledge of the alleged owner."

Appeal from District Court, Dallas County;
E. B. Muse, Judge.

Rosie Brewin was convicted of theft from the person, and appeals. Affirmed.

Wm. M. Jones, G. B. Smedley, and A. S. Baskett, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment charged appellant with theft from the person, and the money is thus described in the indictment: "Twenty-seven dollars in money which passed current as money of the United States of America, of the value of twenty-seven dollars." Motion in arrest of judgment was made because this was not a sufficient description of the money. The motion is not well taken. The description is sufficient. *Butler v. State*, 81 S. W. 743, 10 Tex. Ct. Rep. 982.

The charge of the court is criticised because, among other things, it states: "The theft must be committed without the knowledge of the person from whom the property is taken, or so suddenly as not to allow time to make resistance before the property is carried away." This is in the general definition of the offense, and is a part of the statutory definition. The court then says: "Now, gentlemen of the jury, bearing in mind these definitions, and applying them to the evidence in this case." The indictment charges that the theft was committed without the knowledge of the person from whom the property was taken, and does not charge, "or so suddenly as not to allow time to make resistance before the property is carried away." Applying the law to the facts, however, the court limited the jury "to privately taking the property without the knowledge, etc., of the alleged owner," and does not include the second clause, "or so suddenly," etc. We do not believe this is such error as authorizes a reversal, inasmuch as the jury were limited to the allegations of the indictment when the law was applied to the facts of the case by the charge.

The charge of the court on circumstantial evidence is also criticised. The charge is so clearly right along this line that it is not necessary to discuss it. The transcript does not contain a statement of facts.

There being no such error as requires a reversal, the judgment is affirmed.

HONEYCUTT v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. ASSAULT AND BATTERY—AGGRAVATED ASSAULT—EVIDENCE—ADMISSIBILITY.

In a prosecution for aggravated assault, evidence of a difficulty between the prosecuting witness and a third person about two hours after the assault was inadmissible in the absence of anything to show that the injury complained of by prosecuting witness was caused by that difficulty, and not by defendant.

2. WITNESSES — IMPEACHMENT — CONTRADICTION IN IMMATERIAL MATTER.

In a prosecution for aggravated assault, evidence of a difficulty between prosecuting witness and a third person after the assault related to an immaterial matter, and was not admissible to impeach the witness; she having denied the difficulty.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1224.]

Appeal from Johnson County Court; J. D. Goldsmith, Judge.

Ira Honeycutt was convicted of aggravated assault, and appeals. Affirmed.

Walker & Baker, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction is for an aggravated assault, the fine being \$50.

The first bill shows that after Claudie Honeycutt had testified on direct examination by the state that she met defendant in the street near the railway track between 6 and 7 o'clock in the evening, and that defendant took hold of her right hand with his left hand, and hold of her left hand with his right, and that he squeezed her right hand and twisted the same so badly that her hand and wrist hurt her so badly, she stated that her wrist and lower part of her right arm swelled and got red, and that her wrist was swollen so badly and hurt so much the next day that she could not wash. After Claudie Honeycutt had stated, on cross-examination by the defendant, that she did not strike the witness Mrs. M. M. Honeycutt in the face or anywhere else with her right hand the night following the alleged assault, defendant offered to prove by Mrs. M. M. Honeycutt that the night following the alleged assault, and about two hours after the occurrence of the alleged incident near the railway track, the prosecuting witness, Claudie Honeycutt, came to her house and struck her in the face with her right hand with such force as to stagger her, the said Mrs. M. M. Honeycutt; that said Claudie Honeycutt nearly knocked her down with said blow. To the introduction of said testimony the state by its attorney objected, for the reason that it was immaterial, and defendant's counsel thereupon stated to the court that the testimony was offered as a circumstance tending to show that the hand and wrist of the prosecuting witness were not injured as claimed by her, and that if her wrist or arm was swollen the day after the alleged assault the same was caused by striking Mrs. M. M. Honeycutt, and not by defendant. This evidence was inadmissible.

Bill No. 2 shows that similar testimony was offered in behalf of appellant. We do not think any of this testimony was admissible. The mere fact that prosecuting witness had a difficulty with her mother-in-law, after the injury was done to her person by appellant, would not be admissible for any purpose, unless it shed some light upon the previous difficulty. The mere fact that

prosecuting witness struck Mrs. M. M. Honeycutt (her mother-in-law) with her fist would not per se be admissible, unless the bill of exceptions had shown that the injury complained of by prosecuting witness was inflicted upon her by said blow. The bill does not show that the injury she complained of was so inflicted. This testimony would not be admissible for the purpose of impeachment, because it would be an impeachment upon an immaterial matter; it being immaterial about her having a fight with her mother-in-law. She having denied said fight, it would not be proper to prove the fact that said fight occurred.

The judgment is affirmed.

HOLLEY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. CRIMINAL LAW — CONTINUANCE — ABSENT WITNESSES.

An application for a continuance of a criminal case on the ground of the absence of a witness was properly overruled where, in view of the state's testimony, the testimony of the absent witness would probably have been disbelieved and would not have changed the result.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1381.]

2. CRIMINAL LAW—EVIDENCE—ACCOMPLICE'S TESTIMONY—WHO ARE ACCOMPLICES.

The owner of burglarized premises is not rendered an accomplice within the law of evidence by telling the burglar that he will not prosecute him if he will return the goods stolen, in the absence of any promise by him to testify falsely or to in any wise conceal or suppress the crime.

Appeal from District Court, Limestone County; L. B. Cobb, Judge.

Lewis Holley was convicted of burglary, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment fixed at two years' confinement in the penitentiary.

Appellant made a motion for continuance, based on the absence of a witness by the name of Mary Ellis, by whom he expected to prove an alibi. Said witness appears to have lived about a mile and a half from the alleged burglarized premises, and the application says, in general terms, she would prove that appellant was at her house on the night the store was burglarized from between sundown and dark until near midnight. It is not directly stated in the application that said Mary Ellis was at her home on said night, and that appellant was within her view during all of said time; but this is left to inference. However, as heretofore suggested, in the light of the testimony in this case, we do not believe, if witness Mary Ellis would have testified as is claimed, the jury would have regarded it as probably true, or that it would have changed the re-

sult in this case. The state's case shows that John Davis, one of the accomplices, was present with appellant and helped to burglarize the premises. Besides the owner of the burglarized premises testified that appellant confessed to him that he was a party to the commission of the burglary. We do not believe the court erred in overruling this application.

It is also insisted by appellant that there is no testimony corroborative of the accomplice's evidence; that is, that although the testimony of Frank Beville, the owner of the alleged burglarized premises, is corroborative of that of John Davis, yet he is also an accomplice, and cannot corroborate, so as to support the verdict, and that there is no other testimony of a corroborative character. Without discussing this latter feature of the case—that is, as to other corroborative testimony—we hold under the decisions of this court that Frank Beville is not an accomplice. True, he would have been so regarded under *Gatlin v. State*, 40 Tex. Cr. R. 116, 49 S. W. 87, and other cases; but we understand these cases to have been overruled in *Che-nault v. State*, 81 S. W. 971, 10 Tex. Ct. Rep. 909, followed by *Robertson v. State* (Tex. Cr. App.) 80 S. W. 1000. It appears from the record that Beville told appellant he would not prosecute him if he would return the goods. He did not promise him immunity in the sense that he would testify falsely for him, or would do any act for the purpose of concealing him or suppressing the crime, merely stating that he would not himself undertake the prosecution of the case. Under the decisions above referred to, this would not constitute him an accomplice; and, of course, his testimony, not being that of an accomplice, amply corroborates the testimony of John Davis, the accomplice witness.

There being no error in the record, the judgment is affirmed.

CHORAN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. INTOXICATING LIQUORS — SALE — WHAT CONSTITUTES.

In a prosecution for violation of the local option law, evidence held sufficient to justify a finding that a transaction described in the evidence was a sale, and not a loan, though, after indictment, accused repaid the prosecutor the money he had received.

2. CRIMINAL LAW—ARGUMENT OF COUNSEL.

In a prosecution for violation of the local option law, testimony, that the amount of whisky furnished by the accused to the prosecutor was about a quart, was sufficient to justify an argument of counsel that as the prosecutor let the defendant have the price of a quart of whisky, and then defendant let him have the quart of whisky, the transaction was a sale, and not a loan.

3. SAME—HARMLESS ERROR.

In a prosecution for violation of the local option law, an argument of counsel that as

prosecutor let defendant have \$1, the exact price of a quart of whisky, and then defendant let him have the quart of whisky, the transaction was a sale, and not a loan, was not sufficient to justify a reversal, though there was no evidence that \$1 was the price of a quart of whisky.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 8127.]

4. SAME—PENALTY—INSTRUCTIONS—HARMLESS ERROR.

In a criminal case, an instruction stating the minimum penalty correctly, but not stating the maximum correctly, was not reversible error, where the jury found a legal punishment, and in a subsequent portion of the charge, where the court applied the law to the facts, the penalty was correctly stated.

Appeal from Erath County Court; M. J. Thompson, Judge.

Felix Chorán was convicted of violating the local option law, and appeals. Affirmed.

Ben Palmer, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail; hence this appeal.

The facts, succinctly stated, show that appellant had a gallon package of whisky at the express office. He met prosecutor, Lewis Russell on the streets of Stephenville, who informed him that he had a jug of whisky at the Frisco depot, and he lacked a dollar of having enough money to pay it out. Prosecutor let him have a dollar, and then went with him in a delivery wagon, and drove to the Frisco depot, and appellant paid the whisky out, put it in the delivery wagon, and drove back together in the delivery wagon with the whisky to the wagon yard. They carried the jug into the feedhouse, and appellant told prosecutor if he wanted some of the whisky to help himself. Prosecutor got a bottle, poured out about a quart of said whisky into the bottle, took it home with him. It appears that after this, and after appellant was indicted for the sale of said whisky, he told prosecutor that he owed him a dollar. Some several weeks after that occasion, prosecutor went to appellant and asked him for the dollar, and he paid it to him. This is in substance all the material facts in the case in connection with the alleged sale of the whisky.

Appellant contends that these facts do not show a sale, but a mere loan by the defendant; and in this connection he insists that all of the authorities in this state show that, where whisky has been held by this court to have been sold under circumstances somewhat similar to this, that there was a prior agreement before the whisky was taken out, to let the party have the whisky for the loan. He cites *Ashley v. State*, 60 S. W. 1015, 10 Tex. Ct. Rep. 271; *Hillard v. State*, 87 S. W. 821, 13 Tex. Ct. Rep. 520; and on the same line we refer to *Beall v. State*, 86 S. W. 334, 12 Tex. Ct. Rep. 801; *Dunn v. State*, 86 S. W. 326, 12 Tex. Ct. Rep. 803. While

this may be true, still we do not understand these authorities or others to hold that the circumstances may not show a sale, though no express language was used prior to taking the whisky out of the express office suggesting a sale. We think a sale may be either express or implied. Evidently in a matter of this sort, especially where the parties were seeking to evade the law, a sale would not be mentioned, and it could only be gathered from the acts and conduct of the parties, and perhaps in the very face of their expressions. Here a loan was mentioned; but almost immediately after the whisky was taken out of the express office, the parties drove to the feedstable, and there a quart of whisky is delivered to prosecutor by appellant, who claims that a loan was extended to him by prosecutor. Nothing is said when this money is to be repaid when the loan was extended, and nothing is done in regard to said repayment until after the indictment is lodged against appellant; and then the matter of a loan is brought up, and the money is repaid. We believe that the conduct of the parties, in connection with this transaction, including the delivery of the whisky and the repayment of the money after indictment, constituted sufficient evidence on which the issue of sale *vel non* was raised. The court submitted this issue to the jury, and told them if it was a loan to acquit appellant. They found it was a sale, and we believe the evidence sustains this view of the case.

Appellant complains of certain arguments of the county attorney to the jury, to wit: "It is a strange thing to me, gentlemen, that Russell let defendant have just one dollar, which was the exact price of a quart of whisky; and then defendant let him have a quart of whisky. It looks to me very much like a sale of a quart of whisky." The bill shows that these remarks were objected to on the part of appellant on the ground, as stated, that there was no proof in the record that the whisky gotten from defendant by Russell was a quart. This is a mere ground stated in the bill, and not a certificate by the judge that such was the fact. If we recur to the proof it shows that the witness stated it was about a quart. It is also stated that objection was made upon the further ground that there was no proof whatever as to the value of the quart of whisky. The same observation applies to this portion of the bill; that is, this is not tantamount to a certificate of the judge that the ground stated was a fact. It may be conceded, however, that the argument was not authorized; but it does not occur to us that it is of that character which would authorize a reversal of the case.

Appellant also objected to the charge of the court on the ground that the penalty was not properly stated. It has been held by this court that where the minimum penalty was stated correctly, although the maximum may not have been stated correctly, and the jury found a legal punishment, it is not reversible

error. *Lovejoy v. State* (Tex. Cr. App.) 48 S. W. 521; *O'Docharty v. State* (Tex. Cr. App.) 57 S. W. 657. But more than this, in a subsequent portion of the charge where the court applied the law to the facts, the error is cured and the penalty properly stated.

There being no error in the record, the judgment is affirmed.

GILFORD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

CRIMINAL LAW—NEW TRIAL—GROUNDS—MISCONDUCT OF JURORS.

The action of the jury in a criminal case in commenting during their deliberations on the fact that defendant was a negro, in discussing his character and that of his family, in arguing that a penitentiary sentence might be beneficial to him, and in telling of improper relations existing between negroes in the community generally and certain foreigners residing in the vicinity, and in coercing a dissenting juror during their retirement was such misconduct as to overthrow a conviction, and require a new trial.

Appeal from District Court, Walker County; Gordon Boone, Judge.

Morgan Gilford was convicted of burglary, and appeals. Reversed.

Hill, Williams & Elkins, for appellant. Dean, Humphrey & Powell, Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for burglary, two years in the penitentiary being fixed as the punishment. The main proposition is the misconduct of the jury after their retirement to consider their verdict.

Wilson testified that while considering their verdict a member of the jury made the following statement: "That these negroes had been running over the Polanders down there, and imposing on them; and that Polanders girls down there in that country had had children by negroes—negro babies." He expressed regret that the same should have come up on motion for new trial, but he says: "I have sat upon many a jury, and I rather think that I have never seen men act so rough to one juror in my life. I could not remember everything that was said and done." The remark in regard to the Polanders, he says, was made by Strange. He further stated "that he [Strange] lived down there, and knew all about them." He says the further statement was made, that this defendant "was nothing but a damn negro, anyhow, and it would not hurt him to serve two years in the penitentiary if he was innocent. I could not remember everything, and I thought that it was pretty rough. I do not like the way they proceeded against me. They were all opposed to me, and I could not tell you what all was said, but I thought there were some pretty hard words said. It was said in opposition to the stand I took." On cross-ex-

amination he said: "I think it was Parrish who made the statement 'that it was nothing but a damn negro, anyway, and it would make no difference if he was sent to the penitentiary, even if he was innocent.' There was right smart excitement in the room, and Parrish said something about his being a God damn negro, and there were several talking. He might have said, 'If he went to the penitentiary, it would not hurt.' But it came up, and he was talking. I could not catch all that was said. Some of them said it. I think it was Parrish who said it."

Parrish testified that he did not make the statement, "that it was nothing but a damn negro anyhow, and if we sent him to the penitentiary for two years, it would make no difference, even if he was innocent," and did not hear anybody make that statement. He denied hearing the statement, to the effect, that the negroes were imposing on the Polanders, or that defendant (who was a negro) had been imposing on the Polanders. He further stated "that he believed some one said that it was very probable that the negroes in that community did impose on them, but they did not bring it up as a positive fact." On cross-examination he testified: "I said this: I said that 11 men on the jury only proposed to give him two years, and we all believed him guilty, and we did not think Wilson should hold us there on a proposition of that kind. I don't remember making the statement, 'that defendant wasn't anything but a damn negro anyhow.' I said that he [defendant] as a negro, wouldn't injure his standing in the community to go to the penitentiary for two years. I might have said that. I did not say that I would send him to the penitentiary, even if he was innocent. I cannot say as a fact that we discussed in the jury room, and that statements were made by gentlemen on that jury, that these negroes were in the habit of running over the Polanders, and those negroes made the Polanders get out of the road down there. I do not think I heard that said in the jury room. I did not hear it said as a positive fact, whether they did or not. I might have heard it brought out as a supposition. There was something like that said on the jury, that the Polanders had to get out of the road for the negroes down there."

Strange stated that he told the jury he knew the parties, but denied telling them that the negroes had been running over the Polanders in that community. On cross-examination he further stated: "The only thing I heard: The case had been dropped, and we were sitting after supper, and Wilson got to talking about that Edna affair, and one thing said brought on another; and Wilson said there was a case here, or close here, where there was a white girl had a child by a negro; and I said there was a case down there at Waverly similar to that one; and

that is all I heard about negro babies, and are not a resentful kind of people. That they would take a good deal off of negroes." He further said: "I said that these negroes were spoken of as being bad negroes, and no doubt the Polander was afraid to stop the negro that night." Frame testified, among other things: "I think Parrish said, 'Why didn't they put the other damn negroes on the witness stand that came up here?' But he did not hear the other remark imputed to Parrish." He further stated: "I think they took Wilson off at the time, and probably that might have been said out of my hearing. I would not swear that such a statement was not made that these gentlemen have detailed. They took Wilson turn about. We hauled him over the coals. I thought it was plain enough. We all argued the matter with him."

Levi Justice denied hearing the statement imputed to Strange, as well as that imputed to Parrish, but would not swear that something like it was not said. He says: "I am not prepared under oath to contradict and say that such a statement was not made. I say that I did not hear it."

Lindley testified that he did not hear Frame, or Strange, or any member of the jury, before the rendition of the verdict, say that these negroes (referring to defendant and his family) had been imposing on and running over the Polanders down there (referring to the alleged owner, Buchna), and these negroes had been getting babies by Polish girls. He said he did not hear the remark imputed to Parrish. However, there was some remark made about it, but it was not in evidence, and some one spoke up and said: "We are not saying this, and it hasn't anything to do with the case. Parrish said something about a damn negro, but I did not hear the balance of the discussion, and did not pay any attention to it."

Cunningham testified that he heard some remark of the nature that it was nothing but a damn negro. It was in connection with the argument in the jury room. He says that he could not remember everything that was said. There was something said in regard to the Polanders and the negroes, and that the Polanders were ignorant, and afraid of the negroes anyhow; and that these negroes were supposed to be reckless anyhow, and had no doubt been mistreating the Polanders, or something like that. That it might be a lesson to him, if he was put in the penitentiary for two years, and be beneficial for him, anyhow. He further says: "I considered that was before the jury, and we had a right to consider that without being in connection with the case." He says: "There was something said about the Polanders being afraid of the negroes, and that they were a cowardly sort of people. That was in reply to what Frank Buchna said about seeing the negro that night, and failing to stop him. It was said that Buchna was afraid of the negro, and would let him go rather than undertake to stop him." On recross-examination this juror further stated that Strange said that he knew the family (referring to appellant's family); and that he did not like them so well. It was in that connection that the discussion took place about sending the negro to the penitentiary for two years, and that it would do him good. Strange further stated that he knew these negroes, and had known them, and they did not stand so well. He said he did not think they had a good reputation. This witness further stated: "I have known the Polanders a good while, and I remarked to the jury that I knew the Po-

landers were a peaceful kind of people, and are not a resentful people. That they would take a good deal off of negroes." He further said: "I said that these negroes were spoken of as being bad negroes, and no doubt the Polander was afraid to stop the negro that night." Frame testified, among other things: "I think Parrish said, 'Why didn't they put the other damn negroes on the witness stand that came up here?' But he did not hear the other remark imputed to Parrish." He further stated: "I think they took Wilson off at the time, and probably that might have been said out of my hearing. I would not swear that such a statement was not made that these gentlemen have detailed. They took Wilson turn about. We hauled him over the coals. I thought it was plain enough. We all argued the matter with him."

J. R. Wilson, recalled, stated: "Strange made the statement to me that these negroes had been running over the Polanders, and that Polish girls had had children by these negroes; but all the jury did not hear that. Strange made that statement to me. He said that these Polanders were afraid of the negroes. I told him I thought it was a strange thing that when the Polander saw the negro coming out his smokehouse with the sack of meat on his shoulder, and was within three feet of him, he did not grab hold of it; and he [Strange] remarked, 'he is afraid of him as death.' Strange voluntarily made the statement to me that the negroes were getting babies by the Polander girls. He did not say that this defendant had done anything of the kind."

This is the substance of the evidence detailed on motion for new trial, though it covers several pages, and the examination was continued at some length both by direct, cross, redirect, and recross-examination. We are not willing that the verdict should stand when such conduct by the jury has been had. The testimony of the juror Wilson in regard to the overbearing treatment of himself by some of the other jurors is not only not contradicted, but is sustained by one or more of those, who testified in regard to that phase of the motion. That appellant's character and that of his family was discussed, is shown by the evidence on this phase of the motion. Without going further and summing up the testimony, we think it is of such a nature and the conduct of the jury of such a character that this court cannot afford to allow this verdict to stand. There is no reason or excuse why the jurors should act in this manner. If the evidence is sufficient to sustain the verdict, the consideration of the jury should be relegated alone to the facts under the charge given by the court. Extrinsic evidence and extraneous matter should not be gone over in the jury room, nor permitted to enter into their decision of the case. The matters occurring in the jury room with reference to the extrinsic facts and extraneous

matter would not have been permitted to go before the jury in aid of the state's case, if offered as evidence.

Because of the misconduct of the jury, the conviction is set aside, and the judgment is reversed, and the cause remanded.

RAMM v. GALVESTON, H. & S. A. RY. CO.*
(Court of Civil Appeals of Texas. Dec. 20, 1906.
Rehearing Denied Jan. 24, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—PLEADING—ANSWER—SUFFICIENCY.

Where, in an action for the death of a servant, the petition alleged that deceased and others were engaged in moving a pump by means of a rope and plank, and that deceased was injured by reason of the rope and plank being too short, an answer alleging that if the rope and plank were too short, the defects were as open to deceased as to defendant, and that if there was any danger in using the same, deceased assumed the risk, was sufficiently specific, construed in connection with the petition, as to deceased's contributory negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 859.]

2. TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

In an action for the death of a servant, an instruction that plaintiff could not recover if deceased failed to exercise ordinary care in looking out for his own safety which contributed to his injury, was not open to the objection that it assumed that deceased had been guilty of negligence; an instruction immediately following having given a correct definition of ordinary care and stated that failure to exercise it was negligence.

3. APPEAL—RECORD—MATTERS REVIEWABLE.

An assignment of error complaining of the rejection of the testimony of a witness is not open to consideration on appeal, where the bill of exceptions does not disclose what the witness would have testified to, nor what objections were presented to the testimony.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2905-2909.]

4. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS—ASSUMPTION OF RISK.

In an action for the death of a servant, an instruction that if the danger or risk was as open to the observation or knowledge of deceased as to defendant, plaintiff could not recover, was proper.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1175.]

5. APPEAL—PRESENTATION OF QUESTION IN TRIAL COURT—INSTRUCTIONS—FAILURE TO REQUEST.

A party could not complain on appeal that an instruction which was a correct exposition of a general rule was not sufficiently specific in its application to the case, where he failed to request an instruction which would have remedied the alleged defect.

6. SAME—FAILURE TO REQUEST SUBMISSION OF ISSUE.

Where plaintiff, in an action for the death of a servant, failed to request the submission of a certain issue of negligence, and acquiesced in its being withheld from the jury, he could not complain on appeal of the failure to submit it.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Mary C. Ramm against the Galveston, Harrisburg & San Antonio Rail-

way Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Bertrand & Arnold, for appellant. Newton & Ward, W. B. Teagarden, and Baker, Botts, Parker & Garwood, for appellee.

FLY, J. Appellant instituted this suit against appellee to recover damages for the death of her son, Charles Ramm. A trial by jury resulted in a verdict and judgment for appellee.

The facts disclose that Charles Ramm was in the employ of appellant, as a machinist helper, at Glidden, Tex., and, on the night of March 19, 1903, was engaged with others in lowering an air pump from the tender of a locomotive. A plank was used to slide the pump down, and a rope was tied around the air pump and thrown to the opposite side of the tender from that on which the pump was to be lowered. The plank did not extend to the top of the tender, but the evidence was conflicting as to the distance it lacked of reaching the top. Under order of the foreman or of deceased some of the men got the plank, and it was put up against the side of the tender. Deceased got on top of the tender, with others, and took hold of the rope and assisted in letting the air pump down to the ground along the plank. There was a jar as the pump dropped on the plank. Deceased afterwards complained of being hurt, and a few days thereafter died with general peritonitis. One physician swore that a blow or a strain will produce general peritonitis, and another that it will not. There was no evidence of external violence on the abdomen, or of any internal wound, and the evidence would justify a finding that the disease that caused the death of Charles Ramm was not the result of a strain or wound received by him while lowering the air pump. The evidence indicates that all the workmen, deceased among the number, knew that the plank did not reach to the top of the tender. Deceased had often assisted in unloading air pumps, and was acquainted with the manner of doing it. The jury were justified in finding that he knew the risks and danger attending the lowering of the pump as well as his foreman. The jury had evidence upon which a finding that deceased was superintending the job could be predicated.

It was alleged in the petition that appellant's son, Charles Ramm, deceased, was working in a roundhouse at Glidden, Tex., under the contract of a foreman, as a machinist or machinist helper, and was ordered by the foreman to move a certain locomotive air pump from the tender of a locomotive to the ground. That the air pump weighed about 1,000 pounds and was placed by deceased and those assisting him on the top of a tool box on the edge of the tender to be lowered to the ground, and a plank and rope were furnished by the foreman to be used in lowering the air pump. That, under the

*Writ of error denied by Supreme Court, February 22, 1906.

directions of the foreman, the plank was placed in a slanting position, one end on the ground and the other against the side of the tender below the air pump, and the rope was tied to the air pump and dropped on the opposite side of the tender from that on which the pump was to be lowered, so that men on the ground and on the tender could hold same to lower the pump. It was alleged that the plank was so short that it reached only within a foot or more of the top of the tender and tool box where the pump was lying, leaving a straight drop for the pump of more than a foot; that the rope was also too short for the work in view, and the men on the ground could not reach and pull on same and could not assist properly in lowering the pump. That deceased was on the tender of the locomotive, and took hold of the rope and braced his feet against the side of tender to assist in lowering the pump, and was injured by reason of the rope and plank being short and being negligently placed in position by the foreman and the men being unable to stay or check the progress of the pump, and from such injuries died. Appellee answered that if the rope and plank were too short, the defects were as open and patent to deceased who was a skilled and experienced workman as to it, and that if there was any danger in using the same appellant assumed all risk of such danger, and that if he took hold of the rope as he alleged, he did so voluntarily and because it was the easiest part of the work. The answer continues as follows: "This defendant further says that plaintiff ought not to recover herein, because defendant avers that if the deceased was injured as alleged by plaintiff, which is not admitted, but especially denied, the said injury was brought about by the carelessness and negligence of said deceased in not exercising proper precautions and care for his own safety, and in not protecting himself in his labors as did all the other servants of this defendant engaged in said work; that said air pump only weighed about 500 pounds and that some eight or nine of defendant's servants were engaged in lowering or removing said air pump from the tank; that said men were more than sufficient to lower said air pump with perfect safety to all concerned, and if the said deceased was injured at all, he was injured through his own carelessness and negligence in not looking out for his own safety, all of which proximately contributed to his said injuries, if any he received, which contributory negligence this defendant pleads in bar of this suit." That portion of the answer was excepted to because it was too general in its terms, and did not inform appellant of the specific acts relied on to show contributory negligence. The exceptions were overruled, and that action of the court and the giving of a charge on contributory

negligence form the basis of complaint in the first and second assignments of error.

The answer must be construed in connection with the allegations of the petition, and when so construed it is sufficient to indicate the grounds upon which appellee relied to show contributory negligence. The answer excepted to was, in effect, an allegation that if appellant was injured as he alleged, the injuries grew out of his own carelessness, as indicated in his pleadings. The pleading, however defective, could not have injured appellant, because the case made out under the pleadings and evidence of appellant tended to raise the issue of contributory negligence, and had there been no answer but a general denial, the court should have submitted the issue to the jury. In the case of *Murray v. Railway*, 73 Tex. 2, 11 S. W. 125, the plea of contributory negligence was as follows: "That plaintiff by his own negligence and carelessness contributed to the injuries complained of by him, and that but for his own negligence and carelessness such injuries would not have occurred." The plea was excepted to, and the exception overruled. The court held that the plea of contributory negligence was too general, but the court said: "Plaintiff's own case necessarily put in issue all the facts relied on by defendant to show his contributory negligence, and such being the case he was obliged to acquit himself of fault. The burden of proof was on him to do this, and he could not recover until it was done. It is seen, then, that the case under the facts required no plea of contributory negligence, and the error of the court in overruling the special exception to the insufficient plea was harmless."

The charge of the court complained of in the second assignment was as follows: "Or, if you find that the said Charles J. Ramm was injured in lowering said air pump, as alleged by plaintiff, and that such injury, if any, directly resulted in his death, yet, if you further find that the deceased, Charles J. Ramm, failed to exercise ordinary care in looking out for his own safety in lowering said air pump, and that such failure, if any, either proximately caused or contributed to his injury, if any, then plaintiff cannot recover, and you will so find." The charge is not open to the criticism that the court assumed that deceased had been guilty of negligence. The finding of negligence was clearly left to the jury when they were instructed to find whether deceased had failed to exercise ordinary care in lowering the pump, because the failure to exercise ordinary care is negligence, as the court, in a paragraph immediately following the one copied, correctly informed the jury, and also gave a definition of ordinary care. Similar charges have been approved by the Supreme Court. *Railway v. Casseday*, 92 Tex. 526, 50 S. W. 125. The case of *Railway v. Rogers*, 91 Tex. 52, 40 S. W. 946,

cited by appellant, is not pertinent or applicable. In that case a requested charge made a failure to look and listen when crossing a railroad negligence, without allowing the jury to pass on whether or not it was negligence, and the court said it was properly refused, but, if it had charged the jury that if they found the party had been guilty of a failure to exercise ordinary care, which was defined, and such failure had contributed to the injury, the Supreme Court would not have held the charge to be incorrect. The difference is apparent.

The third assignment of error complains of the rejection of the testimony of a witness as to what Charles Ramm said when he returned from Glidden, and his appearance on that occasion, but the bill of exceptions on which the assignment is based does not disclose what the witness would have testified, nor what objections were presented to the testimony. The bill of exceptions is fatally defective, and the assignment of error cannot be considered. *Fridham v. Weddington*, 74 Tex. 354, 12 S. W. 49; *Schoch v. San Antonio* (Tex. Civ. App.) 57 S. W. 893.

The bill of exceptions on which the fourth assignment is based is also defective in not stating the objections urged to the rejected testimony.

The court instructed the jury: "You are also further charged that if you find that the deceased, Charles J. Ramm, was injured in lowering said air pump substantially as alleged by plaintiff, and that such injury, if any, proximately caused his death, and you further find that there was danger or risk in removing said air pump in the manner and with the means by which it was being removed, yet, if you further find such danger or risk, if any, in the performance of said work was as open to the observation and knowledge of the deceased, Charles J. Ramm, as to the defendant, then plaintiff cannot recover, and you will so find by your verdict." The first ground of objection to the charge is that it assumed that the danger and risk was open to the observation of the deceased. That objection is answered by the language of the charge itself. It plainly and unequivocally left to the jury to determine whether there was danger and risk in the work, and, if so, if it was as plain to deceased as to the appellee. The charge does not assume that the danger was open and obvious, and then instruct the jury to find whether it was just as open to deceased as to appellee, nor could it have led the jury to believe that if the danger was not open to the knowledge of either deceased or appellee, they should find for appellee because it was as open to one as to the other. It will be noted that in this charge the jury are not told that if the defects in the instrumentalities used by appellee were "as open to the observation and knowledge of the deceased" as they were to appellee, they should find for appellee, but if it is "the danger and risk"

in removing the air pump from the tender that must have been as open to the observation of the one as the other. This is the distinction between the charge in this case and the ones condemned in the cases of *Railway v. Guy* (Tex. Civ. App.) 23 S. W. 633, and *Peck v. Peck* (Tex. Sup.) 87 S. W. 248. In the *Guy* Case the charge was: "If said defect was as equally open to the inspection of the plaintiff as to the railway company, then, in that event, the defendants would not be liable, and you will find for the defendants." It was appropriately said in that case: "It might be true that the servant, by examination or inspection, could know all the master should know, and in this sense the condition of the appliances may be said to be as open to the inspection of one as to that of the other. Still the duty of each is not the same. A master is bound to inspect and the servant is not." So in the *Peck* Case the requested charge was: "You are further charged that if you believe from the evidence that the block described in plaintiff's petition was open and obvious to plaintiff, and that plaintiff had had opportunities to see said block, then you will return a verdict for defendant." The charge was held to be incorrect in placing the duty of inspection on the servant. The charge in this case did not require inspection, but merely informed the jury that if the danger was as apparent to the servant as to the master the servant could not recover. That is a correct statement of the general rule of law on the subject, and if any modification or explanation of it was desired a special charge should have been requested embodying application of the rule to the facts of the case. The language of the charge is quite similar to that of one discussed by the Supreme Court in *Bonnet v. Railway*, 89 Tex. 72, 33 S. W. 334, in which it was said: "If the master and servant stand upon an equal footing with respect to a knowledge of the danger, then, in case of an accident as a result of the danger, the master is exonerated." In the case of *Railway v. Lempe*, 59 Tex. 19, the proposition of law contained in the charge is sustained; the court holding: "Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself if he goes on with it." In the case of *Railway v. French*, 86 Tex. 96, 23 S. W. 642, the foregoing language was copied and approved, and it was held that it was error to refuse the following charge: "If the danger to be expected from the caving of the bank was as open to the observation of French as it was to the foreman, Collins, then plaintiff cannot recover, because in such case French assumed the risk of being injured by the caving of the bank." There was evidence tending to show that deceased saw the plank, saw its position against the side of the tender, and knew of its condition, and that he had before then engaged in unloading such ma-

chines, and knew how it should be done. It follows that the charge was not objectionable because of no facts to justify its submission to the jury.

The sixth assignment of error is without merit. The charge did not give too much prominence to the issue of assumed risk. The issue could not have been presented in a more inobtrusive way.

The issue as to the shortness of the rope was not submitted to the jury, although there was slight evidence that it may have had some connection with the injury to deceased. Appellant did not, however, request a submission of that issue to the jury, but acquiesced in its being withheld from their consideration, and cannot now be heard to complain of the failure of the court to submit *It. Shumard v. Johnson*, 66 Tex. 70, 17 S. W. 398; *Wilkinson v. Johnson*, 88 Tex. 392, 18 S. W. 746.

It was not error to inform the jury that if deceased knew the plank was too short for the purpose for which it was to be used or that it was placed so as not to reach the top of the tender, and the attendant danger, that he could not recover. The cases cited by appellant are not applicable to this phase of the case, and are not appropriate to the proposition under which they are cited.

The eighth assignment of error is disposed of by our conclusions of fact.

The judgment is affirmed.

HOUSTON SAENGERBUND v. DUNN.

(Court of Civil Appeals of Texas. Jan. 18, 1906.)

1. NEW TRIAL—MOTION FOR NEW TRIAL—TIME OF HEARING.

A motion for a new trial was filed within two days after the date of the judgment, but was not heard until the day before the last day of the term by law. The postponements were made at the suggestion of the counsel of the successful party in view of the fact that the court was busy. *Held*, that the court abused its discretion in dismissing the motion; district court Rule 71 (87 S. W. xxv), providing that motions for new trial shall be determined not later than two entire days before the adjournment of the court, not being mandatory.

2. LIMITATION OF ACTIONS—LANDLORD AND TENANT—BREACH OF CONTRACT TO REPAIR—ACTIONS.

An action by a lessee against the purchaser of the premises for his failure to repair the same, as required by the written lease executed by the vendor, is an action founded on a contract in writing within the four year statute of limitations.

3. ARBITRATION AND AWARD—ACTION ON AWARD—EVIDENCE—INSTRUCTIONS.

Where, in an action on an award of arbitrators, the petition alleged that the agreement to submit to arbitration was entered into by defendant or his agent, and the evidence of plaintiff showed that defendant was represented in the matter by an agent, and defendant's testimony showed that he never authorized any one to represent him, the court was required to charge that defendant was bound, if he or his agent agreed to the submission.

4. SAME—SUBMISSION—MATTERS SUBJECT TO ARBITRATION.

It is competent for the parties to submit matters in dispute between them to arbitration,

without any special reference to questions of law.

5. SAME.

It is not necessary that a person should have a legal cause of action against another to authorize a submission to arbitration, and to bind the latter by the award, but a difference of opinion between the parties on the whole case including the latter's liability and the amount of damages is sufficient.

6. TRIAL—INSTRUCTIONS IGNORING EVIDENCE.

Where, in an action on an award of arbitrators pursuant to a verbal agreement to submit to arbitration, there was evidence that defendant withdrew from the agreement before the award was pronounced, an instruction basing a right to recover solely on the submission and subsequent award regardless of the fact that defendant might have withdrawn from the agreement was erroneous.

7. LIMITATION OF ACTIONS—LANDLORD AND TENANT—BREACH OF IMPLIED CONTRACT TO REPAIR.

An action, based on the implied obligation of a landlord to repair a part of the building not under the control of the lessee, is barred by the two year statute of limitations.

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by the Houston Saengerbund against Frank Dunn. Judgment for defendant, and plaintiff brings error. Reversed.

Rehearing denied.

Taliaferro & Wilson, for plaintiff in error.
E. P. Turner, for defendant in error.

REESE, J. This suit was instituted by the Houston Saengerbund against Frank Dunn, to recover damages alleged to have been done to the furniture of plaintiff, situated in a house rented from defendant, occasioned by the rain leaking through holes in the roof, which defendant was bound by express stipulations in the lease contract to repair. In the first count of the petition plaintiff sets up a verbal agreement between plaintiff and defendant to submit the matter of plaintiff's complaint to arbitration, and an award of the arbitrators in favor of plaintiff for \$735. In the second count plaintiff sets up the contract to repair, the breach and consequent damages which are alleged to be \$1,500. In the third count plaintiff alleged the lease of a part of the building, that plaintiff had no control over the roof, and that, as landlord, defendant was bound to keep the roof in repair, which had not been done. That by reason of such failure plaintiff had been damaged in the sum of \$1,500 by the water leaking through holes in the roof upon the plaintiff's furniture in the leased premises. That by written contract of leasehold December 22, 1898, plaintiff had leased from Thiel for five years from January 1, 1899, a portion of a brick building in the city of Houston, the portion so leased consisting of a store-room 25 by 50 feet on the first floor, and the upper story of the building. That said lease contract contained, among other provisions, an express stipulation on the part of the lessors "in the event of damage to the same [the leased premises], by fire or otherwise,

the parties of the first part [the lessors] agree and bind themselves to make any and all necessary repairs." It is alleged that on August 1, 1899, the lessors conveyed the property, the building, and grounds, to defendant, who purchased subject to plaintiff's rights under the lease, and became bound by the contract to repair. The damage is alleged to have been occasioned by defendant's having permitted the roof to become damaged, defective, and leaking, whereby, from August, 1899, to and through January, 1900, large quantities of water had run in through the roof upon the plaintiff's furniture. It is alleged that demand was made upon defendant for payment, and that in February, 1901, in order to amicably settle the matter, arbitrators were chosen by the respective parties to whom the matters of difference were submitted, and by whom an award was made, as aforesaid, which amount plaintiff sought to recover. Plaintiff further sought, in the event he failed to recover upon the award, to recover upon the original cause of action growing out of the contract to repair and breach thereof, and, failing this also, to recover upon the alleged obligation of defendant as landlord to keep the roof in repair, plaintiff being lessee of only a part of the building and having no control of the roof. Defendant answered by general demurrer and certain special exceptions, not necessary to refer to specifically, general denial and various special pleas denying specifically and in detail that he made any agreement to submit the matter to arbitration, chose any arbitrators, agreed to be bound by the award, in short that he had anything to do with the arbitration either by himself or by any authorized agent. That if any such thing as arbitration was ever contemplated by the parties, it was clearly and distinctly understood that defendant in no way recognized or admitted his liability for the damages complained of, which was one of the matters to be determined by the contemplated arbitration. It is further alleged that if plaintiff had sustained any damage as alleged, it was occasioned by the unprecedented storm of September, 1900, which was an act of God for which plaintiff was not responsible. The case was tried by a jury, and verdict and judgment were for defendant. The case is before us on writ of error sued out by plaintiff, the Houston Saengerbund.

Plaintiff in error filed a motion for a new trial on April 9th, within two days after the date of the judgment. On the first motion day thereafter, the court being engaged in other business, at the suggestion of counsel for defendant in error, the motion was passed to be taken up at any time which might be agreeable to counsel for plaintiff in error. Thereafter, on the morning of Saturday, April 23, being motion day, counsel for plaintiff in error went to the court to ascertain whether the motion would be taken up. Finding that the motion docket would not be called before

2 o'clock, p. m., it was then agreed by counsel for defendant in error that the motion might be heard on any day during the following week, when the court was at leisure. The motion was called up for disposition on the 29th, when counsel for defendant objected to the consideration of the same and filed a written motion to dismiss the motion, without consideration on the ground that it was then less than two days before the adjournment of the term, and the motion, under Rule 71 for the district court (67 S. W. xxv), could not be heard. The next day, April 30, was in fact the last day of the term by law. Counsel for plaintiff in error made answer, under oath, setting up the reasons why the motion for new trial had not been sooner called up, as herein stated, which in open court were admitted to be true. The court granted the motion of defendant in error and dismissed the motion for new trial without hearing or consideration, to which action plaintiff in error took a bill of exceptions. This action of the court is assigned as error. Rule 71 for the district court (67 S. W. xxv) is as follows: "Motions for new trial and in arrest of judgment shall be determined on motion day of each week of the term, unless postponed to the next motion day, or, for good cause shown, to a subsequent day, and not later than two entire days before the adjournment of the court, at which time all such motions previously filed shall be determined." Evidently the court construed the latter part of this rule as mandatory, leaving the court no discretion in the matter, and for this reason, and not in the exercise of its discretion, dismissed the motion without a hearing on motion of defendant in error. It is not shown that it would have inconvenienced the court or counsel for defendant in error to hear and determine the motion properly, and inasmuch as counsel for plaintiff in error had been led by the agreement of counsel for defendant in error to postpone the hearing until the date stated, and in view of the grave consequences to plaintiff in error from the action of the court in dismissing the motion without a hearing, we cannot think that the court would have refused to exercise its discretion and hear the motion, if it had been thought that it had such discretion. The trial court was in error in construing the rule as mandatory, in the sense that it required a dismissal of the motion without a hearing. It was certainly within the discretion of the court to hear and determine the motion for a new trial under the circumstances and it should have been done. *Wells v. Mellville*, 25 Tex. 337. The assignment of error must be sustained, and it follows that the only course to be taken to relieve plaintiff in error of the consequences of the error will be to consider the motion for new trial as having been heard and overruled, thus giving him the right to have his appeal heard upon the facts.

After charging the jury as to the right

of plaintiff in error to recover upon the award of the arbitrators, the court instructed them, as to the right to recover upon the breach of the contract to repair, independently of the award, that "all the proof shows that the damages claimed were caused by rain and defective building through the year 1899 and January, 1900, and the plaintiff in this case having, for the first time, set up such matters on the 15th of October, 1902, the same are barred by the statute of limitation of two years, and you will find for the defendant." We think this was error. This count of the petition was for damages occasioned by the failure of the defendant in error to repair according to the terms and provisions of the written contract of lease executed by his vendors and binding upon him, being a covenant running with the land. It came within the meaning of the statute prescribing four years as a term of limitation of actions for debt, where the indebtedness "is evidenced by or founded upon any contract in writing" as construed by the Supreme Court of this state in *Robinson v. Varnell*, 16 Tex. 888; *Schurenberg v. Wilhelm* (Tex. Civ. App.) 23 S. W. 817; *Wood Machine Co. v. Hancock* (Tex. Civ. App.) 23 S. W. 885.

It was alleged in the petition that the agreement to submit to arbitration was entered into by defendant in error, by himself, or his agents and representatives, and the evidence submitted by plaintiff in error tended to show that he was represented in the matter by Alex Bartlinck, as his agent. Defendant in error denied, by his answer and his testimony, that he ever authorized any one to represent him. The charge of the court was susceptible of the construction that in order to find for plaintiff in error on the award, the jury must believe that plaintiff in error himself agreed to the submission to arbitration. Under this view the court should have instructed the jury, as requested by plaintiff in error, upon this issue, that defendant in error would be bound by the award if he, either by himself or his agent, agreed to the submission. *Prather v. Williams*, 68 Tex. 190, 4 S. W. 252. The charge of the court instructs the jury to find for the plaintiff in error upon the award, only in the event that they find that the questions both of law and of fact were submitted to the arbitrators. It was entirely competent for the parties to submit the matters in dispute between them to arbitration, without any special reference to questions of law. The inference from the defendant Dennis' testimony is that if there was any submission the arbitrators were to determine the question of his liability as a matter of law, as well as the amount of damages, while the evidence for the plaintiff in error is to the effect that no question was raised as to the liability of defendant in error before the arbitrators, or in the

agreement to submit. It was not necessary that plaintiff should have had a legal cause of action against defendant to authorize a submission and award, and to bind defendant by the award. A difference of opinion between the parties upon the whole case, including the defendant's legal liability as well as the amount of damages might have been submitted to, and determined by, the arbitrators, and the jury should have been so instructed, as requested by plaintiff in error. The instruction on this point requested, however, goes too far, as it bases the right to recover solely upon the submission and subsequent award, regardless of the facts that defendant in error may have withdrawn from the agreement before the award was pronounced, as to which there was some evidence.

Plaintiff in error would not have been entitled to recover upon the third count in his petition based upon the implied obligation of the landlord to repair the roof, plaintiff in error having no control thereof, for the reason that such cause of action was barred by the statute of limitation of two years. For the errors indicated, the judgment of the district court is reversed, and the cause remanded.

Reversed and remanded.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. et al. v. KRAUSE.

(Court of Civil Appeals of Texas. Jan. 17, 1903.)

1. RAILROADS—RIGHT OF WAY—FENCES—CATTLE GUARDS—DUTY TO ERECT.

A railroad company ran its tracks through a person's pasture, fenced the right of way, left an open crossing in the fences for the passage of stock from one side of the pasture to the other and placed cattle guards at the crossing. *Held*, that its failure to place cattle guards at the points where the track entered the pasture was a violation of the statute relating to fencing.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 315-318.]

2. SAME—STATUTE REQUIRING THE CONSTRUCTION OF CATTLE GUARDS—CONSTRUCTION.

The purpose of the statute requiring a railroad company, running its track through a person's pasture, to erect cattle guards at the points of entrance into an exit from the pasture, is not only to prevent depredations of stock on the inclosed land, but also to protect the owner against the escape of his stock.

3. SAME — FAILURE TO CONSTRUCT CATTLE GUARDS—REMOVAL OF FENCE BY THIRD PERSON—LOSS OF CATTLE—PROXIMATE CAUSE.

A railroad company ran its track through plaintiff's pasture, fenced the right of way, but failed to place cattle guards at the points where the tracks entered the pasture. A telegraph company in constructing its line along the right of way opened the right of way fence, and plaintiff's cattle escaped from the pasture on to the track and were lost. *Held*, that both the failure to erect cattle guards and the cutting of the fence operated directly to bring about the result, though they were separate acts.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1580.]

4. DAMAGES—LOSS OF CATTLE—EXPENSES.

Where, in an action for the loss of cattle and for the expenses of searching for them, the evidence showed a search of many days involving considerable expense, an instruction authorizing a recovery for the reasonable value of the services for searching was erroneous for failing to limit the recovery for such a search as a prudent person would institute and follow up.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 269.]

5. SAME—MEASURE OF DAMAGES.

Where, in an action for the loss of cattle, the evidence showed that the cattle were graded milch cows without calves or milk, the measure of damages was the value of the cows as milch cows, and not as cows capable of use solely for beef.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 269.]

6. INDEMNITY—IMPLIED CONTRACTS—TORT-FEASORS—RECOVERY OVER.

A railroad company ran its track through plaintiff's pasture, fenced the right of way, but failed to erect cattle guards at the points where the track entered the pasture. A telegraph company in constructing its line along the right of way cut the fence, and plaintiff's cattle escaped and were lost. *Held*, that the telegraph company was the primary wrongdoer, and a judgment against it in favor of the railroad company for the amount of the judgment rendered against it for the loss of the cattle was proper.

Appeal from Bexar County Court; Robt. B. Green, Judge.

Action by Otto Krause against the Southwestern Telegraph & Telephone Company and another. From a judgment for plaintiff, defendants appeal. Affirmed on conditions.

Newton & Ward, W. B. Teagarden, and Baker, Botts, Parker & Garwood, for appellants. J. D. Guinn, A. G. McNeill, and Bertrand & Arnold, for appellee.

JAMES, C. J. The action was by appellee to recover against the Southwestern Telegraph & Telephone Company and the Galveston, Harrisburg & San Antonio Railway Company, for the loss of eight head of cattle and the expense of searching for same. The ground of the action against the former was that its employes cut the right of way fence adjoining the railway company's right of way through appellee's pasture admitting of the escape of the cattle, and against the latter for not having a cattle guard at the place where its road entered the pasture. There was a verdict for plaintiff for \$272 which was reduced by remittitur to \$256, and judgment in accordance with the verdict was rendered for said amount against the railway company and in favor of the railway company over against the telegraph and telephone company.

The court charged the jury: "If you believe from the evidence that on or about November 1, 1902, the line of the Galveston Harrisburg & San Antonio Railway Company entered and passed through an inclosed pasture, leased and used by the plaintiff, as alleged, and the said defendant the Galveston Harrisburg & San Antonio Railway Company did not have a good and sufficient cattle

guard or stop at the point where said railway track entered the said pasture on the east line; and you further believe that plaintiff's cattle escaped from the pasture onto the right of way of the railway company and along the said right of way out of the pasture at the point where the railway track entered said pasture on the east line; and you believe that said cattle were thereby lost to the plaintiff and never recovered—then you will find for the plaintiff against the defendant the Galveston Harrisburg & San Antonio Railway Company, in such sum as the evidence shows to have been the reasonable market value of the cattle lost, if any." Upon the correctness of this charge the first, second, third, sixth, and seventh assignments of error of the railway company depend.

The testimony was that its road ran through plaintiff's pasture, the right of way being fenced with a good and sufficient fence; that an open crossing was left in the fences for the passage of stock from one side of the pasture to the other; and that cattle guards were placed at the crossing, but none at the place where the road entered the pasture. It further appeared that the employes of the telegraph and telephone company in constructing its line along said right of way opened the right of way fence and this resulted in cattle of plaintiff getting upon the right of way and wandering off and becoming lost, there being no cattle guard at the place where the road entered the inclosure. The view of the trial court appears to have been that the telegraph and telephone company was not liable to plaintiff, on said facts, but that the railway company was, by reason of the failure to perform the statutory duty of erecting cattle guards at the place the road entered the pasture, and further that the telegraph and telephone company was liable to the railway company for any damage recovered against the latter by reason of the cutting of its fence.

It is insisted that the railway company having erected a fence which was shown to be sufficient to prevent cattle from passing it, along its right of way, and having placed cattle guards at the crossing inside the pasture, it had satisfied the requirements of the statute, and it was unnecessary for it to place the guards at the particular place the statute designated. The answer to this contention is that it could not substitute something else for what the law prescribed. *Railway v. Wetz* (Tex. Sup.) 80 S. W. 988. It further insists that the Legislature prescribed cattle guards to be placed at the points of entrance and exit, for the single purpose of preventing depredations of stock on the inclosed land, and that the statute has no reference to stock escaping from the inclosure, and therefore the railway company owed the owner no duty in respect to cattle guards, to prevent his stock from escaping. We cannot see how this view is consistent with what is comprehended in the above decision.

There the owner was considered to have a cause of action against the railway company, for the expense attendant upon having to drive his stock across the track at the crossing each day, because unless he did so the cattle would pass to the right or left of the right of way and on the outside of the premises, there being no cattle guards to prevent this. The above decision necessarily involved holding that the duty to place cattle guards as imposed by the statute rested on the railway company in reference to other cases than depredations from outside stock, and rested upon it for the protection of the owner against the escape of his stock.

We therefore overrule the railway company's first, second, third, sixth, and seventh assignments of error. We should here consider a proposition under the second assignment of error which is: "Upon the undisputed facts in this case the act of cutting the fence was the proximate cause of the loss and damage, and therefore the court erred in not giving a charge in substance that if the fence was cut or torn down by some person without the knowledge or consent of the defendant railway company then the said act was the proximate cause of the escape of the cattle, and the railway company would be entitled to a verdict regardless of whether there was any cattle guard across its right of way or track at the point where it enters plaintiff's inclosure."

As to proximate cause we are of opinion that the loss of plaintiff's cattle resulted proximately from both the act of cutting the fence, and the absence of cattle guards at the proper place. They or either of them could be taken as the proximate cause. The contention of the railway company appears to be that the act of cutting the fence was an independent cause, intervening between the neglect to have cattle guards, and the escape of the cattle, sufficient to constitute it the sole and efficient cause, and therefore the absence of cattle guards was too remote to be the responsible cause. In our view both causes operated directly to bring about the result, though they were separate acts or omissions.

The fourth assignment of error of the railway company, also the fifth assignment of the telegraph and telephone company, is well taken. The charge complained of is: "And if you believe that plaintiff instituted a search for said cattle then you will allow plaintiff such sum as the evidence shows to have been the reasonable value of such services." The evidence showed a prolonged search of many days involving considerable expense under circumstances which made it proper for a jury to say whether or not, it was a reasonably proper search. A liability would no doubt exist for the expense of such a search as a prudent person would institute and follow up, but that this was such a search the charge in effect assumed. This will necessitate a reversal, unless the error

92 S.W.—28

be cured by remitting \$42, the amount of the verdict for this item.

We overrule the railway company's eighth assignment and the telegraph and telephone company's sixth assignment. The contention of appellants that the verdict is excessive is based upon testimony that these cows, although graded milch cows, were without calves or milk at the time, and that their then market value was that of beef cows as distinguished from milch cows, a sum less than that found by the jury. Plaintiff testified that beef cows and milch cows were different prices and these were milch cows. It is evident from testimony that the market value of cows which were capable of being used solely for beef would not be the proper measure of damages for cows that were fit for other uses. The only evidence of the reasonable market value of the class of cows in question was that given by plaintiff. He further explained: "The reason I have tried to testify to the market value of these cattle when they got away was because I have always bought myself and knew what I got. I cannot say just what was the market value of these cattle at the time they got away not on the same day. I cannot tell that." As this was the only testimony on the subject of their market value we see no reason why the verdict should not be sustained as to amount.

The act of the servants of the telegraph and telephone company done in the performance of the work rendered it liable for the proximate consequences. We really see no good reason for not holding it liable to plaintiff. But plaintiff does not complain of this. The telegraph and telephone company complain of the judgment over against it in favor of its codefendant. It invokes the rule that the law recognizes no contribution between wrongdoers. The rule applies where there has been a joint and active wrongdoing. The rule is not applicable to a case in which one defendant is the active wrongdoer and the other is held by reason of its passive negligence. *City v. Talerico* (Tex. Sup.) 81 S. W. 520; *City v. Smith*, 94 Tex. 268, 59 S. W. 1109. No injury would have been occasioned plaintiff, but for the cutting of the right of way fence. The telegraph and telephone company was the primary wrongdoer and primarily liable.

If plaintiff shall within 10 days file a remittitur in the sum of \$42, the judgment so reduced will be affirmed; otherwise the judgment will be reversed, and the cause remanded.

LATTA et al. v. WILEY et al.*

(Court of Civil Appeals of Texas, Dec. 13, 1906. Rehearing Denied Jan. 10, 1906.)

1. *LIS PENDENS*—RIGHTS OF PURCHASER—CONSIDERATION—NOTICE.

Where a purchase is made of property actually in litigation, though for a valuable consideration and without any express or implied

*Writ of error denied by Supreme Court, February 8, 1906.

notice, lis pendens affects the purchaser the same as if he had actual notice, and he will be bound by the judgment or decree.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lis Pendens, §§ 38-46.]

2. SAME—PROSECUTION OF ACTION—DELAY.

He who buys property pendente lite from the party charged with the prosecution of the suit cannot avoid the operation of the doctrine of lis pendens by reason of his vendor's inexcusable delay in prosecuting the suit.

3. SAME.

The purchaser of property from a plaintiff in pending litigation is not relieved from the operation of the rule of lis pendens by the defendant's failure to prosecute his claim in reconviction, where judgment is rendered against the plaintiff on his petition.

4. SAME—TITLE SHOWN BY JUDGMENT.

A purchaser pendente lite cannot be relieved from the effect of a judgment establishing title in a party under the 10-year limitations (Rev. St. 1895, art. 3347) on the ground of the party's delay in prosecuting the action, without pleading and proving that the party had not acquired such title.

5. SAME—LOSS OF PAPERS.

The rule of lis pendens continues in full force till the termination of a case, notwithstanding the loss of the papers in the case in the meantime.

6. SAME—ENTRY IN DOCKET.

The failure of the clerk of court to enter on the file docket the object of a suit cannot affect the rule of lis pendens to the prejudice of the defendant.

7. SAME—CHANGE OF VENUE.

A change of venue without an order of court, but on agreement of the parties, does not affect the conclusiveness of a judgment as to purchasers pendente lite.

8. SAME—PRESUMPTION.

Purchasers pendente lite cannot question the validity of a judgment unless they can show fraud or collusion, and in the absence of such a showing, it is presumed that the court ascertained all the facts necessary to its jurisdiction.

9. EVIDENCE—BEST AND SECONDARY EVIDENCE—LOST PLEADINGS.

Where the pleadings in a suit are shown to be lost, parol evidence is competent to show what was in controversy.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 585.]

10. TRESPASS TO TRY TITLE—EVIDENCE.

In an action of trespass to try title, it was proper to show defendants' possession, claim of ownership, and ouster by writ of sequestration to charge plaintiff, a subsequent purchaser, with notice of his claim of ownership.

11. JUDGMENT—CONCLUSIVENESS—EVIDENCE.

On a plea of former adjudication, parol testimony is admissible to prove that the pending suit and a former one arose from the same cause of action.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by W. B. Latta and another against W. W. Wiley and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Patterson, Buckler & Woodson, for appellants. Patterson & Wallace and Turney & Burges, for appellees.

NEILL, J. On April 8, 1904, the appellants, W. B. Latta and Felix Martinez, sued the appellees, W. W. Wiley, O. B. Patterson, and George Wallace, in trespass to try title, to recover possession of lots Nos. 1 to 7, inclusive, and 11 to 19, inclusive, in block 45 of Campbell's Addition to the city of El Paso. The defendants answered by a plea of not guilty, and the 10-years' statute of limitation. The case was tried without a jury, and the judgment was rendered in favor of defendants, from which this appeal is prosecuted.

Conclusions of Fact.

On March 7, 1887, the Campbell Real Estate Company, a domestic corporation, had a regular chain of title to the land in controversy from the state of Texas down to itself. On August 8, 1898, the said real estate company by its deed of that date conveyed the lots sued for to E. A. Caples; which deed was a general warranty, expressed a consideration of \$500 cash and 52 promissory notes for \$25 each, payable in from 1 to 52 months after said date, and was filed for record and duly recorded on August 17, 1898. On March 27, 1901, E. A. Caples, by his warranty deed, expressing a consideration of \$1,800 cash and two notes for \$1,500 each due 1 and 2 years from said date, conveyed the 17 lots, and other real estate in El Paso, Tex., sued for, to W. B. Latta, P. F. Hammet, and Felix Martinez. On August 6, 1901, P. F. Hammet by his deed of that date conveyed an undivided one-third interest of the 17 lots (and other property) to Felix Martinez; the consideration expressed being \$600 cash and the assumption of paying the two notes of \$1,500 each, above mentioned. This deed was duly recorded on August 7, 1901. On February 11, 1902, Felix Martinez by his deed of that date conveyed to W. B. Latta an undivided one-sixth of the 17 lots (and other property) for the express consideration of \$800 and the grantee's agreement to pay one-half of the two \$1,500 notes before mentioned. This deed was duly recorded on February 12, 1902. On June 1, 1903, W. B. Latta and Felix Martinez signed and acknowledged an agreement in writing to the effect that each was the owner of an undivided one-half of the 17 lots in controversy.

On October 20, 1897, the Campbell Real Estate Company filed suit in the district court of El Paso county, Tex. (34th Judicial District), against W. W. Wiley, one of appellees in the present case, in trespass to try title to recover the land in controversy. Which case was docketed in said court as follows:

No. 2,743.	The Campbell Real Estate Co.	Sequestration.	Filed Oct. 20, 1897.	Citation and copy issued 10-20-97.
Beall & Kemp, Plff.'s Attys.	v.			
Jay Good, Deft.'s Atty.	W. W. Wiley.			Sequestration issued same day.

The appearance docket, at the January term, 1898, showed, opposite the style of the case, in the handwriting of the judge of the court, the following entry: "Defendant demand a jury, and leave to file amended answer and make parties, January 7th." In the minutes of the court (Thirty-Fourth district) appears the following entry: "Campbell Real Estate Company v. W. W. Wiley, No. 2,743. On this 28th day of October, 1899, defendant granted leave to amend." On the civil nonjury docket, opposite case No. 2,743, Campbell Real Estate Company v. W. W. Wiley, April term, 1902, the following entry, in lead pencil, in the handwriting of Judge Walthall, then judge of the Thirty-Fourth judicial district, appears: "April 30th. Plaintiff granted leave to amend and demands a jury. By agreement transferred to 41st Dist. Court of El Paso county for trial." This memorandum was not signed, nor was there any order entered in the minutes of the court transferring the case from the Thirty-Fourth district court to the Forty-First district court of El Paso county. The docket of the district court of El Paso county, Tex., Forty-First District, shows case of Campbell Real Estate Company v. W. W. Wiley docketed as follows:

No. 2,743 (34th) 175.	Campbell Real Estate Com- pany	Sequestration.	Filed Oct. 30, 1897.
Beall & Kemp, Attys. for Plff.			
Patterson & Wallace, Attys. for Deft.	W. W. Wiley.		

The case was placed on the jury docket of the Forty-First district for the October term, 1902, and appears on said docket as follows:

Campbell Real Estate Co.,	Suit in Sequestration.	Filed Oct. 30th, 1897.
No. 174 v.		
W. W. Wiley.		

Opposite the style of the case, in the handwriting of Judge J. M. Goggin, there appears on the docket the following entry: "June 12th, 1903. Both parties granted leave to amend and continued by agreement." It was proven that the "No. 174" was a mistake, and was that of another case; the correct number being 175. The case was carried forward on the docket as No. 174 to the September term, 1903, when it was docketed by its correct number, 175. On the docket, where it appears by its true number, opposite the style of the case appears, in lead pencil, the following memorandum: "1/23/04. Verdict for defendant." It was admitted on the trial that the Campbell Real Estate Company, who sold the property involved to El A. Caples, was the plaintiff in case No. 2,743 on the docket of the Thirty-Fourth district court. On January 23, 1904, judgment was rendered in the district court of El Paso county, 41st district, in cause No. 175, styled "Campbell Real Estate Company v. W. W. Wiley," in

favor of W. W. Wiley against the Campbell Real Estate Company (a corporation) for title and possession of lots Nos. 1 to 20, inclusive, in block 45, according to what is known as the map of Campbell's addition to the city of El Paso, El Paso county, Tex.; said judgment having been rendered against the Campbell Real Estate Company upon its petition and in favor of the defendant, W. W. Wiley, upon his plea in reconvention. This judgment was, on November 16, 1904, affirmed by the Court of Civil Appeals of the Fourth Supreme Judicial District of the state of Texas. 83 S. W. 251.

The plaintiffs' amended original petition, on which the above case was tried, after stating the number (175) and style of the case, proceeds as follows: "Now comes the plaintiff, the Campbell Real Estate Company, by its attorneys, in the above styled, and numbered cause, and by leave of the court first had and obtained, amends its original petition heretofore filed in this case on the 20th day of October, 1897, and in lieu thereof plaintiff represents * * * that defendant W. W. Wiley is a resident of El Paso county in said state; that heretofore, to wit, on the 1st day of October, 1897, plaintiff was lawfully seised and possessed

of a certain tract of land hereinafter described, situated in El Paso county and state of Texas, holding the same in fee simple; that on the day and year last aforesaid,

said defendant entered upon said premises and ejected plaintiff therefrom and unlawfully withholds the possession thereof; * * * that the premises so entered upon and unlawfully withheld by defendant from plaintiff is described as follows: Being block 45, designated on map known as Campbell's map of the city of El Paso." The petition concludes with the usual prayer. It was indorsed as follows: "No 175. The Campbell Real Estate Company v. W. W. Wiley. Plaintiff's First Amended Original Petition. This suit is brought as well to try title as for damages. Filed this 13th day of June, A. D. 1903." Then follows the signature of the clerk of the court. The amended answer of defendant Wiley, in said case, which was filed on the 15th of June, 1903, consisted of pleas of not guilty, the 10-years' statute of limitation, and a plea in reconvention based upon title alleged to have been acquired under and by virtue of the 10-year statute of limitation.

On April 9, 1904, W. W. Wiley by his

deed of that date conveyed to George E. Wallace and C. B. Patterson, his codefendants in this case, an undivided one-half interest in lots 1 to 20 inclusive in block 45 according to the map of Campbell's Addition to the city of El Paso, Tex.; the deed reciting a consideration of one dollar and legal services.

It is shown by the evidence that the original papers in the case were lost, and, since the 11th day of September, 1900, have not been in the clerk's office. The attorneys for Wiley prepared a motion to substitute the lost papers on February 11, 1903, and presented it to one of plaintiffs' (the Campbell Real Estate Company) attorneys, who accepted service of the motion and asked the attorney of Wiley who presented it, not to present it to the court, and agreed with him to continue the cause until the January term, 1903, and that he (plaintiff's attorney) would file an amendment. It was proved by appellants that they had no actual knowledge of the pendency of the suit of the Campbell Real Estate Company when they bought the property in controversy from E. A. Caples; that they had an abstract of title made to the property by an abstract company, which did not show anything in relation to the pendency of the suit of the Campbell Real Estate Company against Wiley for the property, and submitted it to an attorney and purchased the land upon the opinion of the attorney, based on the abstract, that the title was good; that they each paid his respective share of the cash consideration, and that had they known of the pendency of said suit they would not have purchased the property. Caples was in possession when appellants bought from him. And no testimony whatever was introduced or attempt made to show that he did not have actual knowledge of the facts of the pendency of the suit and that Wiley had been dispossessed of the premises (which is a fact) by virtue of the writ of sequestration issued in that suit, or that he ever actually paid as much as one cent for the property.

Conclusions of Law.

Under the facts found, is the judgment in the case of the Campbell Real Estate Co. v. W. W. Wiley conclusive against the appellants in this case? Where a purchase is made of property actually in litigation, pendente lite, although for a valuable consideration and without any express or implied notice, lis pendens affects the purchaser in the same manner as if he had actual notice, and he will accordingly be bound by the judgment or decree in the suit. *Briscoe v. Bronaugh*, 1 Tex. 332, 333, 46 Am. Dec. 108; *Tuttle v. Turner*, 28 Tex. 759; *Herndon v. Robertson's Adm'r's*, 15 Tex. 596, 597; *Wortham v. Boyd*, 66 Tex. 404, 1 S. W. 109; *Randall v. Snyder*, 64 Tex. 353; *Rippetoe v. Dwyer*, 65 Tex. 706; *Oassidy v. Kluge*, 73 Tex. 155, 12 S. W. 18; *Wille v. Ellis* (Tex.

Civ. App.) 54 S. W. 922; *Cooper v. Mayfield*, 94 Tex. 111, 58 S. W. 827; *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781, 33 L. Ed. 184; *White v. Carpenter*, 2 Paige (N. Y.) 217; *Leitch v. Wells*, 48 N. Y. 608. This rule is grounded in public policy, and does not rest on the equitable doctrine of notice binding on the conscience. The doctrine of lis pendens is not peculiar to courts of equity. In the old real actions, the judgment bound the lands, notwithstanding any alienation by the defendant pendente lite, and it cannot be successfully claimed that it rests upon any other ground. *Lamont v. Cheshire*, 65 N. Y. 37. For the rule is older in law than in equity, and was adopted from the common-law courts "for the better and more regular administration of justice in the courts of chancery." *O'Reilly v. Nicholson*, 45 Mo. 167; *McIlwrath v. Hollander*, 73 Mo. 112, 39 Am. Rep. 486.

There is no more wholesome maxim of the law than: "That it is to the interest of the public that there should be an end of litigation." And it is but an application of it, to declare that a purchaser pendente lite cannot re-litigate questions determined in a suit to which his vendor was a party (*Flanagan v. Pearson*, 61 Tex. 304; *Lee v. Salinas*, 15 Tex. 498; *Smith v. Olsen*, 92 Tex. 183, 46 S. W. 631; *Evans Co. v. Reeves* [Tex. Civ. App.] 26 S. W. 219); or that, as with parties and privies, a purchaser pendente lite cannot collaterally attack a judgment or decree except for fraud or collusion (*York v. Carlisle* [Tex. Civ. App.] 46 S. W. 258; *Stout v. Lye*, 103 U. S. 66, 26 L. Ed. 428; *McIlwrath v. Hollander*, supra). As is said in *Morton v. Immigration Ass'n*, 79 Ala. 605: "Whoever purchases property pendente lite takes it subject to the hazard of the pending litigation. The decree against the parties litigant is equally binding against all such purchasers. The unanswerable reason for the rule is that otherwise suits would be absolutely interminable at the mere option of the litigant, who would be able, by collusion or otherwise, to protract litigation forever by the single device of repeated and successive transfers from one to another." See, also, *Parsons v. Johnson*, 84 Ala. 254, 4 South. 335; *Stein v. McGrath* (Ala.) 30 South. 792.

But it is contended by appellants that in order for appellees to avail themselves of the doctrine of lis pendens they must show that there was no unusual or unreasonable delay in bringing the case to trial. It is said in *Pomeroy's Equity*, § 634, that: "The effect of the suit as notice continues through the entire time of its pendency, and ends when the suit is really ended by final judgment. In order, however, that a purchaser pendente lite may be thus affected, the suit must be prosecuted in good faith, with all reasonable diligence, and without unnecessary delay. A neglect to comply with this requisite would relieve a purchaser from the effect of the lis pendens as notice.

The question of reasonable diligence in prosecuting the suit must, however, depend upon the circumstances of each case." Again, it is said in *Van Fleet's Former Adjudication*, § 548: "Inexcusable delay in the prosecution of a suit destroys it as a *lis pendens*." In *Johnston v. Standard Min. Co.*, 148 U. S. 370, 13 Sup. Ct. 585, 37 L. Ed. 485, the court said: "The mere institution of a suit does not of itself relieve a person from the charge of laches, and that if he fall in the diligent prosecution of the action, the consequences are the same as though no action had begun." In *Fox v. Reeder*, 28 Ohio St. 181, 22 Am. Rep. 370, it is said: "The benefit of the rule relating to *lis pendens* may be lost by such long inaction as amounts to gross negligence in the party prosecuting to the prejudice of innocent persons. And in *Gosson v. Donaldson*, 18 B. Mon. 230, 66 Am. Dec. 723, it was held "that the benefit of *lis pendens* is not lost by failure to prosecute a suit with even ordinary diligence, but it can only be lost by unusual and unreasonable negligence in its prosecution." The case of *Dwyer v. Rippe-toe*, 72 Tex. 520, 10 S. W. 668, was one of trespass to try title, where defendant claimed under a sale on foreclosure of a vendor's lien. The plaintiff acquired title pending the appeal in the foreclosure suit. The trial court charged the jury that if plaintiff purchased during the pendency of the foreclosure suit, that he was bound by the judgment rendered therein as fully as if he had been a party to the suit. On appeal, it was held that it was not error to refuse a charge asked by plaintiff, to the effect that the doctrine of *lis pendens* would not be enforced against one who purchased without actual knowledge of the suit, or, having knowledge of the suit, reasonably believed the debt had been paid, where there has been unreasonable delay in prosecuting the suit. Upon the whole, the doctrine seems to be that the delay which may relieve a purchaser from the rule of *lis pendens* must proceed from gross negligence, or, in other words, be inexcusable; and, like all questions of negligence, is ordinarily one of fact and not of law. *Jones v. Robb* (Tex. Civ. App.) 80 S. W. 398, and *Tinsley v. Rice* (Ga.) 31 S. E. 174.

If, however, it should be conceded there was unusual delay in the prosecution of the suit of *Campbell Real Estate Company v. W. W. Wiley*, can it help the appellants in this case? In every case we have examined (and they are numerous) where one who acquired an interest in the subject-matter of litigation *pendente lite* has been relieved from the operation of the rule of *lis pendens* by inexcusable delay in its prosecution, he did not purchase from him whose delay was inexcusable, but from a party not chargeable with the procrastination. The cases to this effect are so numerous and uniform, in the absence of any to the contrary, it is safe to say, when the reason for it is considered, that they are sufficient to establish the rule

that he who buys property *pendente lite* from the party charged with the prosecution of the suit cannot avoid the operation of the doctrine of *lis pendens* by reason of his vendor's inexcusable delay. The plaintiff in a case is the actor—the one who invokes the aid of the law, and puts its machinery in motion to establish a right or redress a grievance; and upon him necessarily rests the burden of the duty of prosecuting the suit without unnecessary or unreasonable delay. Generally the defendant does not want it prosecuted, nor is it to his interest that it should be. His attitude, as the word "defendant" implies, is one of defense. He is only required to stand and repel the assaults of his adversary. Until assailed by the plaintiff he may remain perfectly passive, and it may be his policy and interest to continue so. The cause of his adversary may be so weak that it cannot stand, with all the strength that can be infused into it, and will die of its own weakness. The defendant may know this, and may either hasten its death by a blow or quietly await it. It would be a strange doctrine that would deny a defendant the benefit of the rule of *lis pendens* because of the plaintiff's inexcusable delay in prosecuting a suit against him. If such were the law, then a plaintiff would only have to institute suit against the defendant, obtain possession of the property by legal process, sell it to a third party (as was done in this case) place him in possession, and delay the prosecution of his action in order to avoid the effect of a judgment against him. If, through courts of justice, a man can be chiseled out of his property by any such legerdemain as this, then it would be well to abolish courts, and let every man, like the "heathen, rage" and be "a law unto himself."

But in answer to this, it may be contended that in the case of *Campbell Real Estate Company v. W. W. Wiley*, the defendant plead in reconvention his title by limitation and asked and obtained affirmative relief; and that, as to such plea, he was, in effect, the plaintiff, and the real estate company the defendant, and that it behooved him to prosecute the suit for such affirmative relief without unnecessary or unreasonable delay. Grant the correctness of the contention, still, how does it help the appellants? It has been seen from our statement and the facts in the case that the *Campbell Real Estate Company* never did dismiss its suit against *Wiley* for the lots, but prosecuted it to final judgment, which was "rendered against the *Campbell Real Estate Company* on its petition, and in favor of *W. W. Wiley* upon his plea in reconvention." Now, let the judgment in favor of *Wiley* on his plea in reconvention be entirely eliminated, he still has his judgment against the *Campbell Real Estate Company* on its petition. This judgment was tantamount to a recovery of the land by *Wiley*. For when the plaintiff failed to make out its case, it was a matter of no

concern whether the defendant Wiley could show any title or not. He was entitled to a judgment forever conclusive of the claim of the plaintiff to the premises in controversy. This is the effect of an entry of a judgment in the usual form—"that plaintiff take nothing by his suit," etc. *French v. Olive*, 67 Tex. 401, 8 S. W. 568; *Railroad v. McGehee*, 49 Tex. 481; *Land Co. v. Votaw* (Tex. Civ. App.) 52 S. W. 125.

Again, it is apparent from the record that in the prior suit Wiley defeated the Campbell Real Estate Company's suit, upon his plea of the 10-years' statute of limitation. The facts which established such defense vested full title to the premises in Wiley. Article 3347, Rev. St. 1895. When the period of limitation has fully run while there is adverse possession of the land, this gives title to the adverse possessor which he may assert against the world. *Burton's Heirs v. Carroll*, 96 Tex. 320, 72 S. W. 581. After title has been acquired in this manner, it is not incumbent upon the owner to do anything to give notice of such title. There is no principle of law which will take from one thus invested with full legal title to land, who has done nothing forbidden, nor omitted anything enjoined by the law for the protection of others, his property and bestow it upon another, who has simply made the mistake of buying it without notice of his rights from the original owner, whose title has been extinguished by limitation. *East Tex. Land Co. v. Shelby* (Tex. Civ. App.) 41 S. W. 542. In view of this principle, notwithstanding appellants' position that he can, as a purchaser pendente lite, be treated as a stranger for the purpose of attacking the judgment collaterally, they could not show they were placed in any worse position than they were before without alleging and proving that Wiley had not acquired title to the premises by limitation. *Dwyer v. Rippetoe*, 72 Tex. 539, 10 S. W. 668. For a purchaser pendente lite, in order to escape the effect of the rule of *lis pendens* upon the grounds there has been an inexcusable delay in the prosecution of the suit, must show he bought in good faith without notice of the claims of the litigants (*Hayes v. Nourse*, 114 N. Y. 595, 22 N. E. 40, 11 Am. St. Rep. 700) and this cannot be shown if, at the time of his purchase, the title of his vendor was extinguished by limitation.

It is further urged by appellants that the loss of the papers in the case relieved them from the effect of the rule of *lis pendens*. In this we cannot agree with them. Notwithstanding the loss of the papers the suit was pending, and from its pendency, the rule of *lis pendens*, as the very words imply, arose and continued in full force until the suit was terminated. The law when it takes hold will not loosen its grasp because of accidents. It was held by the Supreme Court of Michigan, in an opinion by Judge Cooley, in the case of *Helm v. Ellis*, 49 Mich. 242, 13 N. W.

582, that where notice of *lis pendens* was duly filed and had been lost from the files, though not entered upon the file book as it should have been, its filing was warning to the world that the title of one of the parties was liable to be divested by the suit; and that whoever purchased would take it with constructive notice, though in point of fact he never saw or heard of the *lis pendens*. The holding of the Supreme Court of Iowa in *Haverly v. Alcott*, 57 Iowa, 171, 10 N. W. 326, is to the same effect. In jurisdictions where the Legislature has provided for record notice of *lis pendens*, as has been done recently in this state, such notice simply takes the place of and operates as such notice as theretofore arose by operation of law. If, therefore, the loss of the record filed as such notice does not affect it, the loss of the papers in a case in jurisdictions where no notice is required by legislation, will not. Here we will observe that the failure of the clerk of the court, when suit is filed, to enter upon the file docket the object of the suit, cannot prejudice the defendant or, as to him, affect the rule of *lis pendens*. It would seem, however, from the action of the Campbell Real Estate Company in its suit against Wiley, that its object was to dispossess the defendant of his land by a writ of sequestration, and that, in view of this, its object was entered by the clerk on his file docket.

Again, it is insisted by appellants that the transfer of the cause from the 34th to the 41st district court of El Paso county was without an order of the court, and therefore fatal to the doctrine of *lis pendens*. It clearly appears from the record before us, and it is undisputed, that this transfer was by agreement of the parties. It also appears from the amended original petition filed by the Campbell Real Estate Company that it was the same case. All agreements made between parties litigant are binding not only on the parties thereto, but on those who may purchase from either party pending the suit; and the facts that a case is transferred by agreement and the lost papers, instead of being substituted, are by agreement supplied by amended pleadings, do not afford purchasers pendente lite grounds to collaterally attack the judgment against their vendors. *Jones v. Robb* (Tex. Civ. App.) 80 S. W. 399; *Punchard v. Delk*, 55 Tex. 305; *Delk v. Punchard*, 64 Tex. 360; *Ferris v. Streeper*, 59 Tex. 312; *Evans v. Welborn*, 74 Tex. 533, 12 S. W. 230, 15 Am. St. Rep. 858; *Mussina v. Moore*, 13 Tex. 8; *Brown v. Dutton* (Tex. Civ. App.) 85 S. W. 455. In *Jones v. Robb*, supra, the contention of appellants was that by agreeing to a change of venue, and thereby consenting to the removal to another jurisdiction of all the papers in the case which would have disclosed the nature and subject of the litigation, the right to invoke the rule of *lis pendens* was lost. In passing upon the question, the court said: "The general rule is that one buying land from a party who

has put it in litigation in the county where it is situate must abide the result of the suit, whether he becomes a party thereto or not. He is, in effect, charged with constructive notice of the pendency of the suit and its nature. A change of venue may become proper or necessary, and is provided by law. It is certainly illogical to hold that in taking advantage of that provision a litigant must abandon some other right; that his judgment will be thereby rendered less effective. It seems to us more logical to hold that purchasers must be held to know that a change of venue may become a part of the history of any litigation, and, so knowing, must govern themselves accordingly."

The effect of what we have said is to overrule appellants' fourteenth, sixteenth, and seventeenth assignments of error; but we will finally dispose of them by adopting appellees' counter propositions to appellants' propositions under them, which are as follows:

"(1) It having been shown that appellants and their vendors were purchasers pendente lite from the Campbell Real Estate Company, and as judgment was rendered against the company holding it had no title to the property in question, this judgment cannot be collaterally attacked, but is conclusive on all parties thereto and their privies, as to every matter litigated.

"(2) Appellants, being purchasers pendente lite, will not be permitted to question the validity of the judgment rendered in the case of Campbell Real Estate Company v. Wiley, unless they can show fraud or collusion. This not being shown, on said judgment being collaterally attacked, it will be presumed that the court ascertained all the facts necessary to its jurisdiction." *Plow Co. v. Pitluk* (Tex. Civ. App.) 63 S. W. 354.

In the same manner, we will dispose of the remaining assignments which complain of the admission of certain evidence over objections of appellants:

"The trial court did not err in admitting the evidence of the witness complained of in the assignments of error, for the reason that this evidence was competent to show how, when, and in what manner this transfer was made, and for the further reason that the evidence consisted of facts of which the witnesses had actual knowledge."

"The pleadings in a suit being shown to be lost, parol evidence to show what was in controversy is competent. *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795; *Hendricks v. Huffmeyer et al.* (Tex. Civ. App.) 88 S. W. 523; *Foster v. Wells*, 4 Tex. 104; *Bailey v. Knight*, 8 Tex. 61; *Graves v. White*, 13 Tex. 126."

"The court did not err in allowing the witnesses Wiley and Alderete to testify that a writ of sequestration was issued and levied upon block 45, for the reason that this was competent evidence to prove notice of Wiley's possession and claim of ownership to said

property, prior to the purchase of said property by appellants."

"Possession of real estate, either in person or by tenant, is equivalent to registration on question of notice; and it was proper to show Wiley's possession, claim of ownership, and ouster by writ of sequestration, in order to charge subsequent purchasers of notice of his claim or ownership. *Bounds v. Little*, 75 Tex. 316, 12 S. W. 1109; *Mainwarring v. Templeman*, 51 Tex. 210."

"It having been shown that all the papers in cause No. 2743 were lost, it was proper to introduce parol testimony to prove their contents, for the purpose of showing that appellants were purchasers pendente lite."

"On plea of former adjudication, parol testimony is admissible to prove that the pending suit and a former one arose from the same cause of action. *Foster v. Wells*, 4 Tex. 104; *Bailey v. Knight*, 8 Tex. 61; *Cook v. Burnley*, 45 Tex. 97-115."

There is no error in the judgment, and it is affirmed.

AMERICAN NAT. BANK OF AUSTIN et al. v. FIRST NAT. BANK OF SAN MARCOS.

(Court of Civil Appeals of Texas. Jan. 17, 1906.)

1. CHATTEL MORTGAGES — CONVERSION OF MORTGAGED CHATTELS — VENUE — NONRESIDENT DEFENDANTS—QUESTION FOR JURY.

In an action by a mortgagee for the conversion of the mortgaged chattels, it appeared that the chattels were, when mortgaged, in the county in which the action was brought, that the president of defendant bank which had a mortgage on the same chattels made arrangements in such county with the mortgagor for the removal of the chattels from the county and for their sale, with the understanding that the proceeds should be applied on the debt due the bank. The chattels were shipped out of the county in the president's name, and sold according to the agreement. The president was not in the county when the chattels were shipped. On the day of the shipment the bank inquired from the carrier whether the chattels had been shipped in the name of its president and received an affirmative reply. *Held*, that the question whether the bank and its president, nonresidents of the county, could be sued in the county under the statute conferring jurisdiction on the county from which mortgaged chattels are removed without the mortgagee's consent because of the acts of the president in that county and the statute fixing the venue in the county where a trespass is committed was for the jury.

2. TRIAL—QUESTION FOR JURY—EVIDENCE— TELEPHONIC COMMUNICATIONS—ADMISSIBILITY.

On the issue of the admissibility of the testimony of a witness detailing a telephone communication between himself and a party to the action, it appeared that the witness did not identify the party as the one who telephoned to witness, that the person telephoning to the witness represented that he was the party to the action, that such party was the only person likely to telephone to witness, and that telephoning to the witness was in accordance to instructions made by an agent of the party. *Held*, that the question of the identity of the party telephoning to the witness was for the jury.

3. CHATTEL MORTGAGES — CONVERSION BY THIRD PERSON—RIGHTS OF MORTGAGEE.

A mortgagee in a chattel mortgage may recover damages from one converting the mortgaged chattels to the extent of their value not exceeding the mortgage debt.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, § 853.]

Appeal from District Court, Hays County; L. W. Moore, Judge.

Action by the First National Bank of San Marcos against the American National Bank of Austin and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Jas. H. Robertson, for appellants. Will G. Barber and O. T. Brown, for appellee.

FISHER, C. J. This is a suit by the First National Bank of San Marcos against the appellants to recover damages for the conversion of 200 head of cattle valued at about \$6,000, which the appellee claimed under a chattel mortgage lien to secure the payment of two promissory notes, one for \$5,333.40, and the other for \$2,220, executed by one J. C. Poulton. The mortgage given to secure the first-named sum was executed July 15, 1901, covering 100 three year old steer cattle, branded P on the left side, and 125 two year old steer cattle, branded T5 on the left side, all these cattle situated and located in Hays county. The note which the mortgage secured was due six months from July 15, 1901. The chattel mortgage which secured the last-named sum was dated August 29, 1901, and covered 185 steer yearlings, all branded P on the left side, located in Hays county. On July 15, 1901, the first mortgage was duly deposited for registration in the office of the county clerk of Hays county, and was duly recorded on that day. The last mortgage was recorded on the 30th day of August, 1901. All of these instruments were executed by Poulton, the owner of the cattle, all of the cattle at the time being located in pastures described in the mortgages situated in Hays county. It is further averred by appellee that the appellants did, in the county of Hays, some time in the month of September, 1902, without the consent of appellee, take, convert and appropriate to their own use, and did remove and carry away from Hays county a large number of these cattle, to wit, 150 head covered by and subject to the first mortgage, and 50 head covered by and subject to the second mortgage. The appellants by a proper plea in abatement, alleged their privilege to be sued in the county of Travis, their place of residence. The answer filed by them denied the conversion, and alleged that the American National Bank had a valid and subsisting mortgage on the cattle, to secure a debt due and owing to the bank by Poulton. That mortgage was executed subsequent to the appellee's mortgage and registration of the same of July 15, 1901, but prior to appellee's mortgage of August 29, 1901. The notes of

Poulton to both parties to the suit were due and unpaid at the time of the alleged conversion.

The plea of privilege was properly submitted to the jury; and the verdict in response to the submission of that question was a finding against the appellants. It is shown by the facts that neither of the appellants resided in Hays county, nor did the bank have an agent there upon whom service could be had, so as to subject it to the jurisdiction of that court; but it is contended, and properly so, that the evidence was sufficient to give the district court of Hays county jurisdiction and fix the venue of the suit in that county, by reason of the active participancy of the appellant Littlefield, acting for his codefendant in converting and taking possession of and removing the cattle covered by appellee's mortgage from Hays county. Littlefield was at that time the president of the American National Bank; and there is no question raised as to his authority to represent the bank in the transaction that is charged to have occurred. The mortgage to the bank provided that the cattle should be shipped to market in the name of Littlefield. Littlefield was named as trustee in the mortgage, and in the pursuit of his duties and authority by virtue of that instrument and as the representative of the bank, a few days before the cattle were actually shipped to East St. Louis he went to Kyle, in Hays county, where the cattle were under the control of Poulton and located in a pen, for the purpose of inspecting the cattle and ascertaining their condition, with a view of their delivery to him or for him on board of the cars at Kyle, Tex., to be shipped to St. Louis. Littlefield examined and inspected the cattle, and the jury had the right to conclude from the evidence, that he became aware at that time of the number of cattle, which seems to have been about 300 head, in the pen, and of the brands that identified the cattle, and their age and sex. A part of the cattle then in the pen were identified upon the trial of this case as the cattle subject to the mortgages of appellee. It was then and there, in effect, agreed between Littlefield and Poulton that the cattle should be shipped to East St. Louis in the name of Littlefield, or consigned to Littlefield—he at the time, it appears, was acting for the bank—and it was then and there the intention of both parties that the cattle should be so shipped. The evidence is sufficient to justify the conclusion that he knew that that promise and agreement would be complied with. And, in fact, a few days afterwards, the cattle were actually delivered to the railway company at Kyle, and shipped under that agreement to St. Louis, in the name of Littlefield. Littlefield was not present on the day that the cattle were shipped; but before they were shipped, it appears that he informed the American National Bank, as to what he had done, and

left directions with its cashier, who appears to be General Hamby, with reference to shipping the cattle. On the day of the shipment, the American National Bank telephoned to the railway company at Kyle, substantially inquiring as to whether Poulton had delivered the cattle, and whether they were to be shipped out in the name of Littlefield, and they received a reply to the effect that such was the case. The law makes it an offense to remove mortgaged property without consent from the county where it is situated; and there is a provision of the statute that confers jurisdiction and venue in the county where such an offense is committed. There is also another provision that fixes venue in the county where a trespass is committed. While it is true that Littlefield was not present when the cattle were put upon board the cars and shipped out of the county, his conduct in advising, aiding, and encouraging Poulton to ship the cattle makes him in law an active participant; and his conduct in that respect is sufficient to bring him within the terms of the statute, and is therefore binding upon his principal, the American National Bank.

On the main issues in the case, we find that the averments of the plaintiff are substantially established by the evidence. The cattle in question were shipped from Hays county by Poulton for the benefit of the appellants, and were sold in St. Louis, and the proceeds applied to the debt owing the American National Bank. It was a controverted issue in the case as to whether the cattle in question were identified as the cattle covered by appellee's mortgage of July 15, 1901; but in our opinion, there is evidence that identifies a sufficient number of these cattle covered by the appellee's mortgage to justify the amount of the verdict according to the evidence of value of these cattle testified to by the witnesses.

An objection was urged below, which is preserved here, to the evidence of witness Johnson, detailing, in substance, a telephone communication between him and the American National Bank. Johnson was the station agent at Kyle that received the cattle, and was communicated with by some one from Austin over telephone, who claimed to be the representative of the American National Bank. The objection is that the evidence does not identify the American National Bank or any of its officers as the party who telephoned to Johnson. The conversation between the two parties over the telephone was relevant evidence, provided it was not objectionable on the ground urged by the appellants. There are some facts and circumstances tending to identify the representative of the American National Bank as the party with whom Johnson had the conversation over the telephone. The party stated that it was the American National Bank that desired the information from Johnson; and it appears from the facts and

circumstances in evidence that the American National Bank was likely the only party here in Austin who had any interest in telephoning to the station agent at Kyle, regarding these cattle; and such telephone communication from the bank was in keeping with the instructions that had been previously given by Littlefield. Not that Littlefield had stated to the bank to telephone, but he did state to the representative of the bank here in Austin what he expected to be done with the cattle, and, substantially, to look after the matter, as Littlefield was not present, and did not intend to be present here in the city of Austin when the cattle were to be shipped. It does not appear from the evidence that any one, as the representative of the American National Bank, went in person to Kyle to see to the shipment of the cattle, after Littlefield had made the agreement with Poulton, nor does it appear that any letter was sent to Poulton concerning the matter; but the only evidence of communication at all in keeping with Littlefield's instruction was over the telephone. The identity of the party as the representative of the American National Bank who telephoned to Johnson, was a question of fact to be passed upon by the jury. 27 Am. & Eng. Enc. Law, 1091; Wolf v. Railway (Mo. Sup.) 11 S. W. 51, 3 L. R. A. 539, 10 Am. St. Rep. 331; Railway v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

There are several assignments of errors that complain of the action of the trial court in overruling the motion for new trial on account of the insufficiency of the evidence to support the verdict. Our findings of fact dispose of these assignments.

There are also objections urged to the charge of the court, and special charges submitted at the request of appellee. These assignments are overruled. An extended discussion of these questions would possibly serve no useful purpose; but we have carefully considered the points raised in the assignments that complain of the action of the trial court in refusing charges at the request of appellant, and of the charges given by the trial court at the request of appellee, and those that complain of the main charge of the court. We are of opinion that none of these assignments are well taken.

The evidence of witnesses Mitchell and Jackson as to the number and identity of the cattle was admissible.

There is an assignment of error in the record, wherein it is contended that the appellee's remedy was not for damages against the appellants, but that it should follow the cattle and seek its remedy in foreclosing the mortgage held by it against them. Appellee's mortgage authorized it to take possession of the cattle upon default of payment; but however, independent of this provision in the mortgage, it has been definitely settled in this state that a mortgagee has a

remedy for damages against one who, without consent, converts the mortgaged property to the extent of the value of the property, not to exceed the mortgage debt. *Scaling v. First Nat. Bank* (Tex. Civ. App.) 87 S. W. 715, and authorities there cited.

We find no error in the record, and the judgment is affirmed.

SWEENEY v. TAYLOR BROS. et al.
(Court of Civil Appeals of Texas. Jan. 17, 1906.)

1. JURY—CHALLENGES—NUMBER ALLOWED.

Where the interest and claims of codefendants are directly antagonistic, each must be considered a distinct party, within the purview of the statute fixing the number of peremptory challenges to jurors to which each party to a suit is entitled.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Jury, § 609.]

2. APPEAL—HARMLESS ERROR—REFUSAL OF CHALLENGES.

The refusal of the trial court to allow appellant his statutory number of challenges to jurors is not ground for reversal, in the absence of a showing that any person objectionable to appellant was chosen as a member of the jury, so that he would have used the additional challenges had he been allowed them.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4128.]

3. CHATTEL MORTGAGE—PRIORITIES—RECORDS—OPERATION AS NOTICE—INVALID INSTRUMENTS.

The registration of a chattel mortgage, executed by a married woman without the joinder of her husband, is not constructive notice of the mortgage, in the absence of a showing of facts authorizing its execution by the wife alone.

4. EVIDENCE—HEARSAY—ORAL DECLARATIONS.

A statement by defendant to plaintiff, made on purchasing goods from him, to the effect that she (defendant) was not married, while admissible upon the issue of fraud in the purchase, was hearsay as to a codefendant on the issue of coverture, and inadmissible in support of that issue.

5. HUSBAND AND WIFE—COMMUNITY PROPERTY—PURCHASE BY WIFE.

A ring purchased by a wife during coverture is community property, in the absence of evidence that it was purchased with her separate funds.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 899.]

6. SAME—RIGHTS OF HUSBAND—SALE OF PROPERTY.

A husband may sell or pledge community property purchased by the wife.

7. CHATTEL MORTGAGES—PRIORITIES—PLEDGES OF CHATTEL.

One who loans money on the pledge of a ring, without notice, actual or constructive, of a chattel mortgage retained on the ring by the seller thereof, has a prior lien to that evidenced by the chattel mortgage.

Appeal from Harris County Court; Blake Dupree, Judge.

Action by E. E. Taylor and others, partners as Taylor Bros., against J. J. Sweeney and others. From the judgment rendered, defendant Sweeney appeals. Reversed in part.

Brockman & Kahn, for appellant. A. E. Amerman, for appellees.

PLEASANTS, J. Appellees, Taylor Bros., a firm composed of E. A. Taylor, C. W. Taylor, and F. C. Taylor, brought this suit against Addie Humphreys, Abe Humphreys, and appellant, to recover against Addie Humphreys the sum of \$265, the alleged unpaid balance of the purchase price of a diamond ring sold by plaintiff to said defendant, and to foreclose a chattel mortgage upon said ring against all of the defendants, or, in the alternative, to recover possession of the ring on the ground that Addie Humphreys obtained its possession by fraud and misrepresentation, and that any title which the other defendants may assert thereto was acquired with notice of plaintiff's rights and is therefore invalid. The petition alleges, in substance, that plaintiff sold and delivered to Addie Humphreys on or about February 15, 1904, the diamond ring involved in this suit, which is fully described in the petition, for the agreed price of \$325, which was its reasonable value; that said defendant paid plaintiff for the ring the sum of \$50 cash and executed and delivered to plaintiff her written contract, wherein she agreed to pay the further sum of \$275 in weekly installments of \$10 each, and to secure the performance of said contract executed and delivered to plaintiff a chattel mortgage upon said ring, which mortgage was on said date duly registered in the chattel mortgage records of Harris county; that said defendant paid the sum of \$10 on said contract, and there is now due and unpaid thereon a balance of \$265, with interest and attorney's fee, for which amount judgment is prayed. It is further alleged that the defendant Abe Humphreys is claiming to be the husband of Addie Humphreys, and that defendant Sweeney is asserting some claim or title to the ring, and judgment is asked against all of the defendants foreclosing the alleged chattel mortgage upon the ring. It is further alleged that plaintiff had no knowledge, at the time the ring was sold to Addie Humphreys, that she was a married woman, and that she represented to plaintiff's agent that she was unmarried, and thereby induced him to sell and deliver the ring to her, and that, if she was in fact married at that time, she obtained possession of said ring by fraud and misrepresentation, and therefore title to same did not pass by said contract of sale, and plaintiff is entitled to recover its possession from all of the defendants. It is further alleged that, if the defendant Sweeney ever acquired possession of the ring, he got it from a person who had no right to its possession and no authority from Addie Humphreys to dispose of it, and therefore he acquired no title thereto as against Addie Humphreys or the plaintiff. There is a prayer in the

alternative for the recovery of the ring against all of the defendants, in event the court should find that the mortgage may be invalid by reason of the fact that at the time of its execution the said Addie Humphreys was a married woman. The defendant Sweeney denied generally the allegations of plaintiff's petition, and pleaded specially that Addie Humphreys was a married woman at the time she executed the mortgage, and the record of such mortgage was not notice to him, and that he was a purchaser for value of the ring in question, without any notice of plaintiff's claim. The defendant Addie Humphreys was non compos mentis at the time of the trial, and was represented by a guardian ad litem. The answer of the guardian ad litem contains a general denial of the averments of defendant Sweeney's answer, and specially avers that the ring is the separate property of said Addie Humphreys, and that the person from whom the defendant Sweeney acquired it was not authorized to dispose of it. This answer further admits the truth of the allegations of plaintiff as to the sale of the ring for the sum of \$325, and the payment of \$60 of said sum, but seeks to avoid the payment of the balance due on the contract, on the ground that Addie Humphreys has since its execution become of unsound mind. The prayer of the answer is for the recovery of the ring as against the defendant Sweeney, and, in event the plaintiff should be held entitled to a foreclosure of the mortgage, that this guardian have judgment against plaintiff for the \$60 paid upon said contract. The cause was tried by a jury, and verdict and judgment rendered in favor of plaintiff for the amount claimed in the petition, with foreclosure of the mortgage upon the ring, and in favor of Addie Humphreys for the recovery of the ring against the defendant Sweeney. The court instructed a verdict in favor of defendant Abe Humphreys, and judgment was rendered accordingly.

Appellant's fifth assignment of error complains of the ruling of the trial court in refusing to allow him, in the selection of the jury, the full number of peremptory challenges given by the statute to each party to a suit in the county court. The interests and claims of appellant and his codefendant, as disclosed by the pleadings, were directly antagonistic, and in such case it is well settled that each must be considered a party in the purview of the statute fixing the number of challenges to which each party to a suit is entitled. *Railway Co. v. Bigham*, 80 S. W. 1113, 13 Tex. Ct. Rep. 971. It is equally as well settled that the refusal of the trial court to allow a party his statutory number of challenges will not authorize a reversal of the judgment, unless it appears from the record that the appellant was probably injured by such ruling. The bill of exceptions in this case shows that ap-

pellant exhausted the challenges allowed him by the trial court, but does not show that any person objectionable to him was chosen a member of the jury. In the absence of such showing, we do not think the record shows probable injury. Unless it be true that the appellant would have used the additional challenges, he was certainly not injured by the ruling complained of, and there is nothing in the bill of exceptions to indicate that he would have used them. *Snow v. Starr*, 75 Tex. 414, 12 S. W. 673; *Waggoner v. Dodson*, 96 Tex. 6, 68 S. W. 818, 69 S. W. 993; *Railway Co. v. Bigham*, supra.

The evidence shows that plaintiff sold and delivered the ring to the defendant Addie Humphreys upon the terms stated in the petition, and that the amount claimed in the petition was due plaintiff under the terms of said contract of sale. The mortgage executed by Addie Humphreys to secure plaintiff was not signed by Abe Humphreys and was not executed by his authority or consent. This mortgage was duly registered on the day of its execution. Some time after she purchased the ring, Addie Humphreys pawned it to one Blanck to secure a loan of \$60, and failed to redeem it at the time specified in the contract of pledge. Subsequently Blanck, with the knowledge and consent of Abe Humphreys, pawned the ring to the defendant Sweeney to secure a loan of \$125. Abe Humphreys testified that, after paying Blanck the amount of his loan out of this \$125, he gave the balance to his wife, Addie. When Sweeney received the ring from Blanck and advanced him the \$125, he did not know that it belonged to Addie Humphreys, and had no actual notice of plaintiff's mortgage. The ring was in his possession at the time the suit was brought, and he has never been paid the \$125 which he loaned thereon. The member of plaintiff's firm who made the sale to Addie Humphreys testified that he had known Abe and Addie Humphreys for several years before he sold her the ring, and knew that they lived together, but that Addie told him, while she was negotiating for the purchase of the ring, that she was not married to Abe, and that he made the contract of sale with her on the faith of the representation that she was not married. Abe Humphreys testified that he was Addie's husband; that he married her in Dallas four or five years before the trial in the court below, and they had lived together as husband and wife until she became insane and was sent to the asylum, and were so living together at the time plaintiff sold her the ring, and the mortgage in question was executed. Upon these facts the priority of plaintiff's lien over that of appellant depends upon the question of whether Addie and Abe Humphreys were married at the time she executed the mortgage to plaintiff,

and the court so instructed the jury. Appellant had no actual notice of the mortgage, and he cannot be charged with constructive notice by the registration of a mortgage executed by a married woman without being joined therein by her husband; no facts being shown which would authorize its execution by the wife alone.

Under appropriate assignments appellant complains of both the charge of the court submitting the issue of coverture, and the verdict of the jury thereon, on the ground that the uncontradicted evidence shows that Addie Humphreys was a married woman at the time she executed the mortgage, and therefore that issue ought not to have been submitted to the jury, and the verdict is without evidence to support it. We think these assignments should be sustained. The only testimony tending to contradict the testimony of Abe Humphreys that he married Addie several years before the trial, and that they had never been divorced, but had continuously lived together as husband and wife up to the time that she was sent to the asylum, was the statement of the witness C. W. Taylor that, when he sold the ring to Addie, she told him that she and Abe were not married. This testimony was clearly hearsay, and for that reason inadmissible on the issue of whether Addie was a married woman at the time she executed the mortgage, and it was objected to by the appellant upon that ground. The evidence was admissible upon the issue of fraud, as alleged in the petition, but should not, over the objection of appellant, have been admitted on the issue of coverture, and cannot be considered as evidence upon that issue. If the defendant Addie Humphreys was the wife of Abe Humphreys at the time she executed the mortgage, its registration was not constructive notice to appellant; no facts being alleged or proven which would make said mortgage valid as between the parties thereto. If purchased by the wife during coverture, the ring became community property, there being no evidence that it was purchased with her separate funds, and the husband had the right to sell or pledge it to appellant.

The undisputed evidence shows that Abe Humphreys not only authorized but participated in the transaction in which the ring was pledged to appellant to secure the loan of \$125, and that appellant had no notice at the time he made said loan that plaintiff had a lien upon the ring. Upon this evidence appellant's lien was entitled to priority over that asserted by the plaintiff, and the verdict and judgment of the trial court cannot be sustained.

None of the remaining assignments point out any error, and all are overruled.

Because, in our opinion, the evidence is not sufficient to sustain the finding that

Addie Humphreys was not married to Abe Humphreys at the time she executed the mortgage to plaintiff, the judgment of the court below, foreclosing plaintiff's lien against appellant, and in favor of Addie Humphreys against appellant for the possession of the ring, is reversed, and the cause remanded. The remainder of the judgment is undisturbed.

KAASE v. GULF, C. & S. F. RY. CO.
(Court of Civil Appeals of Texas. Jan. 17, 1906.)

1. CARRIERS — PASSENGERS — TERMINATION OF RELATION.

Where a passenger remained on a car after its arrival at his destination, the terminus of the road, for a considerable time, his relation as passenger was terminated.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 991.]

2. SAME—EJECTION OF PASSENGER.

Where a passenger remained on a car, sleeping, after arrival at his destination, the terminus of the road, the carrier's employes had the right to resort to whatever means were reasonably necessary to awaken him and get him off the train, and were not guilty of unlawful assault in using such means.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1450.]

3. SAME—EVIDENCE.

Evidence held to justify a jury in finding that a carrier's employes resorted to no means that were unreasonable or unnecessary in awakening the passenger and getting him off the train after arrival at his destination.

Error from District Court, Bell County; John M. Furman, Judge.

Action by Charles Kaase against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Stanton Allen and Pendleton, Ferguson & Durrett, for plaintiff in error. J. W. Terry and A. H. Cuiwell, for defendant in error.

KEY, J. Charles Kaase brought this suit against defendant railway company for damages. He alleged in his petition that while he was a passenger on the defendant's railroad, one of the defendant's employes committed an assault upon him. There was a jury trial, resulting in a verdict and judgment for the defendant, and the plaintiff has brought the case up by writ of error.

The first assignment of error assails the verdict and asserts that the undisputed evidence shows that the plaintiff was a passenger on defendant's train, and, that while that relation existed, a brakeman employed by the defendant in the operation of the train, committed an assault upon him. The undisputed testimony shows that the plaintiff boarded the train in question at Lampasas, and became a passenger by virtue of a ticket which entitled him to transportation to Temple. Temple was the final destination of the train, and, when it reached that place

and all the other passengers got off, the plaintiff, who was asleep in a seat in the chair car, did not get off. This was between 10 and 12 o'clock at night. The plaintiff testified that he had lost sleep for several nights; that he went to sleep before the train reached Temple, and did not wake up until he was jerked out of his seat by the brakeman, who placed nippers or handcuffs on one of his wrists. We have not undertaken to set out his testimony in full, because it may be conceded that it was sufficient to support a verdict in his favor, if the jury had given him credence and decided the case for him. But the conductor in charge of the train testified that when it reached Temple he passed through the car and announced that station in a distinct voice, that he assisted the passengers off, remaining there for at least five minutes after the train stopped at the depot, and until he supposed all the passengers were off, when he left for home. J. H. Ragsdale, the brakeman, testified as follows: "I was brakeman on the train that Mr. Kaase, the plaintiff, was on, the night he complains of. My duties are to protect the rear end of my train, and keep any other train from running into the rear end. I have no control or supervision over the passengers on the train. The conductor is in charge of that part of the work. The destination of that train that night was Temple. I do not know whether or not the station was called before going in. I did not undertake to get plaintiff out of the car until I had done all my work, and I passed by and heard the car man making a fuss in there and I stepped in the car. I was off duty at that time. When my train got to Temple, I took off my lights and put them in the train box, which took me about five minutes after we got in there, and then I took off my cap and put on my hat and started down to the Harvey House. I had nothing more to do with that train when I had done what I have stated. I had no further connection with that train as brakeman. My duties to the railroad company had all been performed, and the services for which I was employed had all been done. I did not know the destination of plaintiff. I thought he wanted to go through somewhere on the main line or on the Katy. The first thing that attracted my attention back to the car, after I had finished my work, was that I heard the car man trying to wake plaintiff up. At that time the car had been turned over to the car cleaner. When I heard him trying to wake the passenger up, I went in the car. I shook plaintiff and raised him up in the seat, and let him sit back down in it, and then I went out and started on back towards home, and Mr. Jordan, the car cleaner, went on through the train and put the rest of the lights out, and was coming back, and as a personal favor to him, I went back up there, and decided that I would get plaintiff out of the car, so that he

could make his connection, if he was going north or south. My motive in going back to the plaintiff the second time was a personal favor to him, to keep him from missing his connections. I didn't know where he was going and thought he might miss his connection. When I went back there I did not have any nippers. I never carry nippers. I did have a car seal, which is made of tin, and maybe a quarter of an inch wide. It is a piece of tin that they run through the lock or door on a freight car to seal it up. I picked that up, I put that around plaintiff's wrist and pinched it, and he rose up in his seat. I did that to wake him up. I had tried every other way and could not wake him. He got up out of his seat and asked me what I was doing, and I said I was waking him up. He said take those things off of me, and I took them off and I said 'Are you awake?' He said 'Yes,' and I went out of the car and he followed me out of the car. There was no one in the car but the plaintiff, myself, and the car cleaner Jordan. I weigh 185 pounds, and am 5 feet 5½ inches tall. According to plaintiff's statement, he is a larger man than I am. I had no intention of doing plaintiff any personal violence, and had no desire to injure him in any way. I was doing that as J. H. Ragsdale, and not as a brakeman of defendant. I did not twist the car seal around plaintiff's wrist, I just pinched it. I did just what I testified on direct examination and that is all there was to it. I do not have anything to do with calling stations. Sometimes I do as an assistance to the conductor. A brakeman is not required to assist passengers off the train, but we do it sometimes. It is customary to see that everybody gets out of a car, and I am not going to let a man sleep, if I can wake him up, but it is not my duty to go in there and wake him up. It is the general custom to see that all passengers get out when we get to terminals, and I heard the car cleaner in the car and I went in to help him. The car cleaner did not take any part in waking plaintiff up. The car cleaner was right there at the seat when I woke him up. I got the car seal out in the yard and carried it in the car with me. It was the second trip that I carried the car seal with me, after I had been in there and tried to wake the plaintiff up by shaking him. I did not curse plaintiff, or use any profane language towards him." The employé referred to as the car cleaner testified for the defendant, and substantially corroborated the brakeman as to what was done by the brakeman to get the plaintiff off of the train. He also stated that before the brakeman came back on the car, he had endeavored, without success, to wake the plaintiff by shaking and pushing him. He stated that he did this twice before the brakeman came to his assistance, and that the train had been there ample time for the plaintiff to get off before

he attempted to wake him the first time. The plaintiff denied being drunk, but admitted that he had taken several drinks of intoxicating liquor before he left Lampasas.

We are of the opinion that the testimony submitted by the defendant was such as justified the jury in finding that the train had been there a reasonable and sufficient length of time for passengers to get off, and that on account of being intoxicated, or for some other reason, the plaintiff was in such condition as that it was necessary for the defendant's employes to resort to some other means than those usually employed to awaken a sleeping person, in order to get the plaintiff off of the train; and that excessive force was not used for that purpose. In other words, we hold that the testimony offered by the defendant supports a finding that the plaintiff was not, at the time he alleges he was assaulted, a passenger. But, if it be conceded that that relation had not terminated, and he was a passenger at the time referred to, we are of the opinion that the verdict should be upheld upon the theory that no unlawful assault was committed. The train had reached its destination; and plaintiff, though asleep, and without fault, had no right to remain on the train throughout the night; and the defendant's employes had the right to resort to whatever means were reasonably necessary to awaken him and get him off the train; and if the brakeman and car cleaner told the truth about the matter, we are not prepared to say that the means resorted to were unreasonable or unnecessary.

The other assignments of error assail the charge of the court, mainly upon the contention that the undisputed testimony shows that the plaintiff was entitled to recover; and that whether or not he was a passenger at the time of the alleged assault should not have been submitted to the jury. What we have already said disposes of that objection. The other criticisms addressed to the charge are not regarded as tenable. We hold that the charge, with fairness and reasonable accuracy, submitted the case to the jury, and that the verdict for the defendant is supported by testimony.

No error has been shown, and the judgment is affirmed.

GALVESTON, H. & S. A. RY. CO. v. PASCHALL.*

(Court of Civil Appeals of Texas. Jan. 15, 1906.)

1. APPEAL—FINDINGS—CONFLICTING EVIDENCE—REVIEW.

A verdict on conflicting evidence will not be reviewed on appeal.

2. DAMAGES—DIMINISHED EARNING CAPACITY—DURATION OF LIFE.

In an action for injuries, probable duration of plaintiff's life may be found from evidence as to plaintiff's age and physical condition, without the introduction of mortality tables.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 488, 489, 508.]

*Writ of error denied by Supreme Court, March 15, 1906.

3. TRIAL—INSTRUCTIONS—OBJECTIONS—REQUEST TO CHARGE.

Where, in an action for injuries, the court charged the jury on the issue of assumed risk, defendant was not entitled to object to the sufficiency of such charge, in the absence of a request for further instructions thereon.

4. DAMAGES—FUTURE MENTAL AND PHYSICAL SUFFERING.

In an action for injuries, plaintiff is entitled to recover for such future mental and physical suffering as is reasonably "probable" to occur, as distinguished from such as is reasonably "certain" to occur.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 55, 56.]

5. SAME—INSTRUCTIONS—SUFFICIENCY.

In an action for injuries, an instruction authorizing the jury to consider such mental and physical suffering as was found by the evidence to "result" from the injuries complained of was sufficient, in the absence of a request to charge that only such suffering as "naturally and directly" resulted from the injuries could be considered.

6. SAME—INJURIES—DIMINISHED EARNING POWER.

In an action for injuries, plaintiff was only entitled to recover the reasonable present value of his diminished earning power in the future, and not the difference between what he would have been able to have earned in the future, but for the injury, and such sum as he would have been able to earn in his present condition.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 237.]

7. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROAD BRAKEMAN—PROXIMATE CAUSE—INSTRUCTIONS.

In an action for injuries to a railroad brakeman, the general charge properly instructed the jury as to other conditions on which plaintiff would be entitled to recover, and then added, "And that, but for such negligence on the part of defendant's engineer, if he was negligent, the injuries complained of by plaintiff would not have happened." Held, that such instruction was objectionable as not a proper definition of "proximate cause."

8. APPEAL—TRIAL—INSTRUCTIONS.

Where, in an action for negligence, defendant is not satisfied with the definition of "proximate cause" in a charge, a special charge should be requested, and where the error was one of omission, in failing fully to define "proximate cause," it is not ground for reversal in the absence of such a request.

9. APPEAL—HARMLESS ERROR.

In an action for injuries to a brakeman on the top of a car, where the jury found that the engineer stopped the car suddenly and in a manner not necessary in the operation of the train, and that his act was negligent as defined by the court, and it is evident that the fall of the plaintiff from the car and his consequent injuries were the proximate consequences of such negligence, any error in fully defining proximate cause was harmless.

10. EXCEPTIONS, BILL OF—EVIDENCE—RECITALS.

A bill of exceptions taken to the admission of certain testimony, merely reciting that the questions objected to elicited the replies of the witness embodied in the bill of exceptions, but failing to set out the questions, was insufficient.

11. JURY—QUALIFICATIONS OF JURORS—EXAMINATION.

Where counsel for plaintiff was not informed that a juror had expressed an opinion adverse to plaintiff's right to recover until after the jury was impaneled, whereupon he asked defendant's counsel to consent that the juror be excused, which was refused, it was

not error to permit plaintiff's counsel then to ask the juror in the presence of his fellow jurors whether he had expressed such an opinion.

Appeal from District Court, Fort Bend County; Wells Thompson, Judge.

Action by John S. Paschall against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied.

Baker, Botts, Parker & Garwood and D. E. Pearlson, for appellant. Ewing & Ring, for appellee.

REESE, J. Appellee, John S. Paschall, sued the Galveston, Harrisburg & San Antonio Railway Company to recover damages for personal injuries alleged to have been sustained by him occasioned by his fall from the top of a car at Rosenberg, which fall is alleged to have been caused by the negligent act of the engineer of the locomotive to which the car was attached. It is alleged that Paschall was a brakeman in the employ of said company, and was, at the time of the accident, on the top of a box car, in the discharge of his duties as such brakeman, and that, while so engaged, the car on which he was riding was suddenly stopped and brought to a standstill by the engineer in charge of the locomotive, without warning to plaintiff and in a manner wholly unusual and unnecessary, whereby plaintiff was caused to lose his balance and was thrown with great violence to the ground and injured, and that the act of the engineer was negligence, which negligence was the proximate cause of the accident and consequent injuries. Plaintiff's injuries are specifically set out and damages are claimed in the sum of \$30,000. Defendant answered by general demurrer and special exceptions, general denial, and special pleas of contributory negligence and assumed risk. There was a verdict and judgment in favor of plaintiff, awarding him \$4,000 damages. Motion for a new trial having been overruled, defendant appeals.

The accident occurred at Rosenberg on the line of appellant's railway, and at the time appellee was a brakeman on one of appellant's freight trains. The train crew was composed of Gibson, engineer in charge of the locomotive, Breeding, fireman, and appellee, Walls, and Walford, train brakemen. At Rosenberg station appellant's tracks run east and west; the depot being on the south side of the main track. The track next the depot is called the "house track," next to which is the transfer track; the tracks being about six feet apart. This makes the distance from the top of a car standing on one track about $3\frac{1}{2}$ feet from the top of a car on the other. The engine was engaged in switching cars at the time, and some cars had been switched on to the transfer track. Appellee was on top of these cars which had stopped opposite some cars

on the house track. The engine then, with two cars, went in on the house track and backed down and coupled on to the four cars standing on that track, and, while moving slowly backward, appellee stepped from the top of the car on the transfer track to the top of one of the cars on the house track. The manner in which the accident occurred, as claimed by appellant, is shown by the following from his testimony: "I was on top of the last box car on the transfer track, and the engine came down on the house track, with two cars, to shove the cars on that track to where they belonged. The engine struck said cars and they were shoved back, and as they were going along I stepped over on top of the last of these four cars. I was on top of said car, and as I got on the running board of said car, or about the center of said car, standing on the end of same, the cars were suddenly stopped from a motion or jerk, and my feet were jerked out from under me, and I was precipitated over the end of the car. I did not know that the engineer was going to stop, nor did I anticipate anything of the kind, because they were already backing said cars down, for I had given the engineer the signal to back, and they were moving slowly, when they were suddenly stopped with a jerk more violent than ordinary. The distance to the ground was about 15 feet. * * * The reason I stepped over on the top of said car was to stop said car at the right place, which was by the platform, so as to leave an opening for the wagons." This statement is substantially corroborated in its material particulars by J. W. Wickler, and is in sharp conflict with the testimony of the engineer, Gibson, and other of the train crew.

Appellant's first assignment of error presents the proposition, as stated, "that the evidence shows that the motion of the train occurring just as Paschall fell was but a motion that was necessary to the proper movement of the train, and a motion or cessation of motion usually and commonly incident to the proper handling of the engine and cars under the existing circumstances, and the verdict and judgment are not supported by the evidence." This assignment presents the question of the negligence of the engineer, as a cause of the accident, under any view of the evidence. This question was submitted to the jury under proper instructions; one condition of appellee's recovery being that the jury should "believe that the engineer in charge of the locomotive suddenly and unnecessarily brought such cars to a standstill." The deduction by the jury from the evidence that the stopping of the car was unusual and not necessary to the handling of the train is supported by evidence in the record. The evidence is conflicting on this point, and the jury accepted the testimony of appellee and his witnesses.

It is contended by appellant in its second and third assignments of error that the evi-

dence does not support the verdict as to the extent of appellee's injuries proximately caused by the fall, and the amount of damages awarded. Upon these points, also, the evidence is conflicting. If the testimony of appellee's witnesses, the physicians, Hillen, Lunn, Lister, and Rabb, irrespective of that of his wife, Mrs. Paschall, as to the character and extent of appellee's injuries, be true, the amount of damages awarded him by the verdict cannot be held to be excessive. Appellee was 54 years of age at the time of the accident, in good health, and earning \$75 a month. The testimony of the witnesses above mentioned was to the effect that his injuries were serious and probably permanent. This was denied by appellant's witnesses. It was an issue to be determined by the jury, subject to the correction of this court only in case we should determine that their finding was against the great preponderance of the evidence. The record certainly does not present such a case.

By the fourth assignment of error appellant presents the proposition that the court erred in submitting to the jury, as an element of damage, the value of the diminished earning capacity of appellee, for the reason that there is no proof nor pleading as to the probable duration of his life.

Appellant contends that there was no evidence from which the jury could determine the probable duration of appellee's life. It has been frequently held that such evidence is admissible as an aid to the jury in the way of mortuary tables of recognized authority, but it has never been held, so far as we can find, that it was necessary to enable the jury to determine the fact of the probable duration of life. None of the cases cited by appellant tend to sustain this assignment. It is settled law, at least in this state, that the jury may determine the probable duration of life from evidence as to the party's age and physical condition. *Railway v. Compton*, 75 Tex. 674, 13 S. W. 667. In the statement by the court in its charge as to the issues made by the pleadings, the court omitted to state the issue of assumed risk as having been pleaded by appellant. This is assigned as error, but in its brief appellant admits that the court did give charges submitting this issue to the jury. This was sufficient, especially in the absence of request for instructions, to supply the alleged omission in the charge referred to.

It is contended by appellant that the appellee was only entitled to recover, if so entitled at all, for such mental and physical suffering in the future as would be reasonably certain to occur as the proximate result of his injuries, and it is assigned as error that the court instructed the jury to take into consideration such mental and physical suffering as he would probably suffer in the future. It is not the law that in his recovery appellee should be limited to

damages for such mental and physical suffering as would be reasonably certain to occur. The rule is that such suffering as is reasonably probable to occur may be considered as an element of damage, or, as stated in *Railway v. Clark* (Tex. Sup.) 72 S. W. 584, such as the injured party will "reasonably and probably undergo." We think the language of the court in directing the jury to take into consideration such mental and physical suffering as appellee would probably suffer was a sufficiently accurate expression of the law on the subject. The distinctive difference between "probably" and "reasonably probable," or "reasonably and probably," does not seem to us to be material, and would hardly be regarded by an ordinary jury. *Railway v. Harriett*, 80 Tex. 82, 15 S. W. 556.

This part of the court's charge is further complained of in the second and third proposition under the sixth assignment of error, on the ground that the court instructs the jury to take into consideration such mental and physical suffering as was found by the evidence to "result" from the injuries complained of, instead of limiting them to those that "naturally and directly" resulted from such injuries. There can be no question that whatever mental and physical suffering there was, to be considered by the jury, resulted naturally and directly from the injury complained of. If appellant desired a more specific instruction on this point, a special charge should have been requested.

The instruction to consider the "reasonable present value of diminished earning power in the future" was correct. Clearly it would not have been proper to allow appellee now, in a lump sum, the difference between what the jury should conclude he would have been able to earn in the future, but for the injury complained of, and such sum as he will be able to earn in his present condition. He was entitled only to the present value of such difference, which is the measure of damages stated in the charge.

The court in its general charge, after instructing the jury properly as to other conditions upon which appellee would be entitled to recover, added, "And that but for such negligence on his part [referring to the engineer], if he was negligent, the injuries complained of by plaintiff would not have happened." Appellant complains of the part of the charge quoted, in that the definition of proximate cause, as embodied in the charge as that cause "without which the accident would not have happened," is incorrect. Considered as an abstract proposition, the criticism of the charge is just. "Proximate cause" is that cause without which the accident would not have happened, but it is something more than this. Such definition standing alone would do equally well for a definition of remote cause. In *Railway Co. v. Bigham*, 90 Tex. 225, 38 S. W. 163, it

is said, "It is usually laid down in cases of negligence that, in order to constitute the proximate cause of an injury, the injury must be the natural and probable result of the negligent act or omission." In *Jones v. George*, 61 Tex. 352, 48 Am. Rep. 280, the court says, quoting from *Milwaukee, etc., Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256: "It is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." It is true that negligence in the particular case on the part of the engineer, with reference to the consequent injury, presupposes and includes the idea that the injury is the natural and probable consequence of the particular act, and such as ought to have been anticipated as likely to occur; for, without this, the particular act would not have been negligence, but the course of reasoning by which this result is reached is too abstruse to be devolved upon a jury. Logically the jury could not have found that the engineer was negligent in stopping the car on which appellee was standing without finding that appellee's fall and consequent injury was the direct result thereof, and one which ought to have been foreseen by the engineer as likely to occur. An act cannot be negligent in a legal sense unless injurious consequences might be reasonably anticipated as likely to result as the natural and probable consequence thereof. Notwithstanding this, we think the court, in its charge, should have given the jury proper instruction as to the causal relation between the negligent act and the injury complained of necessary to entitle appellee to recover. If, however, the appellant was not satisfied with the insufficient definition of "proximate cause" in the charge here complained of, a special charge should have been requested. In the absence of such special request, we do not think the error indicated sufficient cause for reversal. *Railway v. O'Donnell*, 90 S. W. 886, 13 Tex. Ct. Rep. 844; *Railway v. Long* (Tex. Civ. App.) 48 S. W. 599. The error was rather one of omission in failing fully to define "proximate cause." *Railway v. O'Donnell*, 58 Tex. 42.

It may further be said that the error was harmless. If the jury found that the engineer stopped the car suddenly and in an unusual manner, and in a manner not necessary to the proper operation of the train, and that his act in so doing was negligence as properly defined by the court, the conclusion is irresistible, from all of the evidence, that the fall of appellee from the car, and his consequent injuries, were the proximate consequences of such negligent act. There was no question of any other independent or concurring cause operating to produce the ac-

cident. Nor can there be any question, if the testimony upon which alone the jury could have based their verdict be true, that the fall of appellee from the top of the car was the direct and immediate result of the sudden stopping of the car as testified to by him, and a result which should have been anticipated. The jury could not have been misled, to appellant's injury, by the error complained of.

The eighth assignment of error, that the verdict is not sustained by the evidence, in that it does not appear that the injury complained of is the proximate result of the negligent act of the engineer, is without merit.

The bill of exceptions, taken by appellant to the ruling of the court in allowing the witness W. B. Russ to give certain testimony as to injuries to one Hank Cherry, does not set out the questions in response to which the witness testified, although it is stated in the bill of exceptions, in substance, that the questions objected to elicited the replies of the witness embodied in the bill of exceptions. It appears that this witness testified for appellant, and the objectionable testimony was brought out on cross-examination. The testimony, disconnected from other testimony of this witness, appears to be immaterial and irrelevant, but as the witness was testifying as an expert physician for appellant there may have been some legitimate connection between his statements with regard to Hank Cherry and his own connection with that case, and his testimony in this case, that rendered the questions of appellee proper. The matter is not satisfactorily presented, nor is it attempted to be shown by appellant in its brief in what way the testimony could have operated to the prejudice of appellant. It appears to us that it could not have so operated. We do not think the ruling of the court reversible error.

There was no error in permitting counsel for appellee, under the circumstances detailed in the bill of exceptions, to ask the juror Nash, after he had been impaneled as a juror, and in the presence of the other jurors, whether he had expressed an opinion, as counsel had been informed, adverse to the right of appellee to recover. After counsel had been informed as to such expression of opinion by the juror of which he was ignorant at the time the jury was impaneled he asked counsel for appellant to consent that the juror be excused, which was refused. No other course was open to counsel for appellee except to ascertain the truth of the matter by further interrogation of the juror in the presence of the other jurors, as was done. The juror having answered satisfactorily, the trial proceeded. We cannot see that either this juror or any of the others could have been any more influenced by such questions propounded after the jury was impaneled than by similar questions and

answers while the jury was being impaneled. The assignment making this objection must be overruled.

We find no reversible error in the record, and the judgment is affirmed.

Affirmed.

COMANCHE COTTON OIL CO. v. BROWNE.

(Supreme Court of Texas. May 2, 1906.)

CORPORATIONS—SUBSCRIPTIONS TO STOCK.

A subscription to stock in a corporation to be organized to erect and operate a cotton oil mill is binding, though the charter of the corporation organized states its purpose to be to operate a cotton seed oil mill, and to erect, own, and operate whatever cotton gins may be necessary and proper as feeders for said oil mill.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by the Comanche Cotton Oil Company against Mrs. F. M. Browne. From a judgment of the Court of Civil Appeals (90 S. W. 528), affirming a judgment in favor of defendant, plaintiff brings error. Reversed and remanded.

E. C. Gaines, for plaintiff in error. Goodson & Goodson, for defendant in error.

BROWN, J. The plaintiff in error sued Mrs. F. M. Browne to recover of her \$3,000, the price of stock in the said company for which she subscribed. The pleadings by both parties were sufficient to admit the evidence; and, there being no issue made upon the pleadings, we omit a statement of their contents. The facts are stated by the Court of Civil Appeals as follows: "On March 15, 1904, the appellee, together with F. H. Oberthier and a number of other citizens of Comanche, desiring to erect and operate a cotton seed oil mill at that place, prepared and signed the following subscription contract: 'State of Texas, County of Comanche. We, the undersigned, subscribe the amounts opposite our names as stock that we agree to take in a cotton oil mill intended to be erected and operated in the city of Comanche, Tex. It is intended by us to form a corporation and operate the business of said company as a corporation, which is to be organized at a meeting of the subscribers here-to when fifty thousand dollars is subscribed, that being the intended capital stock. We agree to pay one-fourth of our subscription within thirty days from this date, and another one-fourth thirty days later, and the balance November 1, 1904.' Appellee signed this contract and set opposite her name the sum of \$3,000. The necessary amount of stock having been subscribed, there was a meeting of the subscribers at which, however, appellee was not present, and a charter was formally executed, which was duly accepted and filed with the Secretary of State on April 11, 1904, and the plant was immediately erected the machinery installed and

the cotton oil mill set in operation, and it is now an actual, going concern. The charter was in all things regular in form, but the purposes thereof are thus therein stated: '* * * The purpose of said corporation shall be to operate a cotton seed oil mill; and to do all things necessary and incident to the maintenance and operation of the cotton seed oil mill business; and to erect, own, and operate whatever cotton gins may be necessary and proper as feeders for said oil mill.'" The case was submitted to the judge on the trial below, who entered judgment for the defendant without making any conclusions of fact.

If the charter of the Comanche Cotton Oil Company had expressed the purposes of its creation in the language of the subscription contract—"to erect, own, and operate a cotton seed oil mill"—the corporation would be empowered to do all such acts as might be reasonably necessary for the accomplishment of the purposes of its creation; provided, the act done was not forbidden by law. 4 Thompson on Corporations, §§ 5641, 5642. In the latter section the following language is used: "It is but another statement of the principle of the preceding section to say that, although corporations have only such powers as are granted to them in their charters and governing statutes, yet, when an express power is granted to do a particular act, this carries with it, by implication, the right to do any act which may be found reasonably necessary to effect the power expressly granted." Protzman v. Ind. R. Co., 9 Ind. 467, 68 Am. Dec. 650. Therefore, if one or more cotton gins should be found reasonably necessary to the operation of the cotton seed oil mill, the corporation would be authorized to operate such necessary cotton gins. This provision of the charter as it was filed, and to which objection is made—"and to erect, own, and operate whatever cotton gins may be necessary and proper as feeders for said oil mill"—confers upon the corporation no power to own and operate any cotton gins which are not necessary to the operation of the cotton seed oil mill. Therefore, since the language added to that of the contract confers no more power upon the corporation than the law would have implied, without it, there is no material addition to the purposes of the corporation, and Mrs. Browne's liability on the contract of subscription is not discharged. Union Agricultural & Stock Ass'n v. Neill, 31 Iowa, 97. In the case cited the court said: "If the articles had remained as originally drawn, or if they had been entirely silent with regard to duration and mode of renewal of the corporation, the law would have attached to them the same consequences as now. In either case the corporation would endure 20 years from the date of its organization, with a right of renewal by a vote of three-fourths of the stockholders. It follows that the changes are entirely immaterial. The de-

pendant could not possibly be prejudicially affected by them." The charter as it was framed does not empower the corporation to operate cotton gins as a business independent of their necessity as a support for the oil mill business; and if it has engaged in the operation of cotton gins beyond the necessity for them as aids to the oil mill business, that constitutes no defense to the subscription contract, but Mrs. Browne and other stockholders could secure proper relief by application to the courts.

The trial court erred in giving judgment against the corporation, and the Court of Civil Appeals erred in affirming that judgment, for which errors the judgment of both courts are hereby reversed, and the cause is remanded to the district court for further trial.

MOUND OIL CO. v. TERRELL, Commissioner, et al.

(Supreme Court of Texas. April 11, 1906.)

1. PUBLIC LANDS—DISPOSAL BY STATE—ESTOPPEL TO DECLARE FORFEITURE.

In the absence of a statute requiring the Commissioner of the Land Office to notify purchasers of land that their claims are subject to forfeiture because of nonpayment of interest, failure to give such notice does not estop the state to declare a forfeiture, notwithstanding a custom of the office to give the notice.

2. SAME.

A statement by the Commissioner of the Land Office that a purchase of public lands was in good standing does not estop the state to declare a forfeiture of land for nonpayment of interest prior to that time; the inquiry in reply to which the statement was made having made no reference to whether interest had been paid.

3. SAME—REINSTATEMENT AFTER FORFEITURE—RIGHTS OF THIRD PERSONS.

Sayles' Ann. Civ. St. 1897, art. 4218f, provides that, where lands have been forfeited for nonpayment of interest, the purchasers may have their claims reinstated unless the rights of third persons have intervened. After a forfeiture had been declared a third person made an application for purchase of the land, accompanied by the proper payment, but by mistake a part of the payment was returned, and on discovery of the mistake the amount was repaid. *Held*, that the mistake did not affect the validity of the application, and the applicant's rights vested at the time of the first application, so as to prevent a reinstatement of the claim of the original purchaser thereafter applied for.

4. SAME.

Under Sayles' Ann. Civ. St. 1897, art. 4218f, providing that, where lands have been forfeited for nonpayment of interest, the purchasers may have their claims reinstated unless the rights of third persons have intervened, where an application for the purchase of forfeited land was accompanied by an obligation for an insufficient amount, and the original purchaser applied for reinstatement before the necessary amount had been paid, the reinstatement should have been granted; no rights having accrued under the application of the third person.

5. SAME—PRIOR RIGHT OF ORIGINAL PURCHASER.

Sayles' Ann. Civ. St. 1897, art. 4218j, provides that any owner of land forfeited for nonpayment of interest shall have 90 days' prior right to purchase the land without the condition

of settlement and occupancy, where it has been occupied for 3 years. Article 4218a provides that all surveys in counties organized prior to January 1, 1875, which are detached from other public lands, may be sold to any purchaser except a corporation without actual settlement. *Held*, that a corporation which has acquired the rights of a purchaser of public lands is not entitled to the priority given by article 4218j, where the land is detached and is located in a county organized prior to January 1, 1875.

Original petition by the Mound Oil Company for mandamus to J. J. Terrell, Commissioner of the General Land Office, and another, to compel reinstatement of purchases of public lands. Writ granted as to purchases of two sections described in petition, but denied as to other two sections.

Baker, Botts, Parker & Garwood, for relator. R. V. Davidson, Atty. Gen., W. B. Hawkins, Wm. W. Anderson, and G. H. Pendarvis, for respondents.

BROWN, J. Relator seeks a mandamus to compel J. J. Terrell, Commissioner of the General Land Office, to reinstate the purchases made by W. D. Hoskins and A. C. Hunter of sections 4, 8, 10, and 12, H., T. & B. Railway Company surveys, located by virtue of certificates Nos. 10/343, 387, 10/341, and 427, respectively, situated in Brazoria county, which land belonged to the public free school fund of Texas, and was sold to the said Hoskins and Hunter, as detached land, on the 26th day of June, 1890. It is alleged that Hoskins and Hunter complied with all the requirements of the law in making the purchase of the said land, and that they and those who claim under them paid annually the interest upon their obligations as it accrued until the 1st day of August, 1904, when the interest was not paid, and on the 1st day of November, 1904, the land was subject to forfeiture for nonpayment of interest. The Commissioner of the Land Office, after the 1st day of November, 1904, advertised that the land was subject to forfeiture for nonpayment of interest, but the forfeiture was not declared until the 18th day of September, 1905, at which time the land was declared to be forfeited. The relator avers that on the 10th day of July, 1905, it became the purchaser and owner of the said four sections of land by regular chain of transfers from Hoskins and Hunter down to itself. It is also averred that when it was negotiating for the purchase of the said land its attorneys wrote to the Commissioner of the Land Office for copies of the patents for said surveys, to which they received a reply containing this language: "With reference to the H., T. & B. Railway sections in Brazoria county, have to state that they have not been patented. They were sold to Hoskins and Hunter as detached land under act of 1887, and the claims are in good standing on the records of this department." It is also averred in the petition that for many years prior to the date

when this land was declared to be forfeited it had been the custom of the Commissioner of the Land Office to mail to the purchaser of land which became subject to forfeiture for failure to pay interest a written notice of the fact that his land was so subject to be forfeited, but that in this case no notice was sent by the Commissioner to the said Hoskins and Hunter, or to any of the persons who had purchased and was owning the land under them; that relying upon the custom aforesaid, and the fact that no notice had been sent to any of the parties, and also upon the report received from the Commissioner of the Land Office that the surveys were in good standing, the relator purchased the said land on July 10, 1905, for a valuable consideration, and the petitioner claims that by reason of these facts the state of Texas is estopped to declare a forfeiture of the land, and therefore the entry of forfeiture of the land as declared by the Commissioner was ineffective and should be set aside. In connection with the said allegations, the relator states that he has tendered to the Commissioner of the Land Office all interest which accrued upon the said land under the said purchase by Hoskins and Hunter, and was ready and willing to pay the said interest, or any other sum which by law became attached to the said purchase, in order to reinstate the said purchases, that it made application to the Commissioner of the Land Office to reinstate the said purchases and permit it to pay the interest and perform all of the acts required by law of the original purchasers, which the Commissioner refused.

Relator avers that in declaring the forfeiture of the said purchases, the Commissioner of the Land Office entered the following words upon the obligation in each case: "Forfeited for nonpayment of interest. 9-18-05. [Signed] J. T. Robinson, Act'g Com'r." Relator says that the said forfeiture is ineffective, because the Commissioner did not use the language prescribed by the statute; that is, that he should have entered upon the said obligations the words, "Lands forfeited." Therefore the said purchases by Hoskins and Hunter have never been in fact or in law forfeited and annulled, but that the Commissioner of the Land Office refuses to recognize them and the rights of relator under them. Relator alleges that on the 22d day of September, 1905, W. T. Freeland filed in the land office his applications to purchase sections 10 and 12 of the said land, and bid therefor \$4.06 per acre, depositing in the state treasury one-fortieth of the price of each section; but the Commissioner awarded the land to him at \$3.50 per acre, and the Treasurer returned to Freeland the excess; but subsequently the Commissioner of the land office discovered the mistake and corrected the same, so as to make the cash payment correspond with the bid made for the purchase of the land, and Freeland re-

stored to the Treasurer the sum which had been returned to him. It is also alleged that on the 25th day of November, 1905, W. T. Freeland's applications to purchase sections 4 and 8 of the said land were by mail received in the land office, but not marked filed until the 27th of that month; that said land was appraised at \$6 per acre, but the obligation for section 4 was for the sum of \$3,716.45, when it should have been for \$3,721.35, and the obligation for section 8 was for \$2,221.60, when it should have been for \$2,223.84; that said obligations were returned by the acting Commissioner and on the 7th day of December Freeland returned the obligations for the correct sums. On the 23d day of November, 1905, relator notified the Commissioner of the Land Office that it wished to reinstate the purchases of said four sections made by Hoskins and Hunter, and on the 27th day of said month it presented its formal applications to reinstate said purchases, and offered to pay the interest and to submit its evidences of title from Hoskins and Hunter, but the Commissioner refused to receive the transfers or the money to reinstate the purchases. It is claimed that Freeland did not acquire any right in said lands and, if the forfeitures were legally declared, relator was entitled to have its contracts of purchase reinstated. It is claimed that, if the forfeitures were properly entered and declared, it, as the owner of the land under Hoskins and Hunter, had a preference right 90 days from the date of the forfeiture to purchase the said land, and that in the exercise of that right it presented its applications to purchase the four sections, with an obligation for the deferred payments accompanying each application, to the Commissioner of the Land Office, and deposited one-fortieth of the price of each section in the treasury, complying with all the requirements of the law, which applications were delivered to the Commissioner on the 10th day of December, 1905, but the Commissioner of the Land Office rejected said applications.

Relator alleges that it is a corporation created under the laws of the state of Texas for the purpose of exploring for oil and other minerals in Brazoria county and in other counties of the state; that for that purpose it purchased the land in question, as well as other lands, and that the land was suitable for the purposes of its incorporation. It alleges that it was at the time of the forfeiture of the said land in possession of it as owner, and that it supplied itself with all machinery necessary to prosecute the work of exploring the land for oil; that it applied to the Commissioner of the Land Office to purchase the said lands at the price at which they were appraised, but that the Commissioner refused to accept its bid for the reason that the land had been sold to W. T. Freeland. Relator alleges that for the reasons before stated the purchases of said

Freeland are void and constitute no impediment to the sale to it of the aforesaid sections of land.

The first attack by relator upon the forfeiture of sections 4, 8, 10, and 12, described in the petition, is that the state is estopped to declare such forfeiture for a failure to pay interest by the neglect of the Commissioner to notify the original purchasers or any of their vendees that the interest was not paid and the land subject to forfeiture, in accordance with the custom which is alleged to have been established by the Commissioners of the General Land Office by a long course of dealing with such purchasers. There is no statute which prescribes it as a duty of the Commissioner to give such notice, and, although he may have done so as matter of accommodation to purchasers, the state cannot be estopped by his failure to comply with this custom so established by the office. *Day Company v. State*, 68 Tex. 553, 4 S. W. 865; *Salem Imp. Co. v. McCourt*, 28 Or. 103, 41 Pac. 1105; *State v. Brewer*, 64 Ala. 298.

It is also claimed that the state is estopped to maintain the forfeitures declared in this case by the reply of the Land Commissioner to the inquiry made by the relator's attorneys concerning the four sections of land in controversy. If we grant that the state might be estopped by such an act on part of the Commissioner of the Land Office, nevertheless the estoppel cannot be invoked in this case for the reason that the inquiry made of the Commissioner was not as to the payment of the interest on the contracts, and did not suggest to the Commissioner that the parties inquiring desired information as to whether or not the interest had been paid. The answer of the Commissioner does not state, nor necessarily mean, that the interest on the obligations of the purchasers had been paid, but was true in the fact that the land had not been forfeited at the time that the answer was made, and was therefore in good standing. The Commissioner had no notice that the relator was relying upon his answer to determine the question as to whether the interest was paid or not, and therefore the answer had no reference to that matter and cannot operate as an estoppel in this case.

The Mound Oil Company contends that, if the forfeitures were properly entered, still it had the right to reinstate the purchases under the following provision of Sayles' Ann. Civ. St. 1897: "Art. 4218f. * * * In any cases where lands have been forfeited to the state for non-payment of interest the purchasers or their vendees may have their claims reinstated on their written request by paying into the treasury the full amount of interest due on such claims up to the date of the reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as

if no forfeiture had ever occurred." It is not denied that the Mound Oil Company is a remote vendee by regular chain of transfers from the original purchasers, Hoskins and Hunter, and on the 27th day of November, 1905, it made written application to reinstate the purchases by a full compliance with the law upon that subject, and was entitled to reinstate the original purchases unless Freeland had acquired a right which could be enforced and was protected by the constitution. *Anderson v. Neighbors*, 94 Tex. 241, 59 S. W. 543.

Relator contends that the applications made by Freeland to purchase sections 10 and 12, filed on the 22d day of September, 1905, did not constitute an intervening right, because the Commissioner of the Land Office, by a mistake in notifying the Treasurer of the amount of cash payment required of Freeland, caused the Treasurer to return to Freeland about \$17 of the deposit, notwithstanding the mistake was discovered and Freeland restored the \$17 to the treasury within a short time, making the full payment as required by law. This mistake of the officers could not affect the validity of Freeland's applications. His right vested at the time the applications with proper obligations were filed and the deposit of the funds made in the treasury. Therefore, as to sections 10 and 12, the relator had no right to reinstate the original purchases.

The obligations which Freeland filed with applications to purchase sections 4 and 8 being each for an insufficient amount, Freeland had acquired no legal right in sections 4 and 8 on the 27th day of November, 1905, when relator filed its application to reinstate the original purchases of said sections, and the subsequent filing of proper obligations did not affect relator's right to reinstate the purchases by Hoskins and Hunter, which he exercised by a full compliance with the law. *Anderson v. Neighbors*, supra. As to sections 4 and 8 the relator is entitled to have the claims reinstated upon the original obligations.

It is also contended by the relator that, if it be admitted that the forfeitures were properly and lawfully made, it had a preference right for 90 days after the said forfeitures were declared to purchase the said four sections of land under the following provision of the statute: "Art. 4218j. * * * Any owner of land heretofore purchased, which land has been or may be forfeited for non-payment of interest, shall have ninety days prior right after this chapter goes into effect, or after the land is again placed upon the market, to purchase the said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law, but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to the said term of three years; provided, that

when any forfeiture has been made, the Commissioner of the General Land Office shall add to the appraised value of such land the amount of interest due thereon at the time of the forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein." The Mound Oil Company made application for the purchase of this land within 90 days after the forfeiture was declared. The sections of land in dispute were detached lands situated in Brazoria county, which was organized prior to the 1st day of January, 1875. The prior right for 90 days to purchase those lands did not change the legal qualification of the purchaser, which was prescribed in article 4218z in these words: "All surveys and fractions of surveys in all counties organized prior to the first day of January, 1875, which surveys are isolated and detached from other public lands, may be sold to any purchaser, except a corporation, without actual settlement, at not less than \$1.00 per acre, upon the same terms as other public lands are sold under the provisions of this chapter." The relator being a corporation, and the land being detached, the Commissioner of the General Land Office had no power to sell these sections of land to it at the time of its applications to purchase. Therefore the Mound Oil Company could not exercise the right to purchase any of the lands.

It is ordered that the writ of mandamus issue to J. J. Terrell, Commissioner of the General Land Office, commanding him to permit the Mound Oil Company to reinstate the purchases of Hoskins and Hunter for sections 4 and 8, described in the petition, but as to sections 10 and 12 the writ is denied.

GULF, C. & S. F. RY. CO. v. HUYETT.
(Supreme Court of Texas. April 18, 1906.)

1. RELEASE — MISREPRESENTATIONS OF AGENT — UNAUTHORIZED DECLARATION.

An employé may not have his settlement with his employer for personal injuries set aside for misrepresentations as to his condition by a physician in the master's employ, the physician having no authority in relation to the settlement or to make representations, the representations not having been made in the transaction in which the settlement was made, and the master or the agent who made the settlement having no knowledge of the representations.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, § 32.]

2. PRINCIPAL AND AGENT — EVIDENCE OF AGENCY—SUFFICIENCY.

Evidence that a physician in the employ of plaintiff's master made a misrepresentation to plaintiff, who had been injured in the course of his employment, as to his condition, and that on an occasion not shown to have had any connection with the settlement made by plaintiff, the physician when asked by plaintiff as to the propriety of his making a settlement, replied that a reasonable settlement would be better than a

prolonged law suit, does not warrant a finding that the physician was employed to make the representation, or that the master or the agent who made the settlement knew of the representation, as against uncontradicted testimony to the contrary.

3. MASTER AND SERVANT — ASSUMPTION OF RISK.

An employé assumes the risk of danger brought about by the negligence of the master, where to the knowledge of the employé the work is commonly done in the negligent manner which caused the accident.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 559, 580, 583.]

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by Bert Huyett against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff 89 S. W. 1118. Defendant brings error. Reversed.

A. H. Culwell and J. W. Terry, for plaintiff in error. Stuart & Bell, for defendant in error.

WILLIAMS, J. The defendant in error, who had received personal injuries while in the service of plaintiff in error, in consideration of the payment by the latter of the sum of \$250 executed to it a release of all damages thus sustained. He subsequently brought this suit to recover such damages wherein he sought to avoid the release on the ground that it was obtained by a misrepresentation made to him by one of the surgeons of the railroad company engaged in treating him in its hospital as to the nature and extent of his injuries and as to his recovery therefrom. His version of the transaction is that on Friday, October 16, 1903, he had an interview with defendant's claim agent concerning a settlement in which he proposed to settle for \$2,000, and the claim agent declined to consider his proposition; that on the next day, Dr. Scott, one of the surgeons in charge of the hospital, when visiting it, requested him to "stand in front of him," and, when he did so, said to him, "Huyett, you are not damaged, you will soon be as good a man as ever; you will soon be able to go to work"; that, believing this statement to be true, and being induced by it, on the following Monday he renewed his negotiation with the claim agent and settled with him for \$250. It is conceded by Dr. Scott, and shown by all the evidence, that the statement thus attributed to him, if made, was untrue, and did not fairly represent plaintiff's condition; but Dr. Scott explicitly denies having made it. There is no evidence that the doctor knew of the interviews between plaintiff and the claim agent, or that a settlement was then being discussed between them, nor is there any evidence that the claim agent knew of the statement made by the doctor to the plaintiff, or that the doctor in any way acted with him in procuring or for the purpose of procuring a settlement. It may be conceded that the

evidence sufficiently shows that Dr. Scott was an agent of the defendant in rendering services as physician and surgeon to its injured employes at the hospital, and that it lay within the scope of his employment not only to treat them but to advise them concerning the nature and duration of their injuries, and the probability of their recovery. It appears, also, to have been a part of his duty to give information on these subjects to the defendant's employes in its claim department. But, beyond this, he had no connection with that department and nothing to do with making settlements and obtaining releases or in conducting negotiations therefor. The representation relied on to avoid the release, therefore, does not appear to have been made in the transaction in which the contract of settlement was made, nor by the agent authorized to represent the defendant therein; but, so far as the evidence indicates, it was disconnected from that contract and made by an agent whose duties, as agent, had no relation to such matters. The law upon the subject is thus laid down by Judge Story in his work on Agency, § 135, whose statement is supported by many decisions: " * * * If the agent, at the time of the contract, makes any representation, declaration, or admission, touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself. But the qualifications above stated are also most important to be attended to. The representation, declaration, or admission of the agent, does not bind the principal, if it is not made at the very time of the contract, but upon another occasion; or if it does not concern the subject-matter of the contract, but some other matter, in no degree belonging to the *res gestæ*." In section 137, the principle is thus illustrated: "Thus, for example, what an agent has said, or represented, at the time of the sale of a horse, which sale was authorized by his master, whether it be a representation or a warranty of soundness, or of any other quality, will be binding upon the master. But, what he has said upon the subject at another time, or upon another occasion, will not be binding upon him; for it is no part of the *res gestæ*; and did not attach, as an incident or inducement to the sale. For such purposes the agent is no longer acting as agent of the master; and his declarations are not to be used as proofs against the master; but the facts contained in those declarations must be proved allunde. Indeed, in such cases, the agent himself may be properly called as a witness, and, hence, it has been said that his declarations are not the best evidence of the facts."

According to this, if the representation relied on had been made by the agent who effected the settlement, but in a different transaction, it could not affect the rights of the principal under the contract. For a stronger reason is this true of a representation made,

not only in a different transaction, but by another agent having no authority in relation to or connection with the settlement. His statements have only the relation to the contract of settlement that those of a stranger would have, for the reason that in making them he did not represent the defendant with respect to the settlement. Thompson on Corporations, § 6324; Bank v. Cruger, 91 Tex. 451, 452, 44 S. W. 278. The mere fact, therefore, that he was an agent of the defendant for some purposes does not make his representation available as a reason for avoiding a contract which he did not make. It is true that if he, assuming to act for defendant, had procured the release, whether authorized to do so or not, and the defendant were seeking to avail itself of it as a defense, any fraud practiced by him in obtaining it would be imputed to defendant. But a contract complete in all respects was made by defendant through its other agent, and hence the principle laid down in Henderson v. Railroad Company, 17 Tex. 560, 67 Am. Dec. 675, is not applicable, for the reason that the representation of an agent not shown to have had connection with that contract cannot be used to defeat it. It is also true that, if it were shown that defendant or its claim agent used the physician as an instrument to deceive plaintiff as to his condition in order that an advantageous settlement might be made, or that the claim agent and the physician acted together in so procuring the release, the contract would be affected by the physician's representations as fully as if he had been the only agent employed in the transaction (I. & G. N. Ry. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189); and it may be that, if the claim agent in effecting the settlement knew and took advantage of the state of plaintiff's mind, caused by deception practiced by the doctor, the result would be the same. But such things as this must be proved and cannot be supplied by conjecture or suspicion. If plaintiff's statement be accepted that Dr. Scott made the statement, which all concede would have been a glaring misrepresentation of the character of plaintiff's injuries and of his condition, the question as to why he did so would naturally arise in one's mind and might suggest suspicion as to his purposes; but this is not sufficient to warrant the finding of the facts, of which there is no other evidence, that he was employed by defendant or its other agent to make the representation or that they knew that he had done so. Some matters in the record are relied on by the defendant in error to establish these facts such as that Dr. Scott, on some occasion not shown to have had any connection with the settlement made, when asked by plaintiff as to the propriety of his making a settlement, replied in effect that a reasonable settlement would be better than a prolonged lawsuit and the fact that the representation and the settlement were so closely connected in time and sequence; but while these circumstances are consistent

with the conclusion that plaintiff seeks to establish, they are certainly not inconsistent with the opposite one supported by the uncontradicted testimony of both agents that there was no knowledge on the part of either of what the other did. In the case of *Houston & Texas Central Railway Company v. Brown* (Tex. Civ. App.) 69 S. W. 651, in which a writ of error was refused, no question was made in this court, nor, as we judge from its opinion, in the Court of Civil Appeals, as to the responsibility of the railway company for the representations of the physician which were held sufficient to avoid the release there in question.

As the cause is to be remanded because of the insufficiency of the evidence as pointed out, and of error in the charge of the court under which the jury were authorized without sufficient evidence to impute to the defendant the representation of Dr. Scott, we deem it proper to notice one other assignment of error. The trial court charged the jury, upon plaintiff's original cause of action, that a servant does not assume the risk of dangers brought about by the negligence of the master. There was evidence in the case which called for the statement of the well-known qualification of this rule applicable where the servant has knowledge when he enters upon the work in which he is hurt of the negligence of his employer and of the danger created thereby to which he (the servant) is to be exposed in doing such work. The plaintiff claimed that he was hurt by the negligence of his superior in ordering the raising of the hammer of a pile-driver, when the pile to be driven was also suspended in the air, in such manner that the hammer caused the pile to swing against plaintiff and knock him from the bridge on which he was standing to assist in the work. The wrong is alleged to have consisted in raising the hammer before the pile had been lowered to the ground. The plaintiff's evidence represented this as an unusual occurrence, such as he had never witnessed before, and, of course, upon his statement there could be no assumption of the risk. But the defendant's evidence tended to show that this was not only the common but the proper way of doing the work. If the jury agreed with its contention in toto, they necessarily concluded that there was no negligence and hence the instruction could have done no harm. But the jury could, perhaps, have thought that, while this was a dangerous and negligent manner of doing the work, yet it was the one in which it was commonly and habitually done by defendant and that plaintiff knew that fact. Under such circumstances there would, we think, be an assumption of risk arising from a danger known to have sprung from the master's negligence. Of course the mere fact that such an occurrence may have occasionally happened before would not have this effect, for the reason that an employé may not to be held to foreknow that negligent

conduct will be repeated. The assumption of risk would arise from the doing of the work in a manner so common and habitual that the employé should know that it will be followed on the particular occasion. Whether or not the charge referred to would be cause to reverse the judgment when no further instruction was requested it is unnecessary to determine. For the errors first pointed out the judgment is reversed, and the cause remanded.

Reversed and remanded.

HANCOCK et al. v. GULF, C. & S. F. RY.
CO.

(Supreme Court of Texas. April 5, 1906.)

RAILROADS—PERSONS ON TRACK—DEATH—
— CONTRIBUTORY NEGLIGENCE — EVIDENCE
— SUFFICIENCY.

In an action for the death of a night watchman, run over by a train in a railroad cut, evidence held to justify directing verdict for defendant.

Certificate of Dissent from Court of Civil Appeals of Second Supreme Judicial District.

Action by J. M. Hancock and another against the Gulf, Colorado & Santa Fé Railway Company. Judgment for defendant was reversed on appeal by the Court of Civil Appeals, and question certified on dissent to the Supreme Court. Instruction directing verdict for defendant held not error.

The following is the opinion of Conner, C. J., in the Court of Civil Appeals:

"Lewis Hancock, a minor son of appellants, was killed by one of appellee's trains in a deep cut near Valley Mills, Tex., on October 3, 1902. On the trial for damages therefor, the court instructed the jury that the evidence showed conclusively that his death was due to his own contributory negligence, and hence to return a verdict for the defendant. This appeal is from the verdict and judgment entered in accord with said instruction.

"The evidence, briefly stated, shows that the deceased had been employed as a section hand by one of appellee's section foreman. Upon his application he had been assigned to act in the capacity of a night watchman, whose duty it was to walk through and guard the cut mentioned, and to keep the track therein clear by watching for and removing any obstruction that he could remove, and, in event he found an obstruction of such character as he was unable to move in time, then to watch for and stop any passing train by giving a signal with a red lantern with which he had been provided. The deceased was between 19 and 20 years old, fairly well matured for his age, and of at least average intelligence, and had theretofore served as section hand and night watchman with the knowledge and consent of appellants. Appellee's track approached said cut upon a curve and it was downgraded in passing from the south to the north. No one

witnessed the killing, but appellant J. M. Hancock, who lived near the north end of the cut, testified that he was expecting his son to come to breakfast about 6 o'clock, and, the deceased not having done so, he went and found his son lying on the left-hand or west side of the track when going north; that he found the body of his boy lying with his head to the south about 2 or 3 feet from the track, with his feet to the north, or perhaps a little to the northwest, his feet being further from the track than his head; that the deceased's hat was found upon the track from 2 to 3 feet from where he was lying, cut in two on the rails; that one of the lanterns which the deceased carried was lying about south of the body some 12 or 14 feet; that the other lantern had been crushed, the frame being some 30 feet north of where he was lying, and the glass crushed along the track; that the lanterns were found on the same side of the track as the body; that the front side of the deceased's head was mashed in at the corner of the forehead, and his left upper arm was broken, and there was a bruise about the body which the evidence fails to locate. The evidence further shows that it had been raining and that there was water about four feet wide on each side of the railroad track in the ditch; that there was some $3\frac{1}{2}$ or 4 feet of space between the water and the rail of the track nearest where the deceased's body was found; that the body was found near the north end of the cut, from which point an approaching north-bound train could be first observed about 41 rail lengths, where such a train would go out of sight and again come into plain view within 7 or 8 or 10 rail lengths; that when conditions were favorable trains approaching the cut could ordinarily be heard for half a mile. The evidence further shows that there were three of appellee's trains which passed through the cut in question on the morning of the injury under consideration. The first was a train going south about 4:30 a. m.; the second a passenger train, going north about 5:30 a. m.; the third a freight train, also going north about 5:50 a. m. One of appellee's rules required trains approaching the cut to whistle or ring the bells as a warning to persons who might be therein; another required operatives of north-bound trains to have them under control while passing through said cut. The record is silent as to the rate of speed of the south-bound 4:30 a. m. train, and as to whether or not the usual signals were given. The evidence shows that the north-bound freight, which passed through the cut about 5:50 a. m., gave the usual signals, and is not shown to have been going at a prohibitive speed.

"The evidence relating to the north-bound passenger train is that of appellant J. M. Hancock, who testified, in substance: That on the morning that his son was killed he was on his front gallery at the time the passenger train passed. That it blew for the

station about the time that the train got up to the county road; the evidence showing that the county road crossed the track at a point a short distance north of where the body was found. That the train was going about the average speed of a passenger train, which the evidence tends to show was greater than the speed allowed by the rule. That, 'if they ever rang the bell, I didn't know it. They blew the whistle just before they got opposite my house. When it blew the whistle I heard, it had done passed the place where he was, and was coming north.' We make the following further quotation from the testimony of J. M. Hancock on cross-examination: 'When I first noticed this first train [the north-bound 5:30 passenger] that morning after I first got up, it was right along about where the boy was killed, just coming out of the cut. I don't know whether I had heard it before or not. I might have heard it running. It might have been that which caused me to get up when I did. I may have heard the train running a good ways back. I had got up and got out on the gallery when I heard it whistle down at the crossing. I noticed it whistling and heard the other train, as I supposed, about three miles off. * * * I might have been waked up by hearing the first train. That might have been what caused me to get up, because I wanted to get up early that morning to get an early start to Waco. I don't have any definite recollection of having noticed that first train before then. There had been no whistle from it, I am satisfied, because I think I would have heard it before. Trains may sometimes pass there and me not hear them, but that was about my time to get up, and it might have caused me to notice this train. I heard it running and supposed it was the passenger train coming. I might not have noticed it more than a half a mile back. I don't know. It was the first train that I saw, and then I heard the other train whistle. I heard the other train whistle again about the south end of the big cut. * * * I think there is a whistling post up there about the south end of the big cut.' The engineer and fireman of the 5:30 passenger train both testified that it was the rule and their custom to sound signals of warning in approaching the cut, but that they had no distinct recollection of having done so on the night that the deceased was killed; that neither saw Lewis Hancock or any other object upon the track in the cut that night; that their duties were such as to frequently call their attention away from the track in front, and that such might have been the case for the short period of time they would have been able to see Lewis Hancock, had they been looking for him. It was further shown that a younger brother of the deceased had been with him in the cut the night before until about 2 o'clock a. m., at which time, he testified, his deceased brother was perfectly sober, though there was about two

inches of whisky in a pint bottle that the deceased then had in his bucket, and which the evidence further tends to show the deceased had drunk between 2 a. m. and the time when his body was found, as stated.

"Appellee's principal contentions in support of the action of the court in giving a peremptory instruction are to the effect that the undisputed testimony shows that it was the duty of the deceased to keep awake and sober, and to maintain a vigilant lookout, with full knowledge that rapidly moving trains were likely to pass him at any minute; that he went on or close to the railroad track, and remained there until struck by a train, when he could have seen or heard the same in time to have avoided the accident, and that hence, in the absence of any evidence of the exercise of care on his part, he was prima facie guilty of contributory negligence, regardless of whether he was asleep or awake, drunk or sober; that the injuries found upon the body of deceased can only be accounted for upon the hypothesis that he must have been sitting on the cross-ties, and struck by the side projections of the engine; that the whisky he drank caused him to go to sleep close to the track, and hence that the deceased was guilty of contributory negligence in this respect; that the evidence fails to show that the usual and customary warning signals were not given; that the rule requiring north-bound trains to be under control at the point of injury had no application to the deceased; and that if it be assumed that said north-bound passenger train was not under control, and that warning signals had not been given, and that there was negligence in these respects, there is not evidence sufficient to support the issue that such negligence was the proximate cause of the death of the deceased.

"The majority have concluded that the court committed error as assigned in giving the peremptory instruction noted. If it be assumed, which we will do for the present, that the evidence tends to show that Lewis Hancock was killed by the north-bound passenger train, and that the operatives thereof were guilty of negligence in failing to give the usual warning signals, and in running at a greater speed than as prescribed by appellee's rule, then under well-established principles of law we see nothing in the evidence that compels the conclusion that the death of Lewis Hancock resulted in whole or in part from his own negligence. Just how it happened no one can say from this record. Quoting our Supreme Court in the case of *Railway Co. v. Shieder*, 88 Tex. 161, 30 S. W. 905, 28 L. R. A. 538: 'The law raises no presumption of negligence from the mere fact of injury.' The law of contributory negligence goes even farther. In the absence of evidence to the contrary, it must be assumed that Lewis Hancock was at the

time in the exercise of ordinary care for his own safety. *Lee v. I. & G. N. Ry. Co.*, 89 Tex. 588, 36 S. W. 63; *Tex. Mid. Ry. v. Crowder* (Tex. Civ. App.) 64 S. W. 90; *Tex. & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; 2 *Labatt on Master and Servant*, pp. 2329, 2330; and authorities cited in 20 Cent. Dig. col. 132, § 79. In the case first cited supra, the husband of the plaintiff was run over and killed by a switch engine because of an evident inability of the deceased to free one of his feet from a frog of a switch track in which it had become fastened. The act of the deceased in stepping in the frog was unexplained by the evidence. The Supreme Court say: 'There is neither proof nor presumption of law that deceased was negligent in taking that step, and we cannot see how it can be said that he was negligent in the act of stepping into the frog. Being there, he must step somewhere, and, seeing the train coming, he would naturally step off the track, when it may be by misfortune he got his foot fastened in the frog. These facts to our minds strongly indicate negligence, but they are not so conclusive as to exclude a difference of opinion among ordinary men as to whether the deceased did what a man of ordinary prudence would have done at that time and under like circumstances, and they did not warrant the holding as matter of law—a necessary conclusion—that deceased was negligent in taking that step. In so holding, the Court of Civil Appeals was in error. In *Railway v. Crowder*, supra, the deceased stepped upon the track, and walked thereon some 30 or 40 feet before being struck and killed by a backing engine and cars. The evidence failed to definitely show that he looked and listened before or after stepping on the track, yet the court held that the issue of contributory negligence was for the jury. So, in the *Gentry* case, and many other cases that might be cited, among which we refer to *Hutchens v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.) 89 S. W. 24, *Railway Co. v. Matthews*, 88 S. W. 192, 13 Tex. Ct. Rep. 244, and *Schum v. Penn. Ry. Co.*, 107 Pa. 8, 52 Am. Rep. 468, the injured person was not seen at the time he was run over and killed, and yet in all of them it was held that contributory negligence would not be presumed. They all recognize the presumption that the deceased acted with due care for his own safety, and devolve the burden of proof upon the party asserting it to establish by evidence the fact of contributory negligence.

"The cases cited also establish the proposition that in order to authorize the court to withdraw the case from the jury by a peremptory instruction, the evidence tending to establish contributory negligence must be of such character as that there is no room for ordinary minds to differ in the

conclusion to be drawn therefrom. Can it be said that it conclusively appears from the evidence in this case that Lewis Hancock's own negligence contributed to his death? We think not. It is undoubtedly true as a general rule, if, indeed, an exception thereto should be permitted in any case, that the master must exercise ordinary care to safeguard the life and limb of his servant. Ordinarily the servant in undertaking the employment has the right to assume that this will be done, and the care that the law devolves upon him for his own safety does not include the duty of exercising care to observe whether the master has done or omitted to do what the law requires of him. Lewis Hancock clearly was rightfully in the cut where he was killed, and the majority find nothing in the record to compel a finding that the rules before adverted to relating to speed and whistling did not include the deceased within their beneficial purposes. On the contrary, we think, as may be illustrated by the case of *Tex. Cent. Ry. Co. v. Bender*, 75 S. W. 561, 8 Tex. Ct. Rep. 24, that a jury would be fully warranted in finding that Lewis Hancock had the right to expect the usual warning signals to be given by approaching trains. His duty required him to be in the cut, and his instructions required him to walk the track, or near enough thereto to constantly observe it. If it be insisted that he was negligent in being upon the track rather than in the pathway beside it, the answer is that there is no evidence that shows that he was required by any rule or instruction of appellee to walk in the path, and nothing that shows that he was not thereon when struck. It can hardly be said with any show of reason that it conclusively appears that he was drunk, or had drunk sufficiently to materially impair any of his faculties. His brother testified that the deceased was sober at 2 a. m. and had not, previous thereto, drunk any whisky. It was at most for the jury to say what effect two inches of whisky in an ordinary pint bottle would have, and that deceased drank that much is but an inference from the facts that the bottle was found empty near the body, and that the deceased exhaled whisky fumes in vomiting the next morning; the attending physician testifying that in his opinion the act of vomiting was the result of nervous shock, rather than of drunkenness. The asserted fact that he was lying down or asleep is but an inference from the circumstances shown, and is by no means conclusively established, if, indeed, it is not rebutted by the evidence; and the suggestion that the instructions of Lewis Hancock devolved upon him the duty of looking for trains, and that, had he been performing that duty, he necessarily would have seen the train which killed him, may be met with the suggestion that the evidence shows

that his primary duty was to watch for obstructions and for trains only in event that obstructions were found, that he had the right to assume that the operatives of trains would not be guilty of negligence, and that it is not to be presumed that he would deliberately stand in the way of destruction. Besides, it does not appear that the deceased in fact did not see the approaching train; but if he in fact was killed by the north-bound passenger, and if in fact this train was going rapidly, without giving any warning signal, he may have observed it too late to get out of the way. In short, we think the issue of contributory negligence was for the jury, and that the court erred in taking it away from them.

"Perhaps a more serious question in the judgment of the majority is presented by the contention that the evidence failed to show that appellee's negligence was a proximate cause of the death of Lewis Hancock. The case was not disposed of on the trial upon any such contention, and we have finally concluded not to do so. Upon the submission of this cause before us, it seemed to be conceded by counsel for appellee, as, indeed, it may be said that there is evidence tending to show, that Lewis Hancock was killed by the passenger train which passed through the cut in question about 5:30 a. m. If this be conceded, then we feel unwilling to say that the evidence of the appellant J. M. Hancock does not at least raise the issue of negligence on the part of the operatives of said train. If they were negligent in failing to give warning and in operating the train at a prohibitive speed, and the jury should find Lewis Hancock without contributory negligence, we think it for the jury to say whether the negligence, if any, of the engineer and fireman of said passenger train was a proximate cause of Lewis Hancock's death. We think the cases heretofore cited on other propositions support this conclusion, particularly in view of the fact adverted to, that the trial court disposed of the case upon issue of contributory negligence alone.

"It is accordingly ordered that, for the error of instruction shown, the judgment be reversed, and the cause remanded for a new trial."

Stephens, J., filed the following dissenting opinion:

"Lewis Hancock was employed by the section foreman to keep the track clear in the big cut the night he was killed, and was instructed to 'watch it until after train No. 18 went north,' which train, it is claimed, killed him. He was told not to sit down, as he might go to sleep, and was directed to take two lanterns with him, one red and one white, and not to light the red one, with which he was to stop a train in case he found anything on the track, unless he needed it. This section foreman further

testified, as did various other witnesses, and there was no evidence to the contrary, that 'when track walkers are out on the line it is not expected that the train crew will look out for them, but that the track walkers will keep out of the way of the trains and keep the track clear. The train crew is not supposed to know the track walkers are there. If there in any danger that the track walker cannot clear away, he is supposed to flag the train.' Lewis Hancock was, therefore, sent out that night to watch for trains, and not trains to watch for him. If he had faithfully discharged his duty as watchman, he would not have been killed. The circumstances attending his death place him in the attitude of having neglected the very duties he had undertaken to perform. He had ample space on either side of the track to keep out of the way of trains. The cut, according to the testimony even of his father, was 24 feet wide at the deepest place, and the narrow, shallow strip of seep water on either side of the track was some 4 feet from the track. So far from affording any reasonable explanation of his conduct consistent with the care he had undertaken by contract with appellee to exercise, the circumstances all tended in the opposite direction. The wounds and position of his body, the position of his hat and lanterns, and the fact that he was not seen by the train operatives, to say nothing of the bottle of whisky from which he had evidently been drinking, all tended to show that he had sat or lain down, and possibly gone to sleep, too near the track. These circumstances, however, were not of themselves conclusive, but are important in that they fail to rebut the inference of negligence otherwise raised.

"The case differs from the licensee cases cited in the opinion of the majority. A man walking a railroad track by invitation or consent of the railroad company is only required to use the care of a person of ordinary prudence for his own safety, and the railway company owes him the duty of similar care to avoid injuring him. In the case at bar the man was not only under the ordinary obligation to exercise care for

his own safety, but he had undertaken for a valuable consideration to be a watchman—to exercise extraordinary care—for the safety of appellee's passengers and trainmen; whereas appellant, according to the testimony, owed no such duty to him. Suppose his body had thrown the train from the track, when he had undertaken to see that it had a clear track, would not this raise the inference of negligence against him, and without explanation would it not be conclusive? There can be but one answer to this question, and the case supposed is not distinguishable from the one before us. Besides, the evidence did not raise any other issue as the proximate cause of the accident except the negligence of deceased, and the court could not have submitted any of the alleged grounds of recovery without inviting the jury to enter the domain of conjecture.

"The writer, therefore, concurs with the trial court in holding that on the conceded facts appellants had no case."

Lockett & Cureton and Penaleton Ferguson & Durrett, for appellants. Dillard & Word, J. W. Terry and Chas. K. Lee, for appellee.

Certified Question on Dissent.

WILLIAMS, J. At the trial of this cause in the district court, a verdict in favor of defendant was rendered upon a peremptory instruction given by the court. On the appeal of the plaintiffs, a majority of the Court of Civil Appeals held that the evidence was sufficient to raise issues of fact which plaintiffs were entitled to have submitted to a jury, Mr. Justice Stephens dissenting. The question "whether, under the facts, the court committed reversible error in giving the peremptory instruction to find for appellee," was then certified to this court and is now before us for decision. We answer that the instruction was not error. The subject is sufficiently discussed in the opinions of Mr. Chief Justice Conner and Mr. Justice Stephens, which will be reported along with this, and we consider further comment unnecessary.

STATE v. PAYNE.

(Supreme Court of Missouri, Division No. 2,
March 8, 1906.)

1. RAPE — ASSAULT — INDICTMENT — MODE OF ASSAULT.

Where, in a prosecution for assault with intent to rape, the indictment charged an assault, named the female assaulted, and alleged that the assault was with a felonious intent to rape, it was not fatally defective for failure to set out the manner, means, or mode of the assault charged.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Rape, § 30.]

2. SAME—EVIDENCE.

Evidence held sufficient to sustain a conviction of assault with intent to rape.

Appeal from Criminal Court, Greene County; James T. Neville, Judge.

Hiram Payne was convicted of assault with intent to commit rape, and he appeals. Affirmed.

This cause is here for review upon appeal from a judgment of conviction of the defendant in the criminal court of Greene county, Mo. The only assignment of error to which our attention is directed in the brief of counsel for appellant being that the indictment is insufficient to support the judgment it is well to here reproduce it. Omitting formal parts, it thus charges the offense: "The grand jurors of the state of Missouri, impaneled, sworn, and charged to inquire within and for the body of Greene county, upon their oath, presents that Hiram Payne, late of Greene county, and state aforesaid, on the 21st day of November, A. D. 1903, at the county of Greene, and state of Missouri, did then and there unlawfully and feloniously make an assault in and upon the body of one Jennie Tuttle there being, with intent her, the said Jennie Tuttle, then and there unlawfully forcibly and against her will, feloniously to ravish and carnally know, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of state." The record in this cause discloses that Hon. James J. Gideon, judge of said criminal court, disqualified himself, and Hon. James T. Neville, judge of the Twenty-Third judicial circuit, was called in to try said cause. After a mistrial at the January term, 1904, defendant was again tried at the March term, 1904. At said term the prosecuting attorney filed a motion, supported by an affidavit, alleging that the sheriff was biased in favor of the defendant, and praying that he be set aside and that the coroner summon a jury. This motion was sustained by the court. Then defendant filed a motion, supported by affidavit, alleging that the coroner was biased against the defendant, and praying that he be set aside, and that some suitable person be appointed ellisor. This motion was by the court sustained, and B. W. Lamb, a disinterested person, possessing the required qualifications, was appointed ellisor, and summoned the jury, a special venire being sum-

moned on motion of defendant, and the trial proceeded.

The evidence on the part of the state tended to show: That Jennie Tuttle, the prosecutrix, was about 16 years old and was employed as a house girl at a boarding house kept by Mr. and Mrs. Weddell, in the city of Springfield. There were some five or six unmarried men who boarded at said house, among whom was defendant. That for perhaps several weeks prior to the alleged assault there were friendly relations existing between defendant and prosecutrix, and they were frequently seen together about the house and on the front porch, and that they had been engaged about one week. On Saturday night, November 21, 1903, the prosecutrix stated to Mrs. Weddell (whom all the witnesses call "Grandma") that she was going with Miss Bertha Burks, who lived just across the street, to attend preaching at the Latter Day Saints' Church. After going up in town prosecutrix and Miss Burks learned that there was no service that night at said church, so they went to the Herr dry goods store to see the opening of new winter goods. There they met Ira Weddell, who was a son of Grandma and Grandpa Weddell, and who lived at the same home with them. After going around in the store they all went out on the street and met Jones, who also boarded at the Weddell house, and later on defendant came up. Defendant and Weddell made arrangements to take the girls home. Weddell and Miss Burks walked together, and defendant and prosecutrix walked together. The latter couple walked some distance behind. Prosecutrix was a stranger in Springfield, was unacquainted with the names and locations of the streets, and did not know what part of the city they were in. After walking some distance Weddell and Miss Burks turned off of the street that defendant and prosecutrix were on, but defendant and prosecutrix kept on going along said street, which was in the opposite direction from the Weddell home. Prosecutrix asked defendant if they were going the right way, and defendant assured her that he knew the way, and would not take her wrong. After reaching a distant and lonely place near the cemetery, defendant began to talk love to prosecutrix. He took hold of her arm, made her stand still, and said: "You might as well let me. We are engaged to be married. There won't be any discovery. Nobody will know it but you and I." Prosecutrix told him that she was not that kind of a girl, tried to get loose from him, but he held on tight and threw her to her knees. She screamed and defendant let go of her; but, as soon as she got up, he grabbed her again and threw her down on her elbow. She again screamed, and defendant choked her, smothering her breath, and hit her twice in the back. In the meantime defendant either threw prosecutrix to her knees, or she fell to her knees,

and defendant tried to raise her dress. Prosecutrix knocked his hand away, and defendant said: "Jennie, if I had a pistol, I would blow your brains out." Prosecutrix replied: "Well, I don't care. I had rather die than let such a thing occur." As soon as she got away from defendant prosecutrix started back up the street and ran as fast as she could, but defendant overtook her. He jerked her around, and said: "If you ever tell on me, I will blow your brains out." Defendant kept in sight of prosecutrix till they reached the Berry boarding house, when he told her to wait till he went in there a minute. As soon as defendant went in the front door, prosecutrix ran away and walked to the Weddell home which was in a distant part of the city, reaching there at 1 o'clock a. m. As soon as she reached there, prosecutrix went to the bedroom of Mrs. Weddell, waked her up, and told of the assault which defendant had made. Mrs. Weddell was so sleepy she either did not understand or did not want to be bothered, so she refused to let prosecutrix finish her complaint. Then Ira Weddell, who had been home for some time, came into the sitting room and prosecutrix told him of the assault. On the next morning prosecutrix made complaint to Grandpa Weddell. Defendant did not return to the Weddell house till about 11 o'clock the next day, Sunday, when he went to his room and threw himself on the bed. Grandpa Weddell went in his room and said: "Hiram, I guess we can't keep you any longer after the way you treated Jennie last night. I would not have thought it of you, Hiram. We took you in here and treated you like a gentleman, and now you have brought all this trouble on us. Why did you want to treat Jennie the way you did last night, and she only a child of 16?" Defendant replied that he need not cry about it; that he did not care anything about Jennie now. Mr. Weddell then told defendant that he could not stay in his room any longer, so defendant left. The next day, Monday, defendant returned and said to Mr. Weddell: "Grandpa, I want to see you. I want you to forgive me." Mr. Weddell suggested that he ask the Lord for forgiveness, and wanted to know what defendant was going to do about this scrape with Jennie. Defendant said: "I don't know. I just felt so bad, I can't go to work to-day. I thought I would come over and see you folks. I feel so bad I can't go to work." When Mr. Weddell said that defendant had done mighty wrong, defendant said: "I am sorry it occurred. I have done mighty wrong, and am sorry of it. I hardly know what I did do that night." That on Monday prosecutrix refused to talk to defendant, but made complaint to a justice of the peace, and a warrant was issued at 9 a. m. The state's evidence further tended to show that a short time prior to this night defendant said to McClintick and Jones, who roomed with him, "I am going to have in-

tercourse with her [prosecutrix], or tear the clothes off of her." To witness Cummings defendant afterwards stated that prosecutrix was "a nice little girl, nice enough to marry." When asked how he happened to get into trouble with her, he replied that he had been drinking. When further asked why he did not apologize and take her home, and not let her go home in tears, defendant said he did have her laughing at one time, but that she left him when he went into a store to get a match.

The evidence on the part of the defendant tended to show: That there was a friendly feeling existing between him and prosecutrix, and had been ever since he had been boarding at the Weddell home, but that they were not engaged. That defendant was 27 years old and worked at the railroad shops in Springfield, and received his pay on the afternoon of the alleged assault. That defendant, after supper, went down to the business part of the city, visited a barber shop, store, and saloon, paid some of his bills, and took two drinks of liquor. That he walked up near the public square, where he met Miss Burks, prosecutrix, and Jones waiting for a street car. That, with the consent of Mr. Jones, defendant and Ira Weddell made arrangements to take prosecutrix and Miss Burks home. That, as a matter of fact they did not walk towards the Weddell home, but in another direction. That after Weddell and Miss Burks turned and left that street defendant and prosecutrix went on, and prosecutrix made the remark, "They seem to be trying to give us the dodge." That he and prosecutrix walked out near the cemetery, and he told the prosecutrix that he would like to kiss her, but that his breath might not smell good, as he had taken two drinks, and prosecutrix said she would not mind if grandma did not find it out. That they kissed and hugged, and he fondled with the bosom of prosecutrix, and she told him to stop, as some one might come along and see him. That prosecutrix insisted on going back, as it was some distance to the street car line, and it was getting late. That they walked on some distance and he suggested that they sit down, as he had been working all day and was tired. That they talked love, he teased and hugged prosecutrix, pinched her on the leg, and started to pull up her dress. That prosecutrix knocked his arm away, jumped up, and started to walk off. The defendant walked after her and said: "Jennie, I don't believe you care anything about me. I believe I will change my boarding place." Prosecutrix said that she did care for him, threw her arms around his neck, and kissed him. That she said, if he changed his boarding place, she would not stay there. That prosecutrix began to cry, and defendant told her to hush, that he was sorry he ever said anything about changing his boarding place. That they then walked along together, and when they got to the

Berry boarding house defendant went in there to see his cousin. That prosecutrix waited till he came back, and the two walked on up to the public square together. That defendant rolled a cigarette and wanted to go into a store to get a match, but prosecutrix objected, saying she was afraid he wanted to get another drink; but defendant went in, and when he returned to the sidewalk saw the prosecutrix had gone. That he then looked all around for her, made inquiries, but failed to find her. That the next day he went to his boarding house and had a dispute with Mr. Weddell, and Mr. Weddell used some rough language; but that defendant never made any of the alleged admissions. That he went to see Mr. Weddell again on Monday, also saw prosecutrix and apologized to her, and she said that she was sorry, but that it was too late, as a writ had been issued. Defendant denied choking and striking prosecutrix, and also denied making any threats towards her. He said that, while sitting down, he tried to pull up her dress for several reasons. One reason was to see if she was a nice girl, and, if so, he intended to marry her; and the other reason was to have a good time with her if she was not nice.

At the close of the evidence the court instructed the jury and the cause was submitted to them, and they returned a verdict finding the defendant guilty as charged, and assessed his punishment at three years' imprisonment in the penitentiary. Motions for new trial and in arrest of judgment were timely filed and by the court overruled. Judgment and sentence were entered of record in accordance with the verdict, and from this judgment defendant prosecutes his appeal, and the cause is now before us for review.

Val Mason and O. T. Hamlin, for appellant. The Attorney General and N. T. Gentry, for the State.

FOX, J. (after stating the facts). The only complaint made by counsel for appellant in their brief now before us, in respect to the final disposition of this cause in the trial court is directed to the insufficiency of the indictment. There is no indication, nor even a suggestion in the assignment of error in the brief, that any error was committed by the court during the progress of the trial. Hence we are warranted in assuming that none was committed, and will simply direct our attention to the contention of appellant that the indictment is insufficient to support the judgment. Upon this proposition learned counsel for appellant, with commendable frankness, concede that the recent rulings of this court are against the contention now urged, and that the indictment should specifically charge the manner, means, or mode of the assault charged. This same insistence was made in the recent case of *State v. Neal*, 178 Mo. 63, 76 S. W. 958; that is, that the defendant was not fully informed

of the nature and character of the accusation against him. In treating this subject in that case, Gantt, J., speaking for this court, said that "an assault is charged. The name of the female assaulted and the felonious intent to rape are also fully charged. It was not necessary at common law to state all the facts constituting the assault. In *State v. Smith*, 80 Mo. 516, *Sherwood, J.*, speaking for this court, said: 'It was not needful that the indictment should set forth the manner, means, or mode of the assault charged. The general averment that an assault was made with the intent, etc., was all that was requisite. Details as to the mode are immaterial and unnecessary.'" *Wharton's Criminal Law*, § 644; *Wharton's Prec. of Indict.* 253 et seq.; 3 *Chitty Crim. Law*, 816; *State v. Chandler*, 24 Mo. 371, 69 Am. Dec. 432.

It is insisted that this indictment fails to properly charge the intent with which defendant committed the act as alleged. We are unable to give our assent to this insistence of appellant. The indictment charges that the defendant "unlawfully and feloniously made an assault in and upon the body of one Jennie Tuttle there being, with intent her, the said Jennie Tuttle, then and there unlawfully forcibly and against her will, feloniously to ravish and carnally know." It will be observed that the intent with which defendant made the assault is plainly alleged; that is, it was his intent "then and there, unlawfully, forcibly, and against her will, feloniously, to ravish and carnally know the prosecutrix." The indictment substantially charging that the defendant intended to forcibly and against the will of the prosecutrix feloniously ravish and carnally know her, we are of the opinion that the felonious intent with which the acts were done is clearly embraced in such charge. While in *State v. Riseling*, 186 Mo. 521, 85 S. W. 372, *State v. Wray*, 109 Mo. 594, 19 S. W. 86, and *State v. Prather*, 136 Mo. 20, 37 S. W. 805, the charge was under the statute in reference to assaults upon females under the age of consent, hence there was no necessity for the allegation of committing the assault forcibly and against the will of the prosecutrix, yet it was just as essential in those cases to plead the intent and the same principles applicable to the correct method of pleading it were involved as in the case at bar. The pleadings in those cases were held sufficient, and so far as charging the intent were similar in form to the indictment in this case. The indictment in this cause properly charges the offense, and must be held sufficient.

We have indicated in the statement of this case the tendency of the proof, and it is manifest that it was ample to sustain the conclusion reached by the jury, as indicated in their verdict. That the defendant made an assault upon prosecutrix the evidence on the part of the state strongly tends to prove, and, this showing having been made, it was

clearly the province of the jury to determine his intent in making such assault. There was ample proof of the actions and conduct of the defendant to warrant the court in submitting the question of his intent to the jury. It has been uniformly held by this court that, when the record discloses substantial evidence to support the finding of the jury, this court will not undertake to review such finding and retry the question of facts submitted to them from the lifeless disclosures of the record, and the verdict, with such disclosures of the record, will not be disturbed.

We have indicated our views upon the only assignment of errors suggested by learned counsel for appellant in their brief, and, finding no reversible error this judgment should be affirmed, and it is so ordered. All concur.

STATE ex rel. GALLIVAN et al. v. BRADLEY, Judge.

(Supreme Court of Missouri. Feb. 28, 1906.)

1. JUDGES — DISQUALIFICATION — FORMER COUNSEL—SETTLING BILL OF EXCEPTIONS.

Under Rev. St. 1899, § 1602, providing that no judge who is interested in any suit, or who shall have been counsel in any suit pending before him, shall, without the express consent of the parties thereto, sit on the trial or determination thereof, a judge who was formerly counsel was incompetent to sit in a case for the purpose of settling the bill of exceptions without the consent of the parties.

2. EXCEPTIONS, BILL OF — DISQUALIFICATION OF JUDGE—COMPELLING SETTLEMENT.

Rev. St. 1889, § 1679, provides that "if any judge * * * shall have been counsel for either party * * * and the parties to such cause or causes fail to agree to select one of the attorneys of the court to preside and hold court, * * * the attorneys of the court who are present * * * may elect one of its number then in attendance * * * to hold court for the occasion." One of defendant's counsel in a cause was elected judge and had assumed the duties of his office before the expiration of the time for settling a bill of exceptions. After the close of the term and during the vacation, but before the expiration of the time allowed for filing the bill of exceptions, he denied the first application for an extension of time to file the bill of exceptions, on the ground that the relators had not exercised due diligence in procuring the transcript of the evidence, and on a second application he refused it on the ground that he had no power to act. *Held*, that the proper procedure would have been under such section 1679, and should have been taken during the term of court, and that the proceeding by mandamus to compel the judge to extend the time for filing does not lie.

Fox and Lamm, JJ., dissenting.

In Banc. Mandamus by the state, on the relation of Timothy Gallivan and others, against N. M. Bradley, judge of the circuit court of Johnson county. Peremptory writ denied.

R. M. Robertson and J. W. Suddath, for relators. Charles E. Morrow and R. T. Bailey, for respondent.

MARSHALL, J. This is an original proceeding by mandamus to compel the respondent,

as judge of the circuit court of Johnson county, to extend the time to the relators for filing a bill of exceptions in the case of the relators against Mary Lynch. Upon the coming in of the return it appeared that questions of fact were involved, and the court thereupon appointed a commissioner to take testimony, find the facts, and report, and granted leave to either party dissatisfied with the finding of facts by the commissioner to file exceptions within 10 days. Exceptions have been filed. The case is therefore ripe for determination. The case made is this: In August, 1904, the circuit court of Johnson county, of which Hon. W. L. Jarrott was then the judge, heard the case of the relators against Lynch, which was an action to set aside a deed, and took the same under advisement until the October term of the court, at which time it rendered a decree for the defendant. The plaintiff filed a motion for new trial, which was taken under advisement until the 19th of December, 1904, and was then overruled. On the same day the plaintiffs took leave to file a bill of exceptions on or before April 1, 1905, and also filed an affidavit for an appeal, and an appeal was allowed to this court. The respondent was of counsel for the defendant. At the November election, 1904, the respondent was elected judge of said court, for a term to begin on the first Monday in January following. The 19th of December was designated by Judge Jarrott as the last day on which he would hold court, and accordingly the court, after taking the action aforesaid in this case, adjourned to court in course, the next term of which would begin on the second Monday in February, 1905. The respondent qualified as such judge, and held the regular February term of the court beginning on the 13th of February, 1905. The court was held during that term for 20 days and until the 9th day of March, when an adjournment was had until the 17th of April, 1905. All of these facts were known to relators through their counsel, yet during that time the relators took no steps towards having a bill of exceptions prepared or looking toward the selection of a special judge to settle the same, or of otherwise meeting the difficulty in the case arising out of the election of one of defendant's attorneys to the office of judge of the court. During that time relators' attorney had spoken to the stenographer about preparing a bill of exceptions, and the stenographer told him it would cost \$90, and that before doing the work of preparing the bill of exceptions he would have to have the money, or the assurance of the attorney that his bill would be paid. The attorney refused to become liable for the same. Thus matters stood until the 23d of March, 1905, when relators' counsel applied to the respondent, as circuit judge, in vacation, for an extension of time for filing the bill of exceptions. Defendant's other counsel objected to the defendant making such order on two

grounds: First, that the defendant had been of counsel in the case, and therefore could not sit in the matter; and, second, on the ground that plaintiffs had not used any diligence, in getting the evidence transcribed, and therefore no good cause was shown for extending the time. At that time relator's counsel showed to the defendant judge that he had procured a certificate of the judgment to be filed in the office of this court, but had not actually filed the same or paid the filing fee, and had not at that time ordered a transcript of the evidence from the stenographer because his clients were poor and he had not heard from them, and he did not want to bind himself to pay for the same. Defendant's counsel insisted that the relators owned a farm worth \$3,000, on which there was a mortgage for \$2,000, and that they were therefore able to pay the \$90 for the transcript of the evidence. Relators' counsel then informed the defendant that he would see his clients by the 25th of March, and ascertain whether they could raise the money to pay the stenographer. Respondent thereupon refused to extend time for filing the bill of exceptions, on the ground that no good cause had been shown for granting the same. Thereafter, on the 25th of March, relators' counsel again applied to respondent, as such judge, in vacation, for an order extending the time for filing the bill of exceptions. Defendant's counsel again objected that respondent had no right to act in the matter, and stated that defendants would not consent to his acting. Respondent then overruled relators' application for an extension of time, basing his action upon the ground that he had no right to act in the premises. Thereupon relators' counsel asked the respondent to call a special term of the court for the purpose of electing a special judge for the purpose of extending the time for filing the bill of exceptions. That motion being overruled, the relators applied to this court for a writ of mandamus, and an alternative writ was issued. For the purposes of this case the foregoing is a sufficient statement of facts.

1. Respondent, having been of counsel in the case of the relators against Lynch, was incompetent to sit in the case for the purpose of settling the bill of exceptions, without the express consent of the parties thereto, and, the defendants having objected to the respondent so acting as judge, he was incompetent under section 1602, Rev. St. 1899, from acting therein, except to order the election of a special judge.

2. Section 1679, Rev. St. 1899, provides that "if any judge * * * shall have been counsel for either party * * * and the parties to such cause or causes fail to agree to select one of the attorneys of the court to preside and hold court for the trial of cause or causes, the attorneys of the court who are present, but not less in number than five, may elect one of its number then in at-

tendance, having the qualifications of a circuit judge, to hold court for the occasion." The statute makes other provisions necessary to effectually carry out the policy of the law in such cases. The respondent having been the counsel in the case and being incompetent to act, the proper procedure would have been for the plaintiffs in that case to proceed under section 1679 to have a special judge elected to settle the bill of exceptions. Such action should have been had, and could have been had, at any time between the 13th of February, 1904, and the 9th of March, 1905. Such action should have been taken during the life of the period granted for filing a bill of exceptions, which in this case would expire on the 1st of April, 1905. If such steps had been taken, or if they had been attempted to be taken and the respondent had refused to allow them to be taken, a proper case for mandamus would have been presented to this court. But the uncontroverted fact in this case is that the relators took no steps to procure the election of a special judge at any time between these dates.

Much stress is laid upon the fact that in this case respondent first denied the application for an extension of the time to file the bill of exceptions, on the ground that relators had not exercised due diligence in procuring a transcript of the evidence from the stenographer, and therefore no good cause had been shown for granting such an extension, while, when the second application was made on the 25th of March, the respondent refused it on the ground that he had no power to act. In the view here taken, such considerations become unimportant. The application for the election of a special judge should have been made while the court was in session. When the application was made, the court was in vacation, having adjourned from the 9th of March to the 17th of April. At that time, therefore, there was no opportunity for the selection of a special judge, nor would such opportunity be presented until after the expiration of the time originally given for the filing of the bill of exceptions. Relators' counsel knew all the time, from the 19th of December until the 9th of March, that the conditions here presented would, or at any rate might, arise, yet they took no steps whatever to guard against the consequences which might ensue from not taking proper action in term time to secure the selection of a special judge. The relators have, therefore, slept on their rights, and are not in a position to ask this court to exercise its extraordinary power to compel the respondent to take the action sought in this case. Such application for the selection of a special judge should have been made to the respondent while the February term of the circuit court was in session, between the 13th of February and the 9th of March. And, likewise, relators should have taken proper steps between the 19th of December, 1904, and the 9th of

March, 1905, to procure from the stenographer a transcript of the evidence, so as to have the bill of exceptions ready to be signed by the special judge on or before the 1st of April, 1905.

No such timely steps having been taken by the relators, a peremptory writ of mandamus is denied.

BRACE, C. J., and GANTT, BURGESS, and VALLIANT, JJ., concur. FOX and LAMM, JJ., dissent.

STATE v. MINOR.

(Supreme Court of Missouri. Feb. 23, 1906.)

1. HOMICIDE—MURDER—INFORMATION—INSUFFICIENCY.

An information for murder in the first degree, executed by the prosecuting attorney of the county in which the homicide occurred, which failed to recite that the allegations made were upon the prosecuting attorney's oath, was insufficient to sustain a conviction of murder in the second degree.

2. SAME—FIRST-DEGREE MURDER—EVIDENCE—INTENT.

Where, in a prosecution for homicide, defendant claimed that the shooting was accidental, and the state's evidence only proved that defendant killed deceased with a deadly weapon, there being no evidence of any ill will or other motive for the homicide and no eye witness who testified, except defendant himself, it was improper to submit the question of murder in the first degree to the jury.

3. SAME—INSTRUCTIONS.

In a prosecution for homicide, the court charged that if defendant willfully, premeditatedly, and of his malice aforethought, but without deliberation, shot with a pistol, and by such shooting killed deceased, then defendant was guilty of murder in the second degree. By another instruction it charged that if defendant shot with a pistol and killed deceased, the law presumed that the killing was murder in the second degree, in the absence of proof to the contrary, and in such case the burden was on defendant to show that he was guilty of a less crime than murder in the second degree or that the homicide was excusable. *Held*, that the latter instruction was an improper qualification of the first, as authorizing the jury to convict of murder in the second degree without finding that the killing was "intentional," that being the only disputed fact in the case.

4. SAME—USE OF DEADLY WEAPON—SECOND-DEGREE MURDER—PRESUMPTIONS.

In a prosecution for homicide, the jury cannot presume that murder in the second degree was committed, from the bare fact that defendant used a deadly weapon, unless they are satisfied from the facts and circumstances of the case that such use was intentional.

5. HOMICIDE — DYING DECLARATIONS — DETERMINATION OF ADMISSIBILITY—EXAMINATION OF WITNESS.

Where, in a prosecution for homicide, the jury were excused in order that the competency of the evidence of a witness excepted to, testifying to dying declarations of the deceased, might be passed on before the evidence was heard by the jury, but the prosecuting attorney refused to interrogate the witness in the absence of the jury, the court should have permitted defendant's counsel to do so, that the witness might be admonished not to make an objectionable statement.

In Banc. Appeal from Circuit Court, Montgomery County; H. W. Johnson, Judge.

Joseph Minor was convicted of murder in the second degree, and he appeals. Reversed.

Claude R. Ball, Emil P. Rosenberger, and James F. Ball, for appellant. The Attorney General and N. T. Gentry, for the State.

VALLIANT, J. Defendant was arraigned on an information designed to charge murder in the first degree. The trial resulted in a conviction of murder in the second degree, and a sentence of 12 years in the penitentiary. From that judgment this appeal comes.

1. The main question in the case arises upon the face of the information which was presented by the prosecuting attorney of the county in which the homicide occurred. The information follows closely the usual form of an indictment for murder in the first degree in its words descriptive of the acts constituting the alleged crime, charging that the assault, the discharge of the weapon, and the inflicting of the deadly wound, each, was done willfully, deliberately, premeditatedly, feloniously, and of the defendant's malice aforethought. Then it concludes as follows: "And so the said A. W. Lafferty, prosecuting attorney aforesaid, does say; that the said Joseph Minor, him the said William Green, then and there in the manner and form and by the means aforesaid, at the county aforesaid, on the day aforesaid, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought did kill and murder; against the peace and dignity of the state." The only ground on which the sufficiency of this information is challenged is that the words "upon his oath" are not included in the concluding clause, that is, it does not say that the "prosecuting attorney aforesaid upon his oath does say," etc. This precise point has been very recently considered by this court in the case of *State v. Coleman*, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381, wherein, in an opinion by Burgess, J., reviewing the former decisions of this court, it was expressly held that the words "upon his oath," in the connection above mentioned, were essential in an information charging murder, and because of their absence the information then under consideration was held to be not sufficient although the concluding clause there, as here, charged that the defendant willfully, deliberately, premeditatedly, feloniously, and of his malice aforethought did kill and murder the deceased. The decision in that case has since been followed and approved in *State v. Atchley*, 186 Mo. 174, 84 S. W. 984, and *State v. Dawson*, 187 Mo. 60, 85 S. W. 528. In the case at bar the Attorney General has asked us to reconsider the subject, and has fortified his request with such an earnest and learned argument that we have deferred to his request and have gone carefully over the matter again with the aid of the additional light that the learned law officer has given us, but we have found no sufficient reason for recalling what we

said in the Coleman Case. In *State v. Meyers*, 99 Mo. 107, 12 S. W. 516, an indictment, in all respects otherwise sufficient to constitute a charge of murder, was held insufficient because in the concluding clause it was not said that the grand jurors upon their oath so charged. The indictment in that case in the beginning said: "The grand jurors aforesaid upon their oaths aforesaid present" etc., but the words "upon their oath" were not repeated in the concluding clause. For the omission of those words the indictment was held insufficient. That decision was approved and followed in *State v. Stacy*, 103 Mo. 11, 15 S. W. 147, and *State v. Furgerson*, 152 Mo. 92, 53 S. W. 427.

The Attorney General concedes that the words in question are essential in the concluding clause of an indictment for murder, because such was the form of such an indictment at common law, but that for the same reason those words are not necessary in an information, that is, because such was not the form of an information at common law. It is true those words were not used in an information at common law, and in this connection the Attorney General refers us to our decision in *State v. Kyle*, 166 Mo. 303, 65 S. W. 763, 56 L. R. A. 115, wherein it was said that the information referred to in our Constitution was the common-law information. The reference in that case to the common law for an understanding of the term "information," as distinguished from an indictment, was for the purpose of pointing out the difference in the source of an information from that of an indictment, the latter coming from a grand jury, whereas an information was "a criminal charge which at common law was presented by the Attorney General, or, if that office is vacant, by the Solicitor General of England," etc. The same distinction, there pointed out, between an indictment and an information still exists in this state notwithstanding the amendment to our Constitution, that is, the one emanates from a grand jury, the other from the Attorney General or the prosecuting attorney of the county in which the crime was committed. That is all that was said on that point in the *Kyle* Case. By force of the recent amendment of our Constitution, an information has, in one important respect at least, been placed upon equality with an indictment, that is, it is confined no longer, as it formerly was, to the presentation of minor offenses, but is authorized to be used to bring an accused person to trial on a charge of the highest felony known to the law.

There was no other legal document at common law in which there was such particularity as to the words and form of expression required as in an indictment for murder. And that great particularity was required, not because of the source from which the indictment emanated, but because of the high grade of crime which it charged; because life and liberty were at stake. An informa-

tion at common law emanated from the Attorney General, who was pre-eminently learned in the law and in the knowledge and meaning of words and was skilled in the art of arranging his language in a form to express most clearly his meaning. Therefore the fact that an information came from the Attorney General furnished no reason for indulging in less technical particularity of words to charge a crime in an information than in an indictment; the reason for the difference was that the offense charged in an information was not of such serious consequence. But, under the recent amendment to our Constitution, an information may be used to charge the crime of murder and, when so used, it rises to equal solemnity with an indictment, and there is no reason why we should be less strict in the requirement of apt words to distinguish the different degrees of crime in homicide in the one than in the other. We find no precedent in a common-law information charging the crime of murder, therefore the forms and precedents of informations and their set phraseology are of no use to us in this inquiry. When we seek to know in what words and form a charge of murder must be stated the only precedents we have are those contained in common-law indictments. The words which this court, in former decisions, has adjudged to be essential to distinguish murder from manslaughter are but literal translations of the words used for that purpose in indictments at so early a period that the court records in England were written in Latin. Those words, by their long use, have acquired certain fixed meanings which are now so well understood that any departure from them would be unsafe. The set phraseology has sometimes been criticised as for its repetition and surplusage, but, when we consider the gravity of the offense and the dignified solemnity of the words employed, not only to specify the crime so that the accused may know to what he must answer, but also calculated as it is to impress on the mind of the accuser the solemnity of the charge he is laying against the accused, we can find no just fault with the approved form, and no reason for not requiring the accuser to use words calculated to remind him that what he is about to say must be said in memory of his solemn oath.

Charging the crime in the information on the oath of the prosecuting attorney does not mean that the prosecuting attorney is speaking of his own knowledge any more than do the grand jurors when they on their oath charge the crime in an indictment, but it means with the prosecuting attorney what it means with the grand jury, that is, that he has diligently inquired and faithfully considered the evidence that has come to him, and, as the result of his investigation, is so satisfied of the truth of the charge that he is willing to say on his oath, in the same sense that the grand jurors say on their oath, that the accused committed the crime speci-

fied. The grand jurors make their presentment on what they regard as trustworthy evidence and the prosecuting attorney acts on what he regards as trustworthy evidence, and the official oath in each case is designed to show that the official preferring the charge is mindful of the oath he has taken. We adhere to our decision in *State v. Coleman*, 186 Mo. 151, 84 S. W. 978, 69 L. R. A. 381, and must therefore hold that the information in this case is not sufficient to sustain a conviction for murder in the second degree, and for that reason the judgment will be reversed. Since the cause is to be remanded for a new trial, there are some other points in the record that deserve consideration.

2. The evidence for the state tended to show as follows: Defendant and the deceased were of a gang of men, all negroes, employed as laborers in a railroad construction camp in Montgomery county. There was a large tent in which the men slept, arranged with bunks on each side and an aisle in the middle; not far from it was a mess tent where the men ate. On the evening of December 7, 1903, between 6 and 7 o'clock, while the men were at supper in the mess tent, a pistol shot was heard in the direction of the sleeping tent, whereupon one of the men, James Smith, left the table and went immediately to the sleeping tent, and there found the deceased lying in his bunk hallooing "I am shot." No one else was in the tent when Smith got there, but he heard some one running away. Smith testified that deceased said: "I am dying; I am shot through the heart. Joe Minor did it." Witness remained with deceased until he died which was about an hour after the shooting. The defendant was not seen about the camp after that, but was arrested in St. Louis the next day; when arrested he denied that his name was Minor said his name was Thomas, but when he was confronted by a sister of deceased who accused him of killing her brother he fainted. After he was arrested he told the officer that he shot the deceased, but that it was an accident, that he ran away because he was scared.

The defendant, in his own behalf, testified that he was 25 or 26 years old, was born and reared on a plantation in Alabama; that he had been hired as a laborer in this camp; and that on the evening in question he was seated in the bunk opposite the one on which the deceased was; and that a man who was called Mickey was present with a pistol; defendant asked to look at the pistol and, whilst examining it, it went off accidentally and shot the deceased; that when he saw what had happened he got scared and ran away and went to St. Louis, Mickey and one or two others who were present also ran away. There was no evidence of any ill will or other motive for the homicide. The record does not show what became of Mickey and the others who ran away. There was no eye witness to the act who testified, except

the defendant himself. The court instructed the jury that they should find the defendant guilty of murder in the first degree, or murder in the second degree, or manslaughter in the fourth degree, or they should acquit him.

3. The court erred in submitting to the jury the question of murder in the first degree; there was nothing in the evidence that would have justified a conviction of murder in the first degree. The utmost which the state's evidence tended to prove was that the defendant killed the deceased with a deadly weapon, from which act, if done intentionally, until otherwise explained, a presumption of murder in the second degree arises. There was no evidence of deliberation or of lying in wait or of any of the other facts mentioned in section 1815, which distinguish murder in the first degree. The facts, that the man ran away, denied his name, and fainted when charged with the crime, all may go as evidence for what they are worth tending to prove that the killing was criminal, but do not tend to prove deliberation or any of the essential facts specified in the statute defining murder in the first degree.

4. The court at its own instance gave among others the following instructions: "(4) If you believe and find from the evidence in this cause that the defendant, at the county of Montgomery and state of Missouri, on or about the 7th day of December, 1903, willfully, premeditatedly, and of his malice aforethought, but without deliberation, shot with a pistol, and by such shooting killed William Green, then you will find him guilty of murder in the second degree. (5) If the jury believe and find from the evidence in the case that the defendant shot with a pistol, and by such shooting killed William Green, the law presumes that such killing was murder in the second degree, in the absence of proof to the contrary, and in such case the burden of proof devolves upon the defendant to show to the reasonable satisfaction of the jury, from the evidence in the case, that he is guilty of a less crime than murder in the second degree, or that the homicide was excusable." Of those two instructions, No. 4 correctly stated the law, but No. 5 did not, and, taking them together, No. 5 was an unwarranted qualification of No. 4, since it authorized the jury to convict the defendant of murder in the second degree without finding that the killing was intentional, which was the one disputed fact in the case.

Intention to commit a crime, like intention to commit a fraud, need not be proven by direct evidence, but may be inferred from the circumstances provided the circumstances are such as that such inference may fairly be drawn and provided the triers of the fact draw such inference. But it is for the triers of the fact to draw such inference, and not for the court to do so. If the court is of the opinion that the circumstances are such as that such an inference may be fairly drawn, it may submit the question to the jury, but

there its control of the point, for the time being, ends. A man is ordinarily presumed to have intended to do that which he has done and that presumption may have its influence in weighing the evidence, but, after all, the intention is a fact to be found from the circumstances. In *State v. McKinzie*, 102 Mo. 620, 15 S. W. 149, among other instructions given was the following: "(5) The jury are instructed that from the simple act of killing with a deadly weapon the law presumes it to be murder in the second degree. If the defendants killed Emery by stabbing him with a knife, then the law presumes the defendants guilty of murder in the second degree in the absence of proof to the contrary." Commenting on that instruction, this court, in an opinion by Thomas, J., said: "We may concede that apparently some expressions used in the earlier opinions of this court would seem to justify the giving of instruction numbered 5." Then after quoting from one of the earlier cases on that point the court said: "So we take it that even the earlier cases do not teach the doctrine contained in instruction numbered 5. But be that as it may, we feel satisfied that all the cases from the *State v. Wieners*, 66 Mo. 13, decided in 1877, to this time hold that 'from the simple act of killing with a deadly weapon' no presumption of law arise that the killing is murder in the second degree." And so the court held that, because the word "intentional" was omitted in that instruction before the word "killing," it was error.

It is argued that that decision was overruled in *State v. Evans*, 124 Mo. 397, 28 S. W. 8. In the *Evans* Case the court was dealing with an instruction in these words: "If you find from the evidence that the defendant intentionally killed Peter Fine by shooting him with a loaded pistol and that such pistol was a deadly weapon, then the law presumes that such killing was murder in the second degree, in the absence of proof to the contrary; and it devolves upon the defendant to adduce evidence to meet or repel that presumption, unless it is met or repelled by the evidence introduced by the state." The court approved that instruction saying that similar instructions had long received the sanction of this court, and that it was also the rule at common law, then the court said: "We have been cited to a ruling contra this, *State v. McKinzie*, 102 Mo. 620, 15 S. W. 149, but we disapprove of that ruling." In point of fact, however, the ruling in the *McKinzie* Case was not contra to the ruling in the *Evans* Case. The instruction approved in the *Evans* Case contained the very word for the omission of which the otherwise similar instruction in the *McKinzie* Case was disapproved. In the *Evans* Case the instruction was: "If you find from the evidence that the defendant intentionally killed Peter Fine by shooting him with a loaded pistol," etc. What was said in the *McKinzie* Case was not in conflict with any-

thing that was said in the *Evans* Case and is therefore not overruled or disapproved. We hold, therefore, that from the intentional use of a deadly weapon which results in a homicide, a presumption of murder in the second degree may be drawn, unless the evidence satisfactorily shows a different degree of crime or excusable homicide, and although the intention need not be proved by direct evidence, but may be inferred from the circumstances; if the circumstances justify the inference, and if the jury from such circumstances draw such inference, yet, unless the triers of the fact are satisfied that the defendant intentionally used the deadly weapon they cannot, from its bare use, presume murder. Under the evidence in this case the court was justified in submitting that question to the jury and if the instruction No. 5 had contained the word "intentionally" or its equivalent before the words "shot with a pistol" it would have been correct, but, in the absence of the word "intentionally" or its equivalent, the instruction was erroneous.

5. The witness, Smith, who undertook to give the dying declarations of the deceased, testified that the deceased said that the defendant shot him for the purpose of getting his money, but did not get it because it was in his hip pocket. On objection of defendant, and with the consent of the prosecuting attorney, the court ruled that the statement, being only the expression of the opinion of deceased as to the motive for the killing was incompetent and should be stricken out and the court gave an instruction withdrawing it from the consideration of the jury. Counsel on both sides agreed that the testimony was illegal, yet we gather from the record that they anticipated that this witness, if asked to state what the deceased said, would make the objectionable statement above mentioned. To guard against this, when this witness was on the stand and was about to be questioned on this point by the prosecuting attorney, the counsel for defendant asked that the jury be excluded which was done and then they requested that the prosecuting attorney be required to propound the questions he proposed to ask the witness on this point in the presence of the court so that the court could decide how much of the supposed dying declaration was competent, and how much was incompetent, and instruct the witness accordingly. But the prosecuting attorney declined to ask the questions in the absence of the jury and the counsel for defendant complain that they were not allowed to do so and so the jury were brought back and the witness, being asked by the prosecuting attorney to state what the dying man said, made the objectionable statement above mentioned, which, after the jury had heard it, was conceded by the prosecuting attorney to be incompetent and was ordered by the court to be stricken out.

When illegal testimony of an injurious character has once been heard by the jury,

the only remedy the court can, at that stage of the case, apply is that which it did in this instance apply, but that does not always undo the wrong and it does not exhaust the court's power to thereafter do what is necessary to correct the wrong. What consideration should be given to such a fact on a motion for a new trial is a question, in the first place, for the trial judge, and depends greatly on the nature of the illegal evidence and the circumstances of the given case. If the winning party was really not responsible for the bringing out of the illegal evidence the court would be much less inclined to grant a new trial on that ground, than it would if it was satisfied that the winning party had contrived to bring it out. In this case the man's life and liberty were at stake, therefore the greatest care should have been taken by the court and counsel, as well the counsel for the state as for the accused, to prevent the introduction of illegal evidence, which when once lodged in the minds of the jury no one can tell its effect. If the prosecuting attorney did not see fit to question the witness, in the absence of the jury, for the information of the court, the counsel for the defendant should have been allowed to do so, so that the court could have admonished the witness not to make the objectionable statement. On a retrial the court will have no difficulty in guarding against the introduction of that illegal evidence.

The judgment is reversed, and the cause is remanded, to the circuit court to be retried according to the law as herein expressed allowing the prosecuting attorney leave to amend the information, if he sees fit to do so. All concur, except MARSHALL, J., not sitting.

SOUTHERN MISSOURI & A. RY. CO. et al. v. WOODARD et al.

(Supreme Court of Missouri. Feb. 26, 1906.)

1. JURY—RIGHT TO TRIAL BY JURY—CONDEMNATION PROCEEDINGS — CONSTITUTIONAL LAW.

Under Rev. St. 1899, c. 12, art. 7, § 1268, providing that the report of commissioners in condemnation proceedings may be reviewed by the court on written exceptions, filed by either party, and the court shall make such order as right and justice may require, and Const. 1875, art. 12, § 4, preserving the right of trial by jury in condemnation proceedings where a corporation is interested, a party excepting to the report of commissioners in condemnation proceedings by a railroad has the constitutional right to have his damages assessed by a jury and the court's failure to enter a formal order setting aside the report of the commissioners, is not error.

2. EVIDENCE—OPINION EVIDENCE—VALUE.

In condemnation proceedings, a witness having knowledge of the facts, was properly permitted to state his opinion as to the damages from the taking of land for a right of way, taking into consideration the amount of land taken, the shape of the tracts remaining, and the difficulty of getting from one side to another by going to a railroad crossing, and excluding damages arising from smoke or noise from

trains, scaring or killing animals on the right of way, or danger to the owner or his agents or servants in crossing the road.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2285-2288.]

3. TRIAL—INSTRUCTIONS—FACTS ASSUMED BY JUDGE.

In condemnation proceedings, instructions are not erroneous as assuming that the property had been damaged because of the failure of the court to repeat in the other instructions the words "if any" used in the first instruction.

Marshall, J., dissenting in part.

In Banc. Appeal from Circuit Court, Ripley County; J. L. Fort, Judge.

Action by the Southern Missouri & Arkansas Railway Company and another against J. A. Woodard and others. To the report of the commissioners to assess damages, C. E. McKinney excepts, and from a judgment on trial by jury, the plaintiffs appeal. Affirmed.

L. F. Parker and James Orchard, for appellants. Jno. M. Atkinson, for respondents.

BRACE, P. J. This is an appeal in a proceeding by a railroad company, under the provisions of article 7, c. 12, Rev. St. 1899, to condemn a strip of land for its use through a number of tracts or parcels of land in Ripley County; one of which belonged to C. E. McKinney, the respondent herein, who, upon the coming in of the report of the commissioners assessing his damages at \$100, after notice, in due time, filed his written exceptions thereto, in which he asked that the report of the commissioners be set aside, and that his damages be assessed by a jury. Thereupon, in due course, a jury was impaneled, before whom the issues were tried, and a verdict in his favor rendered, assessing his damages at \$750 from which judgment, in due course, this appeal was taken.

1. By section 1268 of said article 7 it is provided that: "The report of said commissioners may be reviewed by the court in which the proceedings are had, on written exceptions, filed by either party in the clerk's office, within 10 days after the service of the notice aforesaid; and the court shall make such order therein as right and justice may require, and may order a new appraisal, upon good cause shown." On the record no formal order appears setting aside the report of the commissioners, and this is assigned as error. There is nothing in this assignment. On filing his exceptions the respondent had the constitutional right to have his damages assessed by a jury, and the court had no discretion in the matter. The calling a jury to assess his damages was such order "as right and justice required." Article 12, § 4, Const. 1875; Chicago, etc., Ry. Co. v. McGrew, 113 Mo. 390, 21 S. W. 201; Kansas City, etc., Ry. Co. v. Story, 96 Mo. 611, 10 S. W. 208.

2. It is next contended that the court erred in permitting witnesses for respondent to give their opinion as to the amount of the damages to respondent's land in answer to the

following question: "Q. I will ask you, taking into consideration the quantity of land taken for the right of way, which is agreed to be $6\frac{1}{2}$ acres, the size, shape, and disfigurement, if any, of the tracts into which the farm is divided, as its market value may be affected by that division into those sizes, shapes, and disfigurements, and the cuts and fills on that tract, if any, and the difficulties, if any, of getting from one side to another by going to a railroad crossing to get over from one side to another, and excluding all elements of damage, if any, that may arise from or be due to smoke or noise from trains passing over the road, or the ringing of bells or sounding of whistles, and scaring, frightening, or killing of animals while on the right of way, or danger to the person of the owner, agent, servant, by the crossing of said road; what, in your judgment, would be the depreciation in the market value of the farm on account of $6\frac{1}{2}$ acres being taken for the right of way, and other inconveniences, taking into consideration all that I have mentioned and excluding all that I have mentioned?" It is settled law in this state that persons shown to be acquainted with the value or damages to property may, in connection with the facts, state their opinion as to such value or damages. *Springfield & Southern Ry. Co. v. Calkins*, 90 Mo. 538-543, 3 S. W. 82; *Nevada & Minden Ry. Co. v. De Lissa*, 103 Mo. 125-130, 145 S. W. 368; *St. L. K. & N. W. Ry. Co. v. St. L. Union Stock Yards*, 120 Mo. 541-550, 25 S. W. 399; *St. L. & K. C. Ry. Co. v. Donovan*, 149 Mo. 93-102, 50 S. W. 286; *K. C. & N. C. Ry. Co. v. Shoemaker*, 160 Mo. 425, 61 S. W. 205. The question in this case is but a paraphrase, adapted to the facts thereof, of the question in the case last cited, in which it was held the question correctly stated the basis for an opinion of the witness as to the amount of the damages. There is nothing in this assignment.

3. The third and last contention of appellant is that the instructions given for respondent are erroneous in that they assume that his property had been damaged. This is a hyper-criticism of the instructions, and seems to be based upon the fact that the words "if any" used in the first instruction were not thereafter continuously repeated in subsequent instructions. The instructions followed approved precedents—no specific error in them has been pointed out, and there is nothing in this contention.

Finding no error, the judgment of the circuit court will be affirmed. All concur, except that MARSHALL, J., does not concur in paragraph 1.

PER CURIAM. The foregoing opinion handed down in Division No. 1 is adopted as the opinion of the court in banc. BRACE, C. J., and GANTT, BURGESS, VALLIANT, FOX, and LAMM, JJ., concur. MARSHALL, J., concurs in paragraphs 2 and 3, but dis-

sents from paragraph 1. And the judgment of the circuit court is accordingly affirmed.

MARSHALL, J. I feel constrained to dissent from the first paragraph of the opinion of the majority of the court in this case. I am unwilling to believe that the Constitution of this state intended that where the property of an incorporated company is to be taken by condemnation, a right of trial by jury is guaranteed to the corporation, and that the land of an individual, to be taken in the same proceeding, can be taken without the citizen being entitled to a trial by a jury. I am aware that the doctrine stated in the first paragraph of the opinion in this case reiterates the rule heretofore announced in this state in the cases of *Kansas City, etc., Ry. Co. v. Story*, 98 Mo. 611, 10 S. W. 203; *Railroad v. Town Site Co.*, 103 Mo. 451, 15 S. W. 437; *Railroad v. Miller*, 106 Mo. 458, 17 S. W. 499; *Railroad v. Shambaugh*, 106 Mo. 557, 17 S. W. 581; *Railroad v. McGrew*, 113 Mo. 390, 21 S. W. 201; and *St. Louis v. Roe*, 184 Mo. 324, 83 S. W. 435. But in my judgment all of those cases were improperly decided, and they declare a rule of law that produces a special privilege in favor of an incorporated company that is not guaranteed to nor conferred upon a private individual, and I am wholly unable to agree that the framers of the Constitution ever intended to create such a special privilege in favor of corporations. I am further aware of the fact that this court has held that a municipal corporation is not an incorporated company within the meaning of section 4 of article 12 of the Constitution, and that, therefore, where the proceeding is by a municipal corporation against an individual, neither the corporation nor the individual is entitled to a trial by jury, thus again discriminating in favor of mere business corporations even as against a political subdivision of the state. *Kansas City v. Vineyard*, 128 Mo. 75, 30 S. W. 326; *Kansas City v. Smart*, 128 Mo. 272, 30 S. W. 773. In my judgment section 4 of article 12 of the Constitution should be construed in connection with section 21 of article 2 of the Constitution, and, reading the whole of section 4 of article 12 together, the correct interpretation thereof is that where the proceeding by eminent domain contemplates condemning the property and franchises of an incorporated company a right of trial by jury is guaranteed; but that where the proceeding is simply to condemn property of an incorporated company, then the damages may be assessed either by a board of freeholders or by a jury, as is provided in section 21 of article 2 may be done where the property of an individual is to be taken. Such a construction as this creates no special privilege in ordinary cases in favor of corporations as against individuals, and does not produce the incongruity in the law that the decisions heretofore referred to have created. Section 4 of article 12 of the Constitution is as follows:

"The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the General Assembly of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation when in the exercise of said right of eminent domain any incorporated company shall be interested either for or against the exercise of said right." Section 21 of article 2 of the Constitution is as follows: "That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

Prior to the adoption of the Constitution of 1875 the only provision of the Constitution in reference to this subject was contained in section 16 of article 1 of the Constitution of 1865, and is as follows: "That no private property ought to be taken or applied to public use without just compensation." All that is now contained in section 21, following the first sentence thereof, first appeared in the Constitution of 1875. The whole of section 4 of article 12 of the Constitution was a new provision in the Constitution of 1875. In *Railroad v. Miller*, 106 Mo., loc. cit. 460-461, 17 S. W. 499, Black, J., in considering those two sections of the Constitution, and in reaching the conclusion that under section 21 of article 2 the property of a citizen might be taken, and that compensation could be ascertained by a jury or a board of freeholders, but that the value of the property of any incorporated company must, under section 4 of article 12 be ascertained by a jury, said: "The first of these sections, found in the bill of rights, does not guaranty to the property owner a common-law jury trial in the assessment of damages. It simply requires the damages to be assessed either by a jury or by a board of not less than three freeholders. But that section is general in its terms, and must be taken in connection with section 4 of article 12, which is specific and must control as to all cases coming within its terms. The last-named section, it has been insisted on some occasions, guaranties a jury trial in those cases only where it is sought to condemn the property or franchises of an incorporated company; but the language quoted does not admit of so narrow and limited construction. A jury is guaranteed in all claims for compensation for

property taken in the exercise of the right of eminent domain when any incorporated company shall be interested, either for or against the exercise of such right. It, therefore, matters not whether the incorporated company is interested either for or against the exercise of this right; for in either case either party to the suit is entitled to a jury trial at some stage of the proceedings. This is the plain language of the section, and it is useless to speculate upon the reasons for its insertion in our present Constitution. In those cases where an incorporated company seeks to condemn the property of an individual, and in those cases where it is sought to condemn the property or franchises of a corporation for public use, either party to the proceeding is entitled to a jury to assess the damages. That the statute may, even in such cases, provide for the assessment of the damages by commissioners in the first instance is not questioned or doubted, but either party to the suit is entitled to a jury as a matter of right at some stage of the proceedings." Thus, it will be observed that without undertaking to ascertain any reason for discriminating in favor of corporations and against individuals, and by changing the conjunctive conjunction "and" in section 4 of article 12 to the disjunctive conjunction "or," the conclusion was reached which created a special privilege in favor of corporations that is not enjoyed by individuals in condemnation cases. This is the only extended discussion of this question in any of the adjudicated cases. All the other cases simply announce the conclusion that section 4 of article 12 guaranties to a corporation the right of trial by a jury in condemnation cases without discussing or attempting to discuss the question at all.

The underlying error in *Railroad v. Miller*, supra, is in changing the conjunctive conjunction "and" to the disjunctive conjunction "or,"—and thereby destroying the true meaning of section 4 of article 12. The conclusion reached in that case could only have been reached by this process. When section 4 of article 12 is read in its entirety, its meaning, to my mind, is perfectly plain. It provides: "The exercise of the power and right of eminent domain shall never be so construed or abridged as to prevent the taking, by the General Assembly, of the property and franchises of incorporated companies already organized, or that may be hereafter organized, and subjecting them to the public use, the same as that of the individuals." etc. Thus it will appear that the framers of the Constitution were providing for the appropriation by eminent domain of the property and franchises of incorporated companies. In other words, the lawmakers never intended that the franchises of corporations should not be subject to condemnation the same as property of an individual. Undoubtedly the trend of modern authority is that franchises of a corporation constitute property within

the meaning of the law, and under this construction it may be that the franchises as well as the property of a corporation would have been subject to condemnation without such an express reservation of power as that contained in the section quoted, and that the provisions of section 21 of article 2 would have been all that was necessary to accomplish that purpose without section 4 of article 12. But there was a time in the law when there was a doubt as to whether franchises of an incorporation could be taken away by condemnation, and many respectable authorities held that the franchise of a corporation, that is, its right to exist, constituted a contract between the corporation and the state, which, under the federal Constitution, could not be impaired by any action of the state, whether that action be an attempted repeal of the franchise or by means of condemnation proceedings. It may have been, and probably was, owing to such considerations that the framers of the Constitution of 1875 took the precaution to insert section 4 in article 12. In other words, my construction of section 4 of article 12 is that it is only in cases where the condemnation proceeding contemplates the taking away of all the property and franchises of an incorporated company that the right of trial by jury is guaranteed. A proceeding with such an object in view might be had either by the state against the corporation or by another corporation, having power of eminent domain, seeking to exercise that right against another corporation, though there are cases which hold that in the latter event one corporation cannot by condemnation destroy the existence or take away the whole of the property and franchises of a previously existing corporation. I have taken the pains to examine the Constitutions of our sister states upon these questions, and I find that provisions similar to section 4 of article 12 down to that part of that section which speaks of the right of trial by jury; in other words, provisions reserving the right to take the property and franchises of incorporated companies the same as that of individuals, are contained in the Constitutions of Alabama (article 1, § 23), Idaho (article 11, § 8), Kentucky (section 195), Nebraska (article 11, § 6), Mississippi (section 190), North Dakota (article 7, § 134), Pennsylvania (article 16, § 3), West Virginia (article 11, § 12), and Wyoming (article 10, § 4). In all those states the right of trial by jury in all condemnation cases, whether the property taken is that of an incorporated company or that of an individual, is guaranteed by other provisions of the Constitution, similar to our section 21 of article 2, except so far as that section of our Constitution allows the compensation to be ascertained by a board of freeholders. And this latter provision of our Constitution I have been unable to find in the Constitution of any other state in the Union. Thus, in all of those states, no such discrimination or creation of special privi-

leges in favor of an incorporated company and against a private individual exists. Such a condition exists only in the state of Missouri, and exists only by reason of what I believe to be the erroneous construction that this court has heretofore placed upon section 4 of article 12, in the doing of which it was said: "It is useless to speculate upon the reasons for its insertion in our present Constitution." A little research and a little more careful reflection would have shown that the reasons for the insertion of that provision in our Constitution forbade the construction which this court placed upon that section, and that the creation of the special privilege by such a construction was directly contrary to every principle of government that has ever been announced in any of the Constitutions of our state. Section 4 of article 12 of our Constitution was borrowed almost literally from section 14 of article 11 of the Constitution of Illinois of 1870. The Illinois Constitution on this subject reads as follows: "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the General Assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity, the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." Thus, it will be observed that section 14 of article 11 of the Constitution of Illinois is almost identical with section 4 of article 12 of our Constitution; the principal difference being that in our Constitution the right of eminent domain is reserved as to corporations that may be hereafter organized; whereas, under the Illinois Constitution, the literal reading of section 14 seems to confine that right to incorporated companies already organized. The Constitution of Illinois, section 13, art. 2, is as follows: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks without consent of the owners thereof shall remain in such owners, subject to the use for which it was taken." Thus it is apparent that our section 21 of article 2 was also taken from section 13 of article 2 of the Illinois Constitution, the only change being that under our Constitution the compensation was authorized to be ascertained either by a jury or a board of freeholders as the law might prescribe. Under the Illinois Constitution a jury trial is guaranteed in every case, whether the property taken be that of an incorporated company or that of a private citizen, and thus no favored class is built up under that law of that state. The framers of our Constitution, however, saw fit,

in section 21 of article 2, to authorize the compensation to be ascertained either by a jury or a board of freeholders as the law might prescribe. Were it not for the presence of section 4 of article 12 in our Constitution, the provisions of section 21 of article 2 of the Constitution would be adequate and amply sufficient to cover cases of condemnation of property whether it was owned by an incorporated company or by a private citizen, and no discrimination in favor of either would be created. The framers of our Constitution, after thus making the changes noted in section 21 of article 2, and allowing the compensation to be assessed by the freeholders as well as by a jury, then borrowed from the Illinois Constitution section 4 of article 12 in reference to condemnation proceedings against incorporated companies or by such companies, and included the right of trial by jury whenever an incorporated company was interested either for or against the proceeding. In other words, copied the Illinois Constitution without noticing if the construction heretofore put upon it by this court is the correct construction; that in so doing they were creating this discrimination in favor of corporations and against individuals. In other words, under the Illinois Constitution, which does not provide for the ascertainment of the compensation by a board of freeholders in any case, but requires the trial by jury in every case, there was no such privilege created by section 14, art. 11, of their Constitution as results from the construction this court has placed upon section 14 of article 12 and section 21 of article 2 of our Constitution.

Either, therefore, we must say that the framers of our Constitution knowingly intended thus to create a special privilege in favor of corporations that was denied to private individuals, or else the construction I place on section 4 of article 12 must have been the construction intended by the lawmakers; that is, that the right of trial by jury is only guaranteed to corporations where the purpose of a condemnation proceeding is to take away the property and franchises of the corporation. In my judgment to say that the framers of our Constitution ever intended to create such a special privilege in favor of incorporated companies is an unjust reflection upon the intelligence of that learned body, composed, as it was, of some of the ablest lawyers in this state, and is in absolute conflict with every other provision of the Constitution, and with the whole spirit, genius, and policy of that document. The idea conveyed in the first sentence of section 4 of article 12 is that neither the property nor franchises of an incorporated company should be beyond the reach of the power of the state by eminent domain, but that all the property and franchises of an incorporated company should be subject to condemnation, "the same as that of individuals." No intimation is con-

tained therein of any intention to create a special privilege in favor of corporations, but, on the contrary, the plain purpose of the lawmakers was to place the property and franchises of an incorporated company upon the same level and plane as that of an individual. This was the dominant idea in the minds of the lawmakers, and to say that after having expressed the dominant idea they were so awkward in the use of language, and so bungling in the expression of intention as in the next breath to create a special privilege in favor of incorporated companies that was not enjoyed by or guaranteed to the individual, would be to do grievous wrong to the intelligence and honesty of purpose of the framers of our Constitution. Neither will it do to say that the framers of our Constitution in enacting section 4 of article 12 by providing for the trial by jury therein guaranteed, overlooked the fact that they had so changed section 21 of article 2 of our Constitution from the manner in which it was written in the Constitution of Illinois, from which ours was borrowed, as to permit a board of freeholders as well as a jury to ascertain the compensation to be paid for the condemnation of property, and thereby to have intended to create the special privilege herein referred to in Missouri when no such special privilege can be found in the Constitution or laws, either of Illinois, from which these provisions of the Constitution were borrowed, or in any other state in the Union. One of two things is absolutely true—either the framers of our Constitution of this state knowingly and purposely created that special privilege in favor of corporations, or else the construction heretofore placed by this court on section 4 of article 12 is not the correct construction nor the meaning of that section that the framers of the Constitution intended to impart. I have no difficulty in reaching the conclusion that the latter is true, for I am unwilling to believe that the former could by any possibility of means be true. By construing section 4 of article 12 to apply only in cases where the object of the proceeding was to take away all property and franchises of the incorporated company, in which case a trial by jury is guaranteed, and that in all other cases where simply some piece of property belonging to an incorporated company is to be condemned the compensation may be ascertained by either a jury or a board of freeholders, as the law directs, pursuant to section 21 of article 2, no such incongruity as that herein pointed out will exist, and no such special privilege will be conferred. That this construction is possible is beyond debate or cavil, and that a construction which does not produce such a result is the construction which ought to be adopted is equally beyond question. Under the construction heretofore placed by this court on section 4 of article 12, if two tracts of land adjoining each

other are to be taken for a public purpose, and one of those tracts is owned by an incorporated company, and the other is owned by a private citizen, and both are used for identically the same purposes, for instance, both are used for ordinary business purposes, the unjust spectacle is presented by the laws of this state, as heretofore interpreted, of guarantying to the mere business corporation a trial by jury when its property is to be taken and of denying the right of trial by jury to the individual and permitting the property of the individual to be taken and the compensation to be assessed by a board of freeholders. The human mind is incapable of conjecturing any reason that could have actuated the framers of the Constitution in providing for such inequality before the law. In my judgment they did not do so, and never intended to be so understood.

I fully understand and appreciate the importance of the principle underlying the doctrine of stare decisis, but there is another principle of law which is of infinitely more importance than the doctrine of stare decisis, which is the doctrine that all men are equal before the law, and that it is contrary to the spirit and genius of our institutions that special privileges shall be conferred upon any class of the community. In the eye of the law an incorporated company stands upon no better footing than an American citizen. To create a special privilege in its favor is, in my judgment, as violative of our principles and theory of government as to say that all men with certain colored hair, or certain colored eyes, or of certain stature should be entitled, when their property shall be taken, to the benefit of trial by jury; but that all other persons in the community, who do not answer to that description might have their property taken either by the verdict of a jury or a board of freeholders as the law might direct. Unless the construction I place upon these provisions of the Constitution is the correct interpretation of the meaning of the lawmakers, it behooves the people of this state by a constitutional convention or by amendment to the Constitution to change the phraseology of section 4 of article 12 so as to prevent the possibility by construction of the creation of such a condition, and of such special privileges as are hereinbefore pointed out. Where a law or provision of a Constitution is susceptible of two constructions, one of which harmonizes with the spirit and purpose and genius of the whole body of the law and the policy of the government, and the other creates special privileges or a favored class, the former construction should always be adopted. Such is the case here. No reason has been given or attempted to be given for the construction heretofore placed upon section 4 of article 12, and none can be given. It has only been said "Ita scripta lex." I think the law has not been so written, but that it has simply been misconstrued.

For the foregoing reasons, I am compelled to dissent from the conclusions announced in the first paragraph of the majority opinion in this case.

SOUTHERN ILLINOIS & M. BRIDGE CO. v. STONE et al.

(Supreme Court of Missouri. Feb. 26, 1906.)

1. APPEAL—DECISION—MATTERS CONCLUDED —LAW OF THE CASE.

Questions passed upon by the Supreme Court on appeal are the law of the case, and cannot be opened on a subsequent appeal.

2. SAME—DISPOSITION OF CAUSE—MANDATE— CONSTRUCTION.

Where, on appeal in condemnation proceedings, the mandate directed the trial "court" to appoint commissioners to assess the damages, they might be appointed by the judge in vacation; Rev. St. 1899, § 1260, authorizing the circuit court, or judge thereof, to appoint such commissioners.

3. SAME—HARMLESS ERROR.

Where, on exceptions filed by defendants to the report of commissioners in condemnation proceedings, the case was tried before a jury, who rendered judgment for damages in favor of defendants, they could not complain on appeal of the manner in which the commissioners were appointed.

4. EMINENT DOMAIN — CONDEMNATION PRO- CEEDINGS — INABILITY TO AGREE WITH OWNER.

Where, in condemnation proceedings, the court had jurisdiction of the parties and the subject-matter, the fact that there was no evidence to support the allegation of the petition that petitioner had endeavored to agree upon damages would not oust the court of jurisdiction.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 462.]

5. SAME—EVIDENCE—SUFFICIENCY.

In condemnation proceedings, it was not necessary that an attempt on the part of petitioner to agree with defendants on damages should be shown by oral evidence, but it might be shown by facts and circumstances.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 533.]

6. SAME—ALLOWANCE OF BENEFITS.

Where land is condemned by a railroad company, the benefits peculiar to the portion of the property not taken, and which are not common to the public at large, may be set off against the landowner's damage.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 388-393.]

7. APPEAL—PRESUMPTIONS.

Where an act of Congress authorized the construction of a bridge, but required it to be completed within a specified time, on appeal by defendants in condemnation proceedings instituted by the bridge company, it will be presumed that the bridge was completed within the required time.

Brace, C. J., and Valliant, J., dissenting.

In Banc. Appeal from Circuit Court, Dunklin County; J. L. Fort, Judge.

Condemnation proceedings by the Southern Illinois & Missouri Bridge Company against R. G. Stone and others, and from the judgment of condemnation defendants appeal. Affirmed.

Giboney Houck, Jno. A. Hope, M. R. Smith, and Shepard Barclay, for appellants. S. H.

West, W. H. Miller, and Alex. Cochran, for respondent.

BURGESS, J. This case was before this court on a former appeal (174 Mo. 1, 73 S. W. 453, 63 L. R. A. 301), wherein a full and fair statement of the facts in the case, as disclosed by the record, was given. The case was then before us on plaintiff's appeal. The judgment of the court below was reversed and the cause remanded, with directions to the court to appoint a commission, as the law required, for the purpose of assessing the damages to the defendant; the said commission to forthwith report its finding to the circuit court in which the proceeding was pending, to the end that the bridge company might take possession of the property and proceed with its work. This commission, acting in accordance with the directions of the court, viewed the property sought to be condemned, and on the 10th day of April, 1903, filed its report, whereby it assessed the damages of defendant at \$8,120. This sum was immediately deposited by the plaintiff with the clerk of the circuit court of Dunklin county, and thereupon plaintiff entered into possession of the premises and, in pursuance of the order and judgment of this court and the report of the commissioners, expended a very large sum of money. In due time defendants filed their exceptions to the commissioners' report and, before the trial, filed what they termed an amended answer, in which substantially the same grounds are urged as in the original answer and as shown by the exceptions to the commissioners' report. Upon trial of the issues presented, the jury returned into court a verdict in favor of defendant for the sum of \$10,000. A judgment of condemnation was entered accordingly, and plaintiff immediately deposited a further sum of \$1,880 with the clerk of the circuit court of Dunklin county, making a total of \$10,000, and in addition thereto paid all the costs which had accrued in said cause up to and including that transaction. The defendants, on behalf of the Cape Girardeau & Thebes Bridge Terminal Company immediately filed a motion in the circuit court of Dunklin county, asking an order directing the sum of money so deposited with the clerk to be paid over to it, which motion was granted and the order entered of record. From the judgment of condemnation thus entered, this appeal is now prosecuted on behalf of the defendants to this court, in which it is sought to review not only the proceedings of the court on the last trial in the assessment of damages, but the entire proceedings from the inception to the close of the case.

This plaintiff contends now that, if there ever was a federal question involved in this case, it was involved as much in the former appeal as it is now, and the defendants, having failed to take any steps to have these questions reviewed by a federal tribunal, cannot now

do so, because all of the matters and things therein contained are res adjudicata, and under no circumstances can be reopened in the same case. Plaintiff further contends that the only questions open to review on this appeal are those raised on the trial in the circuit court on the question of damages, as all the other questions involved were adjudicated on the former appeal. There was much testimony adduced on the question of values, as bearing on the amount of damages to which defendants were entitled on account of the condemnation of their property.

At the instance of plaintiff, and over the objection and exception of defendants, the court instructed the jury as follows: "The court instructs the jury that on the 24th day of April, 1902, at 10:40 o'clock, a. m., the Southern Illinois & Missouri Bridge Company, as plaintiff, filed in the circuit court of Scott county, Mo., its petition against R. G. Stone, Nannie Finley, and R. M. Finley, her husband, as owners, and Birgehardt Miller, Perry Bates, and David Heldt, as occupying tenants, seeking to condemn for public use, in connection with its bridge, a strip of ground 200 feet wide and about 4,500 feet long, then owned by the said R. G. Stone, Nannie E. Finley, and R. M. Finley, her husband, more particularly described as follows: A part of the S. E. and S. W. parts of private survey No. 794 in township 30, range 14 E., and in lot 2, of the N. E. $\frac{1}{4}$ of section 2, township 29, range 14 E., being a tract of land 200 feet wide, 100 feet on each side of the center line of the approaches to the bridge of the Southern Illinois & Missouri Bridge Company as located and platted, beginning at a point on the east line of fractional section 24, township 30, range 14 E., and 1,240 feet from the S. E. corner of said fractional section; thence runs south 70 degrees 45 min. E., 765 feet; thence by one degree curve to the right 980.4 feet; thence south 59 degrees, 45 min. E., 925.8 feet; thence by a 2 degree and 30 minutes curve to the left, 1,289.8 feet; thence north 87 degrees 51 minutes E., to the west bank of the Mississippi river. Said center line intersects the north line of township 29 $100\frac{1}{2}$ feet west of the northwest corner of lot 2, in the N. E. $\frac{1}{4}$ of section 2, township 29, range 14 E., and also intersects the west line of said lot 269.1 feet south of the northwest corner of said lot 2, containing 20.3 acres. (2) The court further instructs you that the plaintiff bridge company has the right, under the law, to take and appropriate said strip of ground, upon paying to said defendant owners, R. G. Stone, Nannie E. Finley, and R. M. Finley, her husband, just compensation therefor, and that the only matter for the jury to determine in this cause is the just compensation to be paid by said company to said defendants. (3) This just compensation, or in other words, the damages to which defendants are entitled, is the difference in the fair market value of defendant's whole property before and after the ap-

appropriation by plaintiff of the strip of land above described, in view of the uses to which said strip condemned was to be thereafter applied. (4) The 'market value' of the property means its actual value, independent of the location of plaintiff's bridge and approaches thereon; that is, the fair value of the property as between one who wants to purchase and one who wants to sell it—not what it could be obtained for in peculiar circumstances, when greater than its fair price could be obtained, not its speculative value; not the value obtained through the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction under the hammer. The question is, if the defendants wanted to sell their property, what could be obtained for it upon the market from parties who wanted to buy and would give its full value? (5) The market value is not to be determined by the value of the strip in question to the plaintiff bridge company or the plaintiff's necessity of acquiring it. This consideration must in no way be allowed to affect the determination by the jury of the value of either the whole property or of the strip sought to be appropriated by the plaintiff bridge company in this proceeding. (6) The jury will consider the benefits, if any, and the disadvantages, if any, resulting to the remainder of defendant's said property from the appropriation by plaintiff bridge company of the strip of land in question for the purpose of its bridge and approaches. The benefits to be considered and allowed by the jury are the direct and peculiar benefits, if any, which result to the remainder of defendant's said property, and not the general benefits which defendants derive in common with the other landowners in the vicinity from the building of the bridge and its approaches."

At the request of defendants, the court further instructed the jury as follows: "(1) Gentlemen of the jury: It is your duty to assess the damages which you may believe from the evidence defendants will sustain on account of the appropriation by the plaintiff of the land involved herein. And in assessing said damages you will be governed by the following rules, viz.: You will consider the quantity and value of the land to be taken and the damages to the whole tract by reason of the construction of plaintiff's bridge and approach. 'Value,' as used in these instructions, means market value; but you are further instructed that the 'market value' is not what it will sell for at forced sale, but it is the highest price it will bring in the hands of a prudent seller in view of all the uses and purposes for which the land is adapted. And, if you believe from the evidence that said land is located so as to be eligible as a site for a bridge across the Mississippi river, or so as to be adapted for use as a terminal railway, or other valuable use, then, in making your estimate of its value, you should con-

sider all such advantages and capabilities of said land, together with whatever superiorities in these respects, if any, over other lands in the vicinity. (2) The court instructs the jury that, under the testimony in this cause, the date of the assessment of the damages by the commissioners will be taken as the date of the appropriation by plaintiff of the land sought to be condemned herein. And whatever sum you may find the property taken by the plaintiff at that time to be worth, according to the rules of fixing damages, as mentioned in these instructions, will be the amount of said damages, whatever it may be, and should be returned by your verdict. (3) The court instructs the jury that the consideration shown by the deeds offered in evidence, either for plaintiff or defendants, is not binding on either of said parties, but only circumstances to be considered, in connection with the other testimony offered in this cause, by the jury in arriving at its verdict, and you are also instructed that the considerations in said deeds may be explained by testimony which you will also consider in your verdict, provided any such testimony of explanation was offered."

It is claimed by defendants that the petition is fatally defective, in that it fails to allege that the land sought to be condemned is to be acquired for public use. But the sufficiency of the petition, and all other questions presented by the record on this appeal, up to the time of the decision of the court on the former appeal, were passed upon in the opinion then delivered, and have become *res adjudicata*. On the former appeal, the judgment was reversed and the cause remanded with specific directions, as before stated, and under such circumstances the mandate must be strictly pursued; all matters included therein being *res adjudicata* and cannot be reopened. *Stump v. Hornbock*, 109 Mo. 272, 18 S. W. 37; *Hurck v. Erskine*, 50 Mo. 116; *Shroyer v. Nickell*, 67 Mo. 589; *Chouteau v. Allen*, 74 Mo. 59; *State ex rel. v. Givan*, 75 Mo. 517; *State ex rel. v. Edwards*, 144 Mo. 467, 46 S. W. 160; *Carey v. West*, 165 Mo. 452, 65 S. W. 713; *Baker v. Railway*, 147 Mo. 140, 48 S. W. 838; *Overall v. Ellis*, 38 Mo. 209; *Chapman v. Railway*, 146 Mo. 481, 48 S. W. 646; *Rees v. McDaniel*, 131 Mo. 681, 33 S. W. 178; *Tourville v. Railroad*, 148 Mo. 614, 50 S. W. 300, 71 Am. St. Rep. 650; *Riley v. Sherwood*, 155 Mo. 37, 55 S. W. 877. In the case of *Metropolitan Bank v. Taylor*, 62 Mo. 338, it is said: "When the case of *Roberts v. Cooper*, 20 How. 467, 15 L. Ed. 969, was before the Supreme Court of the United States the second time, after it had been tried in the circuit court on the principles established by the Supreme Court in the first trial, it was decided that the court could not be compelled, on a second writ of error in the same case, to review their decision on the first; that after a case had been brought there and decided, and a mandate issued to the court below, if a second writ of error was

sued out, it brought up for review nothing but the proceedings subsequent to the mandate; that none of the questions which were before the court on the first writ of error could be reheard or examined upon the second, and, to allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute in the first, would lead to endless litigation, for there would be no end to a suit, if every litigant could by repeated appeals compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

There are several errors assigned by defendants which are claimed to have occurred after the judgment was reversed and the cause remanded to be proceeded with as directed by this court. The first of these is as to the appointing, in vacation, commissioners to assess the damages, when the mandate of this court directed the lower court to appoint commissioners. The contention is that when directions are given by a court to do an act, which under the express terms of the law may be done either by the "court," or by "the judge in vacation," such directions are distinct orders for the court to act, and bar action by the judge thereof; that where the law, or the order of a higher court, requires action by a circuit court, such action cannot properly be taken by the judge in vacation. This objection seems to us to be without merit, and for the following reasons: In the first place, the statute (section 1268, Rev. St. 1899) authorizes the circuit court, or judge thereof in vacation, to appoint such commissioners, and we do not think the mandate, while it directed the court to appoint the commissioners, had the effect of prohibiting the judge from so doing; and his appointment of them was a substantial compliance with the mandate and an exercise of the power conferred upon him by statute. In the next place, upon exceptions filed by defendants to the report of the commissioners, the case was tried before a jury, who found that defendants' property had been damaged in the sum of \$10,000, for which sum, and costs of suit, judgment was thereafter rendered in their favor against the plaintiff. So that defendants have no right whatever to complain of the manner in which the commissioners were appointed.

Under the facts disclosed by the record, we do not think the Cape Girardeau & Thebes Terminal Railroad a necessary party to this litigation; hence no error was committed in refusing it to become a party defendant.

It is said for defendants that the trial court committed error in permitting the plaintiff to introduce and read in evidence the official document and record reciting the fact of the appointment of commissioners and their award of damages in the sum of \$8,120. But this seems to be a misappre-

hension of the facts disclosed by the record, which shows that when Mr. Miller, attorney for plaintiff, offered in evidence the order made on the 24th of March, 1903, appointing commissioners to assess the damages to the defendants, R. G. Stone, R. M. Finley, and Mrs. Finley, an objection was interposed by counsel for defendants to the effect that the order was void upon the ground that the court was without authority to make it, and that it was irrelevant, immaterial, and incompetent, and did not tend to prove any issue in the case. The objection was overruled, and defendants saved exception. The notice to the attorney for defendants of the purpose of plaintiff to make application to Judge Fort, at the time and place therein named, for the appointment of commissioners to assess the damages, if any, growing out of the appropriation of the land in the petition described, the order appointing them, their report, together with the amount of damages fixed by the report, were all admitted in evidence without objection. The objection interposed went no further than to the order appointing commissioners to assess the damages, and it follows that there was no foundation for this contention.

Defendants assert that there was no evidence that plaintiff endeavored to agree with them, or either of them, as to the price to be paid for said property, and intimate that there was no averment in the petition as to a failure to agree upon the price or compensation to be paid therefor, and that therefore the court was without jurisdiction of the case. The petition alleges that the "petitioner has endeavored to agree with defendants, and each of them, upon the price to pay for said property, but has been unable to amicably settle, or to agree at all, upon a proper compensation to either of the parties defendant." That the court had jurisdiction of the parties and the subject-matter of the controversy clearly appears from the record, and, even were it true that there was no evidence in support of this allegation, such fact would not oust the court of its jurisdiction. Nor was it necessary for plaintiff "to sustain this averment of the petition by oral testimony" (Cory v. Chicago, B. & K. Ry. Co., 100 Mo. 282, 13 S. W. 346), but it might be done by facts and circumstances, of which there was an abundance in this case to show that no efforts, however strenuous, upon the part of the plaintiff, would have resulted in such agreement.

The sixth instruction given for plaintiff is criticised, upon the ground that it permitted a reduction of the compensation to defendants for the taking of their land by "benefits" supposed to be conferred on the remainder of defendants' "property" by the bridge approaches. This question has been adjudicated adversely to defendants' contention upon several different occasions, as will appear from the decisions of this court

to be noted. In *Combs v. Smith*, 78 Mo. 32, it is held that the benefits for which a railroad company are entitled to be allowed, in establishing the damages sustained by a landowner by reason of the appropriation of his land for the road, are such as the land derives from the location of the road through it, and are not enjoyed by other lands in the same neighborhood. *Newby v. Platte County*, 25 Mo. 258; *St. Louis & St. Joseph R. R. Co. v. Richardson*, 45 Mo. 466; *Railroad v. Stock Yards*, 120 Mo. 541, 25 S. W. 399; *Railroad v. Knapp, Stout & Co.*, 160 Mo. 396, 61 S. W. 800. And the benefits peculiar to that portion of the property which is not taken, and which are not common to the public at large, may be set off against the damages assessed for the appropriating of the property. This rule was not changed by the Constitution of 1875. *Daugherty v. Brown*, 91 Mo. 26, 3 S. W. 210; *Kansas City v. Martin*, 117 Mo. 446, 23 S. W. 127; *Lingo v. Burford*, 112 Mo. 149, 20 S. W. 459; *Bennett v. Hall*, 184 Mo. 407, 83 S. W. 439.

While we recognize the right as well as the duty of this court to change its former ruling in the same case in order to correct or render harmless any error therein, it will only do so when it becomes satisfied that error was committed, or for some reason more cogent than is presented by the record in this case. The former opinion was well considered, as was every phase of the case then presented by the record. It is, we think, in no way erroneous, and should not therefore be disturbed. The act of Congress authorizing the construction of the bridge was passed January 26, 1901 (21 Stat. 744, c. 181, § 13), and provides that the construction thereof should be commenced within one year, and completed within three years, after the passage of the act, and, if not completed within that time, the act should become null and void and all the rights conferred thereby cease and determine. The presumption will be indulged that it was completed within the time specified, and that plaintiff, relying upon the former decision of this court, expended a vast amount of money in the construction of said bridge and approaches, which, in the event said decision were overruled, could but result in great injury to plaintiff and other investors who acted upon the faith of that decision.

We might therefore predicate our declination to overrule that decision upon the doctrine of *stare decisis*, but do not invoke that doctrine; nor do we think it at all necessary to the conclusion which we have reached, which is that the judgment should be affirmed. It is so ordered.

MARSHALL, GANTT, FOX, and LAMM, JJ., concur. BRACE, C. J., and VALLIANT, J., dissent upon the ground expressed in the dissenting opinion in the former appeal.

STATE v. HEIMBERGER.

(Supreme Court of Missouri, Division No. 2, March 6, 1906.)

HOMICIDE—SUFFICIENCY OF EVIDENCE—ASSAULT WITH INTENT TO KILL.

On a prosecution for an assault with intent to kill, held that the evidence was sufficient to warrant a conviction for assault with intent to kill, without malice.

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Otto Heimberger was convicted of the crime of an assault with intent to kill, without malice, and appeals. Affirmed.

Bass & Wilson, for appellant. The Attorney General and Rush C. Lake, for the State.

BURGESS, P. J. On the 16th day of September, 1904, there was filed in the office of the clerk of the circuit court of the city of St. Louis, by the assistant circuit attorney of said city, an information, in due form, charging the defendant with having feloniously, willfully, on purpose, and of his malice aforethought, shot at and wounded one Stephen Cornelius, with intent the said Cornelius to kill. Defendant, thereafter, at the December term, 1904, of said court, was put upon his trial for the offense charged against him, found guilty of an assault with intent to kill, without malice, and his punishment assessed at imprisonment in the penitentiary for a term of two years. From the judgment and sentence he appeals.

The facts, briefly stated, are that on the 6th day of July, 1904, Stephen Cornelius and some friends were in the saloon kept and conducted by the defendant in the city of St. Louis, when a dispute arose between defendant and Cornelius over the amount owed by Cornelius to defendant for drinks. Cornelius offered to pay defendant what was due him, when defendant said: "Just put it in your pocket"—and the dispute appeared to be settled. Shortly thereafter, the defendant made preparations to close the saloon. He put on his coat and hat, came around to the end of the bar, and said: "Well, you fellows will have to get out of here." He then pulled out his revolver, waived it around his head, and said to those in the saloon: "I will give you five minutes to get out of here." Cornelius replied: "All right, Otto. If you will make it five minutes, we will just take the limit." Defendant then presented his pistol at Cornelius and shot him, the ball penetrating his jaw, knocking out one of his teeth and fracturing the bone. The defendant introduced evidence tending to show his good character for peace and quietness. Testifying in his own behalf, he said that he shot in self-defense, that he thought Cornelius had a gun, and that he started for defendant just before he fired the shot. Defendant is not represented in this court. The court in-

structed for shooting with intent to kill, with and without malice, and also upon self-defense.

The information is in due form: The instructions covered every phase of the case, are unobjectionable; and the verdict of the jury was well warranted by the evidence.

Finding no reversible error in the record, we affirm the judgment. All concur.

ELLIOTT v. JACKSON COUNTY.

(Supreme Court of Missouri, Division No. 2, March 6, 1906.)

DISTRICT AND PROSECUTING ATTORNEYS—DEPUTIES—STATUTORY PROVISIONS.

Rev. St. 1899, § 3286 (Acts 1893, pp. 168, 169), provides that the prosecuting attorney in a county having a population of 100,000 and less than 300,000 shall be entitled to such a number of deputies and assistants to be appointed by him as the county court shall deem necessary, and such deputies and assistants shall be divided into classes and paid as follows: Class A, chief deputy, \$1,500 per year; class B, assistants or deputies, \$1,200 per year. Section 3287 provides that the appointment and number of deputies and assistants of a prosecuting attorney, not expressly fixed by this article, shall be subject to the approval of the judges of the criminal court. *Held*, that only one chief deputy can be appointed in a county of the class named, and the criminal court has power only to determine the number to be appointed in class B.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by George N. Elliott against Jackson county. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

George N. Elliott, for appellant. John A. Sea, for respondent.

GANTT, J. This is an action brought by the plaintiff, as attorney at law, for balance of salary, which he claims is due him as assistant prosecuting attorney of Jackson county, for the months of February, March, April, May, and June, 1896, amounting in the aggregate to \$125, with interest on the same from July 1, 1896. In his petition he alleges that Jackson county in the year 1896 contained a population of more than 100,000 and less than 300,000 inhabitants; that on or about the 1st day of January, 1896, he was appointed assistant prosecuting attorney, in class A, of said Jackson county, by W. T. Jamison, the prosecuting attorney of Jackson county, and that said appointment was approved by the judge of the criminal court of Jackson county, and thereupon plaintiff was duly commissioned and qualified and entered upon the performance of, and performed the duties of said assistant attorney, class A, from the 1st day of January, 1896, up to and including the 1st day of December, 1896; that the salary of said office established by law for said time was \$1,500 per year, payable by the defendant Jackson county, to the plaintiff in monthly installments of \$125; that during said time

the said W. T. Jamison as prosecuting attorney made up and presented to the county court of Jackson county, for allowance and payment a monthly pay roll including \$125 for plaintiff for every month of said year of 1896; that the county court of the defendant, Jackson county, refused to allow and pay plaintiff for the months of February, March, April, May, and June, the full installment of \$125 a month, but allowed and paid plaintiff the sum of \$100 per month for said five months, which was accepted by plaintiff on account; that the sum of \$25 per month for the said five months amounting to \$125 is still due plaintiff from the defendant, on said salary account, with interest from July 1, 1896.

The answer of the county was a general denial of all the allegations in the petition, except that the defendant county contained a population of more than 100,000 and less than 300,000 inhabitants, and then set up the following defense: "The defendant, further answering, states that in the year 1896 W. T. Jamison was the duly qualified and acting prosecuting attorney of Jackson county, and as such he appointed George A. Neal as assistant prosecuting attorney in class A, which appointment was approved by the judge of the criminal court of Jackson county, Mo.; that said George A. Neal occupied said position from the month of February, 1895, until on or about the 1st day of July, 1896, and that during the months mentioned in the petition, to wit, February, March, April, May, and June, the county court of Jackson county recognized said George A. Neal as the only assistant prosecuting attorney in said county in class A, and as such paid him his salary as said assistant in class A, for and during said months, and said Neal was the only assistant prosecuting attorney of said county in said class A, during said months. The defendant, for further answer and defense, states that in the month of August, 1900, plaintiff presented his claim here sued on, to the county court of said Jackson county, and on the 29th of August, 1900, said court took up said claim for hearing and after considering the same, rendered the following judgment thereon, to wit: 'In the Matter of the Claim of George N. Elliott. Now, this matter coming on to be heard, and the court having considered the same, finds in favor of the county, for the following reasons: First, the county does not owe the debt; second, the claim has heretofore been adjudicated in this court, and the claim refused and denied.' Defendant says that by said proceedings in the county court, and by judgment aforesaid on the claim here sued on, the said claim and cause of action of plaintiff has been finally adjudicated, and defendant pleads the said judgment and adjudication in bar of this action as an estoppel of the prosecution of this cause. And defendant further answering says, that

during the months of February, March, April, May, and June, the county court recognized as the chief deputy and assistant in class A, to the prosecuting attorney, said George A. Neal, paid him the salary of such assistant, to wit, \$125 per month, for each of said months. The county court recognized as an assistant in class B, to said prosecuting attorney, the plaintiff herein during all of said months and paid him the salary of \$100 per month, which plaintiff accepted for each of said months, and plaintiff became and is estopped to deny that he was in said class B of assistants to said prosecuting attorney during said months. Plaintiff has been paid all to which he was entitled and defendant owes him nothing."

The jury was waived, and the cause was tried by the circuit court of Jackson county, at the January term, 1901, and judgment rendered in favor of the defendant. A motion for a new trial was filed, heard, and overruled, and the plaintiff appealed to the Kansas City Court of Appeals, and that court, at the March term, 1903, transferred the cause to this court because the county of Jackson is a party to the suit.

No declarations of law were asked or refused by the circuit court, and no special finding of facts was made by the said court. It seems to be mutually conceded by counsel, however, that the judgment of the circuit court was based on the ground that section 3286, Rev. St. 1899 (Acts 1893, p. 168) contemplated and provides for but one chief deputy in the office of the prosecuting attorney of Jackson county, and that the judge of the criminal court had no authority to fix the number of deputies or assistants for the prosecuting attorney, except in class B, and that as the record shows, that at the time for which plaintiff seeks pay for his services, George A. Neal, Esq., was holding the position of chief deputy, class A, under Prosecuting Attorney Jamison, the duly qualified acting prosecuting attorney of Jackson county, it was manifest that plaintiff was not entitled to the salary, for said months, of the chief deputy in class A. The statute upon which plaintiff bases his claim is the act of 1903, now article 2 of chapter 27, Rev. St. 1899, which fixes the fees for certain officers in counties having population of 100,000 or less than 300,000. Section 3286 provides: "Each of the above named officers [among others, prosecuting attorney] in any such county shall be entitled to such a number of deputies and assistants, to be appointed by such official as the county court shall deem necessary for the prompt and proper discharge of the duties of their various offices and such deputies and assistants shall be divided into classes as follows, and be paid in the same manner as the officers: Class A, chief deputy; class B, assistants or deputies; and class C, office clerks or copyists. Class A shall be paid \$1,500 per year; class B, \$1,200 per year; class C, \$900 per year." Section 3287

provides: "The appointment and number of deputies and assistants of a clerk of the criminal court, the marshal and prosecuting attorney, not expressly fixed by this article, shall be subject to the approval of the judges of the criminal court of the county and special deputies and assistants shall not exceed the number determined by said judges to be necessary aids for the performance of the duties of said offices respectively." It is admitted by the plaintiff that the prosecuting attorney Jamison, on the 9th of February, 1895, appointed George A. Neal assistant prosecuting attorney in class A, and that Mr. Neal during the year 1895, and up to July, 1896, performed the duties of deputy prosecuting attorney in class A, and was paid the salary of \$1,500 a year in monthly installments, up to the 1st day of July, 1896. It is also admitted that plaintiff was appointed assistant prosecuting attorney in class B, in 1895, and acted and performed the duties of assistant in class B, until about the 1st day of January, 1896, when Mr. James S. Botsford resigned his position as assistant prosecuting attorney under said Jamison, whereupon said plaintiff was appointed by said Jamison to deputyship in class A, in January, 1896, but no record was made by the court in term time approving this appointment of Mr. Elliott, the plaintiff. There is no record entry of plaintiff's appointment except the one appointing him deputy or assistant in class B. Under these circumstances the county court refused to pay him the salary prescribed for the chief deputy in class A, or \$1,500, but did pay him for each month \$100, the salary prescribed for deputies in class B.

The plaintiff now insists on this appeal that he is entitled to recover that portion of the salary of chief deputy in class A, which the county court refused to pay him. We think that section 3286 of the Statutes plainly provides for only one chief deputy in class A, for the prosecuting attorney, and that as Mr. Neal had already been appointed deputy in class A, and was holding that position when the prosecuting attorney attempted to make another chief deputy in class A, the appointment of the plaintiff in that class was without authority of law and the county court properly refused to pay him the salary of chief deputy, and that the judgment of the circuit court was unquestionably correct. The number of deputies in class A was specifically fixed by the statute and was limited to one chief deputy, nor will it avail the plaintiff that the prosecuting attorney with the approval of the criminal court had in 1895 appointed two chief deputies in the persons of Mr. Neal and Mr. Botsford. When Mr. Botsford resigned, Mr. Neal remained the only chief deputy which the statute permitted, and there was no authority in the prosecuting attorney to appoint another chief deputy until Mr. Neal resigned his position on the 1st day of July, 1896. The statute (section 3287) only permitted the judge of the

criminal court a discretion as to the appointment and number of deputies for the prosecuting attorney when the number was not expressly fixed by the statute, but the statute fixes clearly and distinctly that the prosecuting attorney shall appoint only one chief deputy in class A, and therefore, the attempt to appoint more than one assistant in that class was clearly beyond the power of the prosecuting attorney, even with the approval of the court so as to entitle him to the salary fixed for the one chief deputy. The dire results which plaintiff anticipates from this construction of the statute, to wit, that all of his official acts as assistant prosecuting attorney would be null and void, cannot follow. That plaintiff was an assistant prosecuting attorney, and all his acts as such valid, at least as to third persons, is not a question in this case. The question is one simply of salary and whether, under the pleadings and evidence in this case, he was entitled to the salary of chief deputy. As we understand the judgment of the circuit court, it simply adjudged that inasmuch as the prosecuting attorney had one chief deputy de jure and de facto, there was no authority to appoint plaintiff chief deputy, and require the county court to pay him the salary of chief deputy in spite of the plain statutory provision for the payment of the fees of the prosecuting attorney and his deputies. Having reached this conclusion, it is unnecessary to pass upon any other contention in the case.

The judgment of the circuit court is affirmed.

BURGESS, P. J., and FOX, J., concur.

MILLER v. BAYLESS et al.

(Supreme Court of Missouri. Division No. 2.
March 6, 1906.)

1. COVENANTS—GENERAL AND SPECIAL—LIMITATION.

General covenants in a deed whether express or implied from the use of the words "grant, bargain and sell," as provided by Rev. St. 1899, § 907, are not restricted by special covenants unless they are so irreconcilable that they cannot all have full force, or unless the limited covenant refers to, or is connected with the general covenants in such a manner as to show that the intention of the grantor was to restrain the effect of the general covenants.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 35.]

2. SAME.

Where a deed contained the words "grant, bargain and sell," but thereafter provided that it was expressly understood "in the conveyance and in the covenants therein" that the grantors would warrant and defend the title against the lawful claims of themselves, their heirs, and those through whom they claimed, the implied covenants of warranty and seisin were limited by the subsequent covenant so as to relieve the grantors from liability for claims arising outside their chain of title.

Appeal from Circuit Court, Barry County;
Henry C. Pepper, Judge.

Action by E. B. Miller against J. M. Bayless and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Edward J. White, for appellant. Davis & Steele, for respondents.

GANTT, J. This is an appeal from a judgment of the circuit court of Barry county, Mo., sustaining a demurrer to the petition of the plaintiff and rendering final judgment thereon for the defendant. The appeal in the first instance was taken to the St. Louis Court of Appeals and the judgment of the circuit court affirmed, but one of the judges of the said court being of the opinion that the judgment of the court was in conflict with a prior decision of the said court, it was ordered that the cause be certified to this court for determination under the provisions of the Constitution. The facts of the case fully appear in the opinion of Judge Goode in the St. Louis Court of Appeals, 74 S. W. 648. The opinion is as follows:

"On February 1, 1893, John Bayless, Thomas Allen, and their wives, executed a deed to W. A. Stilley, which purported to convey the title to certain land in Barry county, Mo., to the grantee, Stilley. The granting clause in the deed recites that the grantors 'do by these presents, grant, bargain, and sell, convey, and confirm unto the said party of the second part, his heirs and assigns the following lots, tracts, and parcels of land,' describing the same. Following the description is a habendum clause of the following tenor: 'to have and to hold the premises aforesaid unto said party of the second part and unto his heirs and assigns, forever; that the said premises are free and clear of any incumbrances done by them, and it is expressly understood in this conveyance and in the covenants herein that the grantors will warrant and defend the title to said premises unto the said party of the second part and unto his heirs and assigns, forever, against the lawful claims and demands of themselves, their heirs, or those through whom they claim, except for taxes to become due.' After Stilley bought the land it passed by mesne conveyances, mostly in the nature of general warranty deeds, to the plaintiff Miller, who acquired the title July 11, 1898. Miller instituted this action February 5, 1902, on the covenants contained in the deed made by Bayless and Allen to Stilley. The court sustained a demurrer to the petition, the plaintiff refused to plead further, final judgment was entered on the demurrer in favor of the defendant, from which judgment the cause was appealed to this court.

"The petition states the execution of the deed containing the covenants in question, and alleges that it contained the covenants implied from the words 'grant, bargain, and sell,' and of general warranty; that by its terms the defendants covenanted that they were seised of an indefeasible estate in fee simple in the premises conveyed, and had

good right to convey the same; that Stilley paid \$100 as a consideration for the land. Mesne conveyances are then stated, which sufficed to pass whatever title Stilley acquired to the plaintiff, the petition alleging that they also passed to the plaintiff the covenants of seisin and general warranty, so that those covenants became operative in favor of plaintiff. It is next averred that the said covenants were broken and violated by the defendants in this: that defendants did not have the legal right to the premises at the date of their conveyance, nor the right to the possession nor the possession thereof; but that the land was then in a raw, uncultivated state, in the possession of no one, and remained in this condition until August, 1897, when one F. R. Cartwright purchased the outstanding title, which was held by T. J. Corpeny at the date of said conveyance by the defendants. The petition avers that Cartwright, after purchasing the land, immediately entered into possession, and excluded the plaintiff from possession under a better title to said premises held by him, than plaintiff had, or than had been derived from the defendant. The petition avers that at the date of the execution and delivery of the deed to Stilley containing the covenants sued on defendants did not own the land, but that the title was then outstanding in the heirs of one Turner; that Cartwright, at the date of his entry into possession in August, 1897, entered and claimed the land under a superior outstanding title, which existed at the date of the conveyance executed by the defendants; but that until the entry of Cartwright no claim was made to said premises under the paramount title, nor was there an eviction of the plaintiff or his grantors from the premises. The damages which plaintiff sustained by reason of the alleged breach of the covenants are then stated, and judgment prayed for their amount. The demurrer filed by the defendants states two grounds: That the plaintiff had no capacity to sue; that the petition does not state sufficient facts to constitute a cause of action against the defendants. The deed executed by the defendants to Stilley was called for in the petition, attached as an exhibit to it in appellant's abstract of the record and is treated by both parties in their briefs as being before this court for its consideration in determining the propriety of the judgment of the circuit court.

"Plaintiff's petition, taking the view most favorable to him, counts on covenants of seisin and of general warranty. The covenant of warranty actually contained in the deed, which we have recited above, is a special, and not a general, warranty, and bound the defendants to warrant and defend the title to the premises conveyed only against the claims and demands of themselves, their heirs, or those through whom they claimed. In as much as the failure of plaintiff's title

was due, according to the petition, to a paramount title superior to that of the defendant's, and was not due to any act of the defendants, their heirs, or other persons claiming under them, no breach of the special covenant of warranty is stated. It has been determined in this state and by this court, as well as by courts elsewhere, that the statutory covenants raised by the words 'grant, bargain, and sell,' when used in a conveyance of land, are not restricted in their scope by an express covenant of special warranty, if the latter made no reference to the former covenants, nor is coupled with them in such a way as to modify their ordinary effect. Speaking for myself, I must say that the reasoning on which such decisions are based is not entirely satisfactory, in as much as the words 'grant, bargain, and sell' constitute the ordinary formula for the conveyance of real estate, and are generally employed mechanically in writing conveyances; whereas a covenant of special warranty, restricting the liability of the grantor to the hostile acts and demands of the designated individuals, clearly bespeaks an intention on the part of the grantor to decline the responsibility for adverse demands of titles made or held by persons not designated. But the rule is settled the other way in this state as well as in other states, and we would have to regard it as binding on us in a case falling within its scope. *Tracy v. Greffet*, 54 Mo. App. (St. L.) 562; *Rowe v. Heath*, 23 Tex. 614; *Brown v. Tomlinson*, 2 G. Greene (Iowa) 525; *Gratz's Lessee v. Ewalt*, 2 Bin. (Pa.) 98; *Funk v. Vonelda*, 11 Serg. & R. (Pa.) 111; *Roebuck v. Duprey*, 2 Ala. 641; *Stewart v. Anderson*, 10 Ala. 504; *Winston v. Vaughan*, 22 Ark. 82, 76 Am. Dec. 418; *Prettyman v. Wilkey*, 19 Ill. 235. The contrary rule seems to have been adopted in Mississippi. *Weems v. McCaughan*, 7 Smedes & M. (Miss.) 427, 45 Am. Dec. 314; *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270. The doctrine of the courts is that general covenants whether they be expressed on the face of the deed or raised by implication of law from the words 'grant, bargain, and sell,' are not restricted in their operation by limited special covenants unless the different covenants are so irreconcilable that they cannot all have their full force, or unless the limited covenant refers to or is connected with the general covenants in such a manner as to show the intention of the grantor was to restrain the force and effect of the general covenants. *Alexander v. Schreiber*, 10 Mo. 460, a case in which a number of authorities on the subject are examined. But it is also the law that, however general and far-reaching the force of any covenant (whether expressed in the conveyance or implied by the law) might be if it stood alone, if it is connected with restrictive language in the deed, which shows clearly that the grantor intended to qualify and limit his responsibility on the covenant below its usual sense, the operation of the covenant will be determined, not in its usual

sense, but from the entire contents of the deed. This simply means that the intention of the parties to an instrument is gathered from its four corners, and, when thus gathered, will be enforced; and it may be said that that rule of construction is now as applicable to conveyances of land as to any other sort of contracts and is no longer hampered by those ancient rules which made the different clauses of a deed depend on whether they preceded or followed each other in the instrument, rather than on the plain intention of the parties. *Gainsford v. Griffith*, 1 Sand. 60; *Forrd v. Wilson*, 8 Taunton, 543. In the first of those two decisions in considering when a special covenant restrained a general one, it was said: 'Every case must depend on the particular words used in the instrument before the court, and the distinctions will be found to be very nice and difficult.'

"The rule that covenants are taken most strongly against the covenantor, is reversed in the case of statutory covenants, because they are implied, and are in derogation of the common law. *Douglass v. Lewis*, 181 U. S. 75, 9 Sup. Ct. 634, 33 L. Ed. 53. Many of the authorities on the question of whether a special covenant embraced with general ones in a deed will control the operation of the latter, are collected in *Rawle on Covenants of title* (5th Ed.) § 287 et seq., to which, without reviewing the cases, we refer. We do not review them because, in our opinion, the clauses of the deed before us leave no doubt that the implied statutory covenants are to be restrained by the special warranty, and for this reason: the latter expressly refers to the former, and undertakes to confine their operation. The special warranty stipulated that 'it is expressly understood in this conveyance and in the covenants herein, that the grantors will warrant and defend the title to the premises conveyed against the lawful claims of themselves, their heirs, and those through whom they claim.' If the implied covenants are taken to be of unlimited and unrestrained operation, no force whatever can be given to the words of the special warranty that 'it is expressly understood in this conveyance and in the covenants herein.' Those words, 'covenants herein' must refer to the implied covenants, and limit their operation; for the deed contains no other covenants to which they can refer. The meaning of the instrument, considered as a whole, is that the grantor refused to bind themselves by general covenants, but restricted their liability; and it is to be interpreted as a special warranty deed without general covenants. In its reference to the other covenants, that warranty in this instrument differs from those construed in *Tracy v. Greffet*, 54 Mo. App. 562, and in the cases on which that decision was based, each of which warranties contains no such reference, but was an isolated obligation independent of the rest of the deed.

"As no breach of the covenants, when cor-

rectly understood, was stated in the petition, the demurrer was rightly sustained, and the judgment is affirmed."

It is unquestionably the law of this state, as stated by Judge Goode in his opinion, that general covenants in a deed of conveyance whether they be expressed on the face of the deed or raised by an implication from the use of the words "grant, bargain, and sell," as provided by section 907, Rev. St. 1890, are not restricted in their operation by special covenants unless the different covenants are so irreconcilable that they cannot all have their full force, or unless the limited covenant refers to, or is connected with the general covenants in such a manner as to show the intention of the grantor was to restrain the force and effect of the general covenants. The law was so announced in *Alexander v. Schreiber*, 10 Mo. 460; *Shelton v. Pease*, 10 Mo. 474. The majority of opinion of the Court of Appeals fully recognizes the foregoing statement of the law in this state, but in its application to the covenants in the deed on which this action is based, the court held that the particular language of the special warranty limited the general covenants implied by the words "grant, bargain, and sell," and we think correctly. The opinion in our judgment is in no conflict with the decision of the Court of Appeals in *Tracy v. Greffet*, 54 Mo. App. 562.

For the reason given by Judge Goode in his opinion, the judgment of the circuit court is affirmed. All concur.

STATE v. DAVIS.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. CRIMINAL LAW—JUSTICES OF THE PEACE—CRIMINAL JURISDICTION—EXTENT.

Under Rev. St. 1890, § 2769, providing that, on a defendant entering his plea of not guilty before a justice of the peace, the case may be tried by the justice if no jury be demanded, the justice, in trying a criminal prosecution without a jury, is not bound to decide the case *instantan* on submission, and does not lose jurisdiction by taking the same under advisement until the following day.

2. SAME—INSTRUCTIONS—FORM OF VERDICT.

Where the court submitted a form of verdict to be used in case the jury found defendant not guilty, and charged that defendant was presumed to be innocent until his guilt was established beyond a reasonable doubt, etc., the submission of a form of verdict to be used in case the jury found defendant guilty, in connection with the instructions, was not erroneous as tending to mislead the jury to believe that such verdict was a direction by the court to find defendant guilty.

3. PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—OFFENSES—STATUTES—EVIDENCE.

Laws 1901, pp. 207, 208, § 1, makes it unlawful for any nonregistered person to practice medicine or surgery. Section 4 provides for the registration of licenses to practice medicine and makes any neglect to record a license a misdemeanor, and section 5 declares that any person, except registered physicians, practicing medicine or surgery in the state, or attempting

to treat the sick without first obtaining a license from the state board of health, shall be deemed guilty of a misdemeanor and shall be punished, etc. *Held*, that where defendant, a nonregistered physician residing in Illinois, came to a room at a hotel in Missouri and there held himself out as a physician, diagnosed the ailment of a patient and sent medicine to the patient from Illinois, for which defendant charged and received \$5 per month, he was guilty of a violation of such act.

4. CRIMINAL LAW — INSTRUCTIONS — REFUSAL OF REQUEST.

It is not error for the court to refuse an instruction requested by accused which is substantially covered by instructions given.

5. CONSTITUTIONAL LAW—PRACTICE OF MEDICINE—VESTED RIGHTS.

A physician and surgeon not shown to have been registered in Missouri under any prior existing statute, by merely practicing medicine in that state for a number of years prior to his removal to another state, did not acquire a vested right so to do, so as to render him immune from punishment for violating Acts 1901, pp. 207, 208, prohibiting nonregistered persons from practicing medicine in Missouri.

Appeal from Circuit Court, Scotland County; Charles D. Stewart, Judge.

John M. Davis was convicted of practicing medicine without a license, and he appeals. Affirmed.

This cause is here by appeal from a judgment of conviction of the defendant in the Scotland county circuit court for practicing medicine without a license or any other authority so to do. This prosecution was begun before a justice of the peace of Scotland county on February 4, 1905. Omitting formal parts of the information, it charges the offense as follows: "John E. Luther, prosecuting attorney within and for the county of Scotland in the state of Missouri, informs John B. Montgomery, a justice of the peace of said county of Scotland, that on the 15th day of December, 1904, at the county of Scotland aforesaid, one John M. Davis did unlawfully practice medicine by then and there prescribing for, issuing medicine to, and treating one Arthur Hoover, for the cure of disease and bodily affliction; the said John M. Davis not then and there being a licensed physician of the state of Missouri, nor having any legal authority to practice medicine or treat the sick and afflicted, against the peace and dignity of the state." This cause was first tried before the justice on an agreed statement of facts on the 4th of April, 1905; the cause being submitted, the justice took it under advisement until the next day, the 5th of April, 1905, when he rendered judgment against the defendant, finding him guilty, and assessing his punishment at a fine of \$100. From this judgment defendant prosecuted his appeal to the circuit court of Scotland county. The cause came on for a hearing and trial at the May term, 1905, of the circuit court. Before the trial the defendant filed a motion praying for the discharge of the defendant on the grounds that upon the face of the transcript from the justice it appeared that the justice

had lost jurisdiction of the cause before he rendered a judgment, and that when he did render judgment he had no jurisdiction so to do, as this was a criminal cause, and the justice was without authority to take the case under advisement. This motion was by the court overruled, and the trial of the cause preceeded. We have read in detail the testimony introduced at the trial, which was substantially as follows: The state's evidence tended to prove that one Arthur Hoover was suffering from blood poison, and, learning the defendant was a good physician, went to see defendant at a hotel in Memphis, in Scotland county. The defendant told Mr. Hoover that he (defendant) was a physician, and showed Hoover some blanks with questions on them. That defendant then examined Hoover, diagnosed his case, and prescribed for him. That defendant lived in Hamilton, Ill., and sent bottles of medicine to Hoover by express, from Warsaw, Ill. That Hoover took the medicine according to defendant's directions and according to the instructions on the bottle, and paid defendant \$5 a month. That these payments were made to defendant, and Hoover had an interview with defendant in the hotel in Memphis the first Monday in every month, beginning in November, 1904. That defendant had no diploma, no license from the state board of health, and was not registered as a physician in Scotland county. The defendant's evidence tended to prove that he lived in Hamilton, Ill., sent medicine to Mr. Hoover by express and by mail. That this medicine was sent when the patient would fill out one of defendant's printed blanks. That defendant had been practicing medicine ever since 1857, was formerly located in St. Louis, had practiced in Edina, but had not been located in Missouri for a number of years. That he had studied the allopathic system of medicine, but had never registered in Missouri, and had never been licensed by the state board of health.

At the close of the evidence, the court, at the instance of the state, gave the following instructions: "(1) The court declares the law to be that if you find from the evidence that the defendant, John M. Davis, at the county of Scotland and state of Missouri, at any time within one year next before the filing of this information, did publicly profess to be a physician, and that by reason of his publicly professing to be a physician, one Arthur Hoover accepted his services in his professional capacity by calling upon defendant, and defendant prescribed for, treated, and issued medicine to said Arthur Hoover, who was then and there a sick person; and that the defendant, at the time of so prescribing for, treating, or issuing medicine to said Arthur Hoover, was not a registered physician of the state of Missouri, and had no certificate issued by the board of health of the state of Missouri, authorizing him to practice

medicine in the state of Missouri, you should find the defendant guilty as charged, and assess his punishment at a fine of not less than \$50 nor more than \$500, or at imprisonment in the county jail not less than 30 days nor more than one year, or at both such fine and imprisonment. (2) The court declares the law to be that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt; but a doubt, to authorize an acquittal, must be a substantial doubt of defendant's guilt and not a mere possibility of his innocence." In submitting the instructions the court submitted a blank form for a verdict of guilty. At the request of the defendant the court instructed the jury as follows: "(5) The information in this cause charges the defendant with unlawfully practicing medicine by prescribing for, issuing medicine to, and treating one Arthur Hoover for the cure of a disease and bodily affliction, and that the same was done in the county of Scotland and the state of Missouri, and unless you so find and believe from the evidence beyond a reasonable doubt, you should acquit the defendant. (6) If your verdict be for the defendant, it may be in the following form: 'We, the jury, find the defendant not guilty. ———, Foreman.'" Defendant requested the court to instruct the jury as follows: "(1) If you believe from all the evidence in the case that the defendant merely examined a patient in the state of Missouri, and afterwards, on the application of the patient, sent him medicine from the state of Illinois when he so ordered and desired it, this is not practicing medicine in the state of Missouri in the meaning of the law, and you should find the defendant not guilty. (2) The law is intended to punish only those who prescribe and administer medicine as a profession, within the state of Missouri. It does not apply to physicians who live in another state and, upon application of patients, send medicine into the state of Missouri to be taken by said person, and before you would be authorized to find the defendant guilty you must believe beyond a reasonable doubt that he followed the profession of a physician in the state of Missouri by prescribing medicine within the state as a calling. (3) If you believe from the evidence that the medicine prescribed by the defendant was compounded and prepared by him in the state of Illinois upon the application of patients in Missouri, and was so taken by the patient after the same was sent to Missouri, and that the defendant was a resident of the state of Illinois, then this fact would not make the defendant practicing medicine within the state of Missouri, and you should find him not guilty. (4) Before you can find the defendant guilty you must find and believe from the evidence beyond a reasonable doubt that the defendant has practiced medicine by treating the sick or those afflicted with bodily infirmities, by

prescribing and issuing medicine within this state as charged in the information and without a license so to do; and you must find from the evidence beyond a reasonable doubt that each and all of said facts occurred in this state—that is, you must find beyond a reasonable doubt that all of the acts usual for physicians of prescribing for, issuing medicine to, and treating the sick took place within the state. If you find that the medicine taken by the patient, young Hoover, was prescribed, compounded, issued, or prepared in another state, and, upon the application of the patient, was sent to this state, and was so taken by the patient after the same was sent to Missouri, then this fact would not make the defendant a practicing physician within the meaning of the laws of Missouri, and you should find the defendant not guilty." These instructions were by the court refused. The cause being submitted to the jury upon the evidence and instructions of the court, a verdict was returned by the jury finding the defendant guilty as charged, and assessing his punishment at a fine of \$50. Motions for new trial and in arrest of judgment were filed and by the court overruled. Judgment was rendered in accordance with the verdict, and from this judgment defendant prosecutes this appeal, and the cause is now here for our consideration.

Smoot, Boyd & Smoot, for appellant. The Attorney General and N. T. Gentry, for the State.

FOX, J. (after stating the facts). The record discloses numerous assignments of error as grounds for the reversal of this judgment.

1. It is insisted by appellant that the justice of the peace lost jurisdiction of this cause and erroneously rendered judgment against the defendant, for the reason that said justice had no authority to take the case under advisement from the 4th day of April, 1905, being the day upon which the case was tried and submitted, until the next day, the 5th day of April, 1905, hence the circuit court erred in overruling appellant's motion to discharge him on that ground. We are unable to give our assent to this contention, and we are of the opinion, from an examination of the statute in respect to trials in criminal cases before justices of the peace, that it is without merit. Section 2709, Rev. St. 1899, substantially provides that, upon the defendant entering his plea of not guilty, he or the prosecuting witness or prosecuting attorney may demand a jury, but, if no jury be demanded, the case may be tried by the justice. There is no statute applicable to trials before justices of the peace in criminal cases, which undertakes to designate, if the case is tried by the justice or even tried by a jury, the precise date of the rendition of the judgment or verdict in the cause. It is apparent, if the cause is tried by a jury and

submitted to them, that they have the right to deliberate upon it, and there is no time fixed as to how long they may consider the cause as submitted before returning a verdict; and we take it that where a cause is submitted to a jury on one day that they should, in their jury room, consider and discuss the evidence until the next day before returning a verdict, would not in any way affect the validity of a judgment rendered upon such a verdict. We see no reason why a justice of the peace to whom a cause is submitted may not have a similar right to take the cause under advisement for a reasonable time and then render his verdict and judgment in the cause. The statute by none of its provisions prohibits such a course. The law-making power did not even deem it essential to designate, in the trial of criminal cases before justices of the peace, as it has done in civil cases, the precise number of days in which a case shall be decided; therefore we think it is manifest that no such limitations upon the justice in considering a criminal case, which has been tried before him, as is contended for by appellant, was contemplated by the statute regulating trials in criminal causes before justices of the peace. It has been ruled by some of the appellate courts of this state that if the judgment in a civil case was not rendered within three days, as designated by the statute, it is valid, notwithstanding such statute was not complied with. *Herwick v. Barbers' Supply Co.*, 61 Mo. App. 454; *Pohle v. Dickmann*, 67 Mo. App. 381.

2. Appellant treats the form of the verdict in the event the jury find the defendant guilty, which was submitted to the jury among the instructions, as an instruction given by the court to find the defendant guilty. It is insisted that this was error and calculated to confuse and mislead the jury. We confess that it would have been much more appropriate for the court to have prefaced the submission of that form of the verdict with a direction to the jury to use it if they found the defendant guilty; however, we are convinced that the form of the verdict submitted to the jury in the manner that it was did not in any way mislead the jury. It will be noted that the court also submitted a form of the verdict at the request of the defendant, with a direction that if they found the defendant not guilty they would use such form. In addition to this the court instructed the jury that the defendant was presumed to be innocent, and his guilt must be established beyond a reasonable doubt. The jury were also told in the instructions that the information charged defendant with practicing medicine, treating one Arthur Hoover, and so treating him in Scotland county, and that, unless the jury so found and believed beyond a reasonable doubt, they should acquit the defendant. Considering all the instructions, we are unable to conceive how the jury could have been

misled into the belief that the form of the verdict for the state submitted to them was a direction by the court to find the defendant guilty.

3. It is insisted by appellant that, under the proof as developed at the trial in this cause, defendant was not practicing medicine in this state as contemplated by the statute. The law governing the subject of the practice of medicine and surgery in this state, upon which this prosecution is predicated, will be found in *Sess. Acts 1901*, pp. 207-208. Section 1 of that act provides: "It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of midwifery in the state of Missouri, except as hereinafter provided." Section 4 of that act provides for the recording of the license to practice medicine obtained from the board of health, embracing in the section a provision that any neglect to record the license in the manner and within the time provided by the statute, the party guilty of such neglect shall be guilty of a misdemeanor. Section 5, which is specially applicable to the charge upon which the defendant was convicted, provides that "any person, except physicians now registered, practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, without first obtaining a license from the state board of health, as provided in this act, shall be deemed guilty of a misdemeanor, and punished by a fine of not less than fifty dollars, nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days, nor more than one year, or by both such fine and imprisonment, for each and every offense, and treating each patient shall be regarded as a separate offense." The evidence in this cause is practically undisputed. The defendant had a room at the hotel in Memphis, Scotland county, Mo., professed to be a physician, and held himself out as such. Arthur Hoover applied to him at the hotel in Scotland county, Mo., as a physician for treatment. He diagnosed his case in the usual and ordinary way of practicing physicians, and prescribed remedies. His prescription for medicine, however, was in the form of a blank, which was required to be sent to the state of Illinois, and then the defendant would send the bottles of medicine to Hoover by express from Warsaw, Ill. Hoover took the medicine according to defendant's directions and according to the directions on the bottle. He paid the defendant at the rate of \$5 per month for such treatment. The payments were made to defendant and defendant would come to the hotel for the purpose of seeing his patient, Hoover, the first Monday in every month. This, in our opinion, was clearly

practicing medicine in this state as contemplated by the statute. The mere fact that the medicine was sent from Illinois did not in any way alter the construction placed upon his acts, that he was a practicing physician in this state. The practice of medicine, as contemplated by the provisions of the statute covering that subject, may consist only of the examination of a patient, diagnosing the cause of the trouble complained of, or, by one professing to be a physician, seeing the patient at stated intervals and the indication and prescribing of remedies to be applied, and the acceptance of pay for such services. The mere fact that the remedies indicated and prescribed are sent from another state does not negative the idea that the defendant was practicing medicine or attempting to practice medicine in this state. It would not be an uncommon occurrence for a regular practicing physician of this state to examine his patients, diagnose the cause of their illness, and then say to them, "The remedies I indicate and prescribe you must obtain from the state of New York." This is not a case where the physician does not come to the state and undertake to secure patients, but simply furnishes blanks, which are sent to him in another state and he sends the medicine in accordance with the requests; but here we have a person coming to this state, holding himself out as a physician, has patients visit him, examines them, advises them as to the nature and cause of their trouble, indicates the remedies to be applied, and accepts pay for such services. The bare statement of the two classes of cases makes manifest the distinction between them. The proof in this cause was amply sufficient to show that the defendant was undertaking to practice his profession in Scotland county, Mo., and, it being conceded that he was not a regularly registered physician in this state, and had no license from the state board of health to practice medicine, the testimony fully warranted the conclusion reached by the jury in their verdict.

4. The instructions of the court given to the jury for the state and the defendant fully covered every feature of this case to which the testimony was applicable; hence there was no error in refusing the instructions requested by the defendant.

5. This leads us to the final contention of the appellant, that the statute upon which this prosecution is predicated is unconstitutional and void. This contention is predicated upon the claim that this defendant, commencing in 1857, practiced medicine in this state for a number of years and finally moved to the state of Illinois, and was engaged there in the practice of his profession. It is insisted by having once practiced medicine in this state he thus secured a vested right to practice in this commonwealth whenever he saw proper. We cannot give our assent to this contention. It is but common knowledge that the people who have ill health or whose families are troubled with disease

are more easily and can be more readily imposed upon by persons who represent themselves as physicians, claiming that they can give them permanent relief, than any other class; and it may be added that intelligence is no protection from impositions along that line, for, when a man is sick or his family ill, whether he be intelligent or ignorant, they readily give an attentive ear to any sort of a doctor who claims that he can give them relief, and are at all times ready to purchase and swallow all sorts of nostrums because they are recommended by someone who claims to be a physician. The prime object of this law upon the subject of the practice of medicine is the protection of the people from the impositions herein indicated by persons who are not sufficiently skilled in the profession to authorize them to properly administer medicine and therefore relieve the afflicted. The evidence in this cause nowhere discloses that the defendant was a registered physician under any prior existing statute; in fact, defendant, while on the stand, does not disclose that he was practicing his profession in this state in 1857 and subsequent to that time in accordance with the then existing laws governing the practice of medicine; therefore we are unable to conceive how it can be held that he had secured by virtue of his practice in this state a vested right, and there is no reason why he should not comply with the law now in force in this state if he desires to practice his profession here and reap the rewards of such practice. It was expressly ruled in *People v. Fulda*, by the Supreme Court of New York, 52 Hun, 65, 4 N. Y. Supp. 945, that the fact that, before the enactment of a statute which compelled the taking out of a license, the defendant in that case had been practicing medicine, did not prevent the application of the statute to him, which requires as a condition the taking out of a license in order to justify his practice. The court, in that case, in discussing the statute which imposed the condition of taking out a license to practice medicine, used this language: "This was part of the police regulations of the state. It was thought necessary for the protection of the people that these safeguards should be thrown around them in reference to those who assumed to practice medicine in the community. The state has a right to determine upon what conditions and under what circumstances its citizens should be entitled to pursue any vocation. It is in no way interfering with any vested rights, nor is it a usurpation of authority which is not possessed." In *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623, the same contention was made by the defendant in that case as is made in the case at bar—that is, that he had been practicing medicine within the state six years before the enactment of the law, and that the statute which undertook to impose certain conditions in order to authorize him to practice his pro-

profession deprived him of a vested right, and was a deprivation of property without due process of law. The statute was held valid, and in discussing it the court thus stated the law: "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition, and that the right to continue the prosecution of any lawful vocation cannot be arbitrarily taken away any more than real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud; and it is only when the qualifications required for the pursuit of any calling or profession have no relation to such calling or profession, or are unattainable by reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

The principles in support of the lawmaking power to enact laws imposing conditions upon those who engage in the practice of medicine are very clearly stated by the Supreme Court of Louisiana in *Board of Medical Examiners v. Fowler*, in La. Ann. 1898, vol. 50, loc. cit. 1373, 24 South. 809. It was said by that court that "whenever the pursuit of any particular occupation or profession requires for the protection of the lives or health of the general public, skill, integrity, knowledge, or other personal attributes or characteristics in the person pursuing it, the General Assembly has the power and the authority to have recourse to proper measures to insure that none but persons possessing these qualifications should pursue the calling. We find this right constantly put in force by the general as well as the state government." It is apparent that the General Assembly of Missouri, in the enactment of the provisions of law regulating the practice of medicine and surgery in this state, intended to fix a standard as to fitness, skill, and qualification which would authorize the practice of that profession. This law does not undertake to deprive any person of a vested right, for there can be no such thing as a vested right in the practice of medicine. It does not undertake to suppress or prohibit the practice of medicine or surgery, nor to prohibit any particular person from practicing as a physician or surgeon, but it simply undertakes to require the necessary and essential qualifications for that purpose. The correctness of the conclusions as herein indicated are fully supported by the well-considered cases of this country. *Dent v. West Virginia*, 129 U. S.

114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Myer on Vested Rights*, § 952; *People v. Phippin*, 70 Mich. 6, 37 N. W. 888; *Board of Med. Exam. v. Fowler*, 50 La. Ann. 1358, 24 South. 809; *People v. Fulda*, 52 Hun (N. Y.) 67, 4 N. Y. Supp. 945. We see no necessity for pursuing this subject further. It is clearly manifest that the defendant had no vested right to practice medicine in this state by virtue of his former practice here in 1857. Upon returning to this state to practice his profession, his qualifications, fitness, and skill to do so must be judged by the law in force at the time he so returns, and before he will be authorized to engage in the practice of his profession and reap the rewards from such practice, there is no reason why he should not comply with the conditions imposed upon him by the law in force at the time he so undertakes to engage in the practice.

We have indicated our views upon the assignments of error as disclosed by the record before us. Nothing remains except to announce the conclusion, and that is that there was no reversible error in the trial of this cause. The statute upon which the prosecution rests is constitutional, and the judgment should be affirmed, and it is so ordered. All concur.

STATE v. DOERRING.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. STATUTES—TITLE—AMENDATORY ACTS.

Acts 1883, p. 114, was passed under a caption, "Medicine and Surgery—Dentistry," followed with a title, "An act to regulate the practice of dentistry in the state of Missouri." This act was repealed by Sess. Acts 1897, p. 166, which was enacted in lieu thereof, and which contained the title "Medicine and Surgery—Dentistry—State Board of Examiners," and was followed with a title, "An act to repeal article 3, c. 110, of the Revised Statutes of Missouri [which was Acts 1883, p. 114], and to enact a new article in lieu thereof to be known as article 3, c. 110." The new act provided for the regulation and practice of dentistry; the organization of a state board of dentists, and required that persons practicing dentistry in the state should be licensed. *Held*, that the act of 1897 was not in violation of Const. art. 4, § 28, providing that bills of such nature shall contain but one subject, which shall be clearly expressed in its title.

2. CONSTITUTIONAL LAW—DENTISTRY—REGULATION—STATUTES—DEPRIVATION OF PROPERTY—DUE PROCESS OF LAW.

Acts 1897, p. 166, regulating the practice of dentistry and prohibiting persons from practicing dentistry within the state unless licensed by the state board of examiners, is not unconstitutional as depriving certain classes of citizens or individuals of property without due process of law.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 830.]

3. SAME—INFRINGEMENT ON JUDICIARY.

Acts 1897, p. 166, regulating the practice of dentistry and providing for the examination of applicants to practice dentistry by a dental board, is not unconstitutional as investing such board with judicial functions.

4. PHYSICIANS AND SURGEONS—DENTISTS—PRACTICING WITHOUT LICENSE—INDICTMENT.

An indictment of a dentist for practicing without a license need not allege the names of the persons on whom he practiced.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Physicians and Surgeons, § 9.]

5. INDICTMENT AND INFORMATION—EXCEPTIONS—EXCLUSION.

Acts 1897, p. 166, regulates the practice of dentistry in Missouri, and provides that no person (with certain exceptions, specified in a separate section) shall practice dentistry within the state without a license issued by the board of medical examiners. *Held*, that the classes excepted being enumerated in a separate section it was unnecessary that the state should either allege, in an indictment for violating such act, or prove, that defendant was not within the excepted class.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 295-298.]

6. PHYSICIANS AND SURGEONS—DENTISTRY—PRACTICING WITHOUT LICENSE—DEFENSES.

Where defendant admitted that he was practicing dentistry without a license, it was no defense to a prosecution therefor that the board of dental examiners had wrongfully refused to issue defendant a license.

Appeal from Circuit Court, Jackson County; John W. Wofford, Judge.

D. L. Doerring was convicted of practicing dentistry without a license, and he appeals. Affirmed.

This cause is here on appeal by the defendant from a judgment of conviction in the criminal court of Jackson county, Mo., at Kansas City, Mo., for practicing dentistry without being a duly and legally registered dentist, and without a license therefore, and without any other legal authority so to do. The information in this cause was filed by the prosecuting attorney of Jackson county on the 28th day of December, 1903. Omitting formal parts, the offense was thus charged: "Now comes Roland Hughes, prosecuting attorney for the state of Missouri, in and for the body of the county of Jackson, and upon the affidavit of S. C. A. Ruby hereto annexed and herewith filed, informs the court, that D. L. Doerring, whose Christian name in full is unknown to said prosecuting attorney, late of the county aforesaid, on the 10th day of March, 1902, at the county of Jackson, state of Missouri, did unlawfully and willfully practice dentistry and dental surgery, by performing dental operations, treating disease and lesions of the human teeth and jaws, and by attempting to correct malpositions and by filling teeth, for a fee, salary, and reward to him, the said D. L. Doerring, to be paid, without being then and there a duly and legally registered dentist, and without having a license therefore, and without any other legal authority so to do; said unlawful practice of dentistry and dental surgery by him the said D. L. Doerring, not being then and there performed while a bona fide student of dentistry, in the pursuit of clinical advantages while in attendance upon a regular course of study in a reputable dental college, and not

under the direct supervision of a preceptor, who was at the time a licensed dentist in said state, and he, the said D. L. Doerring, not being then and there a legally qualified physician in the regular discharge of his duties, against the peace and dignity of the state." Defendant filed his motion to quash this information for the reasons, assigned in said motion, that the information failed to state facts sufficient to constitute an offense under the laws of this state, and that the act of the Legislature, commonly called "The Dentistry Act," upon which this charge was predicated, was unconstitutional and void. This motion was taken up by the court and overruled. At the commencement of the trial the defendant objected to the introduction of any evidence in this case under the information filed, for the following reasons: "(1) That article 3 of chapter 128 of the Revised Statutes of Missouri of 1899, said article being the law that the defendant is charged with having violated, and being an act passed in 1897, by the General Assembly of the state of Missouri, entitled 'An act to repeal article 3 of chapter 110 of the Revised Statutes of Missouri of 1899, and to enact a new article in lieu thereof, to be known as article 3 of chapter 110,' is unconstitutional and void and of no force or effect, in that said act is in contravention of the provisions of section 28 of article 4 of the Constitution of the state of Missouri. (2) That said act of the Legislature of 1897 is in contravention of article 2, § 30, of the Constitution of the state of Missouri, in that it deprives certain classes of persons, citizens, or individuals of property or rights without due process of law. (3) Because said act of the Legislature of 1897 is in contravention of article 2, § 15, of the Constitution of the state of Missouri, in that said act is an ex post facto law, or law impairing the obligation of contract, and retrospective in its operation. (4) Because said act of the Legislature of 1897 is unconstitutional, in that it confers judicial power upon the State Board of Dental Examiners not authorized by article 6, § 1, of said Constitution." Which said objections were by the court overruled.

The cause was then submitted to the court without the aid of a jury, upon the following agreed statement of facts:

"(1) That the law relative to the practice of dentistry and dental surgery in the state of Missouri was, first, 'An act entitled "An act to regulate the practice of dentistry in the state of Missouri,"' passed and approved February 20, 1883 (Laws 1883, p. 114); that said act remained in force until the same was repealed or attempted to be repealed by an act of the Legislature of 1897, known as committee substitute for Senate bills 22 and 29, and said act was entitled, 'An act to repeal article 3 of chapter 110 of the Revised Statutes of Missouri of 1899, and to enact a new article in lieu thereof, to be known as article 3 of chapter 110,' which said act was ap-

proved March 19, 1897. (2) That the defendant, D. L. Doerring, prior to the passage of the act of 1897, was a duly registered dentist, and was practicing dentistry and dental surgery in Kansas City; that on the 21st day of May, 1897, said defendant, having complied with the laws of the state of Missouri in force at that time, received from the clerk of the county court of Jackson county, Mo., a dentist's certificate in compliance with the laws of the state of Missouri of said date; that said certificate is in words and figures following, to wit: 'Dentist's Certificate. No. 279. Know all men by these presents, that D. L. Doerring, a resident of Kansas City, in the county of Jackson and state of Missouri, has this day complied with the requirement of the law of the state of Missouri, entitled "An act to regulate the practice of dentistry in the state of Missouri, approved February 20, 1883," by filing a copy of a diploma sworn to by him, duly issued to him on the 2d day of March, 1896, by the Kansas City College of Dental Surgery, which said college is located in the city of Kansas City, state of Missouri, and is duly established under and by virtue of the laws of the state of Missouri. In testimony whereof I have hereunto set my hand and affixed the seal of the county court of said county, at office, in the city of Kansas City, this 21st day of May, 1897. T. T. Crittenden, Jr., Clerk, by S. K. Farr, D. C. [Seal.]' (3) That on the 3d day of August, 1897, the Missouri state board of dental examiners received said certificate from the defendant herein, and also application for certificate under the law of 1897, together with fee of \$1.00, which it had kept, and that thereafter, on September 24, 1899, the defendant was refused registration by said board of dental examiners, in a letter of which the following is a copy: 'W. M. Bartlett, President, St. Louis. S. C. A. Ruby, Secretary, Clinton. H. S. Lowry, Kansas City. W. W. Birkhead, Louisiana. L. E. Jenkins, Fredericktown. Missouri State Board of Dental Examiners. Office of Secretary. Clinton Mo., Sept. 24, 1897. Dear Doctor: I herein return you your certificate of registration. Board declines to acknowledge diplomas from the school from which you are graduated, and it will be necessary for you to make application for examination before this board at its next meeting, on the inclosed blank, at once, sending the indorsement or recommendation of some dentist, known to this board, as to your competency. Pending such examination you will be permitted to practice dentistry. Fee for examination of \$10, and you are credited with \$1.00. Should you apply for examination this dollar will be applied on examination fee; if you do not, I will return it. Next meeting of the board will be held in about two months, due notice of which will be sent you if you apply for examination. If you neglect to apply for examination, it will become my duty to take steps towards prosecuting you

for practicing dentistry in violation of the law. Yours, truly, S. C. A. Ruby.' And that ever since said date said board has refused to register said defendant; that defendant has been ready and willing and able to pay and has tendered to said board the annual fee of \$1, but that said state board of dental examiners has refused and still refuses to receive said payment, and has at all times refused to issue a certificate of registration to defendant, though often requested to do so, and defendant has never received any certificate of registration from said board of dental examiners. (4) That on the dates alleged in the information in Kansas City, Jackson county, Mo., the defendant was engaged in the practice of dentistry and dental surgery for fee or reward to be paid. (5) It is further stipulated by plaintiff and defendant that, upon the trial hereof, further evidence may be introduced tending to prove or disprove the allegations of the information, subject to objections as to the relevancy, materiality, and competency thereof."

The defendant then offered in evidence a certified copy of an act of the General Assembly, entitled "An act to repeal article 3 of chapter 110 of the Revised Statutes of Missouri of 1889, and to enact a new article in lieu thereof, to be known as article 3 of chapter 110." Acts 1897, p. 168. It is unnecessary to reproduce this law as offered in evidence. It will receive such attention as is necessary during the course of the opinion. Upon the submission of the cause the court found the defendant guilty, and assessed his punishment at a fine of \$50. Motions for new trial and in arrest of judgment were duly filed and by the court taken up and overruled. Judgment in pursuance of the verdict was duly rendered, and from this judgment defendant prosecuted his appeal to this court, and the record is now before us for consideration.

Hairgrove & Hairgrove, for appellant.
The Attorney General, Rush C. Lake, and W. E. Owen, for the State.

FOX, J. (after stating the facts). The record presents but one question for consideration, that is the validity of the law upon which this prosecution is predicated. Preceding the commencement of the trial, as well as during the progress of it, and in the motion for new trial, learned counsel for appellant challenged the constitutionality of the law upon which this judgment rests, and this is the only question confronting us for consideration. The Attorney General has filed a brief in this cause in which the questions presented are fully and exhaustively treated. However, for the appellant we are not favored with any suggestions as to his complaints or the correct solution of the propositions involved in the record, hence for the assignment of errors we must look to the objections interposed at the commencement of the trial.

1. The law upon which this prosecution is based is one to regulate the practice of dentistry in this state. Sess. Acts 1897, p. 166. The subject of regulating the practice of dentistry in this state was first treated of by the General Assembly in 1883. Sess. Acts 1883, p. 114. The act of 1883 upon this subject went into the Revision of 1889. The act of 1897, heretofore indicated, repealed the law upon this subject as contained in the Revision of 1889. Treating of the objections urged in the trial court, it was insisted that this law regulating the practice of dentistry was invalid, for the reason that it was in contravention of the provisions of section 28, art. 4, of the Constitution of this state, which provides that bills of this nature shall contain only one subject, which shall be clearly expressed in the title of the bill. The original act of 1883, of which the law of 1897 is a substitute, had the following headnotes or caption to it: "Medicine and Surgery—Dentistry"—followed with this title to the bill, "An act to regulate the practice of dentistry in the state of Missouri." The act of 1897 contained the following headnote or caption to it: "Medicine and Surgery—Dentistry—State Board of Examiners." This was followed with this title to the bill: "An act to repeal article 3 of chapter 110 of the Revised Statutes of Missouri of 1889, and to enact a new article in lieu thereof, to be known as article 3 of chapter 110." Upon the proposition that the act of 1897, known as the "Dentistry Act," treated of more than one subject, will say that we have carefully analyzed the provision of that law, and have reached the conclusion that it simply contains but one subject; that is, to regulate the practice of dentistry in this state. The object and purpose of the constitutional provision was to prevent incongruous, disconnected matters, which had no relation to each other, from being joined in one bill, but it by no means contemplates that all matters that are germane to the principle subject and have a natural connection with it may not be incorporated in the same bill. In *Ewing v. Hoblitzelle*, 85 Mo. 64, the following rule, taken from *Sedgwick*, was approved: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and, if it is sufficiently expressed in the title, the statute is valid." This rule was approved by Judge Black in *State ex rel. Attorney General v. Miller*, 100 Mo. 439, 13 S. W. 677, citing, in support of such approval, *City of St. Louis v. Tiefel*, 42 Mo. 578, *State v. Matthews*, 44 Mo. 523, *State v. Miller*, 45 Mo. 495, *City of Hannibal v. County of Marion*, 69 Mo. 571, and *State ex rel. v. Mead*, 71 Mo. 268, as substantially announcing the same rule as approved in *Ewing v. Hoblitzelle*, supra. To the same effect is *State ex rel. v. Bronson*, 115 Mo. 271, 21 S.

W. 1125, where it was ruled that this section of the Constitution should be reasonably and liberally construed and applied; due regard being had to its object and purpose. It was again announced in that case that if all the provisions of the bill have a natural relation and connection, then the subject was single, and this, too, though the bill contains many provisions. In *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774, the rule announced in the foregoing cases was approved and followed. While this act, the validity of which is challenged by appellant, contains many provisions, yet it is made manifest, by an examination of the various sections contained in the bill, that it treats of but one subject and has but one subject in view, and that is to regulate the practice of dentistry in this state.

The additional objection is made to this law that the subject of which it treats—the regulation of the practice of dentistry in this state—is not clearly expressed in the title of the bill, as required by the constitutional provisions. The evident purpose of this constitutional provision requiring the subject of bill to be clearly expressed in the title is well stated in *State ex rel. v. Ranson*, 73 Mo. 78. In discussing this constitutional provision in that case this court said that "the adjudicated cases, as well as the elementary writers, all concur that it was to prevent the vicious practice of conjoining, in the same bill, incongruous matters, and subjects having no legitimate connection or relation to each other, and in no way germane to the subject expressed in its title; that its object was to prevent surprise or fraud upon members of the Legislature, rather than embarrass legislation by making laws unnecessarily restrictive. *Cooley on Const. Lim.* 174; *City of St. Louis v. Tiefel*, 42 Mo. 590. Some of the adjudicated cases have construed this provision with some strictness, but in the majority of them the rule is otherwise. In the case of *State v. Miller*, 45 Mo. 497, this court uses this language: 'The courts, in all the states where a like or similar provision exists, have given it a very liberal interpretation, and have endeavored to construe it so as not to limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law.' Justice Cooley, in his work on *Constitutional Limitations*, page 178, says: 'There has been a general disposition to construe the constitutional provision liberally, rather than embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purpose for which it was adopted.' The Supreme Court of Louisiana, in commenting on argument of counsel, which demanded a strict construction of a constitutional clause like this, uses this language: 'We think the argument invokes an interpretation of the constitutional clause too rigorous and technical. If, in applying it, we should follow the rules of a nice and

fastidious verbal criticism, we should often frustrate the action of the Legislature without fulfilling the intention of the framers of the Constitution.' Succession of Lanzetti, 9 La. Ann. 333." We therefore must approach the treatment of this proposition, as to the necessity of expressing clearly the subject in the title of the bill required by the Constitution, with the full recognition of the rule that such constitutional provision must be reasonably and liberally construed and applied; due regard being had to its object and purpose.

It will be observed that the original act upon the subject of regulating the practice of dentistry, in 1883, was revised in chapter 110 of the Revision of 1889. This chapter was headed: "Medicine, Surgery and Dentistry." Then followed the designation of the articles of which this chapter treated: First, article 1, medicine and surgery; article 2, disposition of human bodies; article 3, dentistry. When we turn to article 3 of the Revision of 1889, it is headed "Dentistry." Section 6610, Rev. St. 1889, expressly provides that, in the revision of the statutes, the enacting clauses of the several acts, as also the words, "An act concerning," or other equivalent words in the title to the several acts, shall be omitted, substituting in lieu thereof other words expressive of the subject of the act of law. It was held in *State ex rel. v. Ranson*, supra, that the acts, as revised by the general statute, may be taken as the original act, and the title prefixed to the same by the general statute may be accepted as the title to such chapters, since this arrangement and heading of the general statutes is authorized by law and, indeed, has become a part of the law itself. Gen. St. 1865, pp. 882, 883, §§ 1, 8, 9; Rev. St. 1879, p. 530, § 3164; *People v. Mollineaux*, 53 Barb. 9. We have in the act of 1897 the general headnotes as contained in the revision of 1889; that is, "Medicine and Surgery—Dentistry," with the additional headnote of "State Board of Examiners." Then follows the statement, "An act to repeal article 3 of chapter 110 of the Revised Statutes of Missouri of 1889, and to enact a new article in lieu thereof, to be known as article 3 of chapter 110."

After a careful consideration of this proposition we have reached the conclusion that the title to the act of 1897 in a sufficiently definite expression of the subject to which the legislation in the act relates as renders it in harmony with the provision of the Constitution. It will be observed that by this act no change is sought in the chapter, other than in one of the articles of it. The chapter, with its headings, which are accepted as its title, remains the same, hence it is manifest that when the act of 1897 repeals article 3 of chapter 110 and enacts a new article in lieu of it, to be known as article 3 of chapter 110, such new article must necessarily embrace the subject in the title of chapter

110 of that article, which was "Dentistry." In other words, it is clear by the act of 1897 that article 3, treating of the subject of dentistry, was to be retained in chapter 110, and while there were changes to be made in the body of the article, treating of the subject, the subject itself was to remain the same. Article 3 of chapter 110, as denoted in the heading of such chapter, is known only as the article upon the subject of dentistry, hence, when the act of 1897 expressly says in its title that the new article shall be known as article 3 of chapter 110, it necessarily means the article 3 as designated in the title of that chapter as "Dentistry." Chapter 110, at the very opening of the chapter, labels article 3 as being a law upon the subject of dentistry, hence the statement in the title of the act of 1897, that the new article shall be known as article 3 of chapter 110, to all intents and purposes labels that law as being upon the same subject designated by chapter 110, that of dentistry. The main purpose of the constitutional provision in requiring the subject of the legislation to be clearly stated in the title in the bill was to prevent surprise or fraud upon members of the law-making body. The title to this act clearly informed the members of the Legislature as to the nature of the legislation sought by the bill. By the title of this bill they were referred to chapter 110, and informed that this act proposed to repeal article 3 of that chapter, and enact in lieu of or in place of it a new article, to be known as article 3 of the same chapter. Turning to chapter 110 (and the reference to it by the act of 1897 made it a part of the title to the act), the legislator would find the subjects treated of in that chapter, and would discover, in addition, that part of the title to the chapter designated article 3 treated of the subject of dentistry. If the new article enacted was to be known as article 3 of that chapter, the conclusion is inevitable that the legislator seeking information would readily realize that the subject of the new article to be enacted must necessarily be that of dentistry. The title to the act of 1897 makes it manifest that no one was surprised or deceived thereby, and it is sufficiently definite to inform the members of the Legislature of the nature and subject of the legislation sought to be enacted. While the title to the act indicates the enactment of a new article, yet this did not mean a new article upon a new subject, for it is made clear by the language employed in the title that while the article was denominated a new one, it was to be confined to the same subject, and the body of the act itself emphasizes the truth of this fact, for it was confined to the same subject as the former legislation which was repealed by it. The case of *Brandon v. State*, 16 Ind. 197, was approved by this court in *State ex rel. v. Ranson*, supra. It was said by the Indiana court that "if the title of an original act is sufficient to embrace the provision contained in an amend-

tory act, it will be good, and it need not be inquired whether the title of the amendatory act would, of itself, be sufficient." In *State ex rel. v. County Court*, 128 Mo. 427, 30 S. W. 103, 31 S. W. 23, it was ruled that the mere generality in the title will not vitiate an act of the General Assembly unless the title is of such a nature as to compel a conviction that it was designed to mislead as to the subject dealt with. It is clearly the province of the lawmaking power to decide upon the title of an act, and at least some deference must be paid to their decision, and an act should not be declared unconstitutional for the reason that it fails to clearly express the subject by its title, unless it clearly violates that command of the Constitution. *Dogge v. State*, 17 Neb. 140, 22 N. W. 348. In addition to this, in *State v. Murlin*, 137 Mo. 297, 38 S. W. 923, this court, in indicating the title of an act under discussion, included the general caption or headnote of the act, similar to the caption or headnote of the act now under discussion, as being a part of the title of the law, and we see no valid objection, when headnotes, as in this instance, "Medicine and Surgery; Dentistry: State Board of Examiners," are there by the Legislature during the consideration of the bill, to construing such general headnotes or caption of the bill as a part of the title of the law.

2. The act of the Legislature of 1897, which is challenged in this proceeding, is not violative or in contravention of article 2, section 30, of the Constitution of the state of Missouri, in that it deprives certain classes of persons, citizens, or individuals of property or rights without due process of law. It is sufficient to state upon this proposition that the question of the power of the Legislature to regulate the practice of those trades and professions that require particular skill and learning, the practice of which necessarily affects the public, was fully discussed in *State v. Davis* (decided at the present sitting of this court) 92 S. W. 494, and not yet officially reported. It was held in that case that the Legislature had full power to enact such laws, and that they in no way deprived persons of any vested rights or property.

3. This act does not invest the dental board with judicial functions in violation of the provisions of the Constitution. This was expressly ruled where a similar principle was involved, in *State v. Hathaway*, 115 Mo. 36, 21 S. W. 1081.

4. The indictment in this cause properly charges the offense, and there was no necessity to allege in the pleading the names of the persons upon whom the defendant practiced his profession of dentistry. *State v. Little*, 76 Mo. 52.

5. The burden in the trial of this cause was not upon the state to prove that defendant did not belong to one of the classes practicing dentistry which were excepted from the operation of the statute, as urged in the con-

tention of the appellant. It will be noted that the classes excepted from the operation of this law are enumerated in a different section, therefore, if defendant was within the class so excepted, that was a matter of defense, and the burden of proof was upon him. It was ruled in *State v. O'Brien*, 74 Mo. 549, that "when an exception is contained in a statute defining an offense and constitutes a part of the offense, an indictment for such offense must negative the exception; but when the statute contains a proviso exempting a class therein referred to from the operation of the statute, an indictment need not negative the proviso. The accused must make the exemption a ground of defense."

6. The offense with which defendant is charged is practicing dentistry without having a license so to do as provided by the statute, and it is admitted in the agreed statement of facts that he practiced his profession and had no such license, hence the contention of appellant that he had fully complied with the provisions of the law and that the board improperly refused to issue the license cannot avail him anything in this proceeding. If he had substantially complied with all the provisions of the statute, and the board wrongfully withheld from him a license, then he must resort to some appropriate remedy to compel the issuance of such license. If he practiced his profession without having the authority so to do as provided by the statute, the offense was complete, and it can make no difference, so far as this proceeding is concerned, whether the board acted justly or unjustly with him in the matter of refusing to issue the license.

We have thus given expression to our views upon the propositions presented in the record, and finding no reversible error, the judgment should be affirmed, and it is so ordered. All concur.

STATE v. TEMPLE.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—INFORMATION.

Rev. St. 1899, § 1848, provides that every person who shall be convicted of an assault with intent to kill or to do great bodily harm, or to commit any other felony, the punishment for which is not previously prescribed, shall be punished, etc. *Held*, that an information under such section is not fatally defective for failure to charge that the assault was committed "on purpose and of malice aforethought."

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 237-249.]

2. CRIMINAL LAW—TRIAL—CONDUCT.

Where accused was not manacled while his trial was actually in progress, he was not prejudiced by the fact that he was brought into court manacled from the jail and was manacled again in the presence of some of the jurors preparatory to his being returned to the jail during an intermission.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1484.]

3. SAME — APPEAL — PRESUMPTIONS — PRES- ENCE OF ACCUSED.

Where the record of a criminal case affirmatively showed that defendant was present at the time the jury was sworn, it will be presumed, in the absence of evidence to the contrary, that he was also present at all subsequent stages of the trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2763, 3027.]

4. SAME—FORMER JEOPARDY—SEPARATE OF- FENSES IN SAME TRANSACTION.

Accused, while pretending to take a horse out of a stall for inspection by police officers, shot one of them and immediately turned his pistol on the other, who immediately seized the pistol and prevented defendant from discharging it until he could be subdued and arrested. *Held*, that such facts constituted a separate assault on each officer, justifying separate convictions.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 403.]

5. SAME—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that accused is presumed to be innocent of the offense charged, that the presumption continues throughout the case until overcome by evidence showing him guilty beyond a reasonable doubt, and, if the jury had a reasonable doubt of defendant's guilt, they should acquit him, but that such doubt, to authorize an acquittal, must be substantial and founded on the evidence, and not a mere possibility of defendant's innocence, is correct.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1904-1922.]

Appeal from Circuit Court, Buchanan County; B. J. Casteel, Judge.

Sol Temple was convicted of assault with intent to kill, and he appeals. Affirmed.

Houston & Buckner and John C. Moore, for appellant. The Attorney General and Rush C. Lake, for the State.

BURGESS, J. On the 14th day of June, 1904, the prosecuting attorney of Buchanan county filed an information in the office of the clerk of the criminal court of said county, in which it is alleged that the defendant, Sol Temple, on or about the 14th day of May, 1904, at said county, "did then and there, unlawfully, feloniously, and willfully, in and upon one James Grable make an assault, and did, then and there, feloniously and willfully point at and towards him, the said James Grable, a certain * * * revolving pistol, then and there loaded with powder and leaden balls, which he, the said Sol Temple, in his right hand then and there had and held, with the intent then and there him, the said James Grable, feloniously and willfully to kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." The defendant was duly arraigned, and plead not guilty. Thereafter, on the 15th day of August, 1904, defendant was placed upon trial, found guilty, and his punishment fixed at five years in the penitentiary. In due time defendant filed motions for new trial and in arrest, which being overruled he saved exceptions, and brings the case to this court by appeal for review.

The facts of the case are but few, and are

substantially as follows: On the 14th day of May, 1904, a man named Wilkerson called upon William P. Gibson, a police sergeant in the city of St. Joseph, to go to a livery barn with him and see whether a team placed in the barn by the defendant answered the description of a team which had been advertised as stolen at Savannah, Mo., and of which the St. Joseph police officers had a description. In company with Wilkerson, Gibson went to a saloon in the neighborhood of the said barn, where they found the defendant. Gibson explained to defendant that he was a police officer, and requested defendant to show him the team. On the way to the barn they were joined by Officer Grable. Defendant stepped into the stall of one of the horses, and was engaged in untying it when Gibson remarked, "Why, this is not the team." Defendant was slow in backing out the horse, and Wilkerson, addressing defendant, said: "It takes you a long time to untie those horses. Why don't you bring them out of there?" About that time Wilkerson saw defendant draw his revolver and shoot at Gibson; the ball striking Gibson in the face. So close was the revolver that the powder burned Gibson's face. The defendant then turned his revolver upon officer Grable, who testified at the trial that he was very close to defendant, and that as soon as defendant aimed the revolver at him he grabbed it with both hands; his left thumb being placed behind the hammer. Defendant endeavored to wrench the revolver from the grasp of the officer and fire it off, but was unable to do so. With the aid of other persons who went to the assistance of Grable, the defendant was finally subdued and placed under arrest for shooting officer Gibson. No testimony was offered in behalf of the defendant.

Over the objection and exception of defendant, the court gave the jury six instructions, but for the purposes of this opinion it is only necessary to incorporate two, the first and second, as they alone are criticized. They are as follows: "(1) The defendant is presumed to be innocent of the offense with which he stands charged, and this presumption continues throughout the case until overcome by evidence showing him guilty beyond a reasonable doubt, and if you have a reasonable doubt of defendant's guilt you must acquit him; but such doubt to authorize an acquittal must be a substantial doubt founded on the evidence, and not a mere possibility of the defendant's innocence. (2) If you believe and find from the evidence that the defendant, Sol Temple, at the county of Buchanan and state of Missouri, within three years before the filing of the information in this case, with a certain revolving pistol, loaded with powder and leaden balls, feloniously and willfully made an assault on the witness, James Grable, with the intention of then and there killing him, the said James Grable, with said revolving pistol, you will find the defendant guilty of assault with intent to

kill, and assess his punishment at imprisonment in the penitentiary for a term of not less than two nor more than five years, or imprisonment in the county jail for a term of not less than six months, nor more than one year, or by both a fine of not less than \$100 and imprisonment in the county jail not less than three months, or by a fine of not less than \$100." "Willfully," as used in the foregoing instructions, means intentionally; that is, not accidentally. "Feloniously" means wrongfully, and against the admonition of the law.

The defendant requested the following instructions, which were refused, and exceptions saved. "(1) The jury are instructed that if they find from the evidence that an assault was committed by the defendant on Officer Grable, but that said assault was committed at the same time and was part of and was coincident with an assault made upon one William Gibson, you will find the defendant not guilty. (2) The jury are instructed that unless you find that the assault on Officer Grable, complained of in the information filed in this case, is distinct and separate from, and forms no part of, the assault on one William Gibson, for which defendant has already been tried and convicted, you will find the defendant not guilty." The first proposition with which we are confronted is as to the sufficiency of the information, which defendant insists is insufficient, in that it fails to charge that the assault was made feloniously, on purpose, and of defendant's malice aforethought, all of which it is contended is necessary in order to make the information good. If the information was under section 1847, Rev. St. 1899, there would be much force in defendant's contention. *State v. Seward*, 42 Mo. 206. It is not, however, drawn under that section, but under section 1848, and is in accordance therewith. The information is for a felonious assault "with intent to kill," and is not rendered defective by an omission to charge that the assault was committed "on purpose and of malice aforethought." *State v. Stewart*, 29 Mo. 419; *State v. Seward*, supra.

It appears from the record that while being conducted from the jail to the courthouse and back again, as occasion demanded, the defendant was shackled and guarded by two officers, and that the shackles were removed from his hands in the presence of some of the jurors in the courtroom, and again placed on his hands at the adjournment of the court, while the jury was still in the courtroom, the effect of which was, as contended by counsel for defendant, to prejudice the minds of the jury against the defendant and cause them to believe him to be a dangerous and desperate man. In justification of the course pursued by the officers of the court in placing shackles upon defendant while conducting him to and from the courthouse, where the trial was being held, the sheriff and one of his deputies who had

charge of all prisoners confined in the jail made affidavits duly setting forth that from the information in their possession, which seemed to them reliable, the defendant was a dangerous and desperate man; that he had broken jail at Pond Creek, Okl., on two different occasions while confined there for crime; that on one of these occasions the said defendant, while in the courtroom, drew two revolvers which had recently been supplied him, and, covering the officers with same, backed out of the courthouse, mounted a horse in waiting outside, and made his escape; that at no time when upon trial was defendant shackled in the courtroom, but that the shackles were removed immediately upon his arrival there, and not put on again until the officers in whose charge he was were upon the eve of returning him to the jail. It appeared that this was the uniform custom of said officers in conducting prisoners to and from the courthouse when upon trial. It has been held by this court, following the common-law rule, that when a prisoner is brought into court for trial, upon his plea of not guilty to an indictment for a criminal offense, he is entitled to make his appearance free from all shackles or bonds. (*State v. Kring*, 1 Mo. App. 438; *State v. Kring*, 64 Mo. 591; *State v. Craft*, 164 Mo. 631, 65 S. W. 280; *State v. Rudolph*, 187 Mo. 67, 85 S. W. 584), and to justify the keeping of shackles upon the prisoner during the trial there must arise during the trial some good reason therefor based upon the conduct of the prisoner, in the absence of which such action would be improper and would deprive the defendant of a substantial legal right, to his prejudice. But there is no pretense that the prisoner in this case was shackled during the trial. On the contrary, it clearly appears that he was not in any way deprived of the free and calm use of all of his faculties. We do not, however, intend to be understood as holding that any explanation was due from the officers in charge of the defendant for placing shackles upon him in taking him to and from the courthouse during the trial; for, according to defendant's own affidavit, he was not incumbered by handcuffs or other shackles during the progress of the trial, and he has no ground of complaint that he was shackled when he was upon trial.

There is no foundation for the assertion that the record does not show the presence of defendant during the trial or that the jury was sworn to try the case, as it affirmatively shows these facts. It shows that defendant was present at the time the jury was sworn, and it will be presumed that he was present at all stages of the trial thereafter.

Defendant insists that, as he had been convicted of an assault made upon Officer Gibson, he "could not be convicted of another assault committed and coincident with the assault of which he is convicted; that is, out of the one transaction the prosecutor can

carve but one offense." But the facts disclosed by the record do not sustain defendant's position. They show that there were two separate and distinct acts or assaults committed by the defendant in rapid succession. When defendant shot Gibson, the offense was complete the instant the shot was fired, and the assault upon Grable as soon thereafter as the loaded pistol was leveled at him with deadly intent. Defendant's proposition, as above stated, admits that there was another assault committed, which surely means that there was more than one. In Wharton's Criminal Law (6th Ed.) § 565, it is said: "But where the act is separable into two distinct branches, as where a man at the same time assaults two persons, . . . he may be convicted on separate indictments for each offense." In *State v. Standifer*, 5 Port. (Ala.) 531, the court says: "It is not of infrequent occurrence that the same individual, at the same time, and in the same transaction, commits two or more distinct crimes, and an acquittal of one will not be a bar to punishment for the other." The same rule is announced in *Vaughan v. Commonwealth*, 2 Va. Cas. 273, and in *Greenwood v. State*, 64 Ind. 250. In 11 Am. & Eng. Ency. of Law (1st Ed.) pp. 943-944, it is said: "If the two crimes are entirely separate and distinct acts, however closely they may be committed, and even though some of the ingredients of the one enters into the other, a prosecution for the one will be no bar to a prosecution for the other," etc. The test is, if, upon the trial of defendant for feloniously shooting Gibson, he could not have been convicted of the crime charged in the present information, though the jury should have been satisfied that the defendant feloniously assaulted James Grable with intent to kill him, as charged, his former conviction for shooting Gibson is no bar to this prosecution. *Commonwealth v. Roby*, 12 Pick. (Mass.) 496.

There is no merit in the contention that instruction No. 1 is erroneous in defining reasonable doubt. It logically follows from what has been said that instruction No. 2 is free from error, and that no error was committed in admitting evidence with respect to the assault by defendant upon Gibson.

Finding no reversible error in the record, the judgment is affirmed. All concur.

KOENIG et ux. v. UNION DEPOT RY. CO.
(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. INSANE PERSONS—GUARDIAN AD LITEM—STATUTES.

Rev. St. 1899, § 3667, making it the duty of every guardian ad litem of an insane person to prosecute and defend all actions instituted in behalf of or against his ward, is inapplicable, where no inquest has been held and there has been no adjudication of insanity.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, § 165.]

92 S.W.—32

2. SAME.

Where there has been no inquest and no adjudication of insanity, the fact that knowledge of the insanity of one of the complainant's first comes to defendant at the trial is not ground for suspending the proceedings on defendant's suggestion until a guardian ad litem for such plaintiff has been appointed; the insanity having arisen after the commencement of the action.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insane Persons, §§ 164, 165.]

3. STREET RAILROADS—NEGLIGENCE—QUESTION FOR JURY.

In an action for death of a child by the operation of a street railroad, evidence examined, and held, that whether defendant was negligent was a question for the jury.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 251, 253.]

4. SAME—INEVITABLE ACCIDENT—QUESTION FOR JURY.

Whether the accident resulting in the death was inevitable was also a question for the jury.

5. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.

Where instructions are given which, taken together, fully cover every proposition raised by the prospective parties which are necessary to direct the jury in arriving at their verdict, error cannot be predicated on the refusal to give a requested instruction.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by Charles A. Koenig and wife against the Union Depot Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

For former opinion, see 73 S. W. 637.

Boyle & Priest and Kiskaddon & Matthews, for appellant. Lee Meriwether, for respondents.

GANTT, J. This is the second appeal of this cause. The first is reported in 173 Mo. 698, 73 S. W. 637. The evidence is fully stated in the opinion of Judge Burgess on the former appeal, and it is unnecessary to reproduce it in full. The plaintiffs are, respectively, father and mother of Amelia Koenig, their infant daughter, who was struck and killed on the 8th day of May, 1899, by one of defendant's street railway cars at the intersection of Arsenal street and Compton avenue, in the city of St. Louis. Amelia was about six years old at the time she was killed. The defendant is a corporation organized under the laws of this state, and operating a street railway with double tracks on Arsenal street. Its cars are propelled by electricity. On the 8th day of May, 1899, between 2 and 3 o'clock in the afternoon of that day, one of defendant's cars, proceeding westward on Arsenal street, struck Amelia, at or near the crossing of the west line of Compton avenue, with such force that she died an hour or two thereafter. The testimony tended to show that from Michigan avenue, the first street east of Compton, down to Compton, there was a steep descending grade in defendant's railway track. The neg-

ligence alleged was that the defendant recklessly and negligently ran its car with great speed, in excess of the ordinance of the city of St. Louis regulating the speed and operation of street railway cars, and in violation of said ordinance, and with such rapidity that the motorman lost control thereof, so that he could not stop the same at the crossing on Compton avenue; that while running down said grade to Compton avenue the motorman neglected and failed to sound the gong or bell on said car, or to give any other warning of its approach, and failed and neglected to keep a proper lookout for persons crossing said Arsenal street at Compton avenue, and neglected to lower the fender and apply the brake until after the said Amella had been struck. The answer was a general denial. A change of venue was granted to the St. Louis county circuit court. After the reversal of the judgment on the first trial by this court, the cause was retried at the May term, 1903, of said court, and resulted in a verdict for the plaintiff in the sum of \$5,000. Motions for new trial and in arrest were filed in due time and overruled, and an appeal granted to this court. Various errors are assigned on this appeal, which will be considered in the order of their presentation in the brief of counsel for the defendant.

1. In the course of the examination of Mrs. Lizzie Koenig, the mother of Amella Koenig, she was asked, "Where is your husband, Charles Koenig?" and she answered, "He is out of his mind and is at the poorhouse. On the 29th of August he will have been there two years." On cross-examination she was asked if any jury was ever impaneled to find out whether he was insane, and she answered that there had not been. At this point in the trial, counsel for the defendant objected to proceeding further with the case on the ground that the parties would not be bound by any judgment rendered; that, plaintiff being insane, plaintiff's counsel had no authority to appear for him; that he ought to have a guardian to represent him. The court overruled this objection, and the defendant excepted. Afterwards, on the same day, the defendant's counsel made the following suggestion: "I desire to state to the court at this stage of the case— I desire to have the record show that after the jury was impaneled and sworn, and while the first witness was on the stand testifying for the plaintiff, for the first time it came to the knowledge of the defendant and its agent that the plaintiff Charles A. Koenig was insane, and the defendant now makes the suggestion to the court that the plaintiff Charles A. Koenig is insane, and suggests to the court such insanity, and asks that the trial of the case be suspended until such time as a guardian of the insane person can be appointed to represent him in court, and we object to proceeding any further with the trial of the case." The court refused to suspend the trial of the

case and ordered the trial to proceed, whereupon the defendant excepted. After the plaintiffs had introduced their evidence in chief, the defendant put Dr. Erbon on the stand and offered to prove by him that Charles A. Koenig, one of the plaintiffs, was hopelessly and incurably insane, and had been for two years. To this evidence the defendant objected as not pertinent to any issue in the case, and the circuit court sustained the objection, and defendant excepted. In its motion for new trial, the defendant assigned this action of the court as ground for a new trial, and it was overruled. It is conceded that no inquest into the mental condition of Charles A. Koenig had ever been held, and that he has not been adjudged insane by any court of competent jurisdiction. The question now is, did the circuit court err in proceeding with the trial after the suggestion of insanity was made as above stated?

At common law it is stated by Lord Coke in *Beverley's Case*, 4 Coke, 125a: "An idiot in an action brought against him shall appear in proper person, and he who pleads best for him shall be admitted, as appears in 33 Hen. VI, 18b. Otherwise it is of him who becomes non compos mentis; for he shall appear by guardian if he is within age, and by attorney if he is of full age." In *Rock v. Slade*, 7 Dowling's Practice Cases, 22, an action was brought in the name of the plaintiff, who was a lunatic, by his wife, to recover money. The defendant's attorney asked for a rule on the plaintiff's attorney to show by what authority the action was brought. Coleridge, judge on the circuit, was of opinion that under the circumstances the plaintiff's wife had an implied authority to bring the action, and he ordered that the amount of the debt should be paid into court and proceedings stayed until further order. On motion for a rule to show cause why the money paid into court should not be paid to the wife of the plaintiff, it was contended by the attorney for the defendant that the appointment of an attorney presumes mental power upon the part of the individual making it which a lunatic is incapable of exercising, and that, if the rule should be absolute, the defendant would have no protection against future action at the suit of the plaintiff. Lord Abinger said: "It is everyday practice to sue in the name of a lunatic, and I never heard any question as to the propriety of such action where no committee was appointed. If we were to compel a party to go into equity for the appointment of a committee, there are many incidents in which a lunatic might starve before he could recover his money. If the defendant wants the protection of this court, he should let the plaintiff obtain judgment." Chitty, in his *Pleadings* (volume 1, p. 577), adopts the statement of Lord Coke above noted. In *Allen v. Ranson et al.*, 44 Mo. 263, 100 Am. Dec. 282, in an action of ejectment, Judge

Bliss in the course of the opinion said: "The claim of the plaintiff seems to have been sharply contested, and various questions were sprung upon him. First, as the case was called for trial, the defendant filed a paper suggesting to the court 'that the plaintiff was insane,' to which suggestion the court paid little attention, and directed the trial to proceed, and defendant excepted. I do not see precisely the object of the suggestion, nor does the record intimate it. Even if the suggestion was true, which does not appear, the suit must proceed in the name of the plaintiff, and he might all the more require for his support the possession of his property"—citing 2 Saunders, Pl. & Ev. 318; Reed v. Wilson, 13 Mo. 28. In Reed v. Wilson, it was held that a suit on behalf of a lunatic must be instituted in the name of the lunatic, and not in the name of the guardian, and that was an action of replevin for slaves and other personal property. Since the admission of Missouri into the Union as a state, there has always been a statute making it the duty of every guardian of an insane person to prosecute and defend all actions instituted in behalf of or against his ward, and where there had been an inquest, and a party adjudged insane, and a guardian has been appointed and qualified as such, there can be no doubt it is his duty to prosecute and defend all actions instituted in behalf of or against his ward.

But it is obvious that this statute, now section 3667, Rev. St. 1899, makes no provision for a case like the one before us, where no inquest has been held and there has been no adjudication of insanity. Inasmuch as at common law an insane person could appeal by attorney, and as there had been no inquest found in the case of the plaintiff Charles A. Koenig, we think the circuit court properly declined to stop the trial upon the suggestion of the defendant. Such was the ruling in Allen v. Ranson, supra, and we have no doubt whatever that the judgment in the case will be ample protection to the defendant from another action for the same cause. In this state a deed of conveyance of real estate by an insane person before inquest is not void, but voidable only. McAnaw v. Tiffin, 143 Mo. 678, 45 S. W. 656; Jamison v. Culligan, 151 Mo. 416, 52 S. W. 224; McKenzie v. Donnell, 151 Mo. 454, 52 S. W. 214; Blount v. Spratt, 113 Mo. 55, 20 S. W. 967. If the solemn conveyances and contracts of an insane person, not in ward, are not void, but voidable only, upon equitable terms, we see no reason why a contract of employment of an attorney to bring an action should be held void. Clearly, if not void, it does not lie in the mouth of the defendant to make any objection to the retainer of counsel by the plaintiff Charles A. Koenig, especially as he employed the counsel who appeared for him when he was sane and when he obtained the first judgment in this cause in the cir-

cuit court. The circuit court, as indicated by Lord Abinger, by proper orders can protect the defendant in seeing that whatever fund is recovered is paid over to a lawfully appointed and qualified guardian.

2. It is next insisted that the plaintiffs' verdict rests upon such indefinite and such uncertain testimony, and the evidence on behalf of the defendant is so clear and overwhelming to the contrary, that the circuit court should have taken the case from the jury at the close of the whole case. When this case was before this court before on practically the same testimony, it was said: "It is clear from the evidence that defendant's motorman did not become aware of the danger of the child until the time of or after she had been run over by the car." Koenig v. Railway Co., 173 Mo., loc. cit. 724, 73 S. W. 637. The testimony on behalf of plaintiffs was to the effect that at the time defendant's car struck the little girl the motorman in charge was looking off toward the witness Dashman and did not see her in the street. The testimony further shows that up to the time he struck the child he made no effort whatever to stop the car or slacken its speed, he did not drop the fender, he used no brake prior to hitting the child, but struck her while going at a good speed. No gong or other signal or warning was given by the defendant's servants to indicate that his car was approaching, and after striking the little girl the car ran 125 feet before it stopped. There was evidence that it did not stop until it came to the first house beyond Compton avenue, and that that house was 150 feet from the avenue crossing. The weight of this testimony was for the jury, that saw the witnesses and heard them testify, to determine. Two juries have credited the plaintiffs' evidence, and it is too well settled in this state to require a citation of authorities that under such circumstances this court will not interfere with the verdict of the jury, although there may be contradictory evidence.

3. It is conceded by counsel in their brief and argument that the little girl Amelia was of such tender years that she was incapable of contributory negligence, and therefore no such defense as that is interposed in this case; but it is insisted that it was an inevitable accident, for which the defendant should not be held liable. The motorman testified that when the little girl made the start from the sidewalk to cross the tracks his car was 50 feet away from her, and his car was moving at a rate of only 8 or 10 miles an hour, and it was impossible for him to stop his car in less than 60 feet. On the other hand, Harvey C. Montgomery testified that he had had experience as a motorman in operating a street car for the Suburban Railroad, and was familiar with the size and construction of the defendant's street cars on Arsenal street, and that one of those cars,

running at the rate of 10 or 12 miles an hour on a grade descending from 3 to 3½ feet, for a distance of three blocks, on a dry track, on a clear day, could reasonably be stopped with the brakes within 60 feet, but that in an emergency, by using the reverse power, such a car as described, in the same conditions, could be stopped in 40 feet, and such a car, going only 8 miles an hour, in the same conditions, could be stopped by using the reverse power in 25 feet, and that he had often made stops of that sort when running at only 8 miles an hour. If Montgomery's testimony was true, and it was for the jury to say whether or not they believed him, it is plain that, if the motorman in charge of defendant's car which struck the little girl had been keeping a vigilant lookout, he could have seen the child starting directly in front of his car 50 feet away, and if he had applied the power at his command as directed by the ordinance he could have averted the injury to the little girl after he saw the danger she was in.

4. Defendant complains of the refusal to give the fourteenth instruction asked by the defendant. It is obvious that there was no error in the refusal of this instruction, for the reason that the court limited the plaintiffs' right to recovery to the two specifications of negligence in the petition which charged that the servants in charge of the said car failed to sound the bell or give other warning of the approach thereof, and failed to keep a proper lookout for persons crossing Arsenal street at Compton avenue on the occasion of the injury, and only held the defendant liable for failure to observe ordinary care, and then gave the fifth instruction in words as follows: "If you believe and find from the evidence that the said Amelia Koenig was at the north sidewalk of Arsenal street when defendant's car was crossing Compton avenue, and she then suddenly started from her position at the sidewalk to cross Arsenal street, and without regard to her own safety, or without looking for or seeing the car, ran into the same, and that such conduct on her part was the sole cause of her injury and death, without any negligence or want of ordinary care on the part of the motorman in charge of the car causing or contributing to such injury and death, then you should find for the defendant." And in the seventh instruction directed the jury: "If you believe and find from the evidence that the injury and death of the said Amelia Koenig were the result of mere accident or misadventure without the fault or negligence of any one, then you should find for the defendant." The court also defined "ordinary care" as has often been approved by this court. This court has often criticised the giving of numerous instructions, and has admonished the trial courts that a few plain instructions covering all the issues in a case are all that should be given; and it is plain that, taking the instructions together, they fully cover

every proposition raised by the respective parties which were necessary to direct the jury in arriving at their verdict. The cause was tried in accordance with the views expressed by this court on the former appeal, and we find no reversible error in the record. The judgment is affirmed.

BURGESS, P. J., and FOX, J., concur.

BLACK v. BRITTAIN.

(St. Louis Court of Appeals. Missouri. Jan. 30, 1906.)

EXECUTORS AND ADMINISTRATORS — ALLOWANCE TO HUSBAND — STATUTES — APPLICATION.

Rev. St. 1899, § 111, provides that, if a wife shall die intestate owning personal property in her own name, in addition to curtesy, her widower shall be allowed to keep as his absolute property all the articles and property, and be entitled to all the remedies and reliefs relating to the deceased wife's property as is provided for the widow in the deceased husband's property under sections 105-107, 109. *Held*, that such section had no application to the estate of a wife who died testate.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Petition by J. A. Black against J. W. Brittain, as administrator of the estate of R. A. Black, deceased, for an allowance to a husband. From a judgment denying the application, petitioner appeals. Affirmed.

Mooneyham & Mooneyham, for appellant. T. J. Gideon & Sons, for respondent.

BLAND, P. J. The plaintiff presented the following claim to the probate court of Greene county, to wit: "Comes now J. A. Black, your petitioner, and represents to the court: That R. A. Black died on the 20th day of January, 1904, and that your petitioner was her husband and is now her widower. That by virtue of section 111, Rev. St. 1899, he, as her widower, is entitled absolutely to the property mentioned in sections 105, 106, 107, 109. That said decedent died intestate as to all her heirs and distributees except your petitioner. That all of said articles and property mentioned in said sections being all of the household goods and kitchen furniture inventoried and appraised at \$129.45, which the decedent owned at the time of her death, and are now in the hands of John W. Brittain, her administrator. Also the sum of \$400 as his absolute property as said widower, and one year's support. Wherefore your petitioner prays that an order be made by the court directing the administrator to deliver to petitioner such of the said articles in said sections specified as are now in his possession and for \$400 and one year's support." Plaintiff succeeded in having his claim allowed in the probate court.

The administrator appealed to the circuit court, where the case was tried anew upon the following agreed statement of facts: "It

is agreed that the plaintiff, J. A. Black, and the deceased, R. A. Black, were at and before the death of the said R. A. Black, deceased (which occurred on the 20th day of January, 1904), husband and wife, and that on the 18th day of January, 1904, the said R. A. Black, deceased wife of the plaintiff, J. A. Black, made her last will and testament as follows: 'Know all men by these presents, that I, Mrs. R. A. Black, do make and publish this my last will and testament: My will is that all of my just debts and funeral expenses shall be by my executor hereinafter named, paid out of my estate as soon after my decease as shall by him be found convenient. I give, devise and bequeath unto my beloved husband, J. A. Black, all of my household furniture, goods and chattels of every description. I appoint my beloved husband, J. A. Black, to be the executor of this, my last will and testament, dated January 18th, 1904.' That thereafter on the 20th day of January, 1904, the said R. A. Black died at Greene county, Missouri, leaving the plaintiff as her widower, and four sets of grandchildren, descendants of her children, who are all dead. That after her death the said will was duly probated by the probate court of Greene county, Missouri, and admitted to record on the 30th day of January, 1904. That J. W. Brittain, appellant, is administrator with the will annexed of the estate of R. A. Black, deceased. That the only issue submitted for determination, is whether or not under the law and facts in this case, J. A. Black, respondent, as the widower of the deceased is entitled under section 111, to the property and allowances mentioned in sections 105, 106, 107, and 109, Rev. St. 1899. And it is further agreed that the value of the household and kitchen furniture belonging to her at her death, as shown by the appraisal of her estate was about \$181.00, and that the other assets in the hands of the administrator is about \$627.43, and that the debts allowed against the estate at this time are about \$418.48."

The circuit court found the issues for the defendant on the agreed statement of facts, and rendered judgment against plaintiff.

1. Section 111, Rev. St. 1899, relied on by the plaintiff, was first passed in 1895 (Laws 1895, p. 35), and reads as follows: "If a wife shall die intestate, owning personal property in her own name, in addition to curtesy her widower shall be allowed to keep as his absolute property all the articles and property, and be entitled to all the remedies and reliefs as relates to the deceased wife's property, as is now provided for the widow in the deceased husband's property, under and by virtue of sections 105, 106, 107 and 109 of said article and chapter."

The section is in derogation of the common law and for this reason must be given a strict construction (Gibbons v. Steamboat Fanny Barker, 40 Mo. 253; Jackson v. Railway, 87 Mo. 422, 56 Am. Rep. 460; Sarazin

v. Railway, 153 Mo. 479, 55 S. W. 92), and should not be allowed to infringe on the rules and principles of the common law to any greater extent than is plainly expressed. State v. Clinton, 67 Mo. 380, 29 Am. Rep. 506; Zartman-Thalman Carriage Co. v. Reid & Lowe, 99 Mo. App. 415, 73 S. W. 942. At common law, the husband, as the widower of his wife, was not entitled to any of the property allowed the widow on the death of her husband, by sections 105, 106, and 107, Rev. St. 1899. Section 111 gives the widower, in respect to this property, the same right as the widow, if she dies intestate. The statute so reads. Since an elastic construction of the section cannot be given so as to infringe upon the common-law rules and principles any further than is expressed, we are forced to conclude that where the wife dies testate, section 111, supra, as to her husband, is a dead letter.

The judgment is affirmed. All concur.

STATE v. JEFFRIES.

(St. Louis Court of Appeals. Missouri. Jan. 30, 1906.)

1. HUSBAND AND WIFE—WIFE ABANDONMENT—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to warrant a conviction of wife abandonment.

2. SAME—EVIDENCE—CIRCUMSTANCES SURROUNDING MARRIAGE.

Since Rev. St. 1899, § 1844, creating the offense of seduction under promise of marriage, provides that the marriage of defendant to the woman seduced before judgment upon indictment shall be a bar to any future prosecution, it is competent to show, in a prosecution for wife abandonment, that defendant was at the time of his marriage under indictment for the seduction of his future wife, and that the court dismissed the prosecution on the fact of the marriage being made known to it.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1110.]

3. CRIMINAL LAW—APPEAL—ERRORS REVIEWABLE.

An objection to closing argument of the prosecuting attorney cannot be considered on appeal, in the absence of a ruling on the objection adverse to defendant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1689-1691; vol. 15, Cent. Dig. Criminal Law, § 2685.]

4. SAME—MOTIONS FOR NEW TRIAL—DISCRETION OF TRIAL COURT—IMPEACHING EVIDENCE.

In a prosecution for wife abandonment, it was not an abuse of discretion for the trial court to overrule a motion for a new trial, based on affidavits of defendant impeaching the evidence of prosecutrix, where the affidavits and counter affidavits taken together showed that defendant had prosecutrix under his influence, that she was anxious for a resumption of matrimonial relations, that under a fraudulent promise to live with her defendant induced her to write a letter impeaching some of her evidence, and that she, when confronted with the letter, disclosed the scheme concocted by defendant and reasserted the truthfulness of her evidence.

Appeal from Circuit Court, Webster County; Argus Cox, Judge.

George Jeffries was convicted of wife abandonment, and appeals. Affirmed.

Dickey & McDowell, for appellant. J. P. Smith and M. Selph, for the State.

BLAND, P. J. At the October term, 1901, of the Webster circuit court, the defendant was convicted on an information charging him with wife abandonment. The jury found him guilty, but was unable to agree upon the punishment, and the court assessed his punishment at a fine of \$100. A motion for new trial was filed and overruled. Defendant duly appealed from the judgment.

No abstract of the record, no statement of the errors complained of, nor brief has been filed by either party. The case is here on a full transcript, from which it appears that at the March term, 1901, of the circuit court of Webster county, the grand jury presented an indictment against the defendant, charging that on April 12, 1900, at the county of Webster, under a promise of marriage made to Sarelka Moore, he unlawfully and feloniously seduced the said Sarelka, an unmarried female under 21 years of age and of good repute. Pending this indictment, the defendant and the said Sarelka were married, on August 12, 1901. The fact of the marriage was made known to the judge of the court, who, at the September term, 1901, dismissed the prosecution for seduction for the reason the defendant had married the prosecuting witness. It appears that the defendant was under 21 years of age and that Sarelka had a child by him, born prior to the marriage. Defendant had no home of his own, or the means of acquiring one, or the means to procure the necessary furniture to go to housekeeping, so on the day of his marriage he took his wife to his brother-in-law's, with whom he had raised a farm crop.

The evidence of the prosecuting witness is, in substance, that after defendant took her to his brother-in-law's, he was absent most of the time, spending his time at his father's and in the city of Springfield, making promises, however, from time to time, that he would go to housekeeping, but made no preparation or effort to set up a home, and finally, about six weeks after the marriage, said to his wife: "I am free and my bondsmen are free, and I am going to stay away from you. You can go to your father's. I may not be back for two months and don't know that I will ever come back. You can go to your father's and live there; I don't intend to live with you, and am not going to live with you. I am out of law and intend to stay out." Pending the indictment for the seduction, before his marriage, defendant said to one of his friends, "They may make me marry the girl, but they can't make me live with her." The evidence on the part of the state tends to show that the prosecuting witness treated the defendant with kindness and affection and was anxious to live with him and have a home of her own; that they

had no personal difficulties or quarrels and the abandonment was wholly without cause; that neither before nor after the separation did the defendant contribute one farthing to the support of his wife, and never recalled or modified his order to her to go to her father's and live.

There is much countervailing evidence, but what we have recited as having been adduced by the state, we think is sufficient to warrant the verdict of guilty; and the judgment should not be reversed, unless prejudicial error intervened at the trial. The defendant saved an exception to the introduction of the indictment for the seduction as evidence and the order of the court dismissing the prosecution of that indictment, for the reason the fact of the marriage was made known to the court. An indictment is not evidence of guilt and not of itself evidence of any fact, other than the one that it was presented by the grand jury. The statute creating the offense of seduction under promise of marriage (section 1844, Rev. St. 1899) provides: "If before judgment upon indictment, the defendant marry the woman seduced, it shall be a bar to any further prosecution of the offense," etc., and the cause shall be dismissed at the defendant's cost. This provision of the statute opens a way whereby a man indicted for seducing a woman under promise of marriage, may, if he be so base, escape punishment for his crime by going through the form and ceremony of marriage with her while he has in his mind and heart a fixed purpose not to become her husband in fact, but to throw off his marital obligations at the first favorable opportunity and abandon her and the fruit of his crime to shift for themselves as best they can. The evidence for the state tends to show that defendant married the woman, whom he was indicted for seducing, for the sole purpose of escaping trial and apprehended conviction for the seduction, and at the first opportune moment sent her and his child back to her father's, telling her that he did not intend to live with her. It seems to us that the history of the marriage and the circumstances under which it was consummated were relevant to the issue as to whether or not the defendant abandoned his wife. They certainly shed light upon his conduct subsequent to the marriage, and served to interpret his meaning, when he told the prosecutrix to return to her father's house, that he did not intend to live with her. We think, therefore, under the peculiar state of facts shown in the case, the indictment for seduction, and the order of the court dismissing the case were admissible for the purpose of showing that the defendant did not marry the prosecuting witness in good faith, but to escape apprehended punishment and with the intention of abandoning her.

The bill of exceptions shows that the prosecuting attorney, in his closing argument to the jury, over the objections of the defend-

ant, stated that the defendant had been convicted and shown to be guilty of seducing the prosecuting witness prior to the institution of the prosecution for abandonment, and had pleaded with her for mercy and marriage to save him from the penitentiary, and that the defendant had married the prosecuting witness solely for the purpose of escaping the penitentiary on the charge of seduction. The bill of exceptions does not show what ruling, if any, was made on this objection. For aught that appears in the record, the court may have rebuked the prosecuting attorney or have taken some other action withdrawing the objectionable remarks from the jury. In the absence of any showing that the court made a ruling on the objection, adverse to the defendant, it is not before us for review.

Affidavits were filed in support of the motion for new trial, directed to the misconduct of the officer in charge of the jury and for the purpose of impeaching the evidence of the prosecuting witness. Counter affidavits were filed by the state. These affidavits raised issues of fact for solution by the trial court. It is by no means made clear by any of the affidavits that the officer was guilty of misconduct. The affidavits and counter affidavits concerning the evidence of the prosecuting witness show that the defendant yet has her under his influence, that she is greatly attached to him and anxious that he should resume and continue his marital relations with her; and that under a promise to live with her, which promise he did not intend to keep, he induced her to write a letter impeaching some of her evidence. When confronted with this letter she, in an affidavit, disclosed the scheme the defendant had concocted to escape punishment for the abandonment, and reasserted the truthfulness of her evidence. We do not think the learned trial judge was in error or was guilty of an abuse of his discretion in overruling the motion for new trial, on the evidence as presented by the affidavits.

No reversible error appearing in the record, the judgment is affirmed. All concur.

WHITE v. BLANKENBECKLER.

(St. Louis Court of Appeals. Missouri. Jan. 30, 1906.)

1. APPEAL—ABSTRACTS—SUFFICIENCY.

Abstracts filed by appellant, containing a recital of the proceedings in the trial court resulting in an appeal, the pleadings, and a summary of the evidence of each witness, substantially comply with the rule of the St. Louis Court of Appeals governing cases in which a full transcript is filed.

2. LIMITATION OF ACTIONS—COMMENCEMENT OF PERIOD—APPOINTMENT OF ADMINISTRATOR.

Limitations do not begin to run against an action for conversion of property left by a deceased person until the appointment of an executor or administrator.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 424-427.]

3. EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST ADMINISTRATORS—CONVERSION BY DECEDENT.

Where a widow took charge of all her deceased husband's property, and continued to use and dispose of it as she pleased during her lifetime, her administrator could not be sued by her husband's administrator as for a conversion of such property in the absence of an identification of any of such property as coming into the hands of her administrator, but the remedy of the husband's administrator was by a proceeding in the probate court for the allowance of a demand against the widow's estate.

4. TROVER AND CONVERSION—TRUSTS—ESTABLISHMENT.

Any right of the heirs at law of a decedent to establish in equity a trust in their favor in assets of the estate of their ancestor's deceased widow, on the ground of her use and disposition of property left by her husband at his death, cannot be enforced in a suit against the widow's administrator for conversion.

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Action by Edward White, as administrator of Elisha Wallin, deceased, against George Blankenbeckler, as administrator of the estate of Mrs. N. A. Wallin, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Livingston & Burroughs, for appellant. W. B. Campbell and O. L. Haydon, for respondent.

BLAND, P. J. It appears from the evidence adduced on the trial that Elisha Wallin, who was the husband of Mrs. N. A. Wallin, died intestate, in February, 1893, possessed of a small stock of merchandise of the value of about \$250, one milch cow (since dead) worth \$40, a yoke of oxen sold for \$65, \$150 in open accounts, \$175 of solvent notes, \$180 in cash, the usual amount of household goods kept by families in his circumstances, and a lot of provisions. At the time of his death, he was postmaster and kept the post office in his store. His widow succeeded him as postmaster and took charge of the store, and all the goods, wares, and merchandise, and all of his other personal assets. She collected the outstanding accounts and notes, and continued to run the store in her own name and on her own account until her death, which occurred on the 29th day of May, 1904. Defendant is the administrator of her estate, and as such took possession of the goods and merchandise found in the store and all of her other assets, the appraised value of which is \$794.53. After the death of Mrs. N. A. Wallin, plaintiff was appointed administrator of the estate of Elisha Wallin, and as such demanded of the defendant all the personal property in his hands as assets of the estate of N. A. Wallin. Defendant refused to deliver said property or any part of it to plaintiff, whereupon plaintiff brought this suit, alleging that the goods, moneys, effects, etc., inventoried as belonging to the estate of N. A. Wallin, were the goods and effects of the estate of Elisha Wallin, and that the defendant, as administrator of N. A. Wallin,

wrongfully converted said property on the — day of June, 1904, and has wrongfully disposed of the same to plaintiff's damage in the sum of \$1,000, for which judgment was prayed against the defendant as administrator of the estate of N. A. Wallin, deceased.

The answer was a general denial, and the following affirmative defense: "For second and further defense the defendant says that he is the duly qualified administrator of the estate of N. A. Wallin, deceased, and as such administrator he did in the ordinary course of administration take possession of all the personal estate and property of said decedent that was known to him, and that he now holds the same as such administrator. He expressly denies that the plaintiff has ever had any interest in said property, or any part thereof, or was ever possessed of the same. On the contrary he alleges that at the time of her death the defendant's decedent was the absolute owner and in actual possession of all of said property. For a third and further defense the defendant says that the said N. A. Wallin, deceased, was at the time of her death and for more than 10 years prior thereto in the actual and continued possession of all the property that has come into the defendant's possession as her administrator, under a claim of ownership adverse to the plaintiff and to all other persons. He therefore pleads and relies upon sections 4272 and 4273 of the Revised Statutes of 1889, and the defendant alleges that if the plaintiff ever had any claim to said property his right of action for recovery of same is barred by each one and both of said statutes."

Plaintiff showed that he had demanded of the defendant all the goods and personal property inventoried by the defendant as belonging to the estate of N. A. Wallin, but defendant had refused to deliver the same to him. The evidence tends to show that after the death of her husband, Mrs. N. A. Wallin went to see the probate judge of Howell county in regard to said estate, and was told by the judge that she would have to take out letters of administration; that afterwards she called in two "of the Wallin boys" and told them, if they would let her have the store and run it as long as she lived, that what was left at her death should go to them, and they agreed to this proposition. The issues were submitted to the court sitting as a jury, who, at the close of plaintiff's evidence, gave a declaration of law to the effect that the plaintiff could not recover, and rendered judgment for the defendant.

1. Defendant has contented himself with filing a motion to dismiss the appeal, on the ground that the abstracts filed by plaintiff are insufficient and fail to comply with the rules of the court. The case is here on a full transcript. The abstracts filed by plaintiff contain a recital of the proceedings in the trial court, resulting in the appeal, the pleadings and a summary of the evidence of each

witness introduced. We think it substantially complies with the rule of the court, in cases where a full transcript is filed, and deny the motion to dismiss the appeal.

2. We are not informed by anything that appears in the record on what particular ground or for what reason the court gave the declaration of law to the effect that plaintiff could not recover. Plaintiff states in his brief that the trial court was of the opinion that the action was barred by the statute of limitations. If the court took this view, it was in error, for the statute is not put in operation by one taking possession of property left by a deceased party and claiming it as his own. It does not begin to run until an executor or administrator is appointed. The general rule is, to set the statute in motion, there must be some one, at the time, having capacity to sue. *McDonald v. Walton*, 1 Mo. 727 (republication 521), 14 Am. Dec. 318. Where there is no one to sue, laches cannot be imputed. *Reilly v. Chouquette*, 18 Mo. 220; *Dillon's Adm'r v. Bates*, 39 Mo. 292.

3. The evidence fails to show that the personal property or any of it, owned and possessed by Elisha Wallin at the time of his death, was on hand and in the possession of his widow at the time of her death; to the contrary, the evidence tends to show that none of it was on hand at the time of the death of his widow, therefore, none of it came into the possession of the defendant as her administrator. According to the evidence, Mrs. N. A. Wallin took charge of all her deceased husband's property and continued to use and dispose of it as she pleased during her lifetime. If there was a conversion, it is she who was the guilty party as none of Elisha Wallin's property could be identified as coming into the hands of her administrator. It is not clear on what theory of law the defendant, as administrator, can be deemed a party to a wrongful conversion of personal property by his intestate. It seems to us that plaintiff's remedy is the ordinary one provided by law for the allowance of demands against a decedent's estate in the probate court.

4. Plaintiff insists that by the agreement testified to have been made by and between Mrs. N. A. Wallin and the "Wallin boys," that she should have the management and use of her deceased husband's estate during her lifetime, and at her death what remained should go to them, she, as to this property, became a trustee and held it as such for the benefit of the heirs at law of Elisha Wallin. It appears that there were four "Wallin boys," two brothers and two nephews of Elisha Wallin. Only two of them were parties to the agreement with Mrs. N. A. Wallin. It is not shown that the "Wallin boys" are the heirs at law of Elisha Wallin, nor does it affirmatively appear that there are no debts against his estate. If the "Wallin boys" are his heirs at law and there are no debts against his estate, it may be, that in a proper equit-

able proceeding, they may be able to show that N. A. Wallin held the personal property of her deceased husband as their trustee and establish an equity in the assets in the hands of her administrator, superior to the claim of her heirs; but this cannot be done in a suit against her administrator for conversion.

The judgment is affirmed. All concur.

CITY OF MEXICO v. HARRIS.

(St. Louis Court of Appeals. Missouri. Jan. 30, 1906.)

1. MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCES—PROSECUTIONS—NATURE OF PROCEEDING.

Under Rev. St. 1899, § 5795, authorizing the police judge of a third-class city to hear and determine complaints against persons arrested and brought before him, and section 5806, authorizing an appeal from a judgment of the police judge by the defendant or the city, a prosecution for violation of a city ordinance is not a criminal action, but a civil one, and the sufficiency of the complaint is to be determined by the rules applicable in other civil cases.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 1895, 1406.]

2. SAME—REQUISITES OF COMPLAINT.

A complaint for violation of a municipal ordinance is sufficient, regardless of its form, if it notifies defendant of the particular ordinance which he is charged with violating, and is sufficient to bar another prosecution for the same offense.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 1895, 1406.]

3. SAME—CONFORMITY TO AFFIDAVIT.

Since the statute governing prosecutions for violations of a city ordinance does not require the complaint to be supported by an affidavit or oath, it is immaterial whether the complaint, as filed, conforms to the affidavit on which it purports to be based or not.

4. GAMING—CRIMINAL PROSECUTIONS—SUFFICIENCY OF COMPLAINT.

In a prosecution for violating a municipal ordinance, a complaint stating that on a certain day defendant unlawfully set up a gambling device in a certain house within the corporate limits of the city, in violation of a certain ordinance thereof, was sufficient as against a motion to quash the complaint.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, §§ 249-255.]

5. SAME—EVIDENCE.

In a prosecution for violation of a city ordinance prohibiting the setting up of gambling devices, evidence of a complaint against, and plea of guilty by, defendant in a previous prosecution for gaming based on the same transaction as that for which defendant was on trial, was competent to show that a certain table produced in evidence was a gambling device.

6. SAME—OFFENSES—GAMING DEVICES.

A municipal ordinance declaring it a misdemeanor for any person to set up or keep a gaming table or device, or to permit any such table or device to be set up for the purpose of gaming in any house or premises belonging to him, or in his possession, is directed against any person who sets up a gaming device in violation thereof, whether such person is the owner, proprietor, or a mere occupant of the place where he sets up the device.

7. CRIMINAL LAW—FORMER JEOPARDY—IDENTITY OF OFFENSES.

The offense of gaming is not identical with the offense of setting up a gambling device on which the gaming is done, and a conviction for the former is not a bar to a prosecution for the latter.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 401.]

Appeal from Circuit Court, Audrain County; Houston W. Johnson, Judge.

Action by the city of Mexico against John W. Harris for the violation of an ordinance. From a judgment of conviction rendered in the circuit court on appeal from the police judge, defendant appeals. Affirmed.

P. H. Cullen, for appellant. J. T. Baker and O. Hitt, for respondent.

BLAND, P. J. On a trial before the police judge of the city of Mexico, Mo., the defendant was convicted of a violation of the following ordinance of said city: "Sec. 109. Setting up gambling devices.—Any person who shall, in this city, set up or keep any gaming table or gambling device, the setting up and keeping of which is not by the law of this state declared to be a felony, at which any game of chance shall be played for money, property or anything representing money or property or shall suffer or permit any such table or device, at which any game of chance is played, to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or of which he hath at the time the possession or control, shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than fifty nor more than one hundred dollars." Defendant appealed to the circuit court of Audrain county, where on a trial de novo he was again found guilty and adjudged to pay a fine, from which judgment he appealed to this court. In the circuit court the following motion to quash the information, so called, was filed and overruled by the court: "Now comes the defendant and moves the court to quash the affidavit and statement of the city attorney herein, and for cause says there is a variance between the affidavit and the attorney's statement; that neither the affidavit or statement states facts sufficient to constitute a charge against the defendant; that the said affidavit is uncertain, ambiguous, and indefinite, and fails to apprise the defendant of the charge made against him."

The action of the court in overruling said motion is assigned as error. The affidavit upon which the information purports to have been founded need not be set out, as it is of no importance in the determination of the error assigned. The information is as follows (omitting caption and signature): "The undersigned, city attorney of the city of Mexico, Audrain county, Mo., upon the complaint of J. D. Sims, informs the court that one John Harris on the ——— days of January, Febru-

ary, and March, 1903, within the corporate limits of said city of Mexico, did then and there willfully and unlawfully set up and keep a gambling device the setting up and keeping of which is not by the laws of this state declared to be a felony, at which was played a game of chance, commonly called 'poker,' with a pack of playing cards in which chance was a material element at which a game of chance was played for money, property, and effects, and did bet and wager on the side in a house, room, or place which is known as the Mayfield building within the corporate limits of the city of Mexico, contrary to and in violation of the provisions of section 109, of chapter 22, of the revised ordinances of the city of Mexico, 1893, entitled 'Misdemeanors'; wherefore the plaintiff asks the court to render judgment against said defendant for the penalties prescribed by the ordinance for said offense, together with the costs of this prosecution and for all other proper relief."

1. The city of Mexico is a city of the third class. Section 5795, art. 4, c. 91, Rev. St. 1899, concerning cities of the third class, provides: "When any person shall be arrested and brought before the police judge, it shall be the duty of the judge to hear and determine forthwith the complaint alleged against the defendant," etc. Section 5805, of the same article and chapter, authorizes an appeal from the judgment of the police judge by the defendant or the city. A prosecution for violation of a city ordinance is not, as assumed by appellant, a criminal action, but a civil one, and for this reason the sufficiency of the complaint is to be determined by the same rules as are applicable in other civil cases. *City of Gallatin v. Tarwater*, 143 Mo. 40, 44 S. W. 750; *City of St. Louis v. Weltzel*, 130 Mo. 600, 81 S. W. 1045; *Town of Canton v. Ligon*, 71 Mo. App. 407; *City of Cassville v. Jimerson*, 75 Mo. App. 426; *City of California v. Harlan*, 75 Mo. App. 506. The statute, supra, authorizes a police judge to proceed when complaint of a violation of an ordinance is made. Such complaint, regardless of form, is sufficient, if it notifies the defendant of the particular ordinance he is charged with violating, and is sufficiently definite to bar another prosecution for the same offense. The statute does not require that the complaint shall be supported by the affidavit or oath of any one; for this reason it is wholly immaterial whether the complaint, as filed, conforms to the affidavit upon which it purports to be based or not. The defendant was tried on the complaint filed by the city attorney, and not upon the affidavit. The complaint notified him of the particular ordinance he was charged with violating, and is sufficiently definite to bar another prosecution for the same offense. For these reasons the motion to quash was properly overruled.

2. Sims, the prosecuting witness, testified that on March 7, 1903, in company with the

city marshal, he entered the Mayfield building, in the city of Mexico, ascended to the second floor, and, by looking over the top of a partition, saw Harris, the defendant, Boyd, and Miller sitting around a table (produced in court) with poker chips (also produced in court), before them and cards in their hands. The city, over the objection of defendant, offered in evidence a complaint made by Sims, charging Harris, Boyd, and Miller with a violation of section 111, chapter 22, ordinance of the city of Mexico, by playing a game of chance with cards for money, in the Mayfield building, March 7, 1903, filed before the police judge of the city of Mexico, and the docket entry of said judge, showing that the three defendants pleaded guilty to the charge. Sims testified that the offense of gambling to which defendant pleaded guilty and the setting up of the gaming table, for which he was then on trial, were committed at one and the same time. It seems to us that on this evidence of Sims the complaint and plea of guilty to gaming were competent evidence, for the purpose of showing the table produced in evidence was used as a gambling device. Sims also testified that defendant, a few months before his arrest, told him he had a poker game and was running it in the building named in the complaint. The city marshal testified that he and Sims went to the room together and found defendant, Boyd, and Miller sitting around the table with poker chips before them and cards in their hands, and that he seized the table, chips, and cards and produced them in court, and that two days after this he found from 60 to 75 poker chips in the same room. Robert Kemp, a witness for respondent, testified that at one time he occupied the room with defendant and Boyd; that Boyd and defendant turned it into a poker room and he left them; that afterwards they continued to occupy the room as a poker room and played cards in it for money. There was countervailing evidence offered by the defendant and evidence that the room was rented by Boyd alone.

The court refused the following instruction asked by defendant: "The court instructs the jury that a man cannot be fined twice for the same offense, and if you believe that the defendant in this case has been fined for betting at cards in a room in the Mayfield building, and that in assessing such fine the city court took into consideration the same acts as are sought to be proved against the defendant, or that any material part of the evidence in this case made out the offense for which he was fined in the city court, then his conviction here would be unlawful, and you should acquit him." The court refused other instructions asked by defendant, but modified them and gave them as modified. The modifications are indicated by the terms embraced in brackets. The instructions, as given, are as follows: "(a) Even if you believe that Harris and Boyd were jointly in-

terested in the business, yet, if you believe that Boyd rented the building and assumed control of the room [and did solely and exclusively use and control same and Harris had no interest in same or control thereof], then he, and not Harris, was the man who set up and kept the gambling device and the defendant is entitled to an acquittal. (b) The court instructs the jury that one cannot be convicted of setting up a gambling device unless it is proved by the evidence beyond a reasonable doubt that he provided [or assisted in providing] whatever was necessary for the game, and to go further and propose to play and to play upon it, and, if you believe he did not set up the gambling device as above defined [or aid in setting it up], you must acquit him, even though you believe he used it to gamble upon. (c) One cannot be convicted of 'keeping' a gambling device by reason of playing upon it or betting with others. He must have the custody, care, and control of it, and must hold the same in readiness to obtain bettors, and in this case, even though you believe that Harris frequented the room and bet and gambled therein, yet, if you believe that some one else rented the room and assumed to control it [and did control said room and tables or devices therein], then defendant is not guilty. (d) If you believe that one Joe Boyd rented the room and paid the rent thereon and bought and paid for the furniture therein and controlled the room [tables or devices therein, exclusively], then you must find the defendant not guilty. (e) Before you can convict the defendant you must believe that he had the sole and exclusive control of the room and the gambling device therein [or jointly used and occupied the same with said Boyd], and, if you believe that Joseph Boyd or some one else had an interest in the room and controlled the matter of betting [and tables or devices solely and exclusively], then the defendant cannot be found guilty. The court instructs the jury that the defendant is not charged with betting or gaming, and you cannot find him guilty because you may believe he bet or gambled in the room mentioned in evidence. He is charged with setting up and keeping a gambling device, and you must either convict him of this offense or acquit him, and, even if you find that a gambling device was set up and kept in said building, yet if you believe the building was rented by Boyd, and that Boyd controlled said building, then defendant is not guilty [unless defendant occupied said room jointly with said Boyd and aided, abetted, and assisted in setting up or keeping said gambling device]. We think the modifications in the several instructions were correctly made, for defendant could as well violate the ordinance by setting up a gambling device with the consent of the lessee of the room, or in conjunction with him, as if he himself was the lessee. The ordinance is not specially directed against the owner, proprietor, or lessee of a room or place where

the prohibited game is set up, but is directed against any person who sets up the prohibited game in violation of the ordinance, whether he is the owner, lessee, or proprietor, or the mere occupant of the place where he sets up the prohibited game.

In regard to defendant's refused instruction, it will suffice to say that the offense of gaming, to which he pleaded guilty before the police judge, is not identical with the offense for which he was tried and convicted. For this reason the former conviction was no bar to the prosecution. *State of Missouri v. Wister*, 62 Mo. 592.

We have no fault to find with any of the instructions given on behalf of the respondent. It seems to us that on the evidence the conviction was eminently proper, and, no reversible error appearing in the record, the judgment is affirmed. All concur.

SENN v. UNION PREMIUM & MERCANTILE CO.

(St. Louis Court of Appeals, Missouri, Jan. 18, 1906. Rehearing Denied Jan. 20, 1906.)

1. CORPORATIONS — TRANSFER OF STOCK — RIGHTS OF ASSIGNEE.

The right to freely sell and dispose of the shares of stock in an incorporated company is an incident to the ownership of such shares, and an assignee thereof ordinarily has the right to have them transferred to his own name on the books of the company and a new certificate issued to him.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 488, 490.]

2. SAME—GIFT OF STOCK.

The inadequacy of consideration paid for stock in a corporation, or the fact that it is given to the assignee, does not affect the assignee's right to have the stock transferred to him on the books of the corporation.

3. SAME—MOTIVE OF ACQUISITION.

So long as the assignee of stock is a genuine purchaser or donee and does not take the shares in secret trust for the assignor or as a mere puppet for him or for some positively iniquitous purpose, the motive of the assignment does not affect the assignee's rights to acquire the stock and have it registered in his name.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 488, 490.]

4. SAME—RIGHTS OF TRANSFEREE—BURDENS IMPOSED BY TRANSFEROR.

Where the owner of shares of stock in a company has bound his shares by an agreement to which the other stockholders are parties to consolidate the company with another company, and assigns his stock to a purchaser who has knowledge of the agreement, the purchaser takes the stock subject to the burden of and is bound by the agreement.

5. SAME—TRANSFER OF SHARES—CONDITIONS OF TRANSFER.

Where an assignee of stock in a corporation took the same with knowledge of an agreement of his assignor to submit to a consolidation of the corporation with another company, but was not shown the original agreement itself and was placed in doubt as to whether his assignor had signed it unconditionally, he was entitled to a decree ordering a transfer of the stock to him on the books of the company with the condition that he should be fully bound by

the agreement signed by his assignor, but it should not be made a condition of the transfer that he himself subscribe the original agreement.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by G. William Senn against the Union Premium & Mercantile Company. From the judgment rendered, plaintiff appeals. Reversed.

The consolidation contract referred to in the opinion was as follows:

"Memorandum of joint agreement between the stockholders of the Union Premium & Mercantile Company and the stockholders of the Charles Rost Furniture & Premium Company, for the purpose of consolidating the business of both companies. We, the undersigned, stockholders aforesaid, for and in consideration of the mutual promises, stipulations and agreements herein contained, do hereby stipulate and agree with each other as follows:

"First: Each and every stockholder of either company, or both, signing this agreement shall be bound by the same. But this agreement shall be effective only when sufficient of the stock of both companies, as required by the laws of the state of Missouri, shall have been subscribed to effect the purpose intended hereby.

"Second: A corporation shall be organized by a majority of the stock holders in interest who subscribe hereto, under the laws of Missouri, which company shall be styled Rost Union Premium Company, or other suitable name, which company shall have a capital stock of thirty-five thousand dollars, being the combined capital of the two existing companies, which capital stock is to be divided into thirty-five thousand shares of the par value of one dollar per share, and shall be fully paid stock by taking over as going concerns the assets of the present existing companies.

"Third: Each stockholder shall deposit the shares standing in his name on the books of the company with F. A. Trebbe, which stock shall be indorsed in blank, and shall receive in exchange for such stock the same number of shares in the new company as is now held by him in both of the existing companies or in either company.

"Fourth: The new company to be formed shall take over all the assets of both of the existing companies and shall assume all of the liabilities of both.

"Fifth: All terms of employment held by any subscriber hereto in either of the existing companies, whether by election or resolution, or appointment, or in any other manner, shall immediately upon the organization of the new company herein mentioned, cease and determine.

"Sixth: Charles Rost, a stockholder in the Charles Rost Furniture & Premium Company, and Arnold L. De Voigne, a stockholder in the Union Premium & Mercantile Com-

pany, hereby agree with the other subscribers to this agreement (and this is one of the considerations inducing the other subscribers hereto to enter into his agreement), that they will each execute and deliver to the said new company an agreement in words and figures as follows, to wit: 'I will not, either directly or indirectly, for the period of five years from the organization of this company, engage, within a radius of fifty miles of the territorial limits of the city of St. Louis, Mo., in the business now or heretofore carried on by said Charles Rost Furniture & Premium Company, and the Union Premium & Mercantile Company or any other business which this company may engage in, nor shall I, either directly or indirectly, in my own name or otherwise, hold any stock in or be interested in any corporation, firm, or business of like character as said Charles Rost Furniture & Premium Company, and said Union Premium & Mercantile Company, or which this company may engage in, nor shall I hold any office or employment of any kind whatsoever in any business of like character. And for each and every day that I shall violate this agreement, I shall forfeit and pay to this company, its successors or assigns, the sum of fifty dollars per day by way of liquidated damages, and not as a penalty.'

"In Testimony Whereof, the said parties have hereunto subscribed their names at the city of St. Louis, Mo., this 1st day of September, 1904.

"Joseph Loewenberg, 6,622 shares.

"A. L. De Voigne, 12,120 shares."

Then follow the signatures of the other shareholders in the two companies to be consolidated.

Kinnerk's letter, written as defendant's attorney, and refusing to transfer shares of stock to plaintiff, reads: "Mr. G. Wm. Senn, Attorney at law, Granite Building, City—Dear Sir: Referring to your demand made upon Mr. Trebbe, Secretary of the Union Premium & Mercantile Company, this morning, for the transfer of certain stock in said company to yourself and Mr. Joseph C. Mueller, I beg to say that Mr. Arnold L. De Voigne, who is the owner of the stock which is requested to be transferred, in conjunction with all the other stockholders of this company and the Charles Rost Furniture & Premium Company on September 1, 1904, entered into an agreement in writing providing for the consolidation of these two companies. Such being the case, the request that this stock be transferred to yourself and Mr. Mueller can only be complied with provided you and Mr. Mueller agree in writing to be bound by the terms and conditions of this contract. You are welcome to see this contract at my office any time you may desire to do so. We hold stock left with Mr. Trebbe this morning awaiting an answer to this communication. In the meantime, I remain. Very truly yours, Wm. A. Kinnerk, Att'y for

Union Premium & Mercantile Company and Charles Rost Furniture & Premium Company."

The document, delivered by plaintiff to defendant to signify his willingness to be bound by the consolidation contract, reads: "These presents witnesseth that the undersigned, assignee through Arnold L. De Voigne, of shares of stock in the Union Premium & Mercantile Company, a corporation, transferred and assigned by one U. G. Bibby, accepts the transfer of such shares and new certificate therefor issued by said company with full acknowledgment and notice of the claim asserted by Joseph Loewenberg and other stockholders in said company, and in the Charles Rost Furniture & Premium Company, a corporation, under and by virtue of a contract or agreement, alleged to have been executed by said De Voigne, for the consolidation of the aforesaid company with the Charles Rost Furniture & Premium Company, a corporation, and the organization accordingly of a new company upon such consolidation; and that the undersigned, pursuant to the foregoing, requests and accepts such transfer and new certificate subject to any rights against such transferred shares which said Loewenberg and others may have and hereafter establish pursuant to the said alleged contract. Witness my hand and seal this 10th day of November, 1904. G. Wm. Senn. [Seal.]"

Rassieur, Schnurmacher & Rassieur, for appellant. Wm. A. Kinnerk, for respondent.

GOODE, J. (after stating the facts). The petition in this case is in the nature of a bill in equity, and the relief sought is an order on the defendant corporation and its officers, to transfer 1,080 shares of stock to the plaintiff on the books of the company, and issue to him a certificate for the shares. Prior to their alleged purchase by the plaintiff, these shares stood on the books in the name of U. G. Bibby, and he held a certificate for them; but they were actually owned by A. L. De Voigne, from whom plaintiff asserts he purchased them about November 5, 1904. The good faith of this purchase is contested, the answer averring that plaintiff holds the shares for the benefit of De Voigne, whose property they still are; and that the sale to plaintiff was colorable and made for the purpose of evading an agreement which De Voigne had signed. The answer further states that the defendant had agreed, before this suit was brought, to transfer the shares to plaintiff, provided he would abide by and become a party to said contract. The instrument containing the contract bears the date of September 1, 1904, and was executed by all the shareholders, including De Voigne, in the Union Premium & Mercantile Company, the defendant, and also by all the shareholders in the Charles Rost Furniture & Premium Company, a corporation engaged,

like the defendant, in the furniture business. The object of the agreement was to bind the shareholders in the two companies to an arrangement for their consolidation, or merger into a new corporation intended to be organized under the name of the Rost Union Premium Company. The new organization was to have a capital stock equal to the combined stocks of the two old companies and the intention was that it should take over all their assets and assume their liabilities.

There were other stipulations in the contract not relevant to the present controversy. De Voigne signed it as the owner of 12,120 shares of stock, all in the Union Premium & Mercantile Company. The other shareholders in the two existing companies likewise pledged their full holdings to its terms. But De Voigne swore that at the time he signed the instrument, he made notations on it, denoting that he would not be bound by its provisions unless certain changes were made. He objected to the name "Rost" appearing in the name of the new corporation, because he was at enmity with Charles Rost. He also objected to certain persons being taken in as shareholders, and made a more or less insistent demand that a writing be executed showing an agreement to pay him a salary in the new company. De Voigne did not swear that he noted these matters on the consolidation agreement before signing it, or that he wrote anything on it signifying that his signature was not intended to bind him; but says he told Loewenberg, the president of the defendant company, that he would be bound only in case his objections were removed. In point of fact, he put nothing on the instrument except a blue mark under the word "Rost" and a cross-mark after the word "Company" in the clause of the instrument providing that the new corporation should be styled "Rost Union Premium Company." As said, the agreement for the consolidation was executed September 1, 1904, and in a few days, the articles of association of the intended new corporation, into which the old companies were to be merged, were sent to the Secretary of State. But on September 9th, De Voigne telegraphed that official to await a letter objecting to a certificate being issued to incorporate the new company under the name of the "Rost Union Premium Company." This telegram was followed by a letter of the same date in which the objections were stated to be that the defendant, the Union Premium & Mercantile Company, was still active and doing business and had not been consolidated with any other company; further that there was in operation a company known as the "Charles Rost Premium Company," doubtless meaning the "Charles Rost Furniture & Premium Company." Hence, it appears that nine days after he signed the agreement for the incorporation of the Rost Union Premium Company and the merging in it of the existing corporations, De Voigne took steps to prevent

the incorporation of the new company on the ground of the existence, under similar names, of the old companies. In other words, he practically repudiated his consent to the consolidation of the old companies, and attempted to prevent it, by suggesting to the Secretary of State that the proposed name of the new company was an imitation of the names of two companies already in existence, and, therefore, in contravention of the statutes. Rev. St. 1899, § 1312. This move blocked the effort to incorporate the new company, for the Secretary of State never issued a certificate of incorporation. When Loewenberg expostulated with De Voigne about the latter's course, De Voigne wrote a letter, under date of September 10th, in which he stated that his only objection to the incorporation of the "Rost Union Premium & Mercantile Company" was that the name "Rost" was put before "Union," and that if the style of the company changed so as to read "Union Premium & Rost Mercantile Company," he would sign the articles of association, and withdraw his objections on file in the office of the Secretary of State.

Accordingly, articles of association were prepared with the corporate name changed to suit De Voigne; but when the paper was presented to him for his signature, he refused to sign it. In protesting to the Secretary of State, and in all his other doings in reference to the proposed consolidation, De Voigne was represented by *Rassieur & Rassieur*, a firm of attorneys of which the plaintiff, Senn, is a member. In truth, Senn was the active attorney for De Voigne. It should be stated that there stood in De Voigne's name on the books of the Union Premium Mercantile Company 9,620 shares of stock; but he really owned 12,120 shares. The 1,080 shares which stood in Biby's name belonged to him and also 1,320 shares covered by stock certificate No. 15, and 100 shares covered by stock certificate No. 17. The shares embraced in those two certificates were nominally held by other persons whose names are not disclosed. While the attempt to create the new corporation and merge the old ones in it, remained in abeyance on account of De Voigne's opposition, the latter sold to Senn, as the petition avers, the 1,080 shares of stock held by Biby. The stock certificate was assigned by Biby to Senn, and he and De Voigne then went to the office of the defendant company, presented the certificate and demanded that the shares be transferred from Biby's name to Senn's on the books, and a new certificate issued to Senn. At the same time, De Voigne demanded that the 1,320 shares covered by certificate No. 15 be put in his (De Voigne's) name on the books and that the 100 shares evidenced by certificate No. 17 be put in the name of Joseph C. Mueller. The secretary said the matter would be referred to Mr. Kinnerk, the attorney for the company. This was done and on November 7th, Kinnerk wrote Senn a letter saying that De Voigne

had signed the consolidation agreement above referred to, and that shares could be transferred from his name into the name of Senn and Mueller, only on the condition that the transferees would agree to be bound by the terms and conditions of the consolidation contract, which they might see at any time in Kinnerk's office. Senn called at Kinnerk's office once or twice to see the contract but was never shown the original. Instead, a copy was exhibited to him. The copy was like the original in all respects except the blue markings adjacent to the words "Rost" and "Company." Kinnerk swore that he did not have the original when Senn called for it, but the drift of the latter's testimony is that Kinnerk had it but would not exhibit it. The purport of Senn's statement, in this connection, is that he understood the original would show that De Voigne was not absolutely, but only conditionally, bound, and desired to examine the instrument to ascertain whether this was true. In the course of his efforts to have the shares transferred into his name on the books of the company, Senn delivered to Kinnerk, as the company's attorney, the writing copied in the statement, wherein he accepted, in a way, the consolidation agreement. Kinnerk appears to have been satisfied with the writing, and to have deemed it sufficient to bind Senn, as assignee of the stock, by the terms of the consolidation contract. But Loewenberg, president of defendant company, still refused to let the stock be transferred to Senn unless the latter would sign his own name to the contract. With affairs in this posture, the present action was instituted.

One of the incidents pertaining to the ownership of shares of stock in an incorporated company is the right to freely sell and dispose of them. This right is rather strictly maintained by the courts against restrictions imposed in the by-laws of corporations; though reasonable by-laws to regulate the mode of transferring shares of stock are not ignored. *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Moore v. Bank of Commerce*, 52 Mo. 377; *Helliwell, Stock & Stockholders*, § 164. An assignee of shares ordinarily has the right to have them transferred into his name on the books of the company, and a new certificate issued to him. *Merchants' Nat. Bank v. Richards*, 6 Mo. App. 454; 74 Mo. 77; *Spreckels v. Bank*, 113 Cal. 272, 45 Pac. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348; *Johnston v. Laffin*, 103 U. S. 800, 26 L. Ed. 532. In behalf of all parties concerned, it is desirable that the actual owners of the stock of a company should be shown to be the owners on the books. Officers can thereby readily ascertain to whom the company's dividends should be paid and notices of corporate meetings given; the business public, any member of which may have occasion to levy process on the shares of a member, may more conveniently learn who owns the stock and the owner himself is.

given his full rights to vote for directors and receive dividends and relieved from the liabilities of a shareholder when he sells his shares. The defense to the present action is that Senn is not a bona fide owner of the shares, but holds for De Voigne pursuant to an assignment made to relieve the shares from the obligation of the consolidation agreement, to which they are subject while in De Voigne's name. Much stress is laid on the circumstance that Senn bought the shares at a price far below their real value and has never paid the nominal price agreed to be paid. The par value of the shares is \$1 each, or of the whole \$1,080. But this appears to be greatly in excess of their actual value. The evidence goes to show that, a short time before the sale to Senn, De Voigne had bought 2,500 shares for \$400, or about 16 cents a share. Senn agreed to pay between 2 and 3 cents a share for the stock he purchased, and this trifling consideration clouds the transaction with suspicion. But both De Voigne and Senn testified that the purpose of the former was to get some one into the company, who would be friendly to him. De Voigne had holdings of more than \$12,000 at par value and, therefore, was heavily interested in the company's success. The inference to be drawn from his testimony is, that the defendant's directors and officers had been managing its affairs in a way opposed to his interests and had refused to give proper recognition to his wishes and opinions as a shareholder, who owned nearly one-half of the capital stock. He said that he desired the support of Senn and Mueller; and for that reason was willing to dispose of some stock to them at so low a price. Senn did not pay the \$25; but both he and De Voigne testified this was because De Voigne was indebted to him for attorney's fees in a larger amount.

In our judgment, if Senn paid nothing for the stock, his title would not necessarily fall. The inadequate consideration is merely a circumstance to support the theory that no actual sale occurred. De Voigne had a right to give him the shares, and he would be none the less the owner if they were assigned to him in good faith, as a gift, and none the less entitled to have them put in his name on the books. Some facts we have related show that De Voigne failed to live up to his agreement for the consolidation of the two companies, and, instead, did what he could to frustrate it. Possibly the purpose of the assignment of the shares to Senn was to enable the latter to assist in still further obstructing the proposed merger. But this is not alleged as a defense and is positively denied by both the parties to the assignment. The defense set up in the answer is that Senn is no true owner of the stock and that the shares are subject to the agreement De Voigne signed. There is no averment that the purpose of the transfer was to introduce Senn into the defendant company as a member in order that he might oppose the consolidation scheme.

As a general proposition, the motive for which shares of stock are assigned, does not affect the right of the assignee to acquire them and have them registered in his name, provided he is a genuine purchaser or donee, and does not take the shares to hold in secret trust for the assignor. The object may be to enable the assignee to vote for directors, or otherwise assist in maintaining the assignor in control of the corporation, or in moulding its business policy, yet nevertheless equity will enforce the assignee's right to registration and his other rights as a stockholder. 2 Thompson, Corporations, § 2308; Helliwell, § 165; In re Klaus, 87 Wis. 401, 29 N. W. 582; Helm v. Swiggett, 12 Ind. 194; State ex rel. Page v. Smith, 48 Vt. 286. But this relief is not technical nor absolute, and circumstances occasionally surround an assignment of corporate stock which induce courts of equity, in the exercise of a conscientious discretion, to refuse to recognize the assignee as a share holder and entitled to all the rights pertaining to that status, and even to withhold a decree against the corporation commanding that the stock be registered in his name. 2 Thomp. Corp. § 2431. Where stock has been transferred to a person to enable him, as a mere puppet of the transferor, to institute and carry on litigation for the latter's benefit or to wreak his spite, a court of equity will not tolerate the litigation; and, it seems likely, would decline to decree a transfer of the shares on the company's books. Kingman v. Railway Co., 30 Hun, 73; Robson v. Dodds, L. R. 8 Eq. 301. An examination of the cases dealing with this subject will show that for the assignee to be denied recognition of his full rights as a shareholder, it must be shown that he is acting in behalf of another. If he is acting in his own behalf, he is accorded recognition though his motive may be unworthy. Bloxam v. Railway Co., L. R. 3 Ch. 337; Forrest v. Railway Co., 4 D. F. & G. 126. In Gould v. Head (C. C.) 41 Fed. 240, it was held to be a good defense to a bill to compel the registration of shares, that the shares were acquired by the complainant without any consideration, for the purpose of enabling the complainant to participate in a conspiracy, formed by third parties, to get control of the company for the purpose of wrecking it and thereby diminishing the value of shares in another company with which the company to be wrecked was affiliated in business. The decision was put on the ground that the defense as plead showed the complainant was the agent and instrument of the conspiring third parties.

The principles of law we have stated are to be applied to the facts of the case at bar. In making the application, we must remember that the right of an actual owner of stock, whether acquired by purchase or by gift, to have his shares registered, is, from considerations of public policy very jealously guarded. To defeat the right in a given case

it ought to be shown that the pretended owner of the shares is not their real owner; or clearly shown, at least, that he is seeking the transfer for a purpose whose accomplishment is possible and which is so iniquitous that a court of equity will decline to aid it. We have found no instance wherein the court refused to compel a transfer when the petitioner actually owned the stock, on the ground that his object was bad, except when the object was to institute litigation for the benefit of third parties; and no instance wherein it was done for that reason unless *Kingman v. Railway Co.*, 30 Hun, 73, is one. It is not altogether clear whether or not the relief asked in that case was a decree for the transfer of shares, but we think it was. In the other cases we have cited wherein complainants were denied relief because suits had been instituted at the instigation of third parties, the complainants held the shares in their own names, and it was the litigation begun by them as shareholders that the courts held would not lie, because the suits were brought to redress no grievance of the complainants, but to assist an unworthy purpose of their confederates. Still, we apprehend that stock might be acquired for some purpose so unconscionable that equity would refuse to compel a transfer, though no litigation was contemplated. Senn swore unequivocally that he bought the shares in question as a speculation, and that he owned them free from any secret trust or arrangement with De Voigne. The latter individual testified the same way. In the face of this testimony, we are unwilling to pronounce, on the circumstantial evidence before us, that Senn is not a bona fide owner of the stock but the agent of De Voigne. We think it would be rash to decide the cause on that theory; particularly as, in our judgment, Senn can be given the rights of a stockholder without jeopardizing the rights of other shareholders interested in the consolidation agreement. Important facts regarding Senn's demand to have the stock transferred on the books are that he acquired it with full knowledge of De Voigne's agreement, to which the shares stand pledged, that the defendant company shall be merged in the new company along with the Charles Rost Furniture & Premium Company, and that Senn has actually given to the defendant an agreement that he will be bound by the contract. Now, we have no doubt that if the owner of shares of stock in a company who has bound all his shares by an agreement to which the other shareholders are parties, and by which they acquire rights, assigns his stock to a purchaser, who has knowledge of this agreement, the latter takes the stock cum onere and is bound by the agreement. *Johnson v. Laffin*, 13 Fed. Cas. 758, 762, Fed. Cas. No. 7,393; *Trust & Savings Co. v. Lumber Co.*, 118 Mo. 447, 459, 24 S. W. 129.

Our opinion is that Senn is entitled to have

the shares placed in his name on the company books, but with no more power to thwart the purposes of the consolidation agreement than De Voigne possesses. In other words, that he ought to be held strictly to the terms of that agreement, against the legality of which no contention has been made. If this is done, we do not perceive how he can obstruct the rights of those who signed the agreement any more than De Voigne can if the stock remains in his name. It is true that the writing Senn gave in which he agreed to be bound as fully as De Voigne was, implies a doubt about whether the latter had executed the agreement as it reads. But that is a difficulty De Voigne can raise as easily as Senn; hence the other signers of the agreement will be in as good a position when the shares are transferred as they are now. We know of no law by which it can be made a condition of transferring the shares, that Senn should subscribe the original agreement; and this point is emphasized by the fact that the agreement was never shown to him and beyond question, he was not bound to accede to its terms until he knew that De Voigne had signed it in such a way as to be bound, as to which plaintiff had been put in doubt. It turned out that De Voigne had signed it without affixing conditions and therefore the other signers may insist that his shares stand bound by the terms to which he pledged them. We think the decree should order a transfer with the condition embodied in the decree, that Senn shall be fully bound by the agreement.

Therefore the judgment will be reversed, and the cause will be remanded, with the direction to enter the decree in that form in plaintiff's favor.

BLAND, P. J., and NORTON, J., concur.

KEETON et al. v. ST. LOUIS & M. R. RY. CO.

(St. Louis Court of Appeals. Missouri. Nov. 14, 1905. Rehearing Denied Jan. 17, 1906.)

1. CARRIERS—INJURY TO PASSENGER—PLEADING—PETITION—SUFFICIENCY—AMENDMENT.

In an action against a street railway for injuries, a petition alleging that defendant's car was stopped to receive plaintiff as a passenger, and that while she was getting on, and when by ordinary care defendant's employes could have seen the child in plaintiff's arms, and before plaintiff had reasonable time to get in a position of safety in such car, such employes "caused the said car to suddenly start forward," in consequence whereof she was injured, sufficiently charged a cause of action to be amended by the insertion of the word "negligently."

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1273; vol. 37, Cent. Dig. Negligence, § 175.]

2. CONTINUANCE—AMENDING PLEADING.

Under Rev. St. 1899, § 688, providing that when a party shall amend any pleading, and the court shall be satisfied by affidavit or otherwise that the opposite party could not be ready for

trial in consequence thereof, a continuance may be granted, etc., amending a pleading does not entitle the opposite party to postponement of a trial as a matter of course.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, § 99.]

3. SAME—ABUSE OF DISCRETION.

Under Rev. St. 1899, § 688, providing for a continuance on amendment of pleading, where, in an action against a street railway for injuries sustained by plaintiff while boarding a car, the complaint was amended by the insertion of the word "negligently" before the allegation of the acts causing the injury, there was no abuse of discretion in refusing a continuance.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, §§ 106, 109.]

4. DAMAGES—PERSONAL INJURIES—AMOUNT.

Where, in an action against a street railway for injuries received by plaintiff while boarding a car, the evidence showed that plaintiff was knocked unconscious, sustaining an injury to her coccyx, which was treated as a fracture, plaintiff being kept in a plaster cast for 10 days, there being a tenderness across the back, plaintiff suffering great pain, not being able to bend her leg without causing distress, and remaining in bed three or four weeks, being visited by a physician 35 times, and, moreover, suffering from nervous shock and an ailment resembling nervous prostration, being sometimes in a semicomatose condition, that her back was hurt so she could not move for weeks, that she was nervous and restless and suffered great pain, and, though previous to the accident a perfect woman, her health thereafter was poor, a verdict for \$2,500 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 357.]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by Sarah M. Keeton and another against the St. Louis & Meramec River Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jefferson Chandler and J. Lionberger Davis, for appellant. Mortimer B. Levy and Barclay, Shields & Fauntleroy, for respondent.

GOODE, J. Appeal from a judgment for \$2,500 in favor of the plaintiffs in an action for personal injuries sustained by one of the plaintiffs, Sarah M. Keeton. The other plaintiff is her husband. The accident occurred April 22, 1904, at Manchester and Tamm avenues, in the city of St. Louis. At 1 o'clock in the afternoon of that day, Mrs. Keeton, who wished to take passage on one of defendant's east-bound cars, took a position near the southeast corner of said avenues; the usual point for embarking. Several other persons were at the same spot for the same purpose, and all of them except Mrs. Keeton succeeded in getting on the first car that came along. She was holding an infant in her arms. To board the car she placed her foot on the step and grasped the guard rail with her right hand, holding the child on her left arm. While she was in that position the conductor, who was inside the car, gave the signal to the motorman to start, the car was started suddenly and threw Mrs. Keeton down and across the waiting platform

where she had been standing. She was knocked unconscious, but revived afterwards and got home with assistance. The next day a physician was called. He found an injury to the coccyx or lowest bone of the spine, but was unable to tell whether it was a fracture or a sprain. He treated it as a fracture, keeping plaintiff in a plaster cast for 10 days. There was tenderness across the lower part of the back in the region of the kidneys, suppression of urine and a discolored spot about the size of the hand, on her back. Plaintiff suffered great pain and her right leg could not be bent without causing distress. She was in bed three or four weeks and was visited by the physician 35 times. She suffered from nervous shock and an ailment resembling nervous prostration followed the injury. Sometimes she was in a semicomatose condition and unable to recognize the physician. In testifying as to whether the injury would be permanent, the doctor said it had continued to the time of the trial; several months after the accident. He also said the coccyx seemed to be permanently injured. Neurosis or nervous trouble followed the injury to the spinal column, he said, and, further, that immediately after the accident there appeared to be internal injuries. Mrs. Keeton swore she was in bed four or five weeks; that her back was hurt so she could not move for weeks; that she could not turn in bed; that she was nervous, restless, and suffered pain; that previous to the accident she was a perfect woman, but since her health was poor and she was nervous. She was 26 years old at the time of the trial.

The material allegations of the petition, except as regards the injuries, are as follows: "Plaintiffs further state that, April 22, 1904, between 12:30 and 1:00 o'clock p. m., said plaintiff, Sarah M. Keeton, intending to take passage on one of the eastbound cars of defendant's said line, was at or near the southeast corner of Manchester and Tamm avenues in said city, at the usual place where said defendant at that time received on board its said cars persons wishing transportation on defendant's said line. Several other persons were at the same place at the same time, and when car No. 180 of defendant's said line, east-bound, approached said place where said persons and said plaintiff, Mrs. Keeton, were standing for the purpose of entering said car of defendant, the agents and servants of defendant in charge of said car responded to the evident wish and request of said plaintiff and of said other persons to enter said car and to become passengers thereon, by assenting to said request, and consequently said car was by defendant's said agents and servants caused to be halted for the purpose of permitting said plaintiff, Mrs. Keeton, and other persons, to get upon said car in order to be transported thereon as passengers, and thereby said defendant by its agents assented to receive and accept said

plaintiff, Mrs. Keeton, then and there as a passenger for hire on said car. Said Mrs. Keeton, the plaintiff, was ready and willing to pay on demand the fare required by defendant (as a common carrier) for passage on said car then and there. While said car was at rest as aforesaid for the purpose of permitting said plaintiff to enter said car to be carried as a passenger, as aforesaid, and while said plaintiff, Mrs. Keeton, was in the act of mounting the step of said car with reasonable diligence and care for herself and for her infant child, which she was at the time carrying and which was visible to any one observing said plaintiff, and which child could have been seen by defendant's said agents and servants in charge of said car by ordinary care on their part, the said agents of defendant, or one of them in charge of said car, *negligently* caused the said car to suddenly start forward, before plaintiff had reasonable time to get into a position of safety upon said car, or upon said step thereof, and in consequence of said sudden start of said car, said plaintiff, Mrs. Keeton, was thrown from said car and caused to fall upon the platform adjacent to defendant's track (on which platform said plaintiff had been standing previous to her attempt to board said car as aforesaid)." The defendant filed an answer consisting of a general denial, and the plea that Mrs. Keeton's injuries were caused by her own negligence. To this answer a reply was filed in which each and every allegation of new matter contained in the answer was denied. Defendant moved for judgment on the pleadings, which the court overruled, and an exception was saved. Before the jury was called, defendant's counsel directed the court's attention to the motion for judgment; and after considering the matter, the court held the petition was insufficient to state a cause of action. Thereupon plaintiff's counsel asked leave to amend by inserting the word "*negligently*" in the petition at the place where it will be found printed in italics.

The petition is said to state no cause of action because it does not characterize the alleged culpable acts of the defendant as either negligent or willful. This omission is argued to prevent the pleading from stating a case for either a negligent or a willful tort. It is true that until the petition was amended, the acts of the defendant were not denounced by the epithet "*negligent*"; but the stated facts constituted a breach of the defendant's duty to Mrs. Keeton, which breach resulted in damage, and the petition imports a want of ordinary care on the part of the car crew. It is alleged that the car was stopped to receive her as a passenger, and started while she was in the act of getting on, and when, by ordinary care, they could have seen the child in her arms. It is good pleading to state acts of a defendant which constitute a breach of duty, and aver they were *negligently* done. Negligence is the gist of the

action, but there is authority for the proposition that where the acts alleged warrant the presumption of a negligent breach of duty, it is unnecessary to charge formally that they were negligently done. 2 Thompson, Negligence, p. 1248, § 26; Dyer v. Railroad, 84 Mo. 127; Wabash County v. Pearson, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325; Louisville, etc., Ry. v. Wood, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; Louisville, etc., Ry. v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120; Taylor v. Felsing, 63 Ill. App. 624; Clark v. Dyer, 81 Tex. 339, 18 S. W. 1061. In the case of Louisville, etc., Ry. v. Wood, a petition in all respects like the one before us was approved. The argument for the defendant is that the presumption of willfulness on the part of the carmen in starting prematurely may be as readily drawn from the facts stated as the presumption of negligence. The entire thought of the petition is negligence. To constitute a willful tort, the operatives must have been aware of Mrs. Keeton's position, and have started the car regardless of whether she would be hurt or not. Such indifference to human life happens too rarely to be inferred from the facts alleged. The natural inference is that the car was started too soon through the conductor's want of proper vigilance to see that all who were wanting to take passage were safely aboard. But starting the car while plaintiff was known to be in the act of boarding it would present a case for damages and, hence, on that view, a cause of action was stated. We rule, therefore, that the original petition sufficiently charged a cause of action to be amended; though the better way is to characterize the breach of duty counted on, as negligence.

Complaint is made that defendant was refused a continuance after the petition was amended. Amending a pleading does not entitle the opposite party to a postponement of the trial of the cause as a matter of course. The court must be satisfied by affidavit, or otherwise, that in consequence of the amendment said party could not be ready for trial at the time previously appointed. Rev. St. 1899, § 688; Colhoun v. Crawford, 50 Mo. 458; Keltenbaugh v. Railroad, 34 Mo. App. 147. The facts do not call for a ruling that the circuit court abused its discretion in refusing a continuance.

The verdict is said to be excessive. We have set forth in the statement the substance of the testimony regarding the extent of Mrs. Keeton's injuries and sufferings. In our opinion the damages sustained are not so clearly in excess of the compensation to which she is entitled that this court ought to interfere with the verdict after it has received the approval of the trial court.

In arguing for the sufficiency of the petition, plaintiff's counsel insist that many recent rulings on pleadings under the Code have been so technical as to cause a celebrated jurist, now deceased, to turn in his grave.

In answer defendant's counsel declare they have no clairvoyant or psychical communication with the celebrated deceased and are, therefore, unable to refute the painful announcement concerning him, made by plaintiff's counsel. The court is likewise without occult information on the subject and, as at present advised, must leave the point undetermined.

The judgment is affirmed. All concur.

SUTLIFF v. MONTGOMERY.

(Kansas City Court of Appeals. Missouri. Jan. 8, 1906.)

1. INJUNCTION—DISSOLUTION—DAMAGES.

Under Rev. St. 1899, § 3639, providing that on the dissolution of an injunction damages shall be assessed, it is not necessary that the damages should be actually assessed at the same term at which the injunction was dissolved, providing proceedings for such assessment are begun at that term.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 406.]

2. SAME—PROCEEDINGS—PENDENCY.

Where a motion for assessment of damages on an injunction was filed at the same term at which the injunction was dissolved, but the motion and judgment thereon were set aside on plaintiff's motion at a subsequent term, and an amended motion filed on which final hearing was had at a subsequent term, the original motion should be treated as still pending when the amended motion was filed and that the amendment was a continuation of the original proceedings.

3. SAME—INFORMALITIES—WAIVER.

Where plaintiff appeared and consented that a motion for the assessment of damages on an injunction bond be set for trial at a subsequent day, when he appeared, waived a jury, and proceeded to trial, he thereby waived any informality as to the time of the filing of the motion.

4. SAME—JUDGMENT AGAINST SURETIES—NOTICE.

Under Rev. St. 1899, § 3640, providing that the court on dissolution of an injunction shall enter judgment against the obligors in the bond according to the circumstances of the case, including damages assessed, and may award execution thereon or otherwise enforce the judgment, etc., the obligors on such bond are in court to answer for a breach thereof, so that judgment may be properly rendered against them without notice.

5. APPEAL—INJUNCTION BOND—DAMAGES—PRESUMPTIONS.

Where the court assessed damages on an injunction bond in defendant's favor in the sum of \$100 for attorney's fees, it would be presumed on appeal that such allowance was properly made for attorney's fees in getting rid of the injunction, in the absence of a showing to the contrary.

6. SAME—HARMLESS ERROR.

Where only one of several defendants filed a motion for the assessment of damages on the dissolution of an injunction, and none of the other defendants had any interest in such damages, the fact that the clerk erroneously entered up judgment in favor of all the defendants was a mere clerical error not prejudicial to plaintiff.

Appeal from Circuit Court, Cass County;
W. L. Jarrott, Judge.

Action by H. S. Sutliff against W. T. Mont-

gomery. From a judgment for defendant, plaintiff appeals. Affirmed.

W. D. Summers and J. W. Porter, for appellant. H. A. Jones and Whitlitt & Jarrott, for respondent.

BROADDUS, P. J. The matters on this appeal arise upon the record, and it is worthy of note that the parties differ as to what the record contains. We find upon examination that it is as follows: The plaintiff commenced suit in the circuit court of Cass county against W. T. Montgomery, Martha Montgomery, W. W. Montgomery, and H. A. Jones, defendants, in aid of which they sued out an injunction. At the May term of the said court the principal cause was disposed of and a motion was filed by defendants to dissolve the injunction, which motion during the term was sustained. At the same time defendants filed a motion to assess damages. The parties appeared, the motion was heard, and judgment rendered against plaintiff and his securities on the injunction bond. Whereupon plaintiff filed a motion for rehearing and in arrest of judgment. These motions were taken up on December 12, 1904, and by the court sustained. As there was a September term of said court, the order of December the 12th must have been made during said term. At the succeeding January term defendant W. T. Montgomery filed an amended motion to assess damages on the injunction bond. On January the 3d the motion by consent of parties was set for hearing January the 6th. On January 6th parties appeared and announced ready for trial, waived trial by jury, and submitted the issues to the court. The court found the issues for the defendant, and assessed the damages in their favor in the sum of \$100 for attorney's fees. The plaintiff filed motion for new trial and in arrest of judgment, which the court overruled, and he appealed.

The principal claim of the plaintiff for a reversal is that under section 3639, Rev. St. 1899, damages on an injunction bond must be assessed at the term during which the injunction was dissolved; but such is not the law. In *Loehner v. Hill*, 19 Mo. App. 141; *Fears v. Riley*, 147 Mo. 453, 48 S. W. 828; *Hoffelmann v. Franke*, 96 Mo. 533, 10 S. W. 45; and *Moore v. Bank*, 58 Mo. App. 469—it is held that the proceedings shall be begun at the term during which the injunction was dissolved to assess the damages on the injunction bond. But no court has held, that we are aware of, that the damages must necessarily be assessed at said time. We suppose, however, that plaintiff really means that the defendant in an injunction suit upon the dissolution of the injunction shall file his motion or take the necessary steps, at the same term, to have his damages assessed. And he claims that the motion upon which the damages were assessed was filed at the January term, 1905, whereas the injunction

was dissolved at the May term of the court, 1904. But the record does not so show. The original motion was filed in time and judgment rendered thereon, which was set aside upon plaintiff's motion at a subsequent term, to wit, the September term, 1904, and the amended motion, upon which the final hearing was had, was filed at the succeeding term in January, 1905. The original motion was still pending when the said amended motion was filed, and as such it must be treated as a part of the proceedings instituted at the May term, 1904.

The plaintiff encounters another difficulty in his case, viz., that when the matter came up at the January term, 1904, he consented that it be set down for trial at a subsequent day, at which time he appeared, waived a jury, and proceeded to trial. He thus waived any informality as to the time of the filing of said amended motion, had any existed, and he ought not to be heard to complain at this late date. The court had jurisdiction of the matters in issue and the parties to the litigation.

It is also contended that the judgment is erroneous because judgment was rendered against the security on the injunction bond without notice. Section 3840, Rev. St. 1899, does not require such notice. "Signing and filing the bond with the clerk gives the court jurisdiction over the sureties, and if the injunction is dissolved they, under clearly implied provisions of the statute, are practically in court to answer for a breach of the bond"; and they also have the right of appeal in such cases. *Nolan v. Johns*, 108 Mo. 481, 18 S. W. 1107; *J. & W. Ry. Co. v. K. O. Ft. S. R. R. Co.*, 185 Mo. 549, 37 S. W. 540.

It is contended that, as the injunction was only ancillary to the main suit, attorney's fees cannot be allowed. It is held that "where the injunction is * * * only incidental to the main contention, and is dissolved by the judgment on the main controversy, counsel fees for the dissolution are not recoverable in an action on the bond." *Anderson v. Anderson*, 55 Mo. App. 268. But in the same case it is also held that "recoverable attorney's fees for procuring the dissolution of an injunction are rightly considered in the assessment of damages on plaintiff's bond." The amount to be allowed is limited to services in procuring the dissolution. But in *Brownlee v. Fenwick*, 103 Mo. 420, 15 S. W. 611, it is held that on dissolution of an injunction upon the final hearing of the case, and without any motion having been made for that purpose, it was proper to allow counsel fees for services rendered in getting rid of the injunction. The presumption here is that the allowance for attorney's fees was for services rendered in getting rid of the injunction; nothing to the contrary appearing.

Lastly, it is claimed that the judgment is in favor of all the defendants, whereas only

defendant W. T. Montgomery had any interest in the damages. The motion was filed in the name of the said Montgomery only, but it seems that the clerk in entering up the judgment included the names of the other defendants. This was merely a clerical error. It is not conceivable how plaintiff will be injured thereby.

The cause is affirmed. All concur.

DAUWALTER et al. v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals. Missouri. Jan. 8, 1906.)

JUDGES—CALLING IN JUDGE OF ANOTHER CIRCUIT—AUTHORITY.

The ground assigned by a circuit judge for calling in a judge from another circuit to try a case that he "will be unable to try the case" on the date set for its trial, though failing to state the reason of his inability, is sufficient to authorize him to call in another judge under Rev. St. 1899, § 1678, providing that when any judge shall "for any cause" be unable to hold court, he may call in the judge of another circuit, and section 1679, providing that when the judge for any cause shall be unable to hold court and shall fail to provide another judge, or "for any reason cannot proceed in the cause," a member of the bar may be chosen to act."

Appeal from Circuit Court, Cooper County; Wm. H. Martin, Judge.

Action by John S. Dauwalter and another against the Missouri Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Martin L. Clardy and John Cashman, for appellant. John Cosgrove, for respondents.

BROADBODUS, P. J. The plaintiffs sued defendant as common carrier for the value of certain goods alleged to have been lost in transit. The action was instituted before a justice of the peace, where plaintiffs obtained a judgment, and defendant appealed.

After the cause had been appealed to the circuit court, defendant made an application for a continuance, which on the 3d day of March, 1905, was overruled, and the case was set for trial March 16, 1905, by request to be tried by Judge Samuel Davis because the regular judge would be unable to try the case on said date. When the cause was called for trial, the defendant objected to the Hon. Samuel Davis, who was the regular judge of the Fifteenth judicial circuit, of which Cooper county was not a part, but was a part of the Fourteenth judicial circuit, of which the said W. H. Martin was the regular judge. Certain specific objections were made to Judge Davis trying the case, viz.: Because it did not appear that Judge Davis had been called to sit as judge on account of the sickness, absence, or inability of said Judge Martin to hold said term, or part thereof; and because it did not appear that said Davis had been elected to hold such term, or part thereof, or that he had been agreed upon

by the parties as special judge to try the cause. Defendant's objections were overruled by the court, Judge Davis presiding. Whereupon, defendant excepted to the action of the court and withdrew from further appearance in the case. After which the cause proceeded to trial. The finding and judgment being for the plaintiffs, defendant appealed.

The only question presented for consideration is: Was Judge Samuel Davis authorized to try the cause? The defendant contends that the matter was coram non iudice. The case of *Bank v. Graham*, 147 Mo. 250, 48 S. W. 910, among others, is cited in support of defendant's contention. The facts of that case were that in the suit of *Bank against Donnell*, a plea in abatement to the attachment pending was tried before Judge Rucker, the regular judge; whereupon, a jury was impaneled before him to try the cause upon its merits. This was on Friday, and as the circuit court at Salisbury in Chariton county in his district would begin on the succeeding Monday, he did not believe he would get through with the trial on its merits without discommoding him, as he desired to return to his home at Keytesville before going to Salisbury on the Monday following for the opening of his court at that place. Whereupon, the parties agreed to try the cause before the Hon. J. F. Graham, sitting as a special judge. The evidence showed that Judge Rucker was not disqualified and that counsel on both sides preferred that he should try the cause, and that it was only at his urgent request they agreed to excuse him. It was held that the special judge acted without authority as it did not appear that Judge Rucker was unable to hold court on account of sickness, absence, or any other cause. In *Ladd v. Forsee*, 163 Mo. 506, 63 S. W. 831, it is held that: "If the regular judge is present, and nothing appears in the record to show his inability through sickness, absence, or any other cause to try the case, and he is not disqualified by the * * * to try the cause before a special judge gives him no jurisdiction. * * *" The other cases cited by defendant have no application to the question raised. Sections 1678, 1679, Rev. St. 1899, were also construed in *State ex rel. v. Fort*, 178 Mo. 518, 77 S. W. 741, where it appeared that respondent Fort, judge of the circuit court of Butler county, entered on the records of the court an order in a disbarment proceeding against relator, which recited respondent's disqualification to sit at the hearing of said proceeding, and that Judge James Fox of the Twenty-Seventh judicial circuit was called in to hear and try said cause in his place. We quote from the opinion as it is printed and portions italicized as follows: "By section 1678, Rev. St. 1899, it is provided that whenever the judge of any circuit court shall be sick, absent, or *for any cause* be unable to hold any term,

or part of term of court in his circuit, he may request the judge of another circuit to hold it for him, and that such judge called in shall possess all the power of the regular judge of the circuit, and this is followed by section 1679, wherein it is further provided, that whenever the judge *for any cause* shall be unable to hold any term or part of term of court, and shall fail to provide another judge to hold said term or part of term, or *if the judge is interested or related to, or shall have been of counsel, for either party, or when the judge, if in attendance, for any reason cannot properly proceed in any cause or causes pending in such court*, a member of the bar may be chosen, etc." The court held that, "under the sweeping and comprehensive language" of the statutory provisions, the order disqualifying him from trying the cause was lawful. And it is further intimated that the court had the inherent power to make the order independent of the statutory provisions. The words "*for any cause*," or "*for any reason cannot properly proceed in any cause pending in such court*," are certainly of comprehensive import. The language used clearly implies that the statute should be liberally, not strictly, construed.

The ground assigned by Judge Martin was that he "will be unable to try the case on said date"—the date it was set for trial. It seems to us that it was a good cause for calling in Judge Davis to hold that part of the term. If it was true that he would be unable to try the cause on the date set for the trial, a trial could not be had unless before some other judge. But it is insisted by defendant that Judge Martin should have stated the reason why he would not be able to try the case. If the cause he assigned why he could not try the case was sufficient, he was not bound to state the reason why he could not do so. If the cause alleged was good, the law will presume it was true. "Every presumption will be indulged in support of the proceedings of a court of general jurisdiction." *State v. Hunter*, 171 Mo. 435, 71 S. W. 875. In that case it is held that: "It is not necessary for the regular judge of a court of general jurisdiction to recite on the record his reasons for calling in a special judge after he himself has been disqualified." See *Hendrix v. Railroad*, 107 Mo. App. 127, 80 S. W. 970; *Riggs v. Owen*, 120 Mo. 176, 25 S. W. 356. The case at bar differs in principle from that of *Bank v. Graham*, supra. In the latter, the judge stated no cause whatever why he could not try the case, but only that it would inconvenience him to do so. Defendant attempts to draw a distinction between a part of the term of a court and the time it would require to try a single case. But in reality, there is no such distinction; at most, it is only apparent. Other questions raised are immaterial.

For the reasons given, the cause is affirmed. All concur.

GARDNER v. DEEDS & HIRSIG.

(Supreme Court of Tennessee. Feb. 24, 1906.)

SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where a manufacturer contracted for the sale of 500 buggies, to be ordered by the purchaser as needed, and afterwards purchased the necessary material for their construction, but the buyer refused to order them, and finally declined to accept performance, the seller's measure of damages is the profit he would have made if he had been permitted to comply with his contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1098-1107.]

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Action by Russell E. Gardner against Deeds & Hirsig. From a decree of the Court of Chancery Appeals in favor of complainant, defendants appeal. Affirmed, and petition for rehearing dismissed.

P. M. Estes, for appellants. H. H. Barr, for appellee.

McALISTER, J. This cause was decided at a former day of the term, in which the decree of the Court of Chancery Appeals in favor of the complainants was affirmed. It is again before the court on a petition to rehear.

The object of the bill was to recover damages for the breach of a written contract whereby the defendants, Deeds & Hirsig, purchased from the complainant, Russell E. Gardner, 500 buggies of specified descriptions and stipulated prices. The contract contemplated that the buggies were to be ordered as needed by the purchaser. The vendor was a manufacturer doing business in the city of St. Louis, and had purchased all the necessary material and constituent parts necessary for the construction of the vehicles; but these component parts were not assembled and the buggies manufactured for the reason that the purchasers, Deeds & Hirsig, refused to order them and finally declined to accept performance. The Court of Chancery Appeals expressly found that the vendor, Gardner, was without fault, and that the contract had been breached by Deeds & Hirsig without legal justification.

The crucial question presented to this court on the facts found by the Court of Chancery Appeals was in respect of the measure of damages the vendor was entitled to recover. The contention made on behalf of Deeds & Hirsig in this court was that the measure of damages is the difference between the contract price and the market price of the buggies agreed to be purchased at the time and place of delivery, and that, since the Court of Chancery Appeals had found that the price of buggies and buggy materials during the year 1903, when this contract was to be performed, had materially advanced in price, therefore the vendor had lost nothing and was entitled to

no recovery for the breach of the contract, except perhaps nominal damages.

The Court of Chancery Appeals, while finding that the price of buggies and buggy materials had advanced, yet the vendor had purchased his material and was ready to perform his contract, and could have furnished the buggies, and was therefore entitled to recover the profits he would have made, had the contract not been breached by the defendants, Deeds & Hirsig.

The Court of Chancery Appeals also finds that in the year 1902 complainant buggy company sold some 30,000 vehicles, the output of its concern; that it practically only manufactured upon orders; that it had all the stock bought, most of it being in somewhat a finished condition, though not entirely finished, and most of it unpainted; and that the concern could have manufactured and delivered the buggies or vehicles for which the defendants had contracted in addition to the others sold.

That court, however, found there was no market upon which these buggies could have been sold at a profit, or for as much as the defendants had contracted to pay for them, and that if their constituent parts had been assembled and manufactured into buggies, and the lot exposed for sale on the market, it would have resulted in a sacrifice and a loss to the defendants greater than would have been suffered if the buggies had not been manufactured and exposed to sale.

The first complaint made in the petition to rehear is that this court stated in its original opinion that "the Court of Chancery Appeals found there was no market upon which these goods could have been sold at a profit or for as much as the defendants had contracted to pay for them." "Defendant respectfully insists that this court has confused the argument of the Court of Chancery Appeals with its finding of fact." We have again reviewed the report of the Court of Chancery Appeals, and find that we committed no error in our interpretation of their findings on this subject. In order that there may be no mistake, we quote the exact language of that court on this subject as follows: "It is shown that there was no established market for buggies in the sense that would have enabled the complainant in the case to have placed the buggies which the defendants had contracted for upon the market and sold them at the advanced price, or even at as much as defendants had contracted and agreed to pay."

And again: "Or that there was any place where he could have sold them at all."

And again: "The proof does not show that there was any place either in Nashville where these buggies were to be delivered, or at St. Louis where they were to be manufactured, or elsewhere, where the complainant, or any one, if he had manufactured them, could have placed them upon the market and sold them at a fixed price."

And again: "We are entirely satisfied that, if the complainant could have sold these vehicles at a profit, he would have done so."

Again: "We are satisfied that, if the defendants could have taken and sold them at a profit to themselves during this time, they would have done so."

Again, in another place, the court said: "But the proof does not show, and we infer from all these things that there was no place or market where the complainant, if he had manufactured these goods, could have placed them and forced a sale at a profit."

We think that these extracts from the opinion of the Court of Chancery Appeals fully demonstrate that this court was not in error in its former statement of the findings of the Court of Chancery Appeals on this subject. However, the real ground upon which we bottomed our decree was that where goods are to be manufactured upon order, and there is no specific determinate chattel in esse, and the purchaser has refused to accept performance of the contract by the manufacturer, the measure of damages is the profit which the manufacturer would have made if he had been permitted to comply with his contract. This is the rule everywhere recognized for the admeasurement of damages in such cases.

This question arose in *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967. *Hinckley* agreed in writing to purchase from the steel company rails to be rolled by the latter, and to be drilled as may be directed, and to pay for them \$58 per ton. He refused to give directions for drilling, and at his request the steel company delayed rolling any of the rails until after the time prescribed for their delivery, and then the defendant advised the plaintiff that he should decline to take any rails under the contract. Held: (1) *Hinckley* was liable in damages for the breach of the contract. (2) The steel company was not bound to roll the rails and tender them to the defendant. (3) The proper rule of damages was the difference between the cost per ton of making and delivering the rails and the contract price of \$58 per ton.

In the midst of its opinion, the court said as follows: "*Hinckley* contends that the steel company should have manufactured the rails and tendered them to *Hinckley*, and upon his refusal to accept and pay for them should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the market price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of *Hinckley*, the steel company was excused from actually manufacturing the rails, and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present.

The proposition that after the defendant had, for his own purposes, induced the plaintiff to delay the execution of the contract until after the 31st of August, 1882, and had thereafter refused to take any rails under the contract, the plaintiff could still have gone on and made the 6,000 tons of rails and sold them in the market for the defendant's account, in order to determine the amount of its recovery against the defendant, can find no countenance from a court of justice."

The Court of Chancery Appeals finds in the present case that it was a part of the contract between these parties that *Deeds & Hirsig* should order the buggies of the sizes and patterns needed, but that, notwithstanding the buggy company had frequently been urged to send forward their orders, they had persistently refused to do so. Under these circumstances, the buggy company was not required or expected to assemble the constituent parts of the vehicle and manufacture them into buggies.

In *Ault v. Dustin*, 100 Tenn. 386, 45 S. W. 981, it was held by this court that the purchaser of a quantity of rope, which was to be manufactured and delivered upon his orders in assorted sizes by a specified date, breached his contract by failure to give orders a sufficient time before the date fixed for final delivery to reasonably enable the seller to manufacture and deliver the goods. It was further said in that case that the law will imply as a term of this contract that the specifications should be furnished within a reasonable time, in order to enable the defendant to comply with his contract by the time limited; citing 1 *Beach on Contracts*, § 133. It was clearly the duty of *Deeds & Hirsig* to have advised the manufacturer of the kind and number of vehicles desired from time to time during the continuance of the contract, and there was no obligation resting on the buggy company to manufacture the vehicles until they were so ordered.

In *Hinckley v. Steel Co.*, supra, the court held that under the circumstances *Hinckley* was estopped from insisting that the plaintiff should have undertaken the risk and expense of actually making and selling the rails. These considerations also show that the rule of damages adopted by the circuit court was the proper one. It was in accordance with the rule laid down by this court in *Philadelphia, Wilmington & Baltimore R. Co. v. Howard*, 13 How. 307, 14 L. Ed. 157. In that case, a contractor for the building of a railroad sued the company for its breach. On the question of damages, this court said (page 344 of 13 How., 14 L. Ed. 157): "It must be admitted that actual damages were all that lawfully could be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term 'profits' in this instruction as meaning the gain which the plaintiff would have made if he had been

permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains propter rem ipsam non habitam. In the case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exercises his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the party had broken the contract and unlawfully put an end to the work, would be unjust. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains or speculations or states of the market are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value or cost. See *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, and cases there referred to. We hold it to be a clear rule that the gain or profit of which the contractor was deprived by the refusal of the company to allow him to proceed with and complete the work was the proper subject of damages."

In *U. S. v. Behan*, 110 U. S. 344, 4 Sup. Ct. 81, 28 L. Ed. 168, the rule was thus stated: "The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, viz.: First, what he had already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson in the case of *Masterton v. Mayor of Brooklyn*, 7 Hill, 69, 42 Am. Dec. 38, they are 'the direct and immediate fruits of the contract,' they are free from this objection. They are then part and parcel of the contract it is entering into, and constitute a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation."

In *Hale v. Trout*, 35 Cal. 229, the facts were: That A. and B. entered into a contract by which A. was to manufacture for B. a given amount of lumber by specified term, for which B. was to pay a fixed price per thousand, payable at the end of each month, and B., without fault on A.'s part, refused to pay for lumber sawed and received, and to receive any more lumber, declaring the

contract at an end. Held, that the rule of damages for the breach is the difference between the cost of making the lumber and the contract price. In other words, that the plaintiff was entitled to recover the profits that he would have made had he been permitted to complete the contract. See, also, *Kimball Bros. v. Deere, Wells & Co.*, 108 Iowa, 676, 77 N. W. 1041.

In *Cameron v. White* (Wis.) 43 N. W. 155, 5 L. R. A. 493, it was held: "The measure of damages in an action for refusing to perform a contract to purchase lumber to be gotten out and delivered by plaintiff, notice of which refusal is given after the logs have been purchased, but before any of them have been sawed, is the profit which the plaintiff could have made on the contract had he been permitted to perform the same." See, also, *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210; *Tufts v. Weinfeld*, 88 Wis. 647, 60 N. W. 992; *Muskegon, etc., Co. v. Keystone Mfg. Co.*, 135 Pa. 132, 19 Atl. 1008; *Kingman & Co. v. Western Mfg. Co.*, 92 Fed. 489, 34 C. C. A. 489; *Kingman & Co. v. Hanna Wagon Co.*, 176 Ill. 553, 52 N. E. 328.

In *Page on Contracts*, vol. 3, § 1591, the rule is announced that, "if such a contract is broken by the vendee, the measure of damages is the contract price, less the cost of manufacture"; that is to say, he could recover the profit that he would have made had there been no breach. 13 Cyc. p. 159, citing numerous cases.

In *Ault v. Dustin*, supra, it was said: "It is insisted on behalf of defendants that this was not a sale of goods in esse, but a contract to manufacture goods; that, after a person ordering goods has given the manufacturer notice not to proceed with his work, the party so notified has no right to proceed with the manufacture." This court recognized this contention as sound, and quoted from 2 *Beach on Contracts*, § 766, as follows: "The principle is universal that, while a contract is executory, the party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will be compensation to the other party for being stopped in the performance of his work. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages. * * * The legal right of a party, on general principles, to violate, abandon, or renounce his contract, on the usual terms of compensation to the other party for damages which the law allows, is universally recognized."

Now, it is very true that, when *Deeds & Hirsig* notified the buggy company that they would not accept the vehicles, the manufacturer was not warranted in manufacturing the vehicles, and thereby increasing the damages. But, under all the authorities, he was clearly entitled to compensation for the breach, and, under the rule announced, his compensation is to be measured by the profits

he would have made if he had been permitted to complete his contract.

The case of *Smith v. O'Donnell*, 8 Lea, 468, clearly announced the rule that in such cases the measure of compensation is the profit that would have been derived from the execution of the contract. *Singleton v. Wilson*, 85 Tenn. 344, 2 S. W. 801. See, also, *Chisolm & Moore Mfg. Co. v. U. S. Canopy Co.*, 111 Tenn. (3 Cates) 211, 77 S. W. 1062. The case of *Hardwick v. Can Co.*, 118 Tenn. 657, 88 S. W. 797, relied on by the complainants for the rule that the measure of damages in such cases is the difference between the contract price of the chattel and its market value, is not in point, for the reason it appeared that in that case the stoves had all been manufactured and were in esse.

Let the petition to rehear be dismissed.

STATE BOARD OF LAW EXAMINERS v. WILLIAMS.

(Supreme Court of Tennessee. Feb. 17, 1906.)

ATTORNEY AND CLIENT—DISBARMENT—PROCURING ADMISSION BY FRAUD.

Under Acts 1903, p. 576, c. 247, § 5, authorizing the issuance by the state board of law examiners of a preliminary certificate entitling the holder to practice law for the period of two years, and providing that, if such a license is procured by fraud, it may be revoked at any time within two years, the obtaining of such a certificate by concealment of the fact that the applicant had been disbarred in another state is such a fraud as to justify the revocation of the license.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 58.]

Petition by the state board of law examiners for the revocation of the license to practice law previously issued to Martin L. Williams. Petition granted.

S. A. Champion, for petitioner.

McALISTER, J. This petition was preferred by the state board of law examiners, asking a revocation of a license to practice law issued by this court to one Martin L. Williams, upon the ground that the preliminary certificate granted to him by the state board of law examiners had been procured by fraud. The petition is based on section 5 of the act of assembly creating the state board of law examiners, wherein it is provided: "Upon such certificate [from the board of law examiners] if the Supreme Court shall find that such person is of full age and good moral character, and otherwise qualified, it shall enter an order licensing and admitting him to practice as attorney and counselor in all of the courts of this state, and which license, if procured by fraud, may be revoked at any time within two years." Acts 1903, p. 576, c. 247.

This petition was filed in the year 1904, in which it is averred that in 1903 the defendant made application to the state board of law examiners for license to practice law

in Tennessee under rule 6. It appears that prior to the application the defendant had been a citizen and practicing attorney of Arcadia, Fla.

It was further averred in said petition that the defendant had fully complied with rule 6, in that he had filed with the board the proper record, showing that he had been a member of the Florida bar for more than five years, and that the applicant had also filed testimonials of good moral character from many prominent persons of the state of Florida, all of said certificates purporting to be genuine. It is then alleged that upon the strength of said records and testimonials a certificate was duly issued by said board of law examiners, and that upon such certificate a license to practice law was granted the petitioner by the Supreme Court of Tennessee.

The petition then charged that it was subsequently discovered that the applicant had been guilty of falsifying the records in a criminal cause at Arcadia wherein he was of counsel for defendant, and he had been guilty of other criminal offenses, all of which resulted in a proceeding by the prosecuting attorney in the state of Florida for his disbarment.

It is further charged that, although due and timely notice was given the defendant of the disbarment proceedings in the state of Florida, he made no defense thereto, and a decree was accordingly passed disbarring him from practicing law in that state.

The prayer of the petition, as already stated, is that said license so issued to the said Martin L. Williams, authorizing him to practice law, be revoked and declared void. The petition was filed in this court, leave having been granted, and it was directed that publication be made for the defendant as a nonresident, returnable to the 1st day of May, 1904. It was accordingly done. It appears that notice of these proceedings was received by the defendant, who afterwards made application for a continuance until the December term, 1904, declaring he would vindicate himself by setting aside the disbarment proceedings in the state of Florida, and also show his innocence under that indictment. This case was accordingly continued until the December term, 1904, and at that term continued until the present term. No answer has been filed by the defendant to the petition herein.

However, the board of law examiners have taken considerable proof to sustain the charges contained in the petition. The specifications of the charges are:

(1) That in a criminal cause pending in the state of Florida, wherein the said Martin L. Williams was of counsel, he, the said Williams, had caused to be inserted in the record the words, "that the jury that tried said cause was not sworn according to law," whereas said language was not in the bill of exceptions signed by the judge; that, in order to induce the clerk to sign an alleged transcript of the record, said Williams had

made a fac simile copy of the signature of the judge, thereby forging the name of the judge to what purported to be the transcript of the bill of exceptions, and, after procuring the signature of the clerk in this way, the same was forwarded to the Supreme Court of Florida, to which court the case had been appealed, as a true and correct transcript of the record.

(2) The other specifications charged that the defendant had been of counsel in the case of Ivy Midget and Charles Daniels on a charge of murder pending in said circuit court of Florida, and that said Williams in the progress of the trial induced one N. C. Herndon to commit perjury by swearing on the trial of the cause that at the time of the difficulty, which resulted in the death of said Borges, he (Borges) had a knife in his hand, whereas said defendant knew this statement was false, and that the witness Herndon had previously testified to the contrary.

It was upon these charges that the defendant was disbarred by the judge of the Sixth judicial circuit of Florida, after due notice of the charges and specifications had been served upon the defendant, and no answer or defense interposed thereto. It is recited in the judgment of disbarment, which is made a part of the record herein, that the judge of said Sixth judicial circuit of Florida had personal knowledge that the defendant was guilty of the charges exhibited against him in the first specification. The judgment of disbarment recited as follows: "It is therefore ordered that said Martin L. Williams be, and is hereby, adjudged guilty of said charges and specifications; and it is further ordered and adjudged that said respondent, Martin L. Williams, be, and is hereby, disbarred from practicing law as an attorney and solicitor in the courts of the state of Florida."

The judgment of disbarment was pronounced against the defendant in October, 1903, and at the time he procured the certificate from the state board of law examiners of Tennessee, and when license was granted him on said certificate by this court, the said Williams was, and still is, under judgment of disbarment by the circuit court of Florida.

It is very evident that, if these matters had been brought to the attention of the state board of law examiners and to the knowledge of this court, neither a certificate would have been issued by the board nor a license granted by this court to the defendant to practice law. The facts touching his disbarment were fraudulently suppressed, and in our opinion this fact affords full justification for a revocation of said license. "Fraudulent procurement of admission to practice is good ground for disbarment; such conduct making the attorney unfit to be a member of the legal profession, and being an imposition on the court." 4 Cyc. p. 903, citing

Lowenthal's Case, 61 Cal. 122; People v. Campbell, 26 Colo. 481, 83 Pac. 591, which was a case of a concealment of previous disbarment; Dean v. Stone, 2 Okl. 13, 35 Pac. 578; In re Brown, 9 Pa. Dist. R. 103.

Moreover, section 5 of the act creating the board of law examiners expressly provides that, if said license is procured by fraud, it may be revoked at any time within two years. Acts 1903, p. 576, c. 247.

It is therefore the judgment of this court that the defendant, Martin L. Williams, be disbarred and removed from his office of attorney and counselor at law, his license revoked, and his name stricken from the roll of attorneys.

ARKANSAS SOUTHERN RY. CO. v. GERMAN NAT. BANK.

(Supreme Court of Arkansas. Jan. 20, 1906.)

1. COMMERCE—REGULATION—BILLS OF LADING—VALIDITY OF STATE LEGISLATION.

Kirby's Dig. § 530, providing that bills of lading may be transferred in writing thereon and the transferee shall be deemed the owner of the goods specified therein and no goods shall be delivered except on surrender of bills of lading, and section 531 making a violation of the preceding section a criminal offense and authorizing a person aggrieved by a violation to recover the damages sustained, are not, when applied to interstate traffic, in conflict with the commerce clause of the federal Constitution, and are valid, in the absence of congressional legislation on the subject; the object of the statute being to enforce the existing duty of the carrier to deliver property specified in a bill of lading to the legal holder thereof.

2. CARRIER—FAILURE TO DELIVER GOODS TO HOLDER OF BILL OF LADING—ACTIONS—LIABILITY.

A carrier, failing to deliver the goods specified in a bill of lading to the legal holder thereof on his surrender thereof, is liable to him, under the express provisions of Kirby's Dig. §§ 530, 531, for the damages sustained.

3. SAME—BILL OF LADING—CONSTRUCTION—DELIVERY ON PRODUCTION OF BILL OF LADING.

A bill of lading issued to a shipper, which required the carrier to deliver the goods therein specified to the shipper's order at place of destination, care of a company designated, bound the carrier to deliver the goods only on the production of the bill of lading properly indorsed.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 308.]

4. SAME—GOODS AWAITING DELIVERY—DUTY OF CARRIER.

The failure of the legal holder of the bill of lading to appear for the purpose of receiving the goods when they reached their destination did not relieve the carrier of liability, but it was required to store the same with the company designated with directions to deliver to the person entitled thereto on the production of the bill of lading properly indorsed.

McCulloch, J., dissenting.

Appeal from Circuit Court, Union County; James S. Steel, Judge.

Action by the German National Bank against the Arkansas Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Rose, Hemingway & Rose and Gaughan & Sifford, for appellant. Ratcliffe & Fletcher and Smead & Powell, for appellee.

BATTLE, J. The German National Bank brought an action against the Arkansas Southern Railway Company, to recover the value of cotton on bills of lading issued by the company for the cotton, and assigned to the bank; the cotton never having been delivered.

The facts in the case are substantially as follows: Alphin & Lake Cotton Company were dealers in cotton at Little Rock, Ark., and were the principal owners of a compress at El Dorado. They purchased cotton at Bernice, La., and at Junction City, Ark., and at other places along the road of the railroad company. At Bernice the cotton purchased was paid for by the Bank of Bernice and shipped in its name over the railroad of the defendant to El Dorado, a terminus of the railroad, about 30 miles from Bernice. Bills of lading were issue to the shipper in which it undertook to deliver the cotton to shipper's order at its destination. They were forwarded to the Bank of Little Rock with drafts on Alphin & Lake Cotton Company attached for collection. Nine hundred and fifty one bales of cotton were purchased by Alphin & Lake and shipped in the name of the Bank of Bernice over defendant's road from Bernice to El Dorado. Bills of lading were issued for all of them, and forwarded to the Bank of Little Rock with drafts attached in the manner indicated.

"Cotton at Junction City was handled very much in the same way, except that the bills of lading showed Alphin & Lake Cotton Co., as consignor, and the bills of lading with drafts for the price attached, were forwarded to the Bank of Little Rock.

"When the drafts and bills of lading arrived at Little Rock, Alphin & Lake Cotton Co. would draw drafts for the amount on the Bank of Little Rock, which would pay the same by taking up the original drafts for the price of the cotton, and would retain the bills of lading as security for the amounts and all other indebtedness Alphin & Lake Cotton Co. owed that bank.

"The bills of lading were all to shipper's order, care of compress, El Dorado, Ark., notify Alphin & Lake Cotton Co. The cotton was usually loaded on the cars before the bills of lading were signed, and usually left the shipping station the same or next day after the bills of lading were signed up, and reached El Dorado within 24 hours after it left Bernice and was delivered to the compress company for account of Alphin & Lake Cotton Co.

"The railroad had no warehouse or place for delivery or storage at El Dorado. It only had a joint track with the St. Louis, Iron Mountain & Southern Railroad Co., and the two roads maintained a joint agent, Hutchinson, at that place. The Arkansas Southern

Railroad Company delivered all cotton which came in over its road at the compress. It had no cotton platform, and the compress was the only place it had for the delivery of cotton. Before the cotton was delivered to the compress, a memorandum was made of it in a little book by the railroad, showing the initial and number of the car, the number of bales in the car, and the place of shipment. The cotton was checked up by Mr. Wright, assistant manager of the compress company and, if found correct, he wrote 'O. K.,' and signed his name on it with the date of his O. K.

"In delivering cotton to the compress company no other directions were given to it than that contained in this little book. Nothing was said about it in any other way. It was just delivered by that little book, and that was all that passed between the parties. It was always supposed to belong to Alphin & Lake Cotton Co., by the compress and railroad, and was unloaded at once. All the compress did was to count the cotton and O. K. the book as to the number of bales. Neither 'S. O.,' meaning 'shipper's order,' nor 'care of the compress company,' was on this little book. S. O. appears to be upon the book now, but was placed there after the cotton was delivered. It was not on the way-bill from which the book was made up."

The cotton was treated as belonging to Alphin & Lake Cotton Company and was delivered without taking up the bills of lading.

"On December 6, 1902, Lake applied to the German National Bank, which advanced \$17,806 on bills of lading for 558 bales of cotton, and on December 11 the bank advanced \$19,200 on bills of lading for 441 bales, with the understanding that the bills of lading first delivered should also stand for the last advancement. At the time Lake applied for the first advancement, the bills of lading were in the hands of the Bank of Little Rock. He stated that the Bank of Little Rock had required Alphin & Lake Cotton Co. to reduce its account, and a draft was drawn by the company upon the bank in favor of the Bank of Little Rock, with the bills of lading attached, which was presented by and paid to the Bank of Little Rock. At the time the advancement for \$19,200 was made the bills of lading were the property of the Bank of Little Rock, and Lake was permitted to take them from the Bank of Little Rock to the German National Bank with the understanding that they or the money for them should be returned to the Bank of Little Rock. The German National Bank issued \$10,000 in New York exchange in favor of the Bank of Little Rock, and paid \$9,200 in cash, which Lake and Perrie handed to the Bank of Little Rock in lieu of the bills of lading, and the account of Alphin & Lake Cotton Company was credited with, \$19,200 by the Bank of Little Rock."

The German National Bank lost the cotton.

It was delivered to other parties. The bank recovered judgment in this action; and the defendant appealed.

Is appellant responsible for the loss of the cotton?

At common law a bill of lading is a muniment of title to the goods or property therein specified, is a symbol or representative of the goods, "when properly indorsed and delivered, with the intention of passing the title to them, is a symbolic or constructive delivery of the goods themselves; and when assigned, the carrier, having notice of the assignment, becomes bound to deliver the goods to the assignee. If the goods, by the terms of the bill of lading, are deliverable to the order of the shipper, the carrier should not deliver except upon the production of the bill of lading properly indorsed by the shipper; for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods." *North Pennsylvania Railroad Company v. Commercial Bank of Ohio*, 123 U. S. 727, 734, 736, 8 Sup. Ct. 266, 31 L. Ed. 287; *The Thames*, 14 Wall. 98, 20 L. Ed. 804; *Hutchinson on Carriers* (2d Ed.) §§ 129, 130; *Daniel on Negotiable Instruments*, §§ 1728, 1731.

The responsibility of the carrier for the goods continues after their arrival at the place of destination, until they are ready to be delivered and the owner or consignee has had a reasonable time and opportunity to examine them and take them away. If they are not called for by the party entitled to them within that time, it is the duty of the carrier to retain them until they are claimed or store them prudently for and on account of their owner. When his responsibility as a carrier ceases he becomes liable for the goods as a warehouseman. He is responsible, either as carrier or warehouseman, until the goods are properly delivered. The bill of lading is evidence of that obligation. *North Pennsylvania Railroad v. Commercial Bank*, 123 U. S. 727, 734, 736, 8 Sup. Ct. 266, 31 L. Ed. 287; *The Thames*, 14 Wall. 98, 20 L. Ed. 804; *The Titania* (D. C.) 124 Fed. 975; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350.

For the enforcement of these duties and the protection of the parties in interest, the statutes of this state, provide: "Warehouse receipts given by any warehouseman, wharfinger or other person or firm for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and transportation receipts of every kind given by any carrier * * * may be transferred in writing thereon, and the delivery thereof so indorsed, and any and all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no

property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered except on surrender and cancellation of such receipts and bills of lading; provided, that all such receipts and bills of lading which shall have the words, 'not negotiable', plainly written or stamped on the face thereof, shall be exempt from the provisions of this act." Kirby's Dig. § 530.

And the act further provides: "Any warehouseman, wharfinger, forwarder or other person who shall violate any of the provisions of this act shall be deemed guilty of a criminal offense, and upon indictment and conviction shall be fined in any sum not exceeding five thousand dollars, or imprisoned in the penitentiary of this state not exceeding five years, or both; and all and every person or persons aggrieved by the violation of any of the provisions of this act may maintain an action at law against the person or persons, corporation or corporations violating any of the provisions of this act, to recover all damages which he or they may have sustained by reason of any such violation as aforesaid, before any court of competent jurisdiction, whether such person or persons shall have been convicted of fraud as aforesaid under this act or not." Kirby's Dig. § 531.

Appellant does not claim that it has delivered the cotton in question in compliance with these statutes, but contends that the statutes are in conflict with the clause of the Constitution of the United States which vests Congress with power to regulate commerce among the states. But they are not in conflict. It is the duty of the carrier to deliver property specified in a bill of lading to the legal holder thereof. The object of the statutes, and the effect if obeyed, is to enforce this duty and protect the rights of the holder. In the absence of congressional legislation upon the subject the state can do so.

In *Western Union Telegraph Company v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, the court held that a statute of the state of Georgia, "requiring every telegraph company with a line wholly or partly within that state to receive dispatches on payment of the usual charges and transmit and deliver them with due diligence under a penalty of \$100.00, is a valid exercise of the power of the state in relation to messages by telegraph from points outside of and directed to some point within the state." The court in construing that statute says: "The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in no wise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not an addition to the duty which it would owe in the absence of such a

statute. Can it be said that the imposition of a penalty for the violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the federal Constitution under discussion? We think not."

In *Chicago, Milwaukee & St. Paul Railway Company v. Solan*, 169 U. S. 133, 18 Sup. Ct. 239, 42 L. Ed. 688, it was held that "a statute of a state, providing that no contract shall exempt any railroad corporation from the liability of a common carrier, or carrier of passengers, which would have existed if no contract had been made, does not, as applied to a claim for an injury happening within the state under a contract for interstate transportation contravene the provision of the Constitution of the United States empowering Congress to regulate interstate commerce." The court said: "Railroad corporations, like all other corporations and persons, doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate rights and duties of all persons and corporations within its limits."

We have made investigation for and have not found, statutes of Congress upon the sub-

ject-matter of sections 530 and 531, of Kirby's Dig. These statutes do not impose any burdens upon interstate commerce, but are in aid of it, to the extent that they provide for the enforcement of duties and protection of rights already existing; and are useful and necessary legislation, and are valid in the absence of Congressional legislation inconsistent with them. *Railroad Company v. Fuller*, 17 Wall. 560, 21 L. Ed. 710; *Gulf Colorado, etc., Railway Co. v. Hefley*, 158 U. S. 103, 15 Sup. Ct. 802, 39 L. Ed. 910; *Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 23, 32 L. Ed. 352.

In *Central of Georgia Railway Company v. Murphy*, 196 U. S. 194, 25 Sup. Ct. 213, 49 L. Ed. 444, cited by appellant, the state statute in question, imposed upon the initial or any connecting carrier the duty of tracing freight which had been lost, damaged or destroyed on its or connecting carrier's line, and of informing the shipper, in writing, when, where, how and by which carrier it was lost, damaged or destroyed, and of giving the names of the parties and their official position, if any, by whom the truth of the facts set out in the information, can be established; and provided, that "if the carrier to which application is made shall fail to trace said freight and give said information, in writing, within the time prescribed, it shall be liable for the value of the freight lost, damaged or destroyed, in the same manner and to the same amount as if said loss, damage or destruction occurred on its line." The court held that statute was a violation of the interstate commerce clause of the federal Constitution and void. The court in considering this statute said: "Without the provisions of the statute in question, the plaintiff in error would not be liable to the shippers in this case, if, without negligence, they delivered the consignment in good condition to the succeeding carrier. This they offered to prove was the case. But if this statute be valid, this limitation of liability can only be availed of by the railroad company by complying with its provisions. In other words, before it can avail itself of the exemption from liability beyond its own line, provided by its valid contract, the initial or any connecting carrier must comply with the terms of the statute, and must within 30 days after notification obtain and give to the shipper the information provided for therein. This is certainly a direct burden upon interstate commerce, for it affects most vitally the law in relation to that commerce, and prevents the exemption provided by a legal contract between the parties from taking effect, except upon terms which we hold to be a regulation of interstate commerce. * * * The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the state, with regard to the transportation of articles of commerce; it prevents a valid contract of

exemption from taking effect, except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet if the information is not obtained the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it." No such objections can be urged against sections 530 and 531 of Kirby's Digest. The statutes in the two cases are wholly unlike.

Appellant failed to deliver the cotton on the surrender and cancellation of the bills of lading issued therefor, and under the statutes of this state is liable to appellee for damages. But appellant insists that, according to the bills of lading, it was to transport the cotton to El Dorado and deliver it to the care of the compress company, and that when it did so, it discharged its whole duty, and was thereby relieved of further responsibility. If this contention be correct, the stipulation in the bills of lading, by which appellant undertook to deliver the cotton to the order of the shipper, was meaningless. According to the stipulation, it could not have delivered the cotton except upon the production of the bills of lading properly indorsed; "for this was notice to the carrier that the shipper intended to retain in his power the ultimate disposition of the goods [cotton]." The failure of the legal holder of the bills of lading to appear for the purpose of receiving the cotton when it reached its destination did not relieve appellant of further responsibility. But under the contract and the law it had the right to store the cotton with compress company with authority and directions to deliver it to the person entitled to it upon the production of the bills of lading properly indorsed. Under the contract, as shown by the bills of lading, it was relieved of liability on account of the storage, but not of the failure to deliver according to law. See *Midland National Bank v. Mo. Pac. R. R. Co. (Mo.)* 33 S. W. 521, 525, 53 Am. St. Rep. 505.

Judgment affirmed.

McCULLOCH, J. (dissenting). I do not agree with the majority of the court in holding that the liability of the railway company for the loss of the cotton is established by undisputed evidence, and that the trial court was correct in directing a verdict for the plaintiff. The cotton was consigned to the shipper's order, care of the compress company at El Dorado. The railway company complied with the contract by delivering it to the compress company. The language of the contract was, in effect, a selection in ad-

vance by the consignee of a place of delivery and the designation of an agent to accept the delivery for him. The consignee cannot complain because the carrier delivered the cotton, at the place and to the agency designated, without requiring a surrender of the bill of lading, nor can the assignee of the consignee complain, unless the statute quoted in the majority opinion prohibits a delivery by the carrier, under the circumstances of this case, without requiring a surrender of the bill of lading. I do not think that the statute in question has any application to the facts.

In the absence of any statute on the subject, it is the duty of a common carrier of freight, either by land or water, when the point of destination is reached, and the consignee fails to call for the property or refuses to accept it, not to abandon it, but to properly store it for the benefit of the consignee; and the carrier may, when it has no warehouse of its own for bulky freight such as cotton, grain, and the like, discharge itself from further liability by placing the goods in store with a responsible warehouseman for the benefit of the owner. When thus delivered the warehouseman so selected becomes the agent and bailee of the owner. The carrier is not bound to provide storage room of its own for bulky freight of that character. 2 *Rorer on Railroads*, p. 1286; *Fisk v. Newton*, 1 *Denio* (N. Y.) 45, 43 Am. Dec. 649; *Ala. & Tenn. R. R. Co. v. Kidd*, 35 *Ala.* 209; *Navigation Co. v. Marshall*, 48 *Ind.* 506; *Merchants' Dispatch Co. v. Hallock*, 64 *Ill.* 284. There is a clear distinction between the duty of a carrier to furnish suitable facilities for loading and unloading freight, and its duty in respect to storage of freight after it reaches its destination.

The warehouseman so selected, being the agent of the owner and not of the carrier, the latter is liable to the former for his negligence. The measure of the carrier's duty is in the selection of a responsible and trustworthy warehouseman. If it exercises ordinary care in selecting a warehouseman of known reliability and delivers the freight to him for the benefit of the owner it is not responsible for any loss occurring thereafter by reason of the negligence of the warehouseman in delivering the property to the wrong person. Now the statute in question does not alter this rule of law in anywise. Notwithstanding the statute, a carrier is not bound to provide warehouse room for storage of cotton or other bulky commodity, nor is it compelled to keep the cotton in cars until called for by the holder of the bill of lading. It may still store with a responsible warehouseman and thereby discharge itself from further liability. In fact it is a feature of the transportation and handling of cotton sufficiently notorious for us to take knowledge of, that railroads do not provide warehouses for cotton at points of destination, but that this feature of the business is taken

care of by other concerns owning and operating compresses and storage warehouses at intermediate and terminal points. In the face of this universal custom I cannot believe that the Legislature meant to change the established rules of law concerning the duties of carriers in this respect, and to require the carrier of cotton or other bulky freight either to provide at its own expense warehouses for the storage of such freight, or constitute as its agent other warehouseman whom it may select for this purpose. This would be carrying the effect of the statute, in my judgment, far beyond the obvious intention of the lawmakers. It seems to me that by this statute it was only intended to prevent a delivery of the freight except upon surrender of the bill of lading, and that the same duty and responsibility is imposed upon the warehouseman after the freight passes into his hands for storage. In this case, it cannot be said that the railroad company was guilty of any negligence in the selection of a responsible warehouseman. The compress company is conceded to have been entirely responsible at the time of the delivery of the cotton. It was the only storage place for cotton at that point and was generally used for compress and storage purposes by all who shipped cotton to El Dorado. Moreover, the selection was made by the consignor, who was the consignee, and any negligence in the selection, if any, would be chargeable to him and not to the carrier.

But it is contended that the railway company is liable, in this case, for the loss of the cotton because its agent was guilty of negligence in failing to notify the manager of the compress company of the fact that the cotton had been consigned to shipper's order. The opinion of the majority is, as I understand, based upon this theory. I am not sure that under the facts of this case, any duty rested upon the railroad company to notify the compress company of the nature of the shipment. The consignee having selected the compress company as his agent to receive and store the cotton, it would seem to be his duty to give the necessary notice that the cotton was to be held subject to his own order. Be that as it may, however, I think the trial court was clearly in error in directing a verdict, as it was not shown beyond dispute that the agent of the railroad company failed to notify the manager of the compress company that the cotton was consigned to shipper's order. In the first place this instruction was erroneous because the negligence of the railroad company in this regard was not put in issue by the pleadings. The complaint contains no allegations of negligence in this respect. It is simply alleged therein that the defendant received the cotton for shipment and failed to deliver the same to plaintiff as the holder of the bills of lading, and judgment is asked, on that account, for the value of the cotton. The plaintiff manifestly relied upon the force of the stat-

ute in prohibiting a delivery without surrender of the bills of lading, and not upon any negligence of the carrier in delivering to the compress company without notice of the nature of the consignment. The court in directing a verdict on this question did so upon a charge of negligence not set forth in the pleadings. In the next place the direction was erroneous because the testimony was conflicting as to whether proper notice was given and it should have been submitted to the jury.

The railroad station agent testified that the book from which the manager of the compress company checked up the cotton and signed receipts for same, showed that the cotton had been consigned to shipper's order. The jury would have been justified in finding from this that the manager received information as to the nature of the consignment and that the cotton must be held subject to the shipper's order. It is true that on cross-examination of the witness the plaintiff undertook to discredit this testimony by showing the letters "S. O.," meaning "shipper's order," appeared written in the book in a different handwriting from that of the other memoranda. The witness admitted that this appeared to be true in some instances, but he does not say when it was written or that it might have been added after the delivery of the cotton and signing of the memoranda in the book, and, taking the whole of his testimony, the jury might have found from it that the letters "S. O." were a part of the memoranda in the book when signed by the manager of the compress company and that it conveyed the necessary information to the latter. The manager of the compress company, who received the cotton, was introduced as a witness by plaintiff and testified concerning the transactions but he does not say positively that the letters "S. O." were not in the book when he signed it. He merely said that "if it did I don't remember ever seeing it in there." I think the majority opinion is inaccurate in the statement that the letters "S. O." appear to be upon the book, but were "placed there after the cotton was delivered." There was sufficient evidence to go to the jury upon the question of defendant's negligence in delivering the cotton to the compress company without directions or information.

Moreover, the undisputed testimony shows that the compress company and the Alphin & Lake Cotton Company, two corporations, were under the same management. E. H. Lake was the active controlling officer in both and directed the business and affairs of each. He purchased the cotton for the Alphin & Lake Cotton Company and directed the method of shipment; the cotton was handled by the compress company under his management and direction, and he shipped it out from the compress company. He is the individual who is solely responsible for the diversion of the cotton. Under those

circumstances I think it would be a manifest injustice to charge the railroad company with negligence in failing to give information to the compress company of facts which it already knew through the man who was controlling and directing its affairs and business in handling this cotton. At least, it seems to me that this situation was sufficient to go to the jury on the question of negligence, for, if the compress company already knew that the cotton was to be held subject to the shipper's order, the railroad company should not be charged with negligence in failing to again give information of that fact, nor could the negligence of the railroad company under those circumstances be the proximate cause of the loss of the cotton.

The judgment should, in my opinion, be reversed, and the cause remanded.

WESTERN UNION TEL. CO. v. FORD.

(Supreme Court of Arkansas. Feb. 3, 1906.)

1. TELEGRAPHS AND TELEPHONES—REGULATION OF OFFICE HOURS ON HOLIDAYS—REASONABLENESS.

A rule of a telegraph company fixing the office hours on holidays from 8 to 10 a. m., and from 4 to 6 p. m., is a reasonable regulation.

2. SAME—ACTION FOR DELAY IN DELIVERING MESSAGES—EVIDENCE—INSTRUCTIONS.

Where, in an action against a telegraph company for delay in delivering a message, the evidence showed that the message was received at the office of delivery at 1:45 p. m. on a holiday; that no effort was made to deliver it to the sendee until about 4:45 p. m. and that it was not delivered until about 10 o'clock the following day; and that the rules of the company fixed the office hours on holidays from 8 to 10 a. m. and from 4 to 6 p. m.—an instruction that the company was justified in observing holidays and if the delay was due to the observance of the day as a holiday the company was not liable was properly refused because calculated to lead the jury to understand that the observance of the holiday excused the company from diligence in delivering the message while it was bound to exercise diligence consistent with its reasonable rules.

3. APPEAL—GROUND OF OBJECTION—REFUSAL OF REQUEST FOR INSTRUCTION—REQUISITES.

A party who has not asked for a proper instruction cannot complain of the refusal to give an improper one.

4. TELEGRAPHS AND TELEPHONES—DELAY IN DELIVERING MESSAGE—NEGLIGENCE OF SENDER—EFFECT.

In an action against a telegraph company for delay in delivering a message, a finding of negligence on the part of the sender in failing to give a specific address of the sendee does not excuse the company from a negligent failure to deliver.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones. § 32.]

5. SAME—NEGLIGENCE OF COMPANY—EVIDENCE.

Evidence in an action against a telegraph company for delay in delivering a message examined, and held to support a finding of actionable negligence on the company's part.

6. SAME—RECOVERY FOR MENTAL ANGUISH—STATUTES—APPLICABILITY.

The statute providing that all telegraph companies doing business in the state shall be

liable for mental anguish resulting from negligence in receiving, transmitting, or delivering messages, authorizes a recovery for mental anguish where the negligence occurred and the injury was sustained in the state, though such damages are not recoverable in the state whence the message was sent.

Appeal from Circuit Court, Miller County; James S. Steel, Special Judge.

Action by Belle Ford against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for delay in the delivery of a telegram. The plaintiff resided at Texarkana, Ark., and had a sister at Carthage, Mo. Her sister died on January 1, 1904, at an early hour in the morning, and about 11:30 o'clock on that day Jennie Harding, a niece of plaintiff, delivered to defendant company for transmission the following telegram directed to plaintiff: "Joplin, Mo., January 1, 1904. Mrs. Belle Ford, Texarkana, Ark. Your sister is dead can you come? Answer to Carthage. [Signed] Jennie." The message was received at the Texarkana office at 1:45 the same day, but was not delivered to plaintiff until the following day, January 2, 1904, about 10 o'clock. It is alleged that the servants of defendant were guilty of negligence in the delivery of the message; that the funeral of plaintiff's sister was held on January 2d, at Joplin; that plaintiff could and would have left Texarkana at 7:30 p. m. on January 1st, so as to reach Joplin in time to be present at the funeral had she received the telegram in time; and that on account of the disappointment in not being able to attend her sister's funeral, she suffered great anguish and thereby sustained damages in the sum of \$1,000, for which she prayed judgment. The defendant answered, denying negligence on the part of its servants, and alleging that the delay in delivery of the message was due solely to the negligence of the sender in failing to give a sufficient address of the sendee.

The jury returned a verdict in favor of the plaintiff in the sum of \$500 damages, and the defendant appealed.

George H. Fearons and Rose, Hemingway & Rose, for appellant. W. H. Arnold, for appellee.

McCULLOCH, J. (after stating the facts).

1. Appellant assigns as error the refusal of the trial court to give the following instruction: "You are instructed that the defendant is justified in observing the usual holidays, and if you find that the delay in delivering the message sued on was due in any degree to the observance by the defendant of January 1 as a holiday, to that extent you will hold the defendant free from blame." The rules of the company provide that on holidays the office hours shall be from 8 to 10 a. m. and from 4 to 6 p. m. Texarkana being the repeating station for messages en

route to Texas, an operator remains on duty all day to keep the repeater in order, and the message in question was received at 1:45 p. m. by this operator, who placed it on a hook in the office, and no effort was made to deliver it to the sendee until the return of the delivery clerk to the office about 4:45 p. m. A telegraph company may fix reasonable hours for the receipt and delivery of messages, and the question whether such regulation is reasonable, or unreasonable, is one of law for the court to declare. *W. U. Tel. Co. v. Love-Banks Co.*, 73 Ark. 205, 83 S. W. 949. The regulation shown in this case to have been promulgated by the company, fixing office hours on holidays, seems to be reasonable, and it would have been the duty of the court, if requested, to have so declared to the jury. But the instruction in question does not embody any such declaration. It says nothing about reasonableness of the regulation, but tells the jury broadly that the company was free from blame if the delay was due to observance of the holiday. It was misleading, as the jury might have understood from it that observance of the holiday excused the company from diligence in delivering the message. Under the law the company was bound to exercise due diligence, consistent with its reasonable rules, in seeking to make a delivery of the message, and was liable for any negligence in this regard. Appellant cannot, without having asked for a proper instruction on the subject, complain of the refusal of the court to give an improper one.

2. It is contended that the evidence was not sufficient to sustain the charge of negligence against appellant, and that the delay in delivery of the message was due solely to the negligent failure of the sender to give a sufficient address of the sendee. This was a question of fact for the jury and we think the evidence was sufficient to warrant the finding. The sender may have been guilty of negligence in failing to give a specific address, but the company accepted the message and undertook to transmit it and to exercise due diligence in promptly delivering it. The deficiency in the address was a proper matter for the jury to consider, and doubtless they did consider it, in determining whether diligence was exercised in searching for the addressee to deliver the message. But a finding of negligence on the part of the sender in this respect would not have excused the company from a negligent failure to deliver. The proof shows that the plaintiff was living with her husband J. A. Ford, only a few blocks from the telegraph office in the business portion of the city of Texarkana. The name of J. A. Ford appeared in the telephone directory and upon a sign over the door of his place of business. The whereabouts of plaintiff were ascertained the next day, and the message delivered to her by the messenger through inquiry at her

husband's place of business. Her name, stated in the face of the message, indicated that she was a married woman. The jury could rightfully conclude that due diligence required the servants of the company to inquire for plaintiff of a man bearing the name of Ford who was so accessible by telephone as her husband was shown to have been. We cannot say that the jury were not warranted in finding negligence under these circumstances.

8. Learned counsel next contend that there can be no recovery in this case because the message was sent from a point in Missouri where the law does not authorize recovery of damages for mental anguish unaccompanied by physical suffering. An instruction to this effect was asked by appellant and refused by the court. The statutes of this state provide that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting or delivering messages; and in all actions under this section the jury may award such damages as they conclude resulted from the negligence of the said telegraph company." The cause of action arose in this state by reason of the negligent act in failing to promptly deliver the message having occurred here. The authorities on this question are not entirely harmonious, but we think the weight of authority supports the view that the law of this state as to the measure of damages should control, and this view is consonant with sound reason. 2 Wharton, *Conflict of Laws*, p. 1085; *Harrison v. W. U. Tel. Co.* (S. C.) 51 S. E. 119; *Gray v. Same*, 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 106; *Howard v. Same* (Ky.) 84 S. W. 764; *W. U. Tel. Co. v. James*, 162 U. S. 350, 16 Sup. Ct. 934, 40 L. Ed. 1105. It will be observed that our statute does not make the right to recover such damages depend upon any contractual relation existing between the telegraph company and the person injured by its negligence, but declares in broad terms that all telegraph companies doing business in the state shall be liable for mental anguish for negligence in receiving, transmitting, or delivering messages. In fact the right of an addressee to recover damages at all is not based upon contract, as none exists. "The true view," says Mr. Thompson, "which seems to sustain the right of action in the receiver of the message, or in the person addressed, where it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs, upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal, where he is agent, or the receiver, or his principal where he is the agent." Thompson on Electricity, § 427.

While this precise question was not presented in the case of *Peay v. W. U. Tel. Co.*, 64 Ark. 538, 43 S. W. 965, 89 L. R. A. 463, the effect of that decision was to sustain the right of recovery in the case at bar. The *Peay Case* was decided before the enactment of the present statute allowing recovery for mental anguish unaccompanied by physical injury and the court, declining to follow the so called Texas rule, held that no recovery could be had. In that case the message was sent from a point in the state of Kentucky where such damages were allowable, so if the doctrine contended for now by appellant is declared to be the law, the Kentucky rule should have been enforced in the *Peay Case* and the recovery for mental anguish allowed. While as said before, this question was not discussed in the *Peay Case* and may have been overlooked by both court and counsel, yet the effect of the decision serves to negative any intention on the part of the lawmakers to adopt the Texas doctrine in full. The present statute was obviously enacted by the Legislature in order to change the rule announced in the *Peay Case* as to the right to recover such damages, and if we indulge in any speculation at all, as to the motive and intention of the lawmakers, we must say that the statute was passed with a full knowledge of the decision of this court holding that no such damages were recoverable in this state for negligence in delivering a message here, which had been sent from a state where such damages were allowed. A somewhat similar question came before this court recently in the case of *Arkansas Sou. Ry. Co. v. German National Bank*, 92 S. W. 522, in construing the effect of the statute of this state, as applicable to a shipment of freight from another state, prohibiting the delivery by a carrier of freight without surrender of the bill of lading. The freight was shipped from a point in Louisiana to a point in Arkansas, and delivered here without surrender of the bill of lading. Damages were sought to be recovered on the ground that the delivery was in violation of the statute. The court held that the statute was applicable and enforceable, though the contract of affreightment was made in another state. The court quoted with approval the following language of the Supreme Court of the United States in the case of *Chicago, Milwaukee & St. Paul Ry. Co. v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688. "A carrier exercising his calling within a particular state, although engaged in the business, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law."

We need not, and do not, decide what would be the effect of the statute if the act of negligence complained of had occurred in the state of Missouri whence the message was sent. That question does not arise in this case. But we do hold that where the act of negligence occurred here, and the injury was sustained here, the statute is enforceable and gives the right to recover damages for mental anguish, even though such damages are not recoverable in the state whence the message was sent.

Judgment affirmed.

STELLE v. STATE.

(Supreme Court of Arkansas. Jan. 13, 1906.)

1. CRIMINAL LAW—TIME OF OFFENSE—NECESSITY OF PROVING.

Under Kirby's Dig. § 2106, providing that no person shall be prosecuted for an offense less than a felony unless the indictment be found within one year after the commission of the offense, it devolves upon the state in all prosecutions for misdemeanors to prove the commission of the offense within one year next before the finding of the indictment.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 271, 725.]

2. INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE AS TO TIME.

Kirby's Dig. § 2106, provides that no person shall be prosecuted for an offense less than felony unless an indictment be found within one year after the commission of the offense. An indictment for illegally selling liquor was returned on February 18, 1904, and the trial was had on September 20, 1905. The prosecuting witness was asked whether he had bought liquor from defendant "at any time within 12 months before the 18th day of February, 1904." The witness answered that he had. He was then asked, "About when was that?" and replied that he could not tell the exact time, but that it was over two years before the trial. There was no other testimony as to the time of sale. Held, that the two answers of the witness were not in conflict, and construed together they fixed the time of the commission of the offense at some time between February 18 and September 20, 1903, and consequently within one year next before the filing of the indictment.

3. SAME—LIQUORS PROHIBITED—MEDICINAL PREPARATIONS.

Evidence of a sale of "Peruna" by one not licensed to sell liquor, that Peruna is intoxicating, and that it is used as a beverage, authorizes a conviction of an illegal sale of liquor, although the sale was made in good faith and in the belief that the Peruna was to be used as a medicine.

Appeal from Circuit Court, Pike County; James S. Steel, Judge.

C. E. Stelle was convicted of selling liquor without a license, and appeals. Affirmed.

J. C. Pinnix, W. P. Feazel, and W. C. Rogers, for appellant. Robert L. Rogers, Atty. Gen., for the State.

McCULLOCH, J. The appellant was convicted under an indictment charging him with having sold intoxicating liquor without license. The testimony is undisputed and the court instructed the jury to return a verdict

of guilty, which was done, the lowest punishment provided by the statute being inflicted.

Appellant sold to one Kelly an intoxicating compound called "Peruna," which was used as a beverage. He contends that the evidence did not warrant the instruction of the court and conviction, because it failed to show that the alleged offense was committed within one year next before the finding of the indictment, or that he sold the liquor to be drunk as a beverage. The statute provides that "no person shall be tried, prosecuted, and punished for any offense less than a felony unless the indictment be found within one year after the commission of the offense" (Kirby's Dig. § 2106) and in all prosecutions for misdemeanors it devolves upon the state to prove the commission of the offense within that time. *Dixon v. State*, 67 Ark. 495, 55 S. W. 850. The indictment in this case was returned by the grand jury of Pike county on February 18, 1904, and the trial was had on September 20, 1905. The only evidence as to time of sale of the liquor is the testimony of witness Kelly as follows: "Q. Mr. Kelly, have you bought any Peruna from Mr. Stelle at any time within 12 months before the 18th day of February, 1904? If, so, tell the jury how much you bought and what you paid for it. A. Why, I bought a bottle of Peruna from Capt. Stelle and gave him a dollar for it. Q. About when was that? A. I couldn't tell you exactly what time it was. It has been two years ago and over." Two years prior to the date of the trial would carry it back to September, 1903, five months before the finding of the indictment. The answer elicited from the witness by the first question quoted above fixes the time of the commission of the offense on a date within one year before the finding of the indictment. The answer to the next question leaves the precise date in uncertainty, but does not contradict the first answer. It fixes a date more than two years before the trial, but not necessarily more than a year before the indictment was returned. The two answers are not in conflict, and, reading them together, it fixes the commission of the offense some time between February 18 and September 20, 1903. This was undisputed and warranted a peremptory instruction so far as that question was concerned. Appellant testified in his own behalf, and detailed the circumstances attending the sale of the liquor to Kelly, but was not asked about the time of the sale and gave no testimony on that point.

Appellant next contends that he committed no offense because he sold the liquor as a medicine and not as a beverage. Or, rather that there was a conflict in the testimony upon that question and it should have been submitted to the jury. It is, however, established by the testimony in the record beyond dispute that Peruna is intoxicating, that it was used as a beverage, and that appellant sold it without having previously obtained a license. This is sufficient to warrant a

conviction. If the liquor is intoxicating it is, under the statute, unlawful to sell it for any purpose. It is no defense to say that, notwithstanding the fact that the liquor is intoxicating, it is sold for use as a medicine. If such were held to be the effect of the statute, whisky could be sold without a license as a medicine. This court has, however, repeatedly held to the contrary. *Woods v. State*, 36 Ark. 36, 38 Am. Rep. 22; *Flower v. State*, 39 Ark. 209; *Chew v. State*, 43 Ark. 361; *Battle v. State*, 51 Ark. 97, 10 S. W. 12. "In this state no one can lawfully sell intoxicating liquors without first procuring a license from the county court of his county. A druggist cannot sell them without license as as medicine upon the description of a physician." *Chew v. State*, supra. The statute, in plain terms, forbids the sale for any purpose without license of any intoxicating liquor which may be used as a beverage. *Crawford v. State*, 69 Ark. 360, 63 S. W. 801; *Bradshaw v. State* (Ark.) 89 S. W. 1061. The seller must acquaint himself with the contents of the liquid preparation he is selling and if it is one of the liquors under the ban of the law, "or contains the elements necessary to constitute an intoxicating liquid in such form as it may be used as a beverage," it is unlawful to sell the same even though the seller do so, thinking, in good faith, that it is to be used as a medicine.

Judgment affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. CLAY GIN CO.

(Supreme Court of Arkansas. Jan. 6, 1906.)

1. CARRIERS — DISCRIMINATION — STATUTES — CONSTRUCTION.

Kirby's Dig. § 6804, making it unlawful for carriers to make any preference in furnishing cars, and requiring them to furnish without discrimination sufficient facilities for the carriage of freight, is but declaratory of the common law, making it the duty of carriers to furnish facilities for the transportation of freight offered in the regular course of business, but without requiring them to furnish facilities for an unprecedented rush of business, and a carrier unable to furnish cars for all shippers, by reason of an unexpected rush of business, must furnish such cars as it has to all shippers, without discrimination.

2. SAME — FAILURE TO FURNISH CARS — EXCUSE.

In an action against a carrier for failure to furnish cars for the carriage of freight, the evidence showed that there was a shortage in cars by reason of an extraordinary accumulation of freight; that the carrier had seven cars per mile for each mile of its main line and branches, which compared favorably with other carriers in that part of the country; that it, in anticipation of new business, ordered 1,500 new freight cars, which it thought would be sufficient to handle the business. *Held*, that the carrier was not liable; it being bound only to provide reasonable facilities for the carriage of freight offered in the regular course of business.

3. SAME — DISCRIMINATION IN FURNISHING CARS — EVIDENCE — SUFFICIENCY.

On the issue whether a carrier discriminated against plaintiff and in favor of a rival

shipper, the evidence showed that the shippers were given substantially the same facilities for transportation; that in one month plaintiff was given five cars and the rival shipper six; that in another month plaintiff received ten cars, while the rival shipper received seven; that in another month each received seventeen cars. It was also shown that from the 3d to the 10th of the last month the plaintiff received only three cars, while his rival received six. *Held*, insufficient to show a discrimination in violation of Kirby's Dig. § 6804, making it the duty of carriers to furnish without discrimination facilities for the transportation of freight.

Appeal from Circuit Court, Clay County; Allen Hughes, Judge.

Action by the Clay Gln Company against the St. Louis Southwestern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

On the 3d day of August, 1903, the appellee instituted this action against the appellant, and alleged it was a railway corporation operating a line as a common carrier in Missouri and Arkansas, and the appellee was in the months of October, November, and December, 1902, engaged in shipping cotton seed from the town of Rector, in Clay county, Ark., to a customer at Cairo, Ill., and that during said months it had for shipment 65 tons of seed of the market value of \$16 per ton, which were to be shipped over appellant's line, and it made demand through appellant's agents at Rector for cars to ship said seed, and the appellant negligently failed and refused to provide transportation for the same, and that by reason of said failure said seed rotted, whereby appellee was damaged in the sum of \$850. The appellant answered and denied it at the time mentioned, or any other time, either carelessly, negligently, or otherwise failed and refused to furnish and provide transportation for the shipment of appellee's cotton seed, and denied that, by reason of its failure to furnish cars for the shipment of same, any part of the seed rotted or spoiled, and denied plaintiff was damaged in the sum of \$850, or in any other sum. Appellant further alleged: That it was engaged in transporting interstate commerce, and the freight mentioned for shipment was to be transported out of the state of Arkansas through the state of Missouri, and therefore became interstate freight, and under the laws it had to furnish cars and facilities to all of its patrons alike; that, at the time it was claimed the seed rotted and spoiled, there was an usual and unexpected demand for cars from the various shippers of such products as cotton, cotton seed, wheat, corn, flour, lumber, cattle, horses, hogs, and many other classes of freight, and on account of the unexpected and extraordinary demand for cars it was unable to supply the demands during the months of October, November, and December; that it apportioned its cars to the various shippers in proportion to the respective wants and needs as fairly and equitably as it was possible for it to do.

The proof on behalf of appellee showed that during the months of October and November it tendered to appellant cotton seed for shipment in car-load lots, and demanded cars for such shipment; that appellee failed to furnish it the cars it needed; and that, on account of its failure to get the necessary cars, it lost 65 tons of cotton seed worth from \$15 to \$17 per ton. Witnesses for appellee testified that there were others engaged in the same business of shipping cotton seed from Rector Station, and that, while appellee failed to receive cars on its demand therefor, the other parties received cars regularly. But these witnesses on cross-examination all answered that they did not know how many cars the other shippers received during the months of October or November, nor did they know how many cars the appellee received during those months. It was shown that from the 3d to the 10th of October the appellee received three cars, while the Rector Gln Company, during the same period, received seven cars. During this period appellee lost seed which it would not have lost had cars sufficient been furnished it. Demand was made daily upon appellant for cars, and the company was notified that the cotton seed of appellee was rotting for lack of cars in which to load same when it was ready for shipment.

On behalf of appellant the proof showed that during the months of October and November there was a shortage in cars, brought about by an unforeseen and extraordinary accumulation of freight, and by other conditions, which the transportation agent and the chief train dispatcher of appellant explained as follows: A. B. Liggett testified that he was its superintendent of transportation, and had charge of the car service in Missouri and Arkansas. All customers shared alike in a shortage. There was a shortage of cars in the months of October and November. In October, 1902, there was an average daily shortage in Missouri of 104 cars per day, and in Arkansas 175 cars per day. In November they had a daily shortage in Missouri of 224 cars, and in Arkansas of 644 cars. At that time the company had seven cars per mile for each mile of its main line or branches, or about 7,000 cars, which compared favorably with other roads in Arkansas and Missouri. That they now had nine cars to the mile. In explaining the shortage witness said: "It is quite a long story how cars are handled. If we had 15 cars to the mile and we loaned 6 cars of it to other roads, and the other roads didn't give us any assistance, we would soon be out of cars. The rule is, our connections should furnish us their pro rata of cars for our cars loaded to be shipped by way of their line, and their connections are also supposed to furnish their pro rata of cars, or, in other words, for business loaded on our lines and going over the I. C. and over their road, we frequently get 500 or 600 cars from them in a short time.

Now during the fall of 1902 the condition in what we call the Eastern territory was very bad. The lines all got congested—had more business than they could handle. The lines were blocked so that they could not move the cars, and we had thousands of cars off of our own line that could not be sent back home to us. We got our cars away from home and could not get them back. Our immediate connections did not have any cars to give us. That is true of the I. C. and C. & E. I., and previous to this they had been giving us a large number of cars to help us out." Witness said that during the fall of 1902 the demand for cars was greater than it had ever been before. There were a great many new mills along the line of the road. They anticipated some increase in the business in the summer of 1902 and ordered 1,500 new box cars, and they were loaded and gone before they knew they had them. When they ordered the cars they thought they would be sufficient to handle the business, but they were not. They could not anticipate the congested condition of freight on connecting lines in time to have provided cars. O. E. Maer testified he was chief train dispatcher in October and November, 1902, and there was a shortage of the cars at that time. That the conditions were different from what had been in former years. They were unable to procure any cars away from home, and when their cars got away from home they were unable to get them back. They had not anticipated such a shortage. On the question of the distribution of cars this witness further testified that: "He had charge of the distribution of the cars, under the direction of the superintendent of transportation, and he tried to make an equitable distribution of the cars. A portion of the time they were only able to fill about 50 per cent. of the orders, and at other times about 25 per cent.; but he would send cars to the agents, make requisition requesting them to distribute the cars according to the demand. That they tried to help every one and do justice to all." On this subject W. E. Lynch testified: "He was agent for the appellant at Rector in the fall of 1902, and was acquainted with all of the gin companies there. He made requisition for cars and furnished them as rapidly as he could get them. Witness then produced a list of cars disclosing that he had furnished the Clay County Gin Company, in September, five cars; the Rector Gin Company, six cars. In October he furnished the Clay County Gin Company with 17 cars and the Rector Gin Company with 17 cars. In November he furnished the Clay County Gin Company with 10 cars and the Rector Gin Company with 7 cars. He had furnished the Clay County Gin Company with three cars from October 3d to October 10th, and to October 10th he had furnished the Rector Gin Company with six cars. That he had no intention of discriminating, and it was not a discrimination.

He kept the record of the cars ordered, and when they arrived he distributed them in proportion to the number of cars ordered." This witness was asked to explain why he had delivered to the Clay County Gin Company three cars from the 3d to the 10th of October, and had during the same time delivered to the Rector Gin Company six cars, and answered: "Why, I cannot say at this time, unless it was that the Clay County Gin Company may not have been ginning steady at that time. I do not know that they demanded them every day."

S. H. West and J. C. Hawthorne, for appellant. W. E. Spence and F. G. Taylor, for appellee.

WOOD, J. (after stating the facts). This was an action under section 6804 of the Digest (Kirby's) for failing to furnish cars. That section, among other things, provides: "It shall be unlawful for any person or corporation engaged alone or associated with others in the transportation of passengers or property by railroad in this state, as freight or express, * * * to make any preference in furnishing cars or motive power. And all persons or corporations engaged as aforesaid, shall furnish, without discrimination or delay, equal and sufficient facilities for the transportation of passengers, the receiving, loading and unloading, storing, carriage and delivery of all property of a like character carried by him, them or it, and shall perform with equal expedition, and at uniform rates the same kind of services connected with the contemporaneous transportation thereof as aforesaid," etc. Section 6808 provides the penalty for a violation of the act.

The statute did not intend to make the duty of carriers to furnish transportation facilities an absolute one, for it would be unreasonable to conclude that the Legislature intended to impose upon them duties that, under certain conditions, could not be anticipated by them, and which would be impossible to perform, and yet, for such nonperformance, to exact of them heavy penalties. The statute under consideration is but declarative of the requirements of the common law as to the duty of furnishing transportation facilities. After declaring what that duty is, it prescribes the penalty for its nonperformance. "A common carrier, for such goods as he undertakes to carry, is bound to provide reasonable facilities of transportation to all shippers, at every station, who in the regular and ordinary course of business offer their goods for transportation. The carrier is not required to provide in advance for any unprecedented and unexpected rush of business, and therefore will be excused for delay in shipping, or even in receiving goods for shipment, until such emergency can in the regular and usual course of business be removed." *Railway v. Oppenheimer*, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353; 4 Elliott on R. R. § 1470; Hutch. on Car. § 292; 6 Cyc.

872, note 2. To be sure the carrier is liable where he fails entirely to furnish transportation. But the liability of the carrier under the act of March 11, 1899 (Kirby's Digest) is founded, not so much on the inadequacy of the facilities at his command to supply the demands of shippers, as on his refusal or failure to make the facilities which he has available to all who are similarly situated without discrimination or delay. For the act makes it the duty to furnish without discrimination or delay. So, if the carrier by reason of some unforeseen and unusual or unprecedented condition in the traffic is unable to furnish cars for the accommodation of all shippers, he must, in order to escape liability under this statute, furnish such as he has to all shippers without discrimination or delay.

It is conceded that appellant failed to furnish to the shippers of cotton seed at Rector all the transportation needed, but its failure to do this is accounted for in a way to exempt it from liability according to the doctrine above mentioned. So the question, at last, is, did appellant discriminate against the appellee in furnishing what cars it could procure? In *Railway v. Oppenheimer*, supra, and *Railway v. State*, 73 Ark. 373, 84 S. W. 502, it is shown that, to constitute actionable discrimination in the matter of failing to furnish transportation facilities, there must be some undue or unjust preference, something in the facts tending to show that the conduct of the carrier was superinduced by a desire to favor one shipper over another—to give an unjust preference to one over the other, and thereby to attempt to create a monopoly to "pull down one man's business, while building up another's." But if the facts show that "those who are in substantially the same situation with reference to the carrier are treated with the same consideration and accorded the same privileges, there can be no actionable discrimination." Now here the shippers were in substantially the same situation, and, it seems to us the uncontradicted facts show that they were given substantially the same facilities for transportation during the cotton season. In September appellee was given five cars, and the Rector Gin Company, a rival shipper, was given six; but in November the appellee received ten cars, while the Rector Gin Company received only seven, and in the month of October appellee and its rival each received seventeen cars. True the proof shows that from the 3d to the 10th of October appellee received only three cars, while its rival received six, but during that entire month they each received the same number. Had appellee received cars from the 3d to the 10th of October to make it equal to the Rector Gin Company, it would have been entitled to only one car more, as there could not be fractional cars. It is, in the very nature of the business, impossible for mathematical precision to be observed in the manner of the distribution of cars to the various shippers at any given station. This

necessarily results from the difference in the demands that will be made by different shippers, although they may be in substantially the same situation with reference to the carrier and the commodity to be shipped. The undisputed facts here convince us that there was no such difference as to constitute a discrimination, within the purview of the above statute.

Reversed and remanded for a new trial.

CHAPMAN & DEWEY LAND CO. v. BIGELOW et al.

(Supreme Court of Arkansas. Jan. 6, 1906.)

1. QUIETING TITLE—TITLE TO SUSTAIN ACTION—UNOCCUPIED LANDS.

In an action to quiet title to wild and unoccupied lands, the plaintiff must succeed, if at all, on the strength of his own title, and not on the weakness of his adversary's.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quietting Title, § 36.]

2. QUIETING TITLE—PUBLIC LANDS—SWAMP AND OVERFLOWED LANDS.

Evidence in an action to quiet title to swampy land between the meander line of plaintiff's land and the main course of a river held to show that its elevation had not changed since the running of the meander line.

3. PUBLIC LANDS—GRANT TO STATE—CONSTRUCTION—EXTENT OF GRANT.

Swampy lands, checked by bayous, subject to inundation, but reclaimable to some extent for agricultural purposes, lying between the government meander line and the main channel of a river, were not lands, the title to which would pass to the grantee of adjoining land by virtue of riparian rights for fishing and other water purposes.

4. JUDGMENT—CONCLUSIVENESS—NATURE OF DECISION—SECRETARY OF INTERIOR.

A letter of the Secretary of the Interior to the Commissioner of the General Land Office, expressing an opinion as to the character of land lying between a meander line and the main course of a river, written when there was no contest before the department relating to the matter, was inadmissible in an action to quiet title to the lands.

McCulloch, J., dissenting.

Appeal from Circuit Court, Poinsett County; Edward D. Robertson, Judge.

Action by the Chapman & Dewey Land Company against Charles H. Bigelow and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Frierson & Frierson, Ashley, Gilbert & Dunn, and Robert S. Rogers, for appellant. N. W. Norton, for appellees.

BATTLE, J. Chapman & Dewey Land Company, a corporation organized under the laws of the state of Missouri, brought a suit against Charles H. Bigelow, N. P. Bigelow, L. T. Walker, and F. H. Hartshorn to quiet title to certain lands, and for that purpose to have declared void and of no effect certain conveyances, under which the defendants claim title thereto.

Plaintiff claims title under an act of Congress entitled "An act to enable the state of

Arkansas and other states to reclaim the swamp lands within their limits," approved September 28, 1850. It alleges that, in pursuance of the provisions of this act, surveyed sections and parts of fractional sections in fractional township 12 north of the base line, in range 6 east of the fifth principal meridian, and in township 12 north of the base line, in range 7 east of the fifth principal meridian, and in Poinsett county, in this state, were duly selected, approved, and patented to the state of Arkansas, as a part of the swamp land grant; that certain of these lands were conveyed by the state of Arkansas, on the 12th day of June, 1871, to Moses S. Beach, that plaintiff acquired and is the owner of these lands so conveyed to Beach as well as certain other of the lands which were deeded to the state of Arkansas by the United States; that many of the legal subdivisions of sections so acquired by plaintiff were bounded by a large body of nonnavigable water called in the official surveys of the United States and field notes thereof as the "Sunk Lands," "St. Francis River Sunk Lands," the "Hatchie Coon Sunk Lands," and the "Cut-Off Lake"; that the legal subdivisions so bounding were fractional, and in the survey were meandered along such body of water. The plaintiff, thereupon claims the lands lying under this body of water; and these are the lands in controversy in this suit to which it (plaintiff) seeks a decree to quiet its title as against the defendants.

Plaintiff alleges that these lands are wild, unimproved, and unoccupied; and that the defendants are claiming them under certain deeds; and asks that these be declared void, invalid, and of no force whatever.

The defendants answered and denied that the so-called "Sunk Land" was a body of water or that it is shown to be by the surveys of the United States or the field notes; but that it was sometimes temporarily flooded with water, and was land bearing "trees and vegetables, willow, and cypress"; and that the meandered lines run as alleged by plaintiff were run as boundaries, and not for the purpose of finding the number of acres in the sections or legal subdivisions "for which purchasers would have to pay when the government might dispose of the land."

The chancery court, after hearing the evidence adduced by all the parties, dismissed the complaint for want of equity, and rendered judgment in favor of the defendants for costs; and the plaintiff appealed.

We have attempted to state briefly so much of the pleadings in the case as presents the issue for our consideration. Before noticing the facts we will consider the law of the case.

In *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 806, 838, 35 L. Ed. 428, the court, after an extensive review of authorities, held that, "by the common law, under a grant of lands bounded on a lake or pond which is not tide-water and is not navigable, the grantee takes

to the center of the lake or pond, ratably with other riparian proprietors if there be such."

Horne v. Smith, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68, was an action to recover the possession of certain lots. "Plaintiff's title vested on a patent from the United States, dated March 20, 1885, conveying 'lot numbered 7 of section 23, and the lots numbered 1 and 2 of section 26, in township 29 S., of range 38 E., of Tallahassee meridian in Florida, containing 170.42 acres, according to the official plat of the survey of the said lands, returned to the General Land Office by the Surveyor General.' The official plat of township 29 was in evidence, which showed that sections 23 and 26 were fractional sections bordering on the Indian river. On this plat a meander line runs through the sections from north to south, the Indian river being on the west thereof. The east line of the section is, so far as these lots are concerned, the ordinary straight line of government surveys. In the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 23 is lot 7. The area of that lot is given as 73.06 acres. The N. E. $\frac{1}{4}$ of section 26 is divided into lots 1 and 2. The area of lot 1 is 54.90 acres, and of lot 2, 42.53 acres. The boundary lines of these three lots are all straight, with the exception of the meander line on the west. The length of the section line between lot 7 and lot 1, extending from the east section line to the meander line on the west, is stated to be 30.55 chains. Along the course of this meander line, as shown on the plat, runs, according to the testimony, a bayou or savannah opening into Indian river, and west of this bayou, and between it and the main waters of the river, is a body of land extending in width a distance of a mile or a mile and a quarter, and amounting to some 600 acres. This is a body of low land, in some places, however, from 4 to 6 feet above the level of the river, and covered with a growth of live oak trees, many of them 3 and 4 feet in diameter. It was not land formed by accretion since the survey."

Mr. Justice Brewer, in delivering the opinion of the court, said: "But the question in the case is whether the boundary of these lots is the bayou or the main body of the river. That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey, be questioned, but that the meander line of the plat is the water line of the bayou rather than that of the main body of the river, is evident from these facts. In the first place, the area of the lot is given, and when that area is stated to be 170 acres, it is obvious that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the E. $\frac{1}{2}$ of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the east line of the section to

the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27. These considerations are conclusive that the water line which was surveyed, and made the boundary of the lots, was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou, and between it and the main body of the Indian river."

Again he says: "But it is said that because the water mentioned on the plat is called Indian river the boundary must be taken as the water line of the river, and cannot be that of any intermediate bayou. * * * In the case before us, obviously, the surveyors surveyed only to this bayou, and called that the river."

French-Glenn Live Stock Company v. Springer, 185 U. S. 47, 22 Sup. Ct. 563, 46 L. Ed. 800 was an action to recover possession of a certain tract of land. "To support its contention the plaintiff in error put in evidence, at the trial, an official plat of the government survey of township 28 S., range 31 E. of the Willamette meridian, showing the township rendered fractional by abutting upon the meander line along the south side of Malheur Lake, which plat appears to have been approved by the land department and filed in the local land office on September 17, 1877. The plat shows lots 3 and 4, section 34, and lots 1 and 2, section 35, as bounded on the north by the meander line of Malheur Lake." The plaintiff in error purchased these lots of the state of Oregon. He contended that he bought in reliance upon plats and patents which showed the meander line of the lake, and that "such plats and patents must be deemed to conclusively establish that the lake was the northern boundary of the land, so far as the rights of riparian grantees are concerned." The court held "that, while there was a lake abutting on or to the north of the lots, the plaintiff would take all land between the meander line and the water, and all accretions, it was competent for the defendant to show that there was not, at the time of the survey, nor since, any such lake, and to contend that, in such a state of facts there could be no intervening land, and no accretion by reliction."

In *Niles v. Cedar Point Club*, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, the facts are, in part, as follows:

"In the years 1834 and 1835 Ambrose Rice, a deputy surveyor, surveyed and subdivided into sections and quarter sections fractional township 9 S., in range 9 E., and townships 9 and 10 S., in range 10 E., the same being situated in the northern part of Ohio and adjacent to Lake Erie. From his field notes, duly certified to, the surveyor general of that

land district, the latter prepared a correct plat of the townships, showing the subdivisions thereof, and marking all the actual survey lines and the corners designated by said survey. By the field notes and plat, certain sections appear to be fractional, the line on the north being meandered in a general direction from the northwest to the southeast. The tract to the north of this line was described as 'flag marsh' and 'impassable marsh and water.' * * *

"In 1881 John B. Marston, under instruction from the General Land Office, surveyed and subdivided into sections and quarter sections the area marked upon the surveyor general's plat, above referred to, as 'flag marsh' and 'impassable marsh and water.' * * * Disclosing the conditions of these lands, paragraphs 16 and 17 of the statement of facts are as follows:

"At the time of the making of the survey by Ambrose Rice the waters of Lake Erie were above their ordinary stage, and there was more than the usual volume of water standing upon the land in controversy herein and flowing to and upon the same from the large bodies of land now in Ottawa, Wood, and Lucas counties, respectively, having their drainage to and through the said premises in controversy herein.

"(17) The general character, description and condition of the said lands surveyed by said Marston was by him correctly set forth under the title 'General Description' in the field notes of the said survey so as aforesaid by him certified to the Commissioner of the General Land Office.

"That concerning the portion of said survey in township 9 S., range 9 E., reciting, to wit:

"The surface of that part of this fractional township comprised in this survey, is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Many parts of it, particularly in the south and west parts, are mown for a kind of coarse hay. Other parts are filled with bogs and pond holes that do not dry in summer. It receives the natural drainage from the woods on the south and west, which, without any well defined channel, finds its way across the marsh to the lake. Again, in heavy gales of wind it is subject to inundations from the lake, which, upon subsidence of the gale or change of direction in the wind, slowly finds its way out again into the lake. It is bounded along the lake by a sand beach averaging 1 chain in width and 8 feet in height.

"That concerning the portion of said survey in township 9 S., range 10 E., reciting, to wit:

"The surface of this fractional township is covered with a deep marsh of grass, canes or reeds, wild rice, etc. Much of the south part can be mown for marsh hay, being in a measure drained by a canal that has been constructed in the township south. Other parts are filled with bogs and pond holes

that do not dry in summer. It receives the drainage from the woods on the south and west, which spread over the entire surface and without any positive channel finds its way to the lake. Again the township is subject to inundations from the lake during heavy gales of wind, which, upon the termination of the gale or a change in the direction of the wind, slowly finds its way back into the lake."

We should have stated before this that "In July, 1844 (before the Marston survey was made), patents for several of the fractional sections facing on the marsh were issued to Margaret Bailey, under whom the appellant claims; that the patents each recite the number of acres granted, and each states that the tract is a fractional section, 'according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Margaret Bailey.'" After the Marston survey the lands surveyed by him were patented by the United States, and the title so conveyed passed by subsequent deeds to the appellee. The controversy in the case was between the appellant, claiming it by virtue of its contiguity to other lands conveyed to his grantors by the United States before the Marston survey, and the appellee, who claims under a patent of the United States. The appellee's title was sustained.

Mr. Justice Brewer, delivering the opinion of the court, said: "Generally, these meander lines are lines which course the banks of navigable streams or other navigable waters. Here, it appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his survey at this 'marsh' as he called it. These surveys were approved and a plat prepared, which was based upon the survey and field notes, and showed the limits of the tracts which were for sale. The patents, referring in terms to the survey and plat, clearly disclose that the government was not intending to and did not convey any land which was a part of the marsh. The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.' * * * In *James v. Howell*, 41 Ohio St. 696, 707, the Supreme Court of Ohio, speaking of these very patents and this marsh, said: 'The meander line along the southerly border of the marsh was, in fact, intended to be the boundary line of the fractional sections.'"

Again he says: "It is impossible to hold that the lower courts erred in the conclusion that this marsh was not to be regarded as land continuously submerged, either under Lake Erie, a navigable lake, and in that case belonging to the state of Ohio, * * * under a pond or other similar body of nonnavigable inland waters, and therefore generally the property of riparian owners. It was called a marsh by Rice, the first surveyor, is so styled on the plat, and the conditions as disclosed by the agreed statement indicate that it was a body of low swampy land, partly boggy and partly dry, sometimes subject to inundations from Lake Erie or the overflow of the adjacent streams, but not permanently covered with water.

* * * * *

"But it is urged that the fact that a meandered line was run amounts to a determination by the land department that the surveyed fractional sections bordered upon a body of water, navigable or nonnavigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land, or water, government or Indian reservation."

In suits to quiet title the plaintiff is not entitled to recover unless he be in possession, or his title be equitable, or, having the legal title, the land be wild and unoccupied. *Mathews v. Marks*, 44 Ark. 436; *St. Louis Refrigerator & Wooden Gutter Co. v. Thornton* (Ark.) 86 S. W. 852. The lands in controversy are wild and unoccupied. The possession of them follows the title. Hence, appellant, "must succeed, if at all," as in actions of ejectment, "upon the strength of his own title, and cannot rely upon the weakness of his adversary's"; and the burden is on it to show title. *Lawrence v. Zimbleman*, 37 Ark. 644, 647; *Kelley v. Laconia Levee District* (Ark.) 85 S. W. 249, 250; *St. Louis Refrigerator & Wooden Gutter Co. v. Thornton* (Ark.) 86 S. W. 852, 853.

Appellant claims the land in controversy by virtue of the contiguity of certain lands, acquired by it from the United States, through the state of Arkansas and other grantors, to what is called "Sunk Lands" and "Cut-Off Lake." This "Sunk Land" from appellant's land on one side to the St. Francis river, a navigable stream, on the other, is there four and six miles wide. In this area there are over 10,000 acres. The field notes and plat introduced as evidence show the condition of only those sections, and that was on the 30th of May, 1849. John W. Garretson, who surveyed the subdivisational lines and meanders of township 12 N., range 6 E., made this note in his record of surveys:

"May 30, 1849. The water is at a medium stage at this time, and it is utterly impossible to get to the part of the south boundary of section 36, T. 13 N., R. 6 E., which was run by Mr. James M. Danley. The Hatchie Coon Sunk Lands, on the west side of which I

closed the meanders in Sec. 2, T. 12 N., R. 6 E., is so deep at this time that it cannot be waded. The east boundaries of Secs. 24 and 25, T. 12 N., R. 6 E., I passed in December, 1848, in a canoe, there was water there on them then from eight to ten feet deep, and no timber except groups of willow and small cypress trees, such as grow in the main sunk lands of the St. Francis river. Mr. Samuel Johnson, it seems, established corners in this lake, as it is called, on the north side of the right-hand chute of Little river, which right-hand chute is very similar to the ground through which the lines, viz., east boundary of Secs. 24 and 25, T. 12 N., R. 6 E., runs. I have stated this much in order to show the utter impossibility of running lines or meanders from any corners on the above named boundaries, only at the dryest season of the year. The part of the ground through which east boundary of Secs. 24 and 25 lies is called Cut-Off Lake, and the south boundary of section 36, T. 13 N., R. 6 E., could not be reached by Mr. Samuel Johnson, who run the east boundary of T. 12 N., R. 6 E., at the time he run said boundary.

"John W. Garretson, Deputy Surveyor."

He indirectly says the lands mentioned could be surveyed at the dryest season of the year, and says that two of the sections had on them "groups of willow and small cypress trees."

The maps introduced as evidence in the hearing of this cause show that fractional sections 6, 7, 18, 19, 30, 35, and 36 form the western boundary of what is called "Sunk Lands," in controversy. James Anthony, an experienced and skilled civil engineer, testified that in 1876 he found that the government meander lines of these sections followed the old steamboat channel, known as the "Old River," which at one time was navigable. The fact that the meander lines followed the channel of Old river is prima facie evidence that it was the water line of these sections when the meander lines were run, and was the stream meandered.

The official maps show that Cut-Off Lake was the water boundary of fractional sections 35 and 36.

What lay beyond these water lines or boundaries in what is called "Sunk Land"? These sections were surveyed by the government about 1848 or 1849. They were conveyed by the United States to the State of Arkansas by two patents dated, respectively, July 29, 1852, and September 27, 1858; and the state conveyed all of them, except sections 6 and 7, on the 12th of June, 1871, to Moses S. Beach, from whom appellant derives title. On these various dates there is no direct evidence to show the condition of the lands in controversy. Claiming them by virtue of its riparian rights the burden is upon appellants, if it succeeds at all, to show their condition. It has failed to do so.

James Anthony who has known the land since 1874, three years after the state of Arkansas conveyed lands to Moses S. Beach, as before stated, testified as follows:

"Timber grows all over the land; cypress and cottonwood on the outskirts of that land, both on the river and on the meander line. The center of the land in section 10, 15, west half of 11, west half of 14, is the highest land in that country, comparing it with both sides of the river, and it is known as 'Gum Island,' and the timber on these lands, this 10, 15, west half of 11, and west half of 14, are oak, some cottonwood, red gum, mulberry, some hickory, and is also covered with a dense undergrowth of spice wood. Between these lands, which I have said are known as 'Gum Island,' and the land within the meander line, known as 'Hatchie Coon,' the country is low, swampy, and in some places going as wide as 1,000 and 1,200 feet between high land and high land, and narrowing down in places to 75 and 100 feet wide.

"I have followed the meander line through 4 and 3 and 2, about which Mr. Biggs and Mr. Odom testified. I made those meander lines. As to the difference in the timber and land on one side of that line and the other, the timber on the 'Hatchie Coon' property is oak and gum, and on the south, in between the two islands, cypress principally and some little cottonwood. I have known that country since 1874. It is known as the 'Sunk Lands.' It is possible at times to walk across that country. The best crossing is through 6, 12, 11, and 10, and through 9. There is an old wagon road that goes through there, and there used to be a ferry. By 6 I mean sections 6 in 12—7.

"Asked as to the nature of the country south of this crossing, with reference to the possibility of being crossed by team or horses or by foot, the witness said: 'Well, what you call by foot, you mean across this country anywhere, as far as wagons are concerned, you would have to leave these middle sections out, and then you could cross through 35, 34, and 33 with wagon or otherwise.'

"It could not be crossed on foot in the S. $\frac{1}{2}$ of 24 and the S. $\frac{1}{2}$ of 22. By wading you can cross anywhere. There is water in section 23. There may be a little flag in 14. The flag openings commence in the northeast corner of 2. They go down through section 2 to the E. $\frac{1}{2}$ of section 11. The E. $\frac{1}{2}$ of 14 and from the south line of section 14 they turn due west, running out between sections 14 and 23 and 15 and 22, and is here known as 'Lead Fork Slough.' In section 26 there is what is known as the 'Scatters.' That is, more or less over the section, there is bunches of timber covering 25 or 30 acres, and these bunches of timber are surrounded by flag openings. There may also be a little of that in 25, but very little. 25 is pretty high ground, it is ash and oak. 25 is known as 'Ash Camp.'"

This testimony is strongly corroborated by the testimony of other witnesses.

Were the lands in controversy higher in 1874, and since then than they were in 1848, when the United States survey was made, or in 1852 or 1858 when the United States conveyed to this state?

T. L. Davis testified that "there is sediment always forming, and after every overflow there is sediment found, and the land is gradually rising up." F. H. Varner testified that he had resided not far from this land ever since 1844 (four years before any survey was made) that low places, filled with water, are gradually filling up, but further than this the land has not been elevated. John M. Biggs testified that he does not think that the land has filled up or been elevated any at all. That the overflows wash out these low places and prevent them filling; that nearly everywhere on what is known as "Sunk Lands" on top of the ground, there is an ore like substance in pieces as heavy as a pound to five pounds. This clearly indicates that the lands have not been materially elevated by sediment deposited on top of the ground. If it was the ore would be covered. The preponderance of the evidence we think, shows that the elevation of the "Sunk Lands" has not changed.

According to the opinion of the court in

Horne v. Smith, 159 U. S. 40, 15 Sup. Ct. 988, 40 L. Ed. 68, and Niles v. Cedar Point Club, 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171, we do not think that the appellant acquired the lands in controversy by virtue of his riparian rights, or is the owner thereof, and so decide. Like the land in controversy in Niles v. Cedar Point Club, supra, they are low swampy lands, checked by bayous, subject to inundation, and reclaimable, to some extent, for agricultural purposes; and not such lands as can be acquired by virtue of riparian rights for fishing and other water purposes.

Appellant offered a letter of the secretary of the Interior of the United States to the Commissioner of the General Land Office as evidence, and the court refused to receive or allow it to be read. The letter was a mere expression of opinion as to the lands in controversy. There was no contest before his department as to such lands which called for decision. There were no parties before him seeking for an adjudication. There were no issues to be decided. No one interested had an opportunity to be heard. The letter was of no binding force or effect upon any one, and was properly excluded.

Decree affirmed.

McCULLOCH, J., dissents.

ILLINOIS CENT. R. CO. v. HOLT.

(Court of Appeals of Kentucky. April 18, 1906.)

1. CARRIERS — NEGLIGENCE — INJURIES TO STOCK.

In an action against a carrier for damages resulting from its alleged negligence in transporting plaintiff's hogs, an instruction making defendant liable for any loss of the hogs after delivery at the place of destination and their reshipment by plaintiff over another road to a different market, was erroneous.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 923, 924, 950.]

2. SAME—MEASURE OF DAMAGES.

Where hogs transported by a carrier are in bad condition by reason of its negligence, the measure of its responsibility is the difference between the value of the hogs in their condition on arrival at the point of destination and what their value would have been, had they been transported without negligence on its part.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 963, 964.]

3. SAME—FAILURE TO FURNISH CARS—LIABILITY.

A carrier was not liable for damages resulting to a shipper's hogs by reason of delay at the point of shipment, caused by failure of the road to furnish cars at an earlier time than they were furnished, where the agent of the road made no positive engagement as to when the cars would be there, and the shipper could have learned whether the cars had arrived before bringing the hogs to the station.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers § 921.]

4. SAME—EVIDENCE.

Where plaintiff brought his hogs to defendant's railroad station after he had been informed by defendant's agent that it was uncertain exactly when cars for shipment of the hogs could be furnished, proof by plaintiff, in an action by him against defendant for damages resulting from delay in transportation of the stock, as to the muddy conditions of defendant's stock pens at the shipping point and plaintiff's expense in feeding the hogs there while waiting for the cars, was inadmissible.

5. EVIDENCE—REPORT OF GOVERNMENT INSPECTOR.

In an action against a carrier for negligently transporting plaintiff's hogs, the written report of the government inspector of hogs at the point of destination as to their condition on arrival, proved by the inspector to be correct, was admissible.

6. SAME—STATEMENT OUT OF COURT.

Where, by reason of defendant railroad's negligence in transporting plaintiff's hogs, they arrived at their destination in poor condition, and plaintiff was obliged to reship them to another market for sale, a notation on the bill of sale at the latter market, by the commission merchant negotiating the sale, that certain of the hogs had died there, was incompetent as a statement out of court and not under oath.

7. CARRIERS—LIVE STOCK—TRANSPORTATION—DUTY OF CARRIER.

It is the duty of a carrier to transport hogs delivered to it for shipment with reasonable promptness, according to the usual course of business, considering the connections to be made, the way they were carried, and the time usually taken for the journey.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 920-922.]

8. SAME.

A railroad accepting hogs for shipment is bound to use reasonable care in handling and caring for them on the journey according to the usual course of business in such shipment, and on failure so to do is guilty of negligence,

rendering it liable to the shipper for any loss or damage he sustained thereby.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 920-923.]

9. SAME.

A carrier, accepting for transportation hogs loaded on its cars by the shipper himself under a contract whereby the latter agrees to at all times feed, water, and care for the stock at his own expense, and exempting the road from liability for any injury the hogs may do each other, or damage caused by heat or suffocation, or not arising from the road's negligence, is not responsible for any injury done by the hogs to each other, or from suffocation by reason of their being crowded in the car, or from their eating cockle burrs.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 926-928, 933, 942.]

10. SAME—MEASURE OF DAMAGES.

Where, in an action against a carrier for negligent transportation of plaintiff's hogs, a lump sum as damages was alleged, the measure of plaintiff's damages in case he was entitled to recover was the difference in value of his hogs at the time and in the condition they were when delivered at the point of destination and their value if delivered with reasonable promptness and handled and cared for with reasonable care on the journey.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 963, 964.]

Appeal from Circuit Court, Carlisle County.
"Not to be officially reported."

Action by Ed Holt against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Robbins, Thomas & Bridgwater, 'Trabue, Doolan & Cox, and J. M. Dickinson, for appellant. Nichols & Nichols, for appellee.

HOBSON, C. J. On May 18, 1903, appellee, Ed Holt, applied to the agent of the Illinois Central Railroad Company at Arlington, Ky., to furnish him three cars the next day for the shipment of hogs to East St. Louis. The agent said he would use his best endeavors to get them. On the morning of the 19th Holt went again to see the agent, and the agent told him that all he could say was he wired the car man the night before and the man said the cars would be there. Holt proceeded to bring his hogs to the station that evening, but the cars did not come until some time during the night. He loaded the hogs on the cars the next day, finishing the loading about 1 o'clock, and left for St. Louis on a passenger train at 1:30 p. m. The hogs were taken up by a freight train at 2:40 p. m., and were taken by this train to Mounds, where they were turned over to another train, which took them to Carbondale, and there turned them over to a third train, which took them to East St. Louis; there being three junctions on the route, or three different connections to be made. The hogs reached the yards of the railroad company at East St. Louis at 9:30 a. m. on the 21st, but they were not taken up to the stock pens and unloaded until about 12 o'clock. When unloaded seven of the hogs were dead, some died after they were unloaded, and the rest were in bad condition. Holt was unable to sell his hogs in

East St. Louis, and after a couple of days shipped them to Chicago. Some others died on the way to Chicago, and nine died after they reached there. He himself went to Chicago on a passenger train, and, leaving there before his hogs were sold, returned home, reaching Arlington Sunday morning, May 24th. He immediately applied to the agent to have two cars for him the next day, and on the next evening brought the remainder of his hogs to the station and loaded them about 6 o'clock. They left Arlington on a freight train that night, and were unloaded at East St. Louis about 4 o'clock the next afternoon. They were sold on the market the next day, but some of them had died, and the others were not in good condition. When Holt left with the first shipment of hogs, he instructed the man on the farm, if any of the hogs died while he was gone, to burn them. Two hogs had died before this, and ten died while he was gone. He sued the railroad company for damages for not taking proper care of his stock, and not delivering them in a reasonable time, and recovered a verdict for \$600. The railroad company appeals.

For the railroad company it is insisted that the hogs had cholera, and that this was the cause of the death of those that were lost and the bad apparent condition of the others. It is also insisted for it that the cars were carried through in the due course of business without unreasonable delay. The evidence on these questions was very conflicting, and it is not surprising that the jury were not all able to agree on a verdict.

The defendant filed an amended answer, in which it was alleged that by the terms of the written contract under which the hogs were carried it was expressly agreed that Holt would at all times feed, water, and care for the stock at his own expense and risk, and that the company should not be liable for any injury the hogs might do to each other or to themselves, or for any loss or damage caused by heat or suffocation, or for any damage not arising from the negligence of the defendant. It also alleged that the weather was hot at the time of the shipments, and the plaintiff crowded the hogs in the cars. No reply was filed to this amended answer. Its allegations stood confessed on the trial. The court should therefore on the trial have given, under the pleadings, instruction E asked by the defendant; and instruction 2, in so far as it conflicts with instruction E, should not have been given. Instruction 2 also made the defendant liable for the hogs that died before they were sold in Chicago, and for the decline in the market, if any, before they were sold. The defendant did not have charge of the hogs when they were shipped from East St. Louis to Chicago, and it was not responsible for any loss of the hogs after it delivered them at the stockyards in East St. Louis. If the hogs were in bad condition when delivered

at the stockyards by reason of the defendant's negligence, the measure of its responsibility is the difference between the value of the hogs in their then condition and what their value would have been if they had been transported to East St. Louis without negligence on the part of the defendant.

The defendant is not liable for not furnishing cars at Arlington earlier than they were furnished, as the plaintiff's own proof clearly shows that the agent made no positive engagement as to when the cars would be there. The plaintiff, when he brought his hogs to the station, after what had taken place between him and the agent, took the risk. He lived only a short distance away, and could easily have learned whether the cars had come before he drove his hogs up there. The proof by the plaintiff as to the muddy condition of the stock pen and his expense in feeding the first lot of hogs there should have been excluded.

The written report of the government inspector of St. Louis, which was proved by him to be correct and filed with the deposition of Dr. Scott, should have been allowed to be read to the jury.

The notation on the bill of sale by the commission merchant in Chicago that nine of the hogs had died there was incompetent. It was simply the statement of the merchant out of court and not under oath.

For the reasons we have given, the fact that the hogs were muddy when they got to East St. Louis, in consequence of the stock pen at Arlington being muddy, was incompetent.

Instruction B, given by the court on its own motion, is a correct statement of the law of the case under the pleadings, and on another trial instruction 2 will be omitted.

The court should also on another trial instruct the jury that it was the defendant's duty to transport the hogs from Arlington, after they were loaded, to East St. Louis, with reasonable promptness according to the usual course of business, considering the connections to be made, the way they were carried, and the time usually taken for the journey; that it was its duty to handle them and care for them on the journey with reasonable care according to the usual course of business in such shipments; that if it failed to do this it was guilty of negligence, and was liable to the plaintiff for any loss or damage he sustained thereby; but that it was not responsible for the hogs not reaching East St. Louis in time for the first day's market, if reasonable promptness was used in carrying them, nor for any injury or loss to the hogs on the journey, if they were handled and cared for with reasonable care; and that the defendant was not responsible for any injury done by the hogs to each other, or from suffocation, by reason of their being crowded in the car, or from their eating cockle burrs, but only for such loss as was due to its negligence.

On the return of the case the plaintiff will be allowed to amend his petition, if he desires to do so, and allege a lump sum as damages, and in that event, in lieu of instruction B, the court on another trial will instruct the jury that, if they find for the plaintiff, the measure of damages is the difference in value of his hogs at the time and in the condition they were when delivered at the stockyards in East St. Louis and the value of the hogs if delivered with reasonable promptness and handled and cared for with reasonable care on the journey. The plaintiff may also be allowed to file a reply to the amended answer.

Judgment reversed, and cause remanded for a new trial.

BROWN v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 18, 1906.)

1. HOMICIDE—EVIDENCE—SUFFICIENCY.

Evidence on a trial for homicide examined, and held to support a conviction of voluntary manslaughter.

2. SAME—HARMLESS ERROR—INSTRUCTIONS.

Where, on a trial for homicide, the jury found accused guilty of voluntary manslaughter, as authorized by an instruction correctly defining voluntary manslaughter, any error in an instruction as to murder was not prejudicial.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 720.]

3. SAME—VOLUNTARY MANSLAUGHTER—INSTRUCTIONS.

Where, on a trial for homicide, the killing was admitted, and accused claimed that it was accidental, and the court charged that if accused intentionally, or in a wanton and reckless manner, without previous malice, discharged his pistol, and thereby killed decedent, a verdict of voluntary manslaughter should be found, the giving of an instruction that, if the accidental shooting was the result alone of the recklessly careless use of a loaded pistol by accused, a verdict of manslaughter should be found, and his punishment fixed as set out in the previous instruction, was not open to the objections that it emphasized the effect of accused's carelessness in handling the pistol, and that it was contradictory to the previous instruction, in that it omitted the word "voluntary" before the word "manslaughter."

4. CRIMINAL LAW—APPEAL—REVIEW.

Under Cr. Code, § 281, providing that the decisions of the court on motions for a new trial shall not be subject to exception, the Court of Appeals cannot reverse a conviction on a trial for homicide, because the trial court refused a new trial on the ground that the jury were permitted to separate during the trial and were guilty of misconduct in viewing the premises where the homicide occurred, without the permission of the court and in the absence of accused and his counsel.

Appeal from Circuit Court, Monroe County.
"To be officially reported."

Benton Brown was convicted of voluntary manslaughter, and he appeals. Affirmed.

Geo. T. Duff, Duff & Hutcherson, Miller & Jackson, Sherman Spear, and W. H. Walden, for appellant. Baird & Richardson, N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

SETTLE, J. Appellant was tried in the Monroe circuit court under an indictment returned by the grand jury of that county which charged him with the willful murder of Jeff Harlan. By the jury's verdict he was found guilty of voluntary manslaughter, and his punishment fixed at confinement in the penitentiary 21 years. The lower court refused him a new trial, and he has appealed.

Appellant's defense was accidental homicide. According to the evidence, Harlan was shot and killed by appellant at the door of the store of John Roton, in Tompkinsville, on the night of December 24, 1904. Appellant and deceased were about the same age, 21 years, had known each other from boyhood, and were apparently the best of friends. According to the testimony of John Roton, in whose store appellant was then employed as a salesman, the latter, in a conversation with him after the killing of Harlan, and as they were following the body to the hotel, to which it was removed, said: "I would not have killed Jeff for anything on earth. He was the best friend I had." No motive for the homicide was shown upon the trial, unless it grew out of something that took place in a conversation between appellant and deceased in front of the store a few minutes before the shooting, in the hearing of Little Crawford, who testified that appellant then remarked to Harlan that he was going that night to a popcorn party. Harlan said to him, "If I were you, I would not go, for you are drinking," to which appellant replied, "he did not care a damn what he did." As Crawford then went into the store, he heard no more of the conversation, if it was continued. There is no doubt from the evidence that appellant was to some extent under the influence of intoxicants that night and at the time of the shooting; indeed, he admitted it when testifying in his own behalf, and after the shooting he evidently became more intoxicated, for he testified that after following the body of Harlan to the hotel he knew nothing of what happened during the remainder of the night, though he was afterwards arrested and put in jail.

There were several things said and done by appellant immediately after the shooting that appear to be inconsistent with his innocence; for instance, though numerous inquiries were made in his presence by individuals of the gathering crowd as to the identity of the slayer of Harlan, he made no reply, and upon being directly asked by several persons, among them a brother and sister of deceased, who had shot him, he said he did not know. and in reply to one or two of these inquiries he said deceased must have been shot by a stray ball, as he was not shot from the store, and, furthermore, that, if the shooting had occurred from the store, it would have been manifested by powder smoke in the store. These statements, attributed to him,

appellant denied; but we think the great weight of the evidence was to the effect that they were made by him, and that he did not in fact admit his identity as the slayer of Harlan until the pistol with which he did the shooting was found by Roton, with one of its chambers containing an empty shell, and still warm from the firing of the shot. Although there were several persons besides appellant in the store at the time of the killing of Harlan, nearly all of them were at the rear end of the room, and it is a singular fact that not one of them claimed to have seen the shooting, though all heard the report of the pistol. Two or three of them, upon hearing the report, looked toward the front door, and saw appellant standing with his back to them and his face to the door. At the time one Bert High was in front of appellant, holding him by the shoulders. As High was the only witness near appellant when he shot Harlan, we here quote from the record the material parts of his testimony: "I was in Roton's store when Harlan was killed. Myself and Brown [appellant] were the only persons present. When the pistol was discharged, Harlan was in 2½ or 3 feet of Brown. The defendant came around there with the pistol. I said to him, 'What are you going to do?' He said he was going to shoot. I asked him if it was loaded. He said he reckoned it was if he got hold of the right one. I said: 'You must not do that. They are liable to pull you.' I guess then in about a minute Harlan stepped to the door, and he said, 'Do not shoot.' About the time he said, 'Do not shoot,' I turned and looked down toward the other end of the store. About the time I looked down there the pistol fired. I do not think he intended to shoot Harlan. I saw Harlan, and knew him when he spoke. The light was shining out at the door. I was facing the door, and Brown's right side was turned towards the end of the counter. After the shooting, I laid my hands upon Brown's arms. I am not related to either party, but was friendly to both. The last I saw of the pistol before it fired, Brown had it down by his side." The fact that Harlan was close to appellant when shot was demonstrated by the powder burns on his face. He must have been shot, too, while in the act of talking to appellant, as the pistol ball entered his mouth without touching his lips or teeth, severed the spinal cord, and broke the neck at the base of the brain. According to the testimony of Dr. Duncan, a skilled surgeon, Harlan's death must have been instantaneous.

Appellant testified in his own behalf to the effect that he and deceased were intimate friends, and that no trouble or misunderstanding had ever arisen between them; that on the night of the homicide no such conversation occurred between them as was related by Crawford, though he admitted

that he and deceased were together out in front of the store when Crawford made his appearance; that he had with Crawford the conversation about some article he wished to purchase from the store, as testified by the latter; and that, leaving deceased in front, he and Crawford went into the store to get the desired article, after which appellant went out of the store, took a drink of whisky with Crawford, then returned, and had a talk with Harlan, who had in the meantime entered the store. According to appellant's further statement he then went to where two pistols were kept under the counter; one being out of repair and unloaded, and the other loaded and in proper condition for use, and getting, as he believed, the unloaded pistol, he walked toward and near the door, carrying it in his right hand. What followed will better appear from appellant's own language: "Bert High then asked if the pistol was loaded, and I told him it was, and I thought I would go out and shoot it off. Seeing this scared him, I told him it was not, and I thought it was not. I took hold of the pistol to show him it was not, and at this juncture it was discharged, and killed Harlan, who I did not see, just as he was about to enter the storehouse. It went off accidentally, and if he [Harlan] said, 'don't shoot,' I did not hear him. I saw some one just after the pistol went off sinking down. I was greatly excited, and asked what it was, for I did not know who it was." The case was properly allowed to go to the jury. There was some testimony conducing to prove that the shooting was intentionally or wantonly and recklessly done by appellant, and some that it was accidental; but the jury, having weighed all the evidence, came to the conclusion that appellant's defense of accidental killing was without merit, and therefore found him guilty of voluntary manslaughter. Their finding is conclusive of the question of his guilt, unless there was some error of law committed by the trial court which can be said to have prejudiced his substantial rights.

Appellant insists that the lower court erred in instructing the jury, and in refusing certain instructions asked by him. The instructions complained of are numbered 1 and 3a. The first advised the jury in what state of case they might find appellant guilty of murder. It is properly worded, and, if this were not true, it could not have been prejudicial, because it did not influence the jury; for they found appellant guilty of voluntary manslaughter as authorized by instruction No. 2, which was as follows: "If the jury believe from the evidence beyond a reasonable doubt that the defendant, Benton Brown, in said county and before the finding of this indictment, intentionally, or in a wanton and reckless manner, without previous malice, fired off and discharged his pistol, and thereby shot and killed Jeff Harlan, they will find him guilty of voluntary man-

slaughter, and fix his punishment at confinement in the penitentiary for not less than 2 nor more than 21 years." By instruction No. 3 the jury were told that if they believed from the evidence that the discharge of the pistol in the hands of the accused was unintentional, but further believed from the evidence beyond reasonable doubt that the killing of Harlan resulted from the careless use and handling of the pistol by the accused, they should find him guilty of involuntary manslaughter, and fix his punishment at a fine in any amount, or confinement in jail any time, in their discretion, or might in their discretion both so fine and imprison him. Instruction No. 4 told them that in the event they believed from the evidence beyond a reasonable doubt that appellant was guilty of one of the several offenses defined in the instructions, but should have a reasonable doubt as to the degree of the offense, it was their duty to find him guilty of the lesser one. By instruction 5 the jury were further told that if they believed from the evidence the killing of Harlan was accidental, and without carelessness upon the part of appellant, they should find him not guilty, or, if they had a reasonable doubt of his having been proven guilty, they should acquit him.

As the killing of Harlan was admitted by appellant, and there was no claim of self-defense, we think the foregoing instructions embraced and properly presented to the jury all the law of the case; but yet another instruction, numbered 3a, was given by the court on motion of the commonwealth's attorney, which advised the jury "that although they may believe from the evidence before them that the shooting and killing of Jeff Harlan was accidental, yet if they further believe from the evidence to the exclusion of a reasonable doubt that said accidental shooting and killing (if it was accidental) was the result alone of the recklessly careless use of a loaded, deadly pistol by the defendant, they should, notwithstanding the accident, find the defendant guilty of manslaughter, and fix his punishment as set out in instruction No. 2." It is contended by counsel for appellant that this instruction is contradictory of those defining voluntary and involuntary manslaughter, and so reiterated and emphasized the effect of appellant's carelessness in handling the pistol as to minimize the question of accidental shooting and deprive him of any benefit from the evidence in regard thereto, and, besides, that the instruction was confusing to the jury because of the use of the term "manslaughter" without the limiting adjective "voluntary."

We do not think the instruction in question prejudicial. It, as well as instruction No. 2, correctly defined voluntary manslaughter, though the word "voluntary" is not used in No. 3a. In *Montgomery v. Com.*, 26 Ky. Law Rep. 356, 81 S. W. 264, it is said: "It is

essential to the commission of voluntary manslaughter that the homicide should have been willfully and intentionally committed, or under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator." Bishop's New Criminal Law, vol. 1, § 314, says: "Every act of gross carelessness, even in the performance of what is lawful, and a fortiori of what is not lawful, and every negligent commission of a legal duty whereby death ensues, is indictable either as murder or manslaughter." In *York v. Com.*, 82 Ky. 380, we find this statement on the same subject: "It may now be regarded as well settled in this state by numerous decisions of this court that where one intentionally does an act in such a reckless and careless manner that it is calculated to endanger human life, and death ensues, he is guilty of manslaughter, although the death of the person killed may not have been intended." *Smith v. Com.*, 93 Ky. 318, 20 S. W. 229. So, if, as the jury were told in instruction No. 2, appellant "intentionally, or in a wanton and reckless manner," discharged his pistol, and thereby killed Harlan, or if, as stated in instruction 3a, the latter's death, though accidental, "resulted alone from appellant's recklessly careless use of a deadly loaded pistol, in either event he was guilty of voluntary manslaughter, and the omission from instruction 3a of the word "voluntary" could not have misled or confused the jury, as the fact that instruction 3a referred the jury to instruction 2 for the punishment to be inflicted upon appellant in the state of case therein predicated must have indicated to them that the offense described in 3a was voluntary manslaughter, as defined in instruction No. 2, and that they so understood it is demonstrated by the further fact that the verdict named the crime of which they found appellant guilty "voluntary manslaughter."

In *Spriggs v. Com.*, 113 Ky. 724, 68 S. W. 1087, after a review of all the authorities in this state, it was held: "The cases cited seem amply to sustain the proposition that, under our law, the common-law offense of manslaughter has been subdivided by carving out of it the statutory crime of voluntary manslaughter, and leaving involuntary manslaughter to be dealt with as at common law. The term 'manslaughter' has, therefore, become a generic term, covering two specific offenses or degrees of homicide, punishable. the one under the statute, by confinement in the penitentiary, and the other under the common law, by fine and imprisonment in jail. The common-law learning of the text-writers upon the offense of manslaughter can have no place in the definition of the two degrees of homicide which have been carved out of manslaughter by the effect of our statute, however apt such learning may have been under the ancient practice, when the punishment of both grades was a matter

resting in the discretion of the judge." The conclusion stated in the opinion *supra* was deduced from the cases of *Connor v. Com.*, 13 Bush, 714; *Buckner v. Com.*, 14 Bush, 601; *Trimble v. Com.*, 78 Ky. 176; *Bush v. Com.*, 78 Ky. 268; *Smith v. Com.*, 93 Ky. 318, 20 S. W. 229; *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333. But it is conceded by the learned writer of the opinion that the distinction asserted is ignored by the court in the following cases: *Sparks v. Com.*, 3 Bush, 111, 96 Am. Dec. 196; *Chrystal v. Com.*, 9 Bush, 669; *York v. Com.*, 82 Ky. 300; and perhaps others.

It is, however, clear that none of the cases referred to hold that if a person intentionally, or wantonly and recklessly, discharge a pistol in a store, street, or other public place where people are wont to be or congregate, and death thereby results to one of them, such killing would not be voluntary manslaughter, punishable by statute by confinement in the penitentiary from 2 to 21 years. It is likewise true that they contain nothing that impairs the common-law definition of involuntary manslaughter, or that questions the propriety of inflicting upon one guilty of that offense the punishment of a fine, or imprisonment in jail, either or both, as by the common law provided. As already stated, the court should not have given instruction 3a; but, as it was in substance but a repetition of instruction No. 2 as to voluntary manslaughter, the error was harmless. The first of the two instructions refused appellant by the court might properly have been given; but, as what both were intended to express to the jury was better presented by the one instruction given on appellant's motion, it was not error to refuse them.

It is insisted for appellant that the court erred in refusing him a new trial upon the ground that the jury were permitted to separate during the trial, and were also guilty of misconduct in going upon and viewing the premises where the homicide occurred without permission of the court, and in the absence of appellant and his counsel. As to the first complaint, it appears from an affidavit in the record that on one occasion during the progress of the trial one of the jury lingered behind the others as they were leaving the courtroom in charge of the sheriff. This juror was momentarily separated from the other 11, and passed a few words with some person in the courtroom; but the sheriff soon discovered his absence, and at once returned with the remainder of the jury and took him in charge and away with them. It does not appear from the record that the juror thus briefly separated from his associates talked with any one about appellant's case, or to any one connected with it, and the attention of the court was never called to the fact of his separation from the other jurors until the matter was presented by the motion and grounds for a new trial.

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The facts as to the inspection of the place of the homicide were that, though the jury at the beginning of the trial had been allowed, in the presence of the court and appellant, and while in charge of the sheriff, to view the premises, on Sunday and after the conclusion of the evidence they again viewed them under charge of the sheriff, though without permission of the court. It is unnecessary to determine the legal effect of this action of the jury, as it was not brought to the attention of the court until the filing of the motion and grounds for a new trial, though the same, as well as the momentary separation of one of the jury from the others, was known to appellant before the submission of the case to the jury.

It is, however, beyond our power to reverse this case for such errors as these; the right to do so being expressly denied by section 281, Cr. Code, which this court has repeatedly construed to be mandatory. *Howard v. Commonwealth*, 80 S. W. 211, 25 Ky. Law Rep. 2218; *Curtis v. Commonwealth*, 62 S. W. 886; *Brown v. Commonwealth*, 14 Bush, 398; *Kennedy v. Commonwealth*, 14 Bush, 340. Our examination of the record fails to disclose any error on the part of the trial judge in the admission or rejection of evidence.

Judgment affirmed.

BAILEY v. COMMONWEALTH (two cases).
(Court of Appeals of Kentucky. April 13, 1906.)

1. CRIMINAL LAW—APPELLATE JURISDICTION.

Under Cr. Code, § 347, limiting the appellate jurisdiction of the Court of Appeals in prosecutions for misdemeanors to cases where the judgment is for a fine exceeding \$50 or imprisonment exceeding 30 days, the Court of Appeals has no jurisdiction where the judgment of conviction for a misdemeanor fixes the fine at \$50 and provides that, on defendant's failure immediately to replevy the fine, he shall be put at hard labor until the fine and costs are paid.

2. INTOXICATING LIQUORS—SALES—EVIDENCE—SUFFICIENCY.

Where, on a trial for selling liquor without a license, the evidence showed that the sale was made by defendant's wife, that defendant did not permit any one to sell liquor to the prosecuting witness, or any one else, that his wife had rented the house in which the sale was made, and that she had refused to stop selling, though he had requested her to do so, a verdict of guilty was unauthorized.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 159, 184.]

Appeal from Circuit Court, Knott County.
"Not to be officially reported."

Tip Bailey was convicted in two cases for selling spirituous liquors without a license, and appeals. Appeal in first case dismissed, and the judgment in the second case reversed.

Craft & Bailey, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

HOBSON, C. J. Tip Bailey was indicted in the Knott circuit court in these two

cases for selling spirituous liquors without a license. He was found guilty, and his fine was fixed at \$50, in the first case; and, if he failed immediately to replevy the fine, he was to be put at hard labor until the fine and cost were paid, at \$1 a day. In the other case his fine was fixed at \$100, and like hard labor if the fine was not paid.

By section 347 of the Criminal Code, it is provided that this court shall have appellate jurisdiction, in cases of this sort, "if the judgment be for a fine exceeding \$50.00, or for imprisonment exceeding thirty days." It was held in *Anderson v. Commonwealth*, 77 Ky. 171, that this court is without jurisdiction where a judgment is rendered against the defendant for a fine of \$50. The Attorney General has entered a motion to dismiss the appeal in the first case on the ground that the court has no jurisdiction. The motion must be sustained, as the jurisdiction of this court in criminal cases is by statute only allowed in a case of this sort, where there is a judgment for a fine exceeding \$50.

The Attorney General also insists that the other appeal should be dismissed, because the record does not show that the defendant surrendered himself in execution of the judgment, or superseded it. He relies upon *Norton v. Commonwealth*, 78 Ky. 501; but in that case it appeared that the defendants, when called, failed to appear, and that their bail was forfeited. Nothing of that sort appears in this case. On the contrary, the defendant testified on the trial. While the record is fragmentary, it is sufficient for us to understand what is meant. The evidence on the trial for the commonwealth and the defendant was as follows:

Dewitt Perkins: "I am acquainted with defendant. I was before the grand jury of Knott county in March, 1905. I went to the house and got a quart. I do not remember what the whisky was in. I was full myself. The bottle was on the table. I do not remember seeing the defendant, but his wife was there. I put the money on the table and then went back and got the whisky. I never had any talk with the defendant about any whisky. Tip Bailey was a storekeeper at Henry Coombe's distillery, as the best I remember. There was no one with me. After I put the money on the table, my horse got loose and I went to catch him, and when I came back a bottle of whisky was on the table. I do not know who put it there."

Tip Bailey: "I never sold or permitted any one to sell whisky to Dewitt Perkins or any one else. My wife, Polly Bailey, rented the house from Tom Gayheart, and I had nothing to do with it. She refused to stop selling when I requested her to stop, saying that the house was hers, and she would do as she pleased with it."

The court, on this evidence, should have instructed the jury peremptorily to find for the defendant. He was not responsible for what his wife did in his absence and with-

out his authority. If, on the trial, facts were shown from which it might be reasonably concluded that his wife was acting as his agent and by his authority in selling the whisky, the question might be submitted to the jury; for this fact may be established by circumstantial evidence as well as by direct testimony. In such a state of case, the court should instruct the jury that, if the wife acted in selling the whisky with the authority or consent of her husband, he was liable; otherwise he was not. But in the case at bar we do not see that there was anything in the evidence connecting him with the selling of the whisky.

The appeal in the first case is dismissed for want of jurisdiction; and in the second case the judgment is reversed, and cause remanded for further proceedings consistent herewith.

SHOEMAKER v. SHOEMAKER.

(Court of Appeals of Kentucky. April 18, 1906.)

1. PARTNERSHIP — FIRM BOOKS — RIGHT TO COMPLAIN OF INSUFFICIENCY.

Partners in a firm continuing for over 20 years tolerated a deficient system of bookkeeping kept by one of the partners. *Held*, that the copartners could not complain of the insufficiency of the books.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 128.]

2. SAME — PRESUMPTIONS.

No presumptions would be indulged against the bookkeeping partner on account of the state of the books.

3. SAME — FIRM SETTLEMENTS — SUIT TO SURCHARGE — BURDEN OF PROOF.

A firm continuing for 20 years made annual settlements. A partner who kept the books of the firm failed to show whether the settlements included his transactions with the firm arising from his withdrawing firm assets. A copartner, after selling his interest, sued the bookkeeping partner, charging him with having withdrawn firm assets without accounting for the same. *Held*, that the suit was one to surcharge the annual settlements made, and plaintiff had the burden of showing the errors claimed by him.

Appeal from Circuit Court, Pendleton County.

"Not to be officially reported."

Action by Alex Shoemaker against T. M. Shoemaker. From a judgment for defendant, plaintiff appeals. Affirmed.

Appellate & Clark, for appellant. John H. Barker, for appellee.

O'REAR, J. Appellant and appellee and William Shoemaker were co-partners in the operation of a sawmill. The partnership extended over a period of more than 20 years. Appellee T. M. Shoemaker was the bookkeeper for the firm, and its manager. Annually, with two or three exceptions, the firm settled its accounts as among the partners. The method adopted appears to have been that all sums paid out by each of the members on behalf of the firm, and all sums withdrawn from the firm by each of them,

were settled in the annual adjustment, called an "invoicing," without the particulars having been carried into the books of the concern. The invoice, showing the ratio of interests of the members, was then taken as the basis of the firm's operations for the next year. In 1903 appellant sold out his interest in the firm to his partners. A year afterwards he brought this suit for a settlement of this partnership, charging that appellee T. M. Shoemaker had withdrawn about \$1,100 of the firm's assets and used it in his own private affairs without accounting for it. Appellee defended, claiming that he had accounted for it in the settlements above alluded to.

The character of the books kept by the firm, with knowledge of all of its members, was such a crude and deficient system, that we are unable to determine from them whether the settlements did include the items in litigation or not. The trouble is, not that appellee, as bookkeeper, failed to make correct and accurate entries of his transactions with the firm, but it is in the system of bookkeeping which the firm tolerated, and seems to have authorized. It will not, therefore, lie in the mouth of one of the members to complain, after such a length of use, that the books kept by another member are incomplete, and fail to show all that they should have shown. No presumption will be indulged against the bookkeeping member on account of the state of the books under these circumstances. This action is really to surcharge the voluntary settlements made by the copartners from time to time. The burden of showing the errors claimed by appellant was upon him who was the plaintiff below. The evidence was not such in the opinion of the chancellor who tried the case in the circuit court, nor is it such in our opinion, that it showed satisfactorily that the sums sued for were not included in the settlements. The evidence leaves the mind in doubt on this question, and he that had the burden of establishing the proposition must therefore fail.

The judgment is affirmed.

MARTIN v. CITIZENS' GENERAL ELECTRIC CO. et al.

(Court of Appeals of Kentucky. April 13, 1906.)

1. ELECTRICITY—INJURY TO STRANGER—NEGLIGENCE.

A telegraph company is not liable for injury to one touching its wire, even if it had become strongly charged by being crossed with the wire of some one else; it having no knowledge thereof, and there being nothing to put it on notice.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Electricity, § 9.]

2. SAME — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

Evidence in an action for injury to an employé of one electric company by shock from a short circuit, caused by his coming in contact at the same time with the wires of another elec-

tric company and of a telegraph company, held sufficient to authorize a finding of contributory negligence.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by George R. Martin against the Citizens' General Electric Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

B. H. Young and M. W. Ripy, for appellant. O'Neal & O'Neal, for appellee Citizens' General Electric Co. and Louisville Electric Light Co. Gibson, Marshall & Gibson, for appellee American District Telegraph Co.

HOBSON, C. J. George R. Martin was a lineman in the service of the Citizens' General Electric Company. On September 20, 1902, he was directed to put a cross-arm on one of its poles on Fifth street between Jefferson and Market. Right by this pole stood a pole of the Louisville Electric Light Company. The two poles were very close together at the bottom, so close that Martin could not go up between them. He went up the pole of the Louisville Electric Light Company. Both poles carried wires charged with deadly currents of electricity. On the pole of the Citizens' General Electric Company, and above its wires, the American District Telegraph Company had strung a wire, which was used for telegraphing purposes and carried only a small amount of electricity, which was insufficient to hurt any one. After Martin got up the pole of the Louisville Electric Light Company, he stood upon its cross-arm with one foot on or near the wire of that company, and while standing in this way, in passing a rope, he threw his hand up and it came in contact with the wire of the telegraph company. Immediately he received a severe shock of electricity. His hand and foot were terribly burned, and he fell to the ground, suffering thus further injuries. He brought this action against all three of the companies. At the conclusion of the evidence the court instructed the jury peremptorily to find for the telegraph company, and the case being submitted to the jury as to the two electric light companies, they found a verdict for the defendants, and Martin appeals.

The proof was undisputed that the wire of the telegraph company was charged with only a few volts of electricity and that it was in itself entirely harmless. It is said that perhaps this wire had been crossed somewhere with some other wire, and had thus become charged with a deadly current of electricity. But this is pure speculation, and there is nothing in the record to show that the telegraph company knew, or had and reason to suppose, that there was any danger in its wire. Its wire being harmless in itself, the telegraph company would not be responsible to a stranger if he was hurt by touching it

when the wire had become charged with electricity without its knowledge, or anything in the circumstances to put it on notice of the danger. The only reasonable inference from the proof is that Martin's foot was on the heavily charged wire of the Louisville Electric Light Company, and when he touched the other wire he completed the circuit. The electricity that burned his foot and his hand came from the heavily charged wire of the Louisville Electric Light Company. The only reason that he was not killed was that the insulation in part protected him from the deadly current of electricity which the wire carried. We therefore conclude that the peremptory instruction in favor of the telegraph company was correct.

It is also insisted that the instructions of the court to the jury were erroneous. In the recent case of *Mangan v. Louisville Electric Light Company*, 91 S. W. 703, 29 Ky. Law Rep. 38, the previous cases were reviewed, and the proper instruction to be given in cases of this sort was determined. The instructions which the court gave in the case before us were more favorable to Martin than the rule laid down in that case warrants. In fact, we fail to see any very substantial difference between the instructions the court gave on the trial and those which he asked himself. On the whole record, we think it reasonably clear that the jury found for the defendants upon the ground that Martin was himself negligent in standing upon the pole of the Louisville Electric Light Company, with his foot on the wire of that company, which he knew was charged with 2,000 volts of electricity. He knew the dangers of the situation. He could see the wires about him. He knew the danger of making a short circuit, and if he had not placed his foot on the wire of the electric company there would have been no danger in his throwing his hands about the other wires. He knew the danger of getting his hands on these wires when discharging his duties on the pole, and the jury evidently thought that he was negligent in standing on the arm of the Louisville Electric Light Company with his foot on its wire, when any movement of his hand might bring it in contact with some of the other wires about him. The evidence presented a question of fact for the jury, and we cannot disturb their finding on this question of fact.

Judgment affirmed.

BRUMLEY v. NICHOLS & SHEPHERD CO. et al.

(Court of Appeals of Kentucky. April 18, 1906.)

1. JUDGMENT—DESCRIPTION OF PROPERTY—SUFFICIENCY.

While it is the better practice to so describe land in the pleadings and judgment that it may be identified by the commissioner executing the judgment, and by persons interested, without reference to any other paper or record,

still, if it can be identified from the description given, the judgment is not void; nor is it erroneous on that account, unless it be shown that the description is so vague that some one has been misled by it, or that it is probably misleading, so that injury has been done to the owner of the land sold.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 406.]

2. APPEAL—EXCEPTIONS—FAILURE TO MAKE IN CIRCUIT COURT.

Grounds of exceptions, not relied on in the circuit court by an adult defendant not under disability, and who is before the court, are waived, and will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1432-1468.]

Appeal from Circuit Court, Spencer County.
"Not to be officially reported."

Action by the Nichols & Shepherd Company against Ben H. Brumley and another. From a judgment affirming a commissioners' sale under a mortgage, defendant Brumley appeals. Affirmed.

Charles Carroll and Baird & Underwood, for appellant. Greene & Van Winkle and L. W. Ross, for appellee Nichols & Shepherd Company.

O'REAR, J. Appellant, Ben H. Brumley, was indebted to the Bank of Taylorsville, which was secured by a mortgage upon four tracts of land, constituting really one boundary. He was also indebted to appellee Nichols & Shepherd Company, secured also by mortgage on the same land, as well as upon certain chattels. The Nichols & Shepherd Company brought this suit to enforce their mortgage lien, making the bank, the senior mortgagee, a party defendant. The land was described as it was in the mortgages. Appellant failing to answer, judgment went by default, decreeing a sale of the mortgaged property to pay both the debt of the bank and of the Nichols & Shepherd Company. The judgment directed the commissioner to sell the tracts of land separately and as a whole, accepting the bid producing the most money, if separate sales did not pay the total mortgage debt. The commissioner sold the land as directed, after having first sold the personal property described in the suit. The mortgaged property did not bring enough to pay the mortgage debt, and, the land having brought more when sold as a whole, that bid was accepted. Appellant filed a number of exceptions to the report of sale, which were overruled, and the sale was confirmed. This appeal is prosecuted from the judgment confirming the sale.

All of the exceptions filed in the circuit court are waived here, except one; that is, that the judgment of sale was void because the land was not sufficiently described in the petition and in the judgment. This exception goes to the second tract. This tract was described as follows in the judgment: "Lying in Spencer county, Kentucky, and is described as follows: * * * Second tract. On the waters of Goose creek,

and is the dower and three-fourth interest in the land owned by W. H. Edlington, and contains 91 acres, same conveyed by David Wigginton to Wm. Brumley, deed for same recorded in Deed Book M, page 519." The same description substantially is contained in the petition, and in the mortgages filed as exhibits with the petition. It is contended that this description is insufficient, and that the judgment rendered upon the petition is void for that reason. While it is a better practice to so describe land in the pleadings and judgment that it may be identified by the commissioner executing the judgment, and by persons interested, without reference to any other paper or record, still, if it can be identified from the description given, the judgment is not void. *Wilson v. Thorne*, 13 S. W. 365, 11 Ky. Law Rep. 945; *Shannon v. Pennington*, 10 Ky. Law Rep. 814; *Calvert v. Alexander*, 8 S. W. 696, 10 Ky. Law Rep. 119; *De Haven v. De Haven's Adm'r*, 46 S. W. 215, 47 S. W. 597, 20 Ky. Law Rep. 663. Nor is the judgment erroneous on that account unless it be shown that the description is so vague that some one has been misled by it, or that it is probably misleading, so that injury has been done to the owner whose land is sold. Such informality would not be allowed to set aside a sale otherwise unobjectionable.

A further objection is urged to the sale that the advertisement did not follow the judgment, in that it did not apprise bidders that the tracts would be first offered separately and then as a whole. As a matter of fact the land was so offered at the sale. While this might not have availed to cure the evil in the failure to properly advertise, still this fact was not made a ground of exception in the circuit court, and it will not, therefore, be considered on appeal; for it must be presumed that grounds of exceptions not relied on in the circuit court, by an adult defendant not under disability, and who is before the court, are waived by failure to rely upon the exception in the circuit court.

Perceiving no error prejudicial to the substantial rights of appellant, the judgment is affirmed.

NASHVILLE, C. & ST. L. RY. CO. et al. v. HIGGINS.

(Court of Appeals of Kentucky. April 12, 1906.)

1. RAILROADS—CROSSING ACCIDENT—ACTION—PLEADING.

In an action against a railroad for injuries sustained in a crossing accident, it is not necessary that the petition should allege the specific acts constituting the negligence complained of, but a general allegation of negligence is sufficient.

2. APPEAL—REVIEW—VERDICT—CONFLICTING EVIDENCE.

A verdict on conflicting evidence will not be disturbed on appeal unless palpably against the evidence.

3. RAILROADS—CROSSING ACCIDENT—ACTION—INSTRUCTION.

Ky. St. 1903, § 786, requires that the bell shall be rung or whistle sounded at a distance of at least 50 rods from the place where a railroad crosses any highway, and that it shall be rung or whistle sounded continuously or alternately until the engine has reached the highway. *Held*, that an instruction, in an action for injuries sustained in a crossing accident, that defendant was required to give notice of the approach of the train by blowing a whistle or ringing the bell, did not impose the care required by the statute.

Appeal from Circuit Court, Marshall County.

"Not to be officially reported."

Action by F. A. Higgins against the Nashville, Chattanooga & St. Louis Railway Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Wheeler, Hughes & Berry, Claude Waller, and A. B. Lamb, for appellants. Oliver, Oliver & McGregor, for appellee.

CARROLL, C. For injuries received by being struck by one of appellant's trains at a railroad crossing, the appellee recovered a judgment for \$1.175, to reverse which this appeal is prosecuted.

One of the errors assigned by appellant is the failure of the lower court to sustain a demurrer to the petition because it did not set out the specific acts constituting the negligence complained of. The petition charged that the injury was caused by the gross carelessness and negligence of the defendant in operating and managing its train. In actions of this character it is not necessary, in order to state a good cause of action, that the petition should allege the specific acts constituting the negligence. A general allegation of negligence is deemed sufficient (*L. & N. R. Co. v. Wolfe*, 80 Ky. 82; *L. & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, and therefore the demurrer was properly overruled.

The principal contention of appellant is that the verdict is flagrantly against the evidence, and that the injuries received by appellee were the result of his failure to exercise ordinary care for his own safety at the time of the accident. The appellee testified that he lived in the town of Benton, which is a short distance from the crossing at which he was injured, and was entirely familiar with the public road and railroad at this point. The crossing is one that is frequently used, and in some respects is rather dangerous to persons going in the direction appellee was traveling, as there is a hill that prevents a view of an approaching train going north; the foot of this hill being 30 or 40 feet from the railroad track. Then for a short distance there is a small space through which the train might be seen, and immediately approaching the track there is an embankment erected by the railroad company that shuts off a view of approaching trains. Appellee further testified that he was gathering corn on the day of the injury,

and was going from Benton towards the cornfield when injured. When he was in about 450 yards of the crossing, a passenger train passed, going north, and as he was not expecting any other train he drove rapidly to the crossing, and was struck by the engine of a freight train that was following close after the passenger, and running about 18 miles an hour. He did not hear the whistle sounded or bell rung; and introduced several witnesses who were in the immediate neighborhood, close enough to have heard the whistle or bell if they had been sounded or rung, who said that they heard neither the whistle nor the bell until the train was near the crossing, and some distance from the whistling post. For the company, the persons in charge of the train and several employees of the company working on a section near the crossing testified that they heard the crossing whistle, which is two long and two short blasts, given at the usual and proper place, and that the bell was rung continuously from the whistling post to the crossing. The engineer testified that he was keeping a good lookout, but that he did not see the appellant until the engine was about 150 or 200 feet from the crossing, when he at once applied the air brakes and sounded the alarm whistle, and the train ran about 1,200 yards beyond the crossing before it stopped. Measured by the number of witnesses and their opportunity of knowing whether the whistle was sounded and the bell rung, as required by the statute, a preponderance of the evidence favors the view taken by the appellant; but we are not prepared to say that the verdict is so flagrantly against the evidence as to authorize a reversal of the case for this reason. As under repeated decisions of this court, when there is a conflict in the evidence, it is the province of the jury to weigh and determine it, and their finding will not be disturbed unless palpably against the evidence. *Risk v. Ewing*, 60 S. W. 923, 22 Ky. Law Rep. 1485; *Johnson v. Johnson*, 45 S. W. 456, 20 Ky. Law Rep. 138; *L. & N. R. Co. v. Slack*, 49 S. W. 3, 20 Ky. Law Rep. 1200; *L. & N. R. v. Clark*, 49 S. W. 323, 20 Ky. Law Rep. 1375.

The instructions are not complained of by counsel for the appellant. In fact, they are more favorable to appellant than the law authorizes. It is the duty of those in charge of a railroad train when approaching a road crossing to comply with the requirements of section 786 of the Kentucky Statutes of 1903, which provides that the bell shall be rung or whistle sounded at a distance of at least 50 rods from the place where the road crosses on the same level any highway, and such bell shall be rung or whistle sounded continuously or alternately until the engine has reached such highway crossing. *L. & N. R. Co. v. Clark*, 49 S. W. 323, 20 Ky. Law Rep. 1375. This degree of duty was not imposed upon the appellant by the instructions, which only required it "to give notice of the approach

of said engine and train to the crossing where plaintiff claimed he was injured by blowing the whistle or by ringing the bell." The jury were properly instructed as to the degree of care required of appellee, and were told that if they believed from the evidence that plaintiff was guilty of negligence which contributed to bring about the injury complained of, and but for which negligence on his part he would not have been injured, they should find for the company. The verdict is not excessive in view of the injuries inflicted on appellee.

The instructions of the court were not at all prejudicial to its rights; and, there being sufficient evidence to sustain the verdict, the judgment of the lower court is affirmed.

COMMONWEALTH v. NEVILL

(Court of Appeals of Kentucky. April 18, 1906.)

PHYSICIANS AND SURGEONS—DENTISTS—REGULATION—CERTIFICATES—REGISTRATION—STATUTES—REPEAL.

Acts 1904, p. 92, c. 32, declares that all persons "hereafter receiving" a certificate of qualification to practice dentistry or dental surgery shall have it recorded in the office of the clerk of the county or counties in which he shall practice. At the time such act was passed Ky. St. 1903, § 2641, was the only law in force requiring a dentist to have his certificate registered, and this section required the registry to be made in the county of his residence. *Held*, that section 2641 was repealed by the act of 1904 only so far as it applied to certificates subsequently issued, and hence a dentist who had previously received his certificate and had it registered under such section in the county of his residence was not bound to have it registered again in the county or counties in which he should practice.

Appeal from Circuit Court, Livingston County.

"Not to be officially reported."

W. H. Nevill was indicted for practicing dentistry without having recorded his certificate in the county clerk's office of the county where he was practicing. From an order sustaining a demurrer to the indictment, the commonwealth appeals. Affirmed.

Jno. L. Grayot, N. B. Hays, and C. H. Morris, for the Commonwealth. C. C. Grassham, J. C. Hodge, and L. D. Threlkeld, for appellee.

HOBSON, C. J. Appellee, W. H. Nevill, was indicted in the Livingston circuit court for practicing dentistry in Livingston county for fee or reward when he had not recorded in the county clerk's office of Livingston county, "the county where he practiced dentistry and dental surgery, a certificate of registration from the Kentucky state board of dental examiners." The circuit court sustained a demurrer to the indictment, and dismissed it. From this judgment the commonwealth appeals.

In *Commonwealth v. Bashan*, 101 Ky. 170, 40 S. W. 253, it was held that the act of April

8, 1878, the act of May 10, 1886, and the act of May 1, 1893, should all be considered together, and that the act of 1893 is not the whole law on the subject. Since that decision was rendered the act of 1893 was amended by the act of March 17, 1904. Laws 1893, p. 840, c. 189, amended by Laws 1904, p. 86, c. 32. So the law on the subject is now to be determined from all four of these acts. The first act (see 1 Acts 1877-78, p. 97, c. 847) made it unlawful for a person to practice dentistry without a diploma, or a certificate of qualification from the Kentucky State Dental Association; but this act did not require him to have his certificate recorded. It simply required the association to keep a register of the names of persons having certificates. The act did not apply to persons engaged in the practice of dentistry at the time of its passage. The second act (see 2 Acts 1885-86, p. 523, c. 1017) required every person legally engaged in the practice of dentistry in the state at the time of the passage of the act, within six months thereafter, to cause his name and residence or place of business to be registered with the board of examiners, upon which the board was directed to issue to him a certificate. Any person desiring to commence the practice of dentistry after the passage of the act was required to stand an examination before receiving his certificate, and it was made an offense to practice dentistry in violation of the act. The third act (see Ky. St. 1903, § 2636) substantially continued in force the provisions of the act of 1886 as to persons thereafter commencing the practice of dentistry. This act also contained the following provision: "All persons hereafter receiving such certificates, before being qualified to practice dentistry, or dental surgery, in this state, shall have the same registered in the office of the clerk of the county in which they reside; and all persons now holding certificates of qualification from said dental association, shall within one year after the passage of this law, have the same registered in the office of the clerk of the county in which they reside." Section 2641, Ky. St. 1903. By this provision all persons who were practicing dentistry were required to have their certificates recorded in the office of the county clerk of the county in which they resided; those already holding such certificates being given a year to comply with the provisions of the act. By the last act, section 2641, Ky. St. 1903, was stricken out, and an entirely new provision substituted for it. So much of it as is material to the question here before us is as follows (see Acts 1904, p. 92, c. 32): "All persons hereafter receiving such certificate of qualification to practice dentistry or dental surgery in this state, shall have same recorded in the office of the clerk of the county, or counties, in which he shall practice, and it shall be the duty of such clerk, upon presentation of said certificate and a fee of fifty cents, to register same

in a book kept in the office for the registration of physicians."

At the time this act was passed, section 2641, Ky. St. 1903, was the only law in force requiring a dentist to have his certificate registered, and this required the registry to be made in the county of his residence. This provision was repealed by the act of 1904, which requires the registry to be made in the county or counties in which he shall practice. But the act by its terms only applies to persons receiving certificates after its enactment. It does not make it incumbent upon a dentist, who had before received his certificate and had it registered in the county clerk's office of his residence, to again have it registered in the county or counties in which he shall practice. It was evidently intended to exempt those who had complied with the old law from having their certificates registered under the new. It was not charged in the indictment that appellee received his certificate after the act of 1904 was passed, and therefore the provisions of that act are not shown to be applicable to him. It only applies to persons thereafter receiving such certificates.

Judgment affirmed.

HEARD v. CHERRY et al.

(Court of Appeals of Kentucky. April 13, 1906.)

PARTITION—TITLE TO SUSTAIN ACTION.

In an action of partition where plaintiffs and defendant claimed title from a common source, the defendant cannot defeat the action because plaintiffs failed to exhibit a title which had come to them from the commonwealth.

Appeal from Circuit Court, Warren County. "Not to be officially reported."

Action by John Allen Cherry and others against John B. Heard. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Lewis McQuown, W. O. Rodes, and Byron Renfrew, for appellant. Sims & Grider, for appellees.

PAYNTER, J. The title to the land in controversy was derived by the appellant and appellees from a common source. They claimed and occupied under the title thus obtained. They have made a common defense when it has been assailed. After this status had been maintained by the ancestors of the parties, and by themselves for more than 40 years, the appellant conceived there was a defect in the title which had been conveyed to Heard and Cherry by the Sharpe heirs, set up an adverse claim to the boundary of the land, and denied that appellees were entitled to any part of it.

This action was brought against appellant for a partition of the land, and for damages for cutting and removing the timber therefrom. Because in this action the plaintiffs did not exhibit a title which had come to

them from the commonwealth it is claimed that they failed to make out a cause of action. The parties were tenants in common, had a common title and it is not permissible for one tenant in common to question the validity of the title. When, in an action for ejectment, both parties are claiming under the same third party, it is sufficient for the plaintiff to show a derivation of title from him, and it is not necessary that he should trace the title back to the commonwealth. *Luen v. Wilson*, 85 Ky. 503, 3 S. W. 911; *Barnett v. Mimick*, 17 S. W. 334, 13 Ky. Law Rep. 503.

The judgment is affirmed.

SETTLE, J., not sitting.

CARPENTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 18, 1906.)

1. CRIMINAL LAW — CONTINUANCE — ABSENT WITNESS — SUFFICIENCY OF AFFIDAVIT.

Cr. Code Prac. § 189, provides that, when application for a continuance on account of an absent material witness is made, the affidavit as to the facts which said witness will prove shall be admitted as true, if the motion for a continuance is made at the same term at which the indictment is found. *Held*, that an affidavit containing an expression of opinion to the effect that defendant could prove by a certain person that at the time of the shooting defendant was in great peril, and which did not show that the person was within the jurisdiction of the court, nor where he resided, was insufficient.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1353.]

2. SAME — INABILITY TO OBTAIN COUNSEL.

There was no reversible error in denying a continuance sought on the ground of defendant's inability to obtain counsel, where the affidavits for continuance stated that negotiations for the employment of counsel had been commenced, but never consummated, but it appeared that the attorneys with whom defendant was negotiating represented him at the trial and brought up his case on appeal.

3. SAME — EVIDENCE — CONFESSIONS.

Confessions by accused, made after his arrest, were admissible in the absence of a showing that they were induced by any hopes or fears raised by the promises or threat of any person.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1167.]

Appeal from Circuit Court, Hardin County.
"Not to be officially reported."

Bernest Carpenter was convicted of willfully and maliciously shooting with intent to kill, and he appeals. Affirmed.

Irwin & Irwin and R. L. Stith, for appellant. J. R. Layman, N. B. Hays, and C. H. Morris, for the Commonwealth.

CARROLL, C. Under an indictment for willfully and maliciously shooting and wounding with the intention to kill Steadman Roberson, appellant was found guilty, and his punishment fixed at a term of three years in the state penitentiary, to reverse which he appeals.

The offense with which appellant was charged

was committed on November 9, 1906, and a few days afterwards he was arrested, and in default of bail was lodged in jail, where he remained until his trial. The indictment against him was found on November 17th, and on December 11th, during the same term of the court, a trial was had. Counsel for appellant insists that error was committed in not granting a continuance of the case and in refusing to permit his affidavit for continuance to be read as true. Section 189 of the Criminal Code of Practice provides that, when application for continuance on account of an absent material witness is made, the affidavit as to the facts which such witness will prove shall be admitted as true, if a motion for a continuance is made at the same term at which the indictment is found. This provision of the Code, however, only applies when the affidavit for a postponement shows the materiality of the evidence expected to be obtained, that due diligence has been used to obtain it, the facts the affiant believes the absent witness will prove, that they are true, and that the witness is within the jurisdiction of the court. In the affidavit filed by appellant he stated that he could prove by one Harry Johnson, "who was present when the difficulty occurred, that he acted in his defense, and that at the time he fired the shot that struck Roberson his life was in great peril at the hands of Roberson, and others with him at the time." He did not state that Harry Johnson was within the jurisdiction of the court, nor did he state where he resided, nor any fact that he could prove by Johnson, except that he acted in self-defense in shooting Roberson and was in great peril at the hands of Roberson at the time he shot him. This is merely an expression of an opinion, and is not a statement of any material fact that Johnson would testify to, and would not have been competent evidence by Johnson if he was present at the trial. An affidavit for continuance must show that witness is within the jurisdiction of the court and the facts that he would testify to, if present, and that there are reasonable grounds to believe that his testimony can be secured at the next term. The court did not err in refusing to grant the continuance on this ground, or in refusing to allow the affidavit to be read as the evidence of the absent witnesses. *Kennedy v. Com.*, 73 Ky. 447; *Benge v. Com.*, 92 Ky. 1, 17 S. W. 148.

He also sought a continuance because of his inability to obtain counsel to prepare his case and to represent him on the trial of the case, and the affidavits for continuance on this ground state that negotiations for the employment of counsel had been commenced, but never consummated. The word "negotiations," as used in these affidavits, has a well-defined professional meaning, and we can easily understand how appellant's rights might have been prejudiced by depriving him of the opportunity to obtain the

services of counsel, if the pending negotiations had not terminated in a satisfactory manner; but it appears from the record that appellant was represented in the court below by the attorneys with whom he was negotiating and who have brought this case to this court, and there is ample evidence in the record and briefs disclosing how faithfully and intelligently they represented his interest, leaving nothing undone that able and skillful counsel could do to save their client from the natural and proper consequences of his wanton, reckless, and malicious acts. We have, therefore, no hesitation in assuming that the negotiations were consummated in a manner entirely agreeable to all parties concerned, and that no injustice was done the accused in not granting a continuance on account of supposed inability to procure counsel.

Counsel also insist that error was committed to the prejudice of the accused in permitting W. R. Hart and D. W. Rider to testify as to confessions made by the accused after he had been arrested; but it does not appear that these confessions were induced by any hopes or fears raised by the promise or threat of any person, or that they were not entirely voluntary, or that there was anything improper resorted to to obtain them. Under these circumstances these voluntary statements of the accused were competent evidence against him. *Taylor v. Com.*, 42 S. W. 1125, 19 Ky. Law Rep. 836; *Rector v. Com.*, 80 Ky. 468; *Rutherford v. Com.*, 2 Metc. 387.

He shot and attempted to kill Roberson without excuse or provocation; and, as we perceive nothing in the record to show that any substantial right was prejudiced, the judgment is affirmed.

CARPENTER v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 13, 1906.)

CRIMINAL LAW—HOMICIDE—EVIDENCE—OTHER OFFENSES—ADMISSIBILITY.

Inasmuch as Cr. Code Prac. § 37, gives a private person the right to make an arrest when he has reasonable grounds for believing that the one arrested has committed a felony, on a prosecution for shooting with intent to kill, the prosecutor having been at the time of the shooting endeavoring to arrest defendant, it was proper to admit evidence that defendant had shot a third person before prosecutor sought to make the arrest, and to admit evidence as to the substantial facts connected with the shooting of the third person, as it tended to prove a motive to overcome the defense of self-defense.

Appeal from Circuit Court, Hardin County.
"Not to be officially reported."

Bernest Carpenter was convicted of willfully and maliciously shooting another with intent to kill, and he appeals. Affirmed.

Irwin & Irwin and R. L. Stith, for appellant. J. R. Layman, N. B. Hays, and C. H. Morris, for the Commonwealth.

CARROLL, C. The appellant was convicted of willfully and maliciously shooting and wounding Ed Hicks with the intention of killing him, and his punishment fixed at confinement in the state penitentiary for a term of four years.

He assigns as error the refusal of the court to grant a continuance on account of inability to employ counsel and prepare his case for trial; but, as it appears that he was represented on the trial by able counsel, we do not think the court erred in granting a continuance because of this ground. He was indicted on November 15th, and was not tried until December 12th, and there is nothing in the record to show that he was not as well prepared for trial then as he would have been if the case had been continued until the next term of the court.

The principal error assigned by appellant is the admission of the testimony of Steadman Roberson, and to understand the force of this objection it is necessary to briefly state the facts of the case: Appellant was stealing a ride on a freight train on which Steadman Roberson was a brakeman. On the night of the shooting Steadman Roberson was ordered by the conductor of the train to eject from it any trespassers or persons wrongfully trying to ride, and while engaged in the discharge of this duty Steadman Roberson was shot by appellant. Ed Hicks lived at Sonora Station, several miles south of Elizabethtown, and while at the station was informed of the shooting of Roberson. After receiving this information, Hicks started in pursuit of appellant, whom he had seen about the depot, and when he approached him told him to throw up his hands, and, before he had time to inform appellant of the nature of the charge against him or for what purpose he was attempting to arrest him, the appellant shot him. Steadman Roberson was introduced as a witness by the commonwealth for the purpose of showing that appellant shot and wounded him before Hicks sought to make the arrest, and was permitted to detail the substantial facts connected with the shooting. Section 37, Cr. Code Prac., provides: "A private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony." It was therefore material and important for the commonwealth to prove that, when Hicks attempted to arrest appellant, he had reasonable grounds for believing that he had committed a felony, and to establish this it was necessary to show the information upon which he acted; and in this case it was further competent to prove on behalf of the commonwealth that appellant had not only committed a felony, but the facts thereof to overcome appellant's defense that he shot Hicks in self-defense, and to prevent Hicks from killing him, and to prove a motive on his part for shooting him. It was really done to prevent his ar-

rest by Hicks for the crime that appellant knew he had committed, and not in defense of his person from a threatened assault by Hicks. *Baker v. Com.*, 50 S. W. 54, 20 Ky. Law Rep. 1778. When the evidence was introduced for this purpose, the court should have instructed the jury that it was admissible only to show the motive on the part of appellant for committing the crime; but in this case the failure so to instruct the jury did not prejudice his substantial rights.

The judgment is affirmed.

CITY OF LOUISVILLE v. KAYE.

(Court of Appeals of Kentucky. April 17, 1906.)

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—DAMAGES.

In an action for damages to an abutting owner from a change of grade of a street, the plaintiff is entitled to recover the difference between the fair market value of the property just before and just after the change; and the increased value of plaintiff's property, in common with other property in the square, by reason of the change in grade, is to be considered in determining the damages.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 946.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Kate E. Kaye against the city of Louisville. From a judgment in favor of plaintiff, defendant appeals. Reversed.

A. E. Richards and A. B. Bensinger, for appellant. Wallace A. McKay and Isaac T. Woodson, for appellee.

BARKER, J. The appellee, Kate E. Kaye, is the owner of a lot of ground in Louisville, Ky., situated on the northeast corner of Catalpa and Woodland avenues. In making Woodland avenue the city changed the grade of the street theretofore existing, and made a cut of $4\frac{1}{2}$ to 5 feet along the entire length of appellee's lot. To recover damages for this alleged injury, this action was instituted. A trial was had before a jury, and a verdict and judgment rendered in favor of appellee for the sum of \$200, of which the city is now complaining.

Upon the trial of the case the court gave the following instructions: "(A) The city of Louisville had the right to have Woodland avenue improved along and adjacent to the plaintiff's property described in the petition, but it had no right, in so doing, to diminish the value of said property; and if you believe from the evidence that said property was diminished in value by reason of the construction of said street, as it was constructed along and adjacent to plaintiff's property, then the law is for the plaintiff and you should so find." "(2) But, unless you believe from the evidence that said property was diminished in value by reason of the construction of said street as it was constructed, the law is for the defendant and you

should so find. (3) In making your estimate, you should consider the fair market value of plaintiff's property just before it was known that said street would be made as it was made, and the fair market value after the making of said street was completed, as shown by the evidence; and if there is a decrease or diminution in value, caused by the making of the street as it was made, you should award the difference in value so found to plaintiff as the amount of the damage to her property by reason of the construction of said street, not exceeding \$700, the amount claimed in the petition. (4) If there has not been any decrease in the value of plaintiff's property by reason of the making of said street as in these instructions above submitted, you should find for the defendant. (5) If you believe from the evidence that the property generally on the square in which plaintiff's property is situated was increased in value by reason of the construction of the said street, you should not consider the increased value of plaintiff's property, if any there was, which was common to the other property on the said square, by reason of the said construction, in determining whether or not plaintiff's property was diminished by the construction of said street." The only error seriously relied upon for reversal of this action is the giving of instruction No. 5.

The case of *City of Henderson v. Winstead*, 109 Ky. 328, 58 S. W. 777, is identical in principle with that at bar. There the court, in instructions 1 and 2, gave to the jury the principle as announced in instruction No. 5 under consideration; that is, "In estimating the damages they should not diminish the amount on account of any enhancement of the property in value by the change of the grade of the street, unless it received some special benefit not in common with other property along the line of the work." Instruction A in the case cited fixed the measure of damages as in No. 3 here. In the opinion, written for the court by Judge Hobson, it is said: "The measure of damages is the diminution in value of the property by reason of the lowering of the grade of the street. *City of Louisville v. Hegan*, 49 S. W. 532, 20 Ky. Law Rep. 1532. Instruction A given by the court expressed the rule properly, and instructions 1 and 2 should not have been given." This was a condemnation of instruction No. 5 as given by the court in this case. In the case of *City of Covington v. Taffee*, 68 S. W. 629, 24 Ky. Law Rep. 373, we condemned an instruction containing the principle enunciated in No. 5 here, in the following language: "The recovery should have been limited to the difference caused by the grading of the street between the fair market value of the property before and after the grading was done. The city is not liable for a general drop in the real estate market." In the case of *Jeffersonville, Madison & Indianapolis R. Co., etc., v. Esterle*, 18 Bush, 667, which

involved the damages to an abutting property owner by reason of the occupancy of a street of the city of Louisville by a railroad, the measure of damages was thus stated: "The jury should ascertain what the value of the property was just before it became generally known that the appellants' roads were to be located in front of it, and then determine what proportion of that value was taken from the house and lot by the obstruction of the street and the annoyances incident to the movement of engines and trains of cars along and over appellants' roads. This rule is simple, and it strips the question of the complication and confusion which must necessarily arise in an attempt to distinguish between the natural increase of the value of the particular piece of realty and the increase attributable to the location of the line of railway." The same rule is laid down in the case of *City of Louisville v. Hegan*, 49 S. W. 532, 20 Ky. Law Rep. 1532. In *Lewis on Eminent Domain*, § 494, in defining the measures of damages in cases similar to this, the rule is thus stated: "The correct measure of damages, in all such cases, is undoubtedly the diminution in value of the property by reason of the change. The owner should receive such a sum as will make him whole. It is proper to consider the expense of adjusting the property to the new grade, the cost of filling, and the cost of a retaining wall, if necessary. But these items cannot be recovered specifically. They are only elements tending to show damages."

The instructions given by the court in this case, from 1 to 4, inclusive, state the correct rule of law and the proper measure of damages in lucid and succinct terms. The learned trial judge, in giving instruction No. 5, evidently failed to distinguish between the direct damage, which arises from taking private property for public use, and the consequential damage, which arises, as in this case, from the city's changing the grade of its own street. At common law the property owner in a case such as this was without remedy, but our present Constitution has been construed so as to make the municipality liable. When the property of the citizen taken for public use, the loss or damage accruing to him by this act cannot be offset by any speculative advantage; but it has never been the rule that the incidental advantage arising from the public improvement may not be considered in diminishing the consequential damage or inconvenience. In the case of *Henderson & Nashville R. R. Co. v. Dickerson*, 17 B. Mon. 173, 68 Am. Dec. 148, on the subject in hand, it is said: "If, however, the owner claims more than the value of the property taken, and seeks indemnity for consequential inconvenience or injury, then the advantages which result to him may be taken into consideration, and such advantages and disadvantages may be compared and set off, the one against the other; and, if the advantages are equal to

the disadvantages, then he will not be entitled to anything for such consequential inconvenience or injury. In this case, however, the court instructed the jury, who assessed the damages, that they were not to take into consideration, in estimating the consequential damages which the owner might sustain, any advantage that he might derive from the construction of the road, unless it were a special individual benefit, which was not common to others in the same neighborhood. In this exposition of the law we think that the court erred. The advantages which the owner may derive from the construction of the road are not in the least diminished by the fact that they will be enjoyed by others, nor does it furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from the establishment of the road. Other persons, it is true, may enjoy the same advantages, without being subjected to the same inconvenience; but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes."

The foregoing authority is deemed conclusive of the question in hand, and the judgment is therefore reversed, for proceedings consistent herewith.

BEST v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 18, 1906.)

1. CRIMINAL LAW—PARTIES TO CRIME—ACCOMPLICES—WHO ARE.

A person who knew that a crime was to be committed, but who was not connected as a party with the crime, is not an accomplice in the commission thereof.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 87-90, 1082-1084.]

2. SAME—TRIAL—INSTRUCTIONS.

Where the court correctly defined an accomplice, and charged that whether a witness was an accomplice was for the jury, and that a conviction could not be had on the testimony of an accomplice, unless corroborated, a conviction will not be reversed on the ground that the witness was an accomplice and his testimony not sufficient to sustain a conviction, if the same was corroborated.

3. ARSON—CORROBORATION OF ACCOMPLICE—SUFFICIENCY.

Evidence on a trial for arson examined, and held to corroborate the testimony of an accomplice sufficiently to justify a conviction.

Appeal from Circuit Court, Hardin County.

"Not to be officially reported."

Gilbert Best was convicted of arson, and he appeals. Affirmed.

Irwin & Irwin and R. L. Stith, for appellant. N. B. Hays, Atty. Gen., J. R. Layman, and Chas. Morris, for the Commonwealth.

O'REAR, J. Appellant was convicted of the crime of barn-burning, and sentenced to two years in the penitentiary. He was joint-

ly indicted with Lonnie Nichols and Thomas Richardson. Thomas Richardson was introduced as a witness for the commonwealth, and it was upon his testimony largely that the conviction was based.

The contention is that the testimony of Richardson, an accomplice, was not enough to sustain a conviction. The only evidence that Richardson had any connection with the crime is his own testimony. That does not show that he was guilty as an accomplice or otherwise under the law. At most it shows that he had knowledge that the crime was to be committed, and was being done; but there was nothing to show that he was connected as a party with the crime. There is a marked distinction between knowledge of a crime and participation in it. The former does not at all necessarily include the latter. However, the question whether Richardson was or not an accomplice was fairly submitted to the jury by the court's instructions in commendable form, as follows: "(1) The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant, in Hardin county and before the finding of the indictment, feloniously set fire to and burned a barn of Zach Hoskinson, they should find him guilty, and fix his punishment at confinement in the penitentiary for not less than one nor more than six years, in their discretion. (2) If upon all the evidence the jury have a reasonable doubt of the proof of defendant's guilt, they should find him not guilty. (3) If the jury shall believe from the evidence that the witness Thomas Richardson was an accomplice in the burning of the barn of Hoskinson, then a conviction cannot be had upon his testimony, unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof; and the question as to whether said Richardson was an accomplice is one for the jury to determine under the evidence. (4) The evidence as to general moral character of the defendant can only be considered by the jury in so far as same may affect his credibility as a witness. (5) An accomplice, in the meaning of the law, is one of several equally concerned in the commission of a crime, either as principal or one who aids or abets in the commission of the crime."

But appellant contends that there was no other evidence tending to connect him with the crime. On this point the proof was that appellant was seen passing the barn with one of his codefendants about dark on the night on which it was burnt; that he and his codefendants were not on good terms with the owner of the barn; that on the morning after the barn was burned he failed to return to his work, and did not return until late in the day; that he spent a part of the night, if not

all of it, with his codefendants carousing and drinking in the neighborhood of the barn; that the owner of the barn was away from home, and appellant and his codefendants probably knew this fact; that a short while after the barn was burned appellant was accused by a neighbor boy of being a barn-burner, who told that he would have to go to the penitentiary for it, and appellant responded that, if he did, somebody else would have to go also; that appellant's young brother, aged about 15 years, who lived with him, and who said he spent a part of the night with him, on the morning after the fire came to the barn, and, upon being told that bloodhounds had been sent for to track the person who fired it, hastily returned to his home and was seen to obliterate some tracks in the dust leading from the barn in the direction of appellant's home. The jury were authorized to infer from the circumstances in proof that appellant's brother was sent to the scene of the fire to learn what was being done toward discovering who burned the barn. All of this was enough in our opinion to satisfy the requirements of the law that incriminating testimony of an accomplice must be corroborated to sustain a conviction.

Judgment affirmed.

MITCHELL v. WHALEY et al.

(Court of Appeals of Kentucky. April 17, 1906.)

1. PARTNERSHIP—DELIVERY OF FIRM CHECK IN PAYMENT OF COPARTNER'S DEBT—LIABILITY.

A partner gave a firm check to a third person to pay the copartner's debt. The consideration for the check was a sale of a horse by the third person to the copartner. The firm had money in bank more than sufficient to pay the amount thereof. *Held*, that the partner was liable for the amount of the check; it being supported by a valid consideration.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 237.]

2. SAME—LIABILITY ON NOTES EXECUTED IN FIRM NAME.

A note executed by a partner in the firm name prima facie binds the partners, on the theory that the partner had authority to make the note, and a copartner, asserting the contrary, has the burden of proving it.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 242-249.]

Appeal from Circuit Court, Nicholas County.

"Not to be officially reported."

Action by D. B. Mitchell against Joseph E. Whaley and another. From a judgment for defendant Charles S. Talbert, plaintiff appeals. Reversed.

Kennedy & Dickson, for appellant. Holmes & Ross, for appellees.

BARKER, J. The appellant, D. B. Mitchell, instituted this action against Joseph E. Whaley and Charles S. Talbert, as partners under the firm name of Whaley

& Talbert, to recover a judgment for the sum of \$300 evidenced by the firm's check for that amount, and also to recover a judgment for \$300 on a note signed by the firm for that sum. The transaction involved herein grows out of a sale by Mitchell, as he claims, of a two-thirds interest in a horse called Clearmont Chief, to the firm, Whaley & Talbert, for the sum of \$600. Talbert alleges: That the horse was not sold to the firm, but to Joseph E. Whaley individually. It is admitted, however, by all parties, that a two-thirds interest in the horse was sold either to the firm of Whaley & Talbert, or to Joseph E. Whaley individually, for the sum of \$600. That after the sale Talbert executed and delivered the firm's check to Mitchell for \$300, which is as follows: "Carlisle, Ky., July 15, 1903. Farmers' Bank of Carlisle, Ky.: Pay to the order of D. B. Mitchell (\$300.00) three hundred dollars, for payable Oct. 1, 1903, for ½ of chestnut stallion Clearmont Chief. Whaley & Talbert." That afterwards Whaley executed and delivered the note sued on, which is as follows: "\$300.00. Carlisle, Ky., July 15, 1903. On October 1, 1904, after date, we promise to pay to the order of D. B. Mitchell three hundred dollars, for value received, negotiable and payable at the Deposit Bank of Carlisle, Kentucky, with interest at the rate of 6 per centum per annum from October 1, 1903, until paid. The drawers and indorsers hereof waive presentment, protest, and notice of dishonor. Second and last payment for ¾ interest in chestnut stallion 'Clearmont Chief.' Whaley & Talbert." The answer to the petition as amended, which declares on the foregoing instruments, pleads non est factum for Charles S. Talbert, and "no consideration" for the firm, and that the horse was unsound and worthless as to both defendants. Upon a trial of the case, there being no evidence whatever of the horse being unsound, the court gave a peremptory instruction to the jury to find for the plaintiff as against Joseph E. Whaley for the amounts claimed, and the jury, under the instruction of the court as to Talbert's liability, found a verdict in his favor upon the issue presented by him. Of this verdict, and the judgment predicated thereon, the plaintiff, D. B. Mitchell, is here on appeal.

While there is much in the evidence which goes to establish the claim of appellant that the horse was sold to the firm of Whaley & Talbert, for the purposes of this appeal it may be conceded that the sale was to Joseph E. Whaley, individually, and, this being admitted, we will examine the instructions awarded by the trial court on the issue as to Talbert, with a view of testing the soundness of the principles of law enunciated therein. Talbert admits that he gave Mitchell the firm's check sued on. He states, however, he did this in order to pay Whaley's debt to

Mitchell. This being true, it is difficult to understand why he is not liable on the check, although it was given in payment of the debt of Whaley. The latter was his partner, and had purchased the horse. The firm had money in bank more than sufficient to pay the amount, and, as it had the right to pay Whaley's debt out of the partnership funds, it certainly does not lie in Talbert's mouth to deny his liability on this check when he wrote and delivered it himself, and thereby obtained, in part at least, the title to the horse for Whaley. The consideration of the check was the sale of the horse to Whaley. It is elementary that a consideration for a contract may be either a benefit to one party or a loss to the other. Here the consideration for the check given by Talbert to Mitchell was the loss, in part, by the latter of his title to the horse. The appellant, on Whaley's own statement, was clearly entitled to a peremptory instruction for a judgment for the amount of the check sued on, as soon as it became apparent that Whaley had no defense to it.

Instructions 2 and 3, awarded by the court, are as follows: "(2) The court instructs the jury to find for the defendant C. S. Talbert, unless they believe from the evidence that both of the defendants, C. S. Talbert and J. E. Whaley, jointly purchased the horse in the proof described, or that the defendant Whaley, with the consent of Talbert, purchased the said horse for and on behalf of the firm of Whaley & Talbert, in either of which events they should find for the plaintiff against both of the defendants, the sum of \$300, with interest from October 1, 1903, and the further sum of \$300, with interest from October 1, 1904, subject to a credit of \$333.33, as of date July 9, 1904. (3) The defendant Whaley had no power to bind the firm of Whaley & Talbert in the purchase of the horse mentioned in the evidence, without the consent of Talbert; but if they believe, from the evidence, that Whaley did purchase said horse for and on behalf of the firm of Whaley & Talbert, and further believe that the defendant Talbert, after receiving notice of such purchase, adopted and ratified the same, then the law is for the plaintiff, and the jury should so find."

These do not state the rule applicable to the transaction under discussion. The note sued on was executed by one of the partners, Whaley, who signed the name of the firm. He admits in his evidence that it was his intention to bind the firm as payors of the note, and this being true prima facie he was authorized so to do, and the burden of showing to the contrary was upon the defendant Talbert. In the case of *Hamilton v. Summers*, 12 B. Mon. 11, 54 Am. Dec. 509, the rule on the subject is thus stated: "The note itself, executed in the firm name by one of the firm, was prima facie obligatory upon both partners, and after proof of its having been so

executed, it devolved upon the defendant to show to the satisfaction of the jury that it was executed for the individual debt of Sanford, or loaned to him for his private purposes, and not for the benefit of the firm or in its business, and that Summers knew, or had reason to know, that this was the case." And in *Magill v. Merrie and Bullin*, 5 B. Mon. 168, it is said: "The members of a firm are presumed to have confidence in each other, and that neither will abuse the implied power confided to each. A note executed in the firm name by either is therefore prima facie evidence that it was properly executed, and for a valid consideration to the firm; and if it was not so executed, it lies upon the defendant to impeach it, and shows that it was executed upon and for a different consideration and purpose."

For the foregoing reasons, the judgment is reversed, for proceedings consistent herewith.

STAR DRILLING MACH. CO. v. McLEOD et al.

(Court of Appeals of Kentucky. April 11, 1906.)

1. SALES—ELEMENTS—PAYMENT—ACCEPTANCE AND USE.

Where, on receiving a payment, a company delivered a drilling machine for a 10 day test, after which, if it fulfilled certain guaranties, the person receiving it agreed to accept it at a certain price, for which he was to give notes and a chattel mortgage, and he continued to use it after the 10 days expired, though without giving the notes and mortgage, the transaction constituted a sale, and not a mere option, even if the payment made were denominated rent by the parties.

2. SAME—LIEN FOR PRICE.

Under a contract for sale of a drilling machine, whereby the buyer agreed to give notes and a chattel mortgage for the unpaid portion of the price, which he failed to do, the seller had a lien for the unpaid portion.

3. SAME—PRIORITIES—ATTACHMENT.

The lien retained by a seller of a machine for its price, though unrecorded, has priority over the lien of an attachment by general creditors.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 873.]

4. DISMISSAL—GROUNDS—ERROR IN FORM OF ACTION.

That an action was brought in ordinary, when it should have been in equity, was not ground for dismissal, where the petition showed plaintiff's right to relief, but it should be transferred to the equity docket.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 111.]

Appeal from Circuit Court, Barren County.
"To be officially reported."

Action by the Star Drilling Machine Company against George K. McLeod and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Hatchett & James, for appellant. Baird & Richardson and J. W. Jones, for appellees.

HOBSON, C. J. In July, 1904, the Star Drilling Machine Company delivered to Geo.

K. McLeod a portable drilling machine, which McLeod used in drilling oil wells in Barren county. On October 17, 1904, creditors of McLeod brought suit in the Barren circuit court against him and took out attachments, which were levied on the drilling machine. Thereupon the Star Drilling Machine Company brought this suit, alleging that it was the owner of the property and took out an order of delivery for it. The written contract under which the machine was delivered to McLeod was filed as part of the petition. The court sustained the demurrer of the creditors to the petition of the Star Drilling Machine Company and entered judgment in their favor. From this judgment the company appeals.

The judgment of the court is based on the idea that the written contract between the company and McLeod constituted a sale of the property by it to him. It is insisted for the company that the contract is not a sale, but only an option, or offer, to sell, and that the title to the property remained in the company. The written contract, so far as material, is in these words: "Memorandum of agreement, made in duplicate, this 16th day of July, 1904, by and between, the Star Drilling Machine Company of the city of Akron, county of Summit, and state of Ohio, party of the first part, and George McLeod of city of Masontown, county of Fayette, and state of Pennsylvania, party of the second part: Witnesseth that the said first party has this day agreed to furnish to said second party one No. 7 Star Portable Drilling Machine, oak frame, with 20 H. P. Oil Country Boiler, mounted on its own trucks, together with the ropes and tools mentioned in the schedule hereto annexed, and made part hereof. The said first party agrees to load said machine on board cars at Akron, Ohio, for shipment; said second party agrees to receive the same upon its arrival at Glasgow, Kentucky, and to pay the freight and charges upon the same. The said party of the first part warrants said machine to be of good materials, to be well made, and to do good work in drilling, pipe driving, or prospecting, if properly managed. It is agreed that said machine shall be furnished by said first party to the second party on a test trial of ten days, from its arrival at Glasgow, Kentucky, and that until the end of said test trial and until the complete fulfillment of the conditions of this agreement as herein set forth, that the title and possession of said machine shall remain vested in the party of the first part. At the end of said test trial, hereinbefore mentioned, the party of the second part agrees to accept said machine in the manner hereinafter set forth, provided the said machine shall have fulfilled the guarantee herein, and it is agreed that until said machine is accepted, a net rental of fifty cents per foot for the amount drilled shall be paid by the party of the second part to the party

of the first part, but that when accepted and all the conditions of the contract hereinafter set forth have been complied with, the rental shall not be required. In consideration of the agreements hereinbefore set forth, the party of the second part agrees to pay to the party of the first part, twenty-four hundred (\$2,400) dollars, in manner and form following, to wit: On receipt of a copy of this agreement, \$500.00, and upon the acceptance of said machine to furnish the following promissory notes, drawn up in due form, and the payment thereof to be secured by chattel mortgage on machinery, boiler, ropes and tools. [Here follows schedule of notes to be executed.] Said second party agrees to deliver, or mail said payments and notes promptly upon the completion of the test trial, and the acceptance of said machine."

The plaintiff alleged in the petition that \$500 was paid, but charged that it was paid as rent, and that this was left out of the contract by oversight and mistake. It also alleged that McLeod had failed to execute the notes and mortgage referred to; that he had bored a number of wells, which, at 50 cents a foot, amounted to more than the sum he had paid it; that under the contract McLeod only held the machinery for the purpose of testing it, and that he at the end of 10 days decided to reject the plaintiff's offer to sell and did not accept it, and failed and refused to execute the notes and mortgage as provided in the contract; that McLeod had no rights in the property, other than to use it as rented property, and at the end of 10 days from the execution of the agreement plaintiff's offer to sell lapsed, and was not open for acceptance after that time. The rule in this state is that whether a contract is a sale of property or a renting of it will be determined by the court from the substance of the writing taken as a whole, and not by the name which the parties may give the contract, or the form in which they may put it. If the writing had specified that the \$500 was paid for the rent of the machine, this would not have changed its legal effect. The fact, therefore, that such a clause was omitted from the contract by oversight, or mistake, is immaterial, if the contract with such a clause in it would constitute a sale of the property, for the fact that the parties stipulated that the \$500 should be treated as paid on rent would not be conclusive on the court, if from the whole contract it was clear it was paid as purchase money on a contract of sale. *Baldwin & Co. v. Crow*, 86 Ky. 679, 7 S. W. 146; *Welch v. National Cash Register Co.*, 44 S. W. 124, 19 Ky. Law Rep. 1664; *Wicks v. McConnell*, 43 S. W. 205, 20 Ky. Law Rep. 84; *Townsend v. Frazee*, 54 S. W. 722, 21 Ky. Law Rep. 1183.

The substance of the contract is that the company guaranteed the machine to be of good material, to be well made, and to do good work if properly managed, and that

it gave McLeod 10 days after the arrival of the machine at Glasgow to test it, and at the end of that time McLeod was to accept the machine if it filled the guaranty and settle for it as provided in the contract. When after 10 days' trial McLeod continued to use the machine, he could not be heard to say that he had not accepted it. His failure to execute the notes and mortgage, as provided in the contract, did not affect his obligation. The company could at the end of the 10 days have sued him for the balance of the purchase money and enforced a lien on the property. His continued use of the machinery, and its acquiescence in such use, made it a complete contract of sale. The title to the machinery vested in McLeod, but subject to the lien of the company for the unpaid purchase money. His failure to execute the notes and mortgage according to the contract put the company in no worse position than if he had complied with it. As between the company and McLeod, it is clear that it had a lien on the machinery for the unpaid balance of the price due from him. Its lien, though unrecorded, is good against subsequent attaching creditors. *Baldwin v. Crow*, 86 Ky. 679, 7 S. W. 146, and cases cited. The reasons for this rule are thus admirably stated by Judge Simpson in *Swigert v. Bank of Kentucky*, 56 Ky. 290: "A general creditor, when he comes into a court of equity to obtain satisfaction of his debt out of the estate of the debtor, cannot, as a general rule, successfully assert any claim to his debtor's property, unless, indeed, where a fraudulent disposition of it has been made, which the latter could not himself render available. If the debtor have only an equitable interest in property, any lien or incumbrance on that equity, if not fraudulent, that would be valid against the debtor, will also be valid against the creditor in a court of equity. The creditor has only an equity on his debtor's estate, and that equity does not exist until he commences his suit to subject some specific part of the estate to the payment of his debt. This equity cannot prevail against an elder equity, for as between mere equities that which is prior in time is regarded as best, and takes precedence over any which may be subsequently created." An attaching creditor can acquire no greater right in attached property than the attachment defendant has at the time of the attachment. He simply obtains by his attachment such rights as the debtor then had. *Drake on Attachments*, § 245. It follows, therefore, that the attaching creditors of McLeod obtained by their attachments only a lien on the machinery referred to, subject to the older equity of the drilling company.

The circuit court properly discharged the order of delivery and properly held that the drilling company was not the owner of the property, but he erred in sustaining the demurrer to the petition of the drilling

company and dismissing its action. Though the plaintiff had brought its action in ordinary, when it should have been in equity, the fact that the action was brought on the wrong docket was no reason for dismissing it. The facts stated in the petition being sufficient to show that the plaintiff was entitled to a lien on the property, the court under the prayer for proper relief might give the plaintiff such relief as the facts showed it was entitled to. The case of *Herriman v. Whitescarver's Adm'r*, 89 Ky. 633, 13 S. W. 103, was tried on its merits. It was an action by the purchaser for the property, and was not so framed as to warrant the enforcement of a lien by him for what he had paid on the contract. Here, in any event, a sale must be ordered by the court. On the return of the case the circuit court will transfer the action to the equity docket and consolidate it with the attachment suits. He will then adjust the rights of the parties as the facts may warrant.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

CRICE v. ILLINOIS LIFE INS. CO.

(Court of Appeals of Kentucky. April 12, 1906.)

1. INSURANCE—LIFE POLICY—ASSIGNMENT BY INSURED.

An insured, in a life policy payable to his wife and stipulating that he may, with the consent of the insurer, assign it, may, without the consent of the wife, assign the policy to the insurer as collateral for money borrowed from it; the wife having no vested right in the policy, either in the absence of statute or under Ky. St. 1903, § 654, providing that a policy payable to a married woman shall inure to her separate use independently of her husband or his creditors.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 472, 474, 475.]

2. SAME—ASSIGNMENT OF POLICY AS COLLATERAL—SETTLEMENT BY INSURED—VALIDITY AS AGAINST BENEFICIARY.

An insured, in a life policy payable to his wife and stipulating that he might, with the consent of the insurer, assign it, assigned it to the insurer as collateral for a loan without the consent of the wife. Subsequently, the insured surrendered the policy for cancellation, by means of which he paid his debt to the insurer and received the cash surrender value of the policy. *Held*, that the settlement was binding on the beneficiary, in the absence of fraud on the part of the insurer or its agent, or of a showing that the amount allowed the insured as the cash surrender value was inadequate.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 518.]

Appeal from Circuit Court, Ballard County.
"To be officially reported."

Action by Elizabeth Crice against the Illinois Life Insurance Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

John W. Ray and J. D. White, for appellant. Robbins & Thomas, and Long & Price, for appellee.

SETTLE, J. On the 6th day of February, 1900, the Mutual Life Insurance Company of

Kentucky, in consideration of \$54.78 then paid it, by Frederick G. Crice, and his undertaking to thereafter annually pay it, on the same date, a like sum, issued and delivered to him a policy of insurance on his life, numbered 32,000, whereby it agreed to pay at his death, to his wife, the appellant, Elizabeth Crice, the sum of \$2,000. By a written contract of date August 1, 1902, the Mutual Life Insurance Company of Kentucky, for a valuable consideration, and with the approval of its policy holders, sold and assigned its assets, premium lists, and property of every kind to the appellee, Illinois Life Insurance Company, and the latter company thereby became subrogated to its rights, assumed its liabilities to the holders of its policies, and issued to each of them a certificate to that effect. The Mutual Life Insurance Company of Kentucky then quit business, and the premiums that were thereafter paid on the policies it had issued were received from the policy holders by the Illinois Life Insurance Company. The policy of \$2,000 on the life of Frederick G. Crice was of the number upon which the latter company, under its contract with the Mutual Life Insurance Company of Kentucky, became liable. On August 7, 1904, Frederick G. Crice died in Ballard county, and shortly thereafter his widow, the appellant, Elizabeth Crice, instituted this action against appellee in the Ballard circuit court to recover of it \$2,000, the amount of insurance specified in the policy referred to; it being alleged in the petition that the policy, though in appellee's possession at the time of her husband's death, was then in full force, that appellee by virtue of its contract with the Mutual Life Insurance Company of Kentucky assumed its payment, and is liable therefor, and that appellant, as the beneficiary named in the policy, is entitled to its proceeds. The answer of appellee admits the contract with the Mutual Life Insurance Company, and its undertaking to carry out the contracts of that company with its policy holders, including Frederick G. Crice, and also admits its possession of the policy in controversy, but denies any liability thereon, or that it was in force at the time of his death. It is averred in the answer that, after the payment by Frederick G. Crice of four annual premiums upon the policy in question, he borrowed of appellee \$105, for which he at the time executed to it his promissory note of date May 14, 1903, due one year thereafter, and to secure its payment assigned and delivered to appellee the policy in controversy, as permitted by a clause in the policy containing this provision: "This policy is issued and accepted upon the express condition that the said Frederick G. Crice may, with the consent of the company, at any time assign it, or before assignment, change the beneficiaries therein, or make any other change." The answer contains, in substance, the further averments that, after

thus executing to appellee his note for the \$105 borrowed of it, and assigning his policy of insurance as collateral security for its payment, Frederick G. Crice failed to pay the annual premiums on the policy which became due February 6, 1904, and by reason thereof the policy by its terms lapsed and became void, except as to its cash value, which at the time of the default in the payment of the premiums was \$118, and that on April 25, 1904, Frederick G. Crice notified appellee that he had determined, instead of reviving the policy, to accept its cash or surrender value, of \$118, and appellee at his request settled with him upon that basis, and, after deducting the note of \$105 he owed appellee, there was left due him of the cash surrender value of the policy \$13, and this amount appellee then paid him, upon receiving which the insured executed to appellee a formal receipt and full release, and surrendered to it the policy in question, which was then and there canceled. Appellant demurred to the answer and to each paragraph thereof. The demurrers were overruled by the lower court. Appellant refusing to plead further, and having elected to stand upon the demurrer, judgment was entered dismissing the action at her costs, and she has appealed.

It is insisted for appellant that the lower court erred in overruling the demurrer, and this contention is bottomed upon the theory that she, as the beneficiary named in the policy, upon its issue, took a vested interest therein, of which she could not be deprived by the act of the insured in assigning it as collateral security for a loan made him by the company, or by later surrendering it for its cash value for cancellation, as neither the assignment nor surrender of the policy was with her consent. It is also argued, in her behalf, that her interest in the policy and right to its proceeds is protected by section 654, Ky. St. 1903, which declares, in substance, that a policy of insurance on the life of any person expressed to be for the benefit of, or duly assigned, transferred, or made payable to, any married woman, or to any person in trust for her, or for her benefit, by whomsoever such transfer may be made, shall inure to her separate use and benefit and that of her children, independently of her husband, or his creditors, or any other person transferring the same, or his creditors.

We are unable to sustain these contentions of counsel. In discussing the question under consideration this court, in *Hopkins v. Hopkins' Adm'r*, 92 Ky. 324, 17 S. W. 864, said: "The general rule is that the right to a policy of insurance, and the money to become due under it, vests immediately upon its issue in the person named in it as the beneficiary, and that this interest, being vested, cannot be transferred by the insured to any other person. *Central Nat. Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. The vested right cannot be divested with-

out the consent of the person invested with it. This is so as to insurance in both mutual and ordinary life insurance companies. This does not hold true, however, where the contract of insurance provides that the insured may change the beneficiary. In such case it vests conditionally only. The right of the one named in the policy is then subject to be defeated by the terms of the very contract naming him as the beneficiary. It is a condition of the contract, and his right is therefore subject to it." In considering the statute upon which counsel for appellant relies, the court in the opinion, supra, also declares: "The clause in the policy relative to change of beneficiary does not, in our opinion, conflict with these provisions of the company's charter and the general law. They certainly do not in express terms forbid such a condition in the contract, nor can the prohibition be fairly implied. They merely mean that, when a married woman is entitled to insurance, or the proceeds of it, it must be held to be her separate estate, and not liable for the debts of the husband, or those of the person through whom it was obtained. The insurance is her separate estate so long as it remains payable to her. This, however, does not prevent the insertion of a condition in the contract by which her right to the insurance may be defeated." In *Wirgman v. Miller*, 98 Ky. 620, 33 S. W. 937, and *Wrather v. Stacy*, 82 S. W. 420, 26 Ky. Law Rep. 683, the view of the law expressed in *Hopkins v. Hopkins' Adm'r* was adhered to, and in the very recent case of *Mutual Life Insurance Company on Kentucky v. Twyman*, 92 S. W. 335, 28 Ky. Law Rep. 1153, the court, after a careful reconsideration of the questions here presented and an elaborate review of the authorities, withdrew the first opinion, which may be found in 89 S. W. 178, 28 Ky. Law Rep. 167, and came to the conclusion that it would be unwise to depart from the doctrine announced in the cases supra.

In the case at bar, the policy in express terms conferred upon the insured the right, with the consent of the company, at any time, "to assign it, or before assignment, change the beneficiary therein, or make any other change," and this right is not in any way made to depend upon the consent of the beneficiary named in the policy. It is alleged in the answer, and admitted by the demurrer, that the insured did in fact assign the policy to appellee as collateral security for the payment of his note, executed for money borrowed of it. He clearly had the right to make such use of the policy, though without the knowledge or consent of appellant, whose interest in it as the named beneficiary was subject to his superior right to so use it.

It is likewise alleged in the answer, and admitted by the demurrer, that, after assigning the policy to secure the payment of his note to appellee, the insured voluntarily surrendered it for cancellation, by means of

which he paid his note to appellee and received the full cash surrender value of the policy which exceeded the amount of the note by \$13. He clearly had the right to so dispose of the policy without the consent of appellant. This settlement is not attacked by appellant, and no claim is made by her that it was procured by fraud on the part of appellee, or its agents, nor is it claimed by her that the amount allowed the insured as the cash surrender value was inadequate.

Our examination of the record affords us no ground for disturbing the judgment complained of.

Wherefore it is affirmed.

WATKINS v. PFEIFFER.

(Court of Appeals of Kentucky. April 13, 1906.)

1. WILLS—CONSTRUCTION—ESTATES CREATED—ESTATE TAIL—CONVERSION INTO FEE-SIMPLE ESTATE.

Testator devised his estate in trust for his daughter "and the heirs of her body," and provided that in case she died without "children" the estate should go to persons named. *Held* to create an estate tail in the daughter, converted by the statute into a fee simple, subject to the defeasance under which the estate would pass on her death without children; the words "and the heirs of her body" being words of limitation, and the word "children" being synonymous with "issue" or "heirs of her body."

2. LIMITATION OF ACTIONS—ACCRUAL OF RIGHT OF ACTION—POSSESSION OF REAL PROPERTY.

Testator devised his estate in trust for his daughter for life and the heirs of her body, and provided that on her death without children the estate should pass to persons named. The daughter married and had children. Subsequently the trustee instituted an action against the daughter and her children for a sale of the trust estate for the purpose of reinvestment. A decree for a sale and reinvestment was entered. The purchaser at the sale and those claiming under him continued in the adverse possession of the property for 50 years. *Held*, that the possession by the purchaser and those claiming under him constituted, under the express provisions of Ky. St. 1903, § 2508, a perfect title as against the daughter and her trustee; the daughter and the trustee holding a fee-simple estate, so that the statute commenced to run at the time the purchaser took possession.

3. SAME—TRUST ESTATES—RIGHTS OF BENEFICIARY.

Where the right of a trustee holding the legal title to the estate is barred by limitations, all equitable estates dependent on the legal estate in the trustee are also barred, though the beneficiary in the trust is an infant.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Limitation of Actions, § 660.]

4. SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF LAND—ENFORCEMENT BY VENDOR.

Where a vendor in a contract for the sale of land is possessed of an indefeasible title under the statute of limitations, equity will enter a decree in his favor specifically enforcing the contract.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 277.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Action by Thomas H. Watkins against John

H. Pfeiffer. From a judgment for defendant, plaintiff appeals. Reversed.

Boyce Watkins, for appellant. L. H. Hickman, for appellee.

BARKER, J. The appellant, Thomas H. Watkins, entered into a contract in writing with the appellee, John H. Pfeiffer, by which the former agreed to sell to the latter, for the sum of \$12,000 cash, a lot of ground and the improvements thereon, situated in Louisville, Ky. conditioned that the vendor was able to convey a good title. Afterwards the appellant prepared and tendered to the appellee a general warranty deed for the land, and demanded payment of the purchase money agreed upon. The appellee declined to accept the deed, or pay the contract price for the land, whereupon appellant instituted this action in the Jefferson circuit court for a specific performance of the contract and a judgment for the purchase money. Appellee filed an answer, admitting the contract in question, but alleging that appellant did not have a good title to the land he proposed to sell, and pointed out specifically the defects in the title upon which he relied. To this answer appellant interposed a general demurrer, which was overruled by the chancellor, and thereupon he declined to plead further, and the petition was dismissed, from which judgment he prosecutes this appeal.

A crucial question in this case turns upon the proper construction to be given the will of Charles Miles, who died, domiciled in Jefferson county, the owner of the property involved herein. After his death his will was duly probated in the Jefferson county court. The pertinent portions of the testament are as follows: "I do give and bequeath unto my nephews, John Lancaster and James M. Lancaster and Edward Baker Smith, and the survivor or survivors of them, forever, in trust for the sole and separate use of my daughter Eliza Ann Miles and the heirs of her body, forever, all my estate, real, personal, and mixed, except as hereinafter excepted. * * * But, should my daughter as aforesaid die without being married, or, being married, die without any children, then and in that case my said estate shall descend to four of my nieces, Mary Jane, the daughter of my sister Catherine Lancaster, Ellen Miles, the daughter of my brother John Miles, Harriet Mattingly, the daughter of my sister Morica Mattingly, and the youngest daughter of my sister Dorothy Johnson (whose name I do not now recollect)."

We will first inquire what estate the daughter Eliza Ann Miles took under her father's will. The appellant insists that by the language used the testator intended to convey an estate in tail, which by the statute is converted into a fee simple, subject, of course, to the defeasance under which the estate descended to the nieces mentioned. As it is admitted in the answer that the daughter died leaving issue of her body alive,

the question of the interest of the nieces may be omitted from further consideration. It is evident that the language, "and the heirs of her body, forever," are words of limitation, and not words of purchase, and created an estate tail, which by our statute is converted into a fee. The fact that, in the defeasance clause of his will, the testator provides that, if his daughter should die without "children," then the estate should go to his nieces, does not tend, in our opinion, to show that he used the words "heirs of her body," in describing the estate devised to his daughter, in any other sense than as words of limitation; the word "children" in the defeasance clause being used as synonymous with "issue" or "heirs of her body." In the case of *Marshall v. Walker*, 80 S. W. 1132, 26 Ky. Law Rep. 199, the will of the testator contained the following provision: "After all my just debts being paid out of my estate, I do hereby will and bequeath to my beloved wife, Sarah Young, all my real property and mixed estate, during her natural life, and after her death I wish it to be equally divided between my two beloved children, my son William Young and my daughter Ann Marshall, to her and her bodily heirs, forever." The question in that case for adjudication was the estate which the daughter, Ann Marshall, took under her father's will. In the opinion written for the court by Judge Paynter it is said: "For the plaintiffs, who are appellants, it is insisted that the testator's daughter, Ann Marshall, took a life estate, with remainder to her children. For the appellees, it is urged that the will created a fee in her. At common law the clause would have created an estate tail, which, by the statute, has been converted into a fee. [Omitting authorities.] When an estate tail is converted under the statute into a fee, it becomes an absolute fee. *Pruitt, &c. v. Holland*, 92 Ky. 641, 18 S. W. 852. The words 'to her and to her bodily heirs' are not words of purchase, but words of limitation. The court, in *Johnson v. Johnson*, supra [2 Metc. 331], said: 'These words are words of limitation, and unless there is something in the deed or will from which a reasonable inference can be drawn that the words were used in a sense different from their legal and technical signification.' This construction is sustained in *Sanders v. Wade*, 30 S. W. 656, 17 Ky. Law Rep. 205; *McCauley v. Buckner*, 8 S. W. 196, 10 Ky. Law Rep. 99; *McMeekin v. Smith*, 21 S. W. 353, 14 Ky. Law Rep. 732; *Moran v. Dillehay*, 8 Bush, 434; *Gorham v. Betts*, 5 S. W. 465, 9 Ky. Law Rep. 607; *Louisville Trust Co. v. Erdman*, 58 S. W. 814, 22 Ky. Law Rep. 729.

After her father's death Eliza Ann Miles intermarried with Samuel B. Young, by whom she had two children. Afterwards the trustees, who resided in Nelson county, Ky., as did also Young and wife, instituted an action in the Nelson circuit court against *cestuis que trustent* and their two children

for a sale of the property in question for the purpose of reinvestment. In this action a decree for a sale and reinvestment was entered, and at the judicial sale had the property was bought by John E. Shepherd, who paid the purchase money and received a commissioner's deed. The land so purchased by regular devolution of title came into the possession and ownership of the appellant, and the question for adjudication is whether or not he has an indefeasible title to it. The appellee, holding the opinion that Eliza Ann Young (Née Miles) took only a life estate under her father's will with remainder over to her children, insists that, the property being in Jefferson county, the Nelson circuit court was without jurisdiction to sell the estate of the infants for reinvestment, and this view is based upon the statute then in force (1854) authorizing the sale of the property of infants for reinvestment. The conclusion we have reached on the subject of the estate which the daughter took under her father's will obviates the necessity of any inquiry into the validity of the judicial sale had. The answer of appellee affirmatively alleges that appellant and his vendors—near and remote—have been in actual, continuous, adverse possession of the property in question for 50 years next before the institution of this action, and this possession, under the 30-year statute of limitations, constitutes a perfect title as against the daughter and her trustees. The statute (section 2508) is as follows: "The period within which an action for the recovery of real property may be brought shall not, in any case, be extended beyond thirty years from the time at which the right to bring the action first accrued to the plaintiff, or the person through whom he claims by reason of any death or the existence or continuance of any disability whatever." In the case of *Rose and Others v. Ware*, 115 Ky. 420, 74 S. W. 188, after discussing the statute and various opinions construing it, we said: "From these cases we deduce the rule that no disability whatever will prevent the running of the 30-year statute of limitations, if a right of action would have existed in the claimant but for the disability." Ordinarily, during the continuance of a life estate, the statute does not run against the remaindermen; but, as the daughter and her trustees held a fee-simple estate, the statute commenced to run at the time the original purchaser, through whom appellant claims, took possession, and continued to run until after the expiration of 30 years, when it ripened into an indefeasible title. *Stillwell v. Leavy*, 84 Ky. 379, 1 S. W. 590; *Conner v. Downer*, 4 Bush, 631; *Medlock v. Suter*, 80 Ky. 101; *Bradley v. Burgess*, 87 Ky. 648, 10 S. W. 5; *L. & N. R. Co. v. Thompson*, 105 Ky. 190, 48 S. W. 990.

But, even if the contention of appellee that under the will of the ancestor the grand-

And as purchaser in remainder is considered, this would not avail him on the issue as presented in this record. The trustee under the will held the legal title to the estate, and against them the statute of limitations ran from the time the adverse possession began, and when the owner of the legal estate was barred all equitable estates terminated with the legal estate were also barred. And this rule applies where the trustee, who is an infant or married woman, or whether the estate is for life or remainder. This very question arose in *Adwards v. Woolfolk's Adm'r*, 17 B. Mon. 274, and, on the subject in hand, the court said: "But is the equitable right of those who are entitled in remainder, as well as that of the tenant for life, defeated in consequence of the right of action of the trustee being barred by the statute of limitations? The trustee holds the legal title in fee as well for the benefit of the particular estate as the estate in remainder. When his legal right is barred, both estates are thereby clearly affected, and it is difficult to perceive any ground upon which the estate in remainder can be withdrawn from the operation of the statute. A right of action exists in the trustee for the benefit of both estates; and in this respect there is a clear distinction between a case of this kind and that where the legal title to the estate is in the tenant for life and also in the remainderman. In the latter case, the cause of action does not accrue until the estate for life is determined. But in the former it exists, not only in the trustee, but also in the holder of the equitable title in remainder, who may bring an action in equity to re-establish his right from the first moment of the breach of trust, or as soon as the trust property has come into the hands of a stranger, who holds it in opposition to the trust. *Andrews v. Wrigby*, 4 B. C. C. 125, referred to in *Lewin on Trusts and Trustees*, 24 Law Lib., side p. 615. This doctrine was upheld in *Coleman v. Walker*, 8 Metc. 66, 77 Am. Dec. 163; *Barclay v. Goodloe's Ex'rs*, 83 Ky. 493, and *Willson v. Louisville Trust Co.*, 102 Ky. 522, 44 S. W. 121.

We recognize the rule that, as a general proposition, the granting of a decree for specific performance of a contract is a matter of discretion with the chancellor; but this is a legal, not an arbitrary, discretion, and where it appears, as in this case, that the vendor is possessed of an indefeasible title under the statute of limitations, we see no reason why the court should refuse him a decree specifically enforcing his contract of sale, any more than it would refuse to grant him damages for a breach of the contract. Of course, this reasoning would not apply if there was any rational doubt as to the complete bar of the statute of limitations, or if there was any doubt that the vendee possessed the evidence required to show the lapse of

time necessary to constitute a title by possession. But in this case the issue of the appellee affirmatively alleges that he is vendor, and those under whom he claims had actual, hostile possession of the land against the whole world for 20 years. If this be true, he has an indefeasible title to the property in question, and there is no legal reason why the appellee should be required to carry out his contract.

For these reasons, the judgment of the chancellor, overruling the decision of the answer, is reversed, for further proceedings consistent herewith.

SHUGARS, Police Judge, v. HAMILTON.
(Court of Appeals of Kentucky, April 11, 1906.)

1. MUNICIPAL CORPORATIONS—SPECIAL MEETINGS OF CITY COUNCIL—NOTICE—NUMERITY. Ky. St. 1903, § 3653, providing that special meetings of the council may be held at short notice of the proposed meeting, require giving of notice of special meetings to all members of the council; and special meeting called without notice to all the members is invalid, when any of the members are absent.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 197.]

2. SAME—PLACE OF MEETING.

Where the council of a city has designated by ordinance the place at which meetings of the council shall be held, a meeting held at another place, unless a cogent reason may be shown why it was not held at the regular place, is unauthorized, under Ky. St. 1903, § 3654, providing that all meetings of the council shall be held at such place as may be designated by ordinance.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 192.]

3. SAME—QUORUM.

Under Ky. St. 1903, § 3634, providing that at meetings of a city council a majority of the members shall constitute a quorum and that the mayor shall preside at the meeting, four members of the council of a city of the fifth class constitute a quorum, though the mayor may not be present, and a member of the council chosen as mayor pro tem may be counted as a councilman for the purpose of a quorum.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 201.]

4. SAME—ORDINANCES—ENACTMENT.

Ky. St. 1903, § 3636, providing that no ordinance granting a franchise shall be passed by a city council on the day of its introduction nor within five days thereafter, applies only to a franchise proper, which is a contract between the city and the party to whom it is granted, and does not prohibit a council from passing an ordinance imposing an occupation tax at the meeting at which it was first introduced.

5. SAME—ORDINANCES IMPOSING OCCUPATION TAX—VALIDITY.

An ordinance imposing a license fee as persons engaging in the trade of merchant tailoring, adopted under the authority of Const. § 181, and Ky. St. 1903, § 3637, does not levy a tax, within Const. § 180, providing that every ordinance levying a tax shall specify distinctly the purpose for which the tax was levied; and the ordinance is not invalid because it does not specify the purpose for which the license fee is imposed.

appeal from Circuit Court, Garrard County. To be officially reported." Action between William Shugars, police, and H. C. Hamilton. From a judgment for the latter, the former appeals. Reversed.

J. B. Swinebroad, for appellant. R. H. Wilkinson, for appellee.

CARROLL, C. To test the validity of an ordinance enacted by the city council of Lancaster, Kentucky, a city of the fifth class, this action was instituted. The ordinance in question provides that it shall be unlawful for any person to engage in the occupation or trade of merchant tailoring without first having obtained a license therefor and paying the license tax of \$50 per year, and its validity is assailed: First. Upon the ground that Ky. St. 1903, § 3636, requires an ordinance of this character to be introduced into the council five days before it is passed, and that the meeting at which this ordinance was first introduced was a called meeting, at which only four of the six members of the council were present, two members and the mayor and clerk being absent; that this special meeting was not called either by the mayor or by three members, nor was written notice of the meeting delivered to each of the members, as required by section 3633, of the Kentucky Statutes of 1903. Second. That this special meeting was not held at the place where the city had designated by ordinance that meetings of the council shall be held. Third. That it is in violation of section 180 of the Constitution, providing in part that "every ordinance or resolution passed by any county, city, town, or municipal board, or local legislative body, levying a tax shall specify distinctly the purpose for which said tax is levied," as the ordinance fails to specify the purpose for which the tax was levied. On hearing, the circuit court adjudged the ordinance void, and the city appeals.

Under the admitted allegations of the petition it may be conceded that, if this ordinance was required by the statute to be introduced at a meeting of the council held five days before its final passage, it would be invalid, as the meeting at which it was first considered was not called in the manner provided by the statute, nor held at the place designated for meetings of the council. Ky. St. 1903, § 3633, provides that the city council "shall hold regular meetings once in each month, at such times as they shall fix by ordinance. Special meetings may be called at any time by the mayor, or by three members by written notice delivered at least three hours before the time specified for the proposed meeting. All meetings of the city council shall be held within the limits of the city, and at such places as may be designated by ordinance, and shall be public." The purpose of the statute in requiring the city council to hold its meetings at the time and place fixed

by ordinance was to give the citizens of the town an opportunity to be present, if they desire, at the deliberations of the council, and to make such suggestions as they deem wise and proper for the government of the city.

The council is the legislative body of the city, and occupies towards it the same general relation as the General Assembly of the state does towards the people of the state, and it is important for the well-being of the city and the proper administration of its affairs that the people of the city who are interested in its governmental affairs shall know when and where their local legislative body is to meet, and when special meetings of the council are called, as they may be, each member of the council who can be notified is entitled to have written notice of the time and place of the meeting, so that all of the council may be present and participate in the deliberations of the municipal body. It is true that a quorum of the council may transact its business, but it is the duty of each member of the council who can attend its meetings to do so, and to give advice and counsel touching the business pending before the body, and the people of the city are entitled to have the joint and collective judgment of all their representatives at the meeting. Statutory provisions requiring notice of special meetings given to each member in the manner provided by the statute are held in *Dillon on Municipal Corporations*, §§ 263-267, to be mandatory, and special meetings called without notice to all the members, and when any of the members are absent, are invalid for the purpose of transacting the business of the city.

When the council has designated by ordinance the place at which meetings of the city council shall be held, a meeting held in another place, unless some cogent reason could be shown why it was not held at the regular place, would not be authorized under the statute, and the council at such meeting would have no power to enact ordinances for the government of the city. *Town of Springfield v. People's Deposit Bank*, 63 S. W. 271, 23 Ky. Law Rep. 519.

At a regular meeting of the council assembled at the place designated, four members of the council, being a majority of the whole board, constitute a quorum for the transaction of business, although the mayor may not be present. Under the statute (section 3634) it is the duty of the mayor to preside at meetings of the council, and he may only vote in case of a tie. In his absence, a member of the council may be chosen as mayor pro tem.; but this does not deny him the right to vote as a member of the council. Of course, he cannot also vote as mayor. The mere fact that he is discharging temporarily the duties of the office of mayor does not interfere with the performance of his duties as councilman, and he may be counted as a councilman for the

purpose of a quorum, to constitute which the presence of four members of the council is necessary. *City of Somerset v. Smith*, 49 S. W. 453, 20 Ky. Law Rep. 1488; *Bybee v. Smith*, 61 S. W. 15, 22 Ky. Law Rep. 1684.

We cannot, however, agree with counsel for appellee that it was necessary that this ordinance should be introduced at a meeting of the council held before its passage. Section 3636 of the Kentucky Statutes of 1903 provides that "no ordinance and no resolution granting a franchise for any purpose shall be passed by the city council on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting. No resolution or order for the payment of money shall be passed at any other time than a regular meeting. And no ordinance, resolution or order shall have any validity or effect unless passed by the votes of at least three members of the city council." Under this statute no ordinance or resolution granting a franchise can be passed at the time of its introduction, nor within five days thereafter; but an ordinance or resolution that does not grant a franchise may have its final passage at the meeting at which it is introduced. A distinction is made between the ordinary ordinance enacted for the government of the city, and ordinances or resolutions by which important rights and privileges in the form of franchises are granted to persons or corporations. A franchise is a contract between the city and the party to whom it is granted, and cannot be revoked or annulled as an ordinary ordinance may be, and therefore the Legislature wisely provided that the city council, before granting a franchise, should have time to carefully consider the nature and effect of the contract it was about to enter into, and these charter provisions relating to the granting of franchises have been held mandatory in *Maraman v. Ohio Valley Tel. Co.*, 76 S. W. 398, 25 Ky. Law Rep. 784, *Rough River Tel. Co. v. Cumberland Tel. Co.*, 84 S. W. 517, 27 Ky. Law Rep. 32, and other previous decisions.

As the ordinance in question in this case does not grant a franchise to any person, and was passed at a regular meeting of the council held at the time and place provided by ordinance for meetings of the council, and when the mayor and clerk were present, it is not open to the objection urged against it on account of defects in the meeting at which it was first introduced, as it is not material whether the meeting at which it was introduced was a valid meeting or not.

Nor is the contention of counsel that the ordinance is void because it fails to specify the purpose for which the tax is levied tenable. It is true, as held in *City of Somerset v. Somerset Banking Co.*, 60 S. W. 5, 22 Ky. Law Rep. 1129, *City of Louisville v. Button*, 82 S. W. 293, 26 Ky. Law Rep. 608, and *Carpenter v. Town of Central Covington*,

81 S. W. 919, 26 Ky. Law Rep. 430, that every ordinance or resolution levying a tax shall specify distinctly the purpose for which the tax is levied; but the ordinance in this case does not levy a tax within the fair meaning of section 180 of the Constitution. It only provides for the payment of a license fee by such persons as engage in the occupation or trade of merchant tailoring within the city, and this license fee the city council was authorized to impose by virtue of section 181 of the Constitution and section 3637 of the Kentucky Statutes of 1903, which is a part of the charter of fifth-class cities, enacted for the purpose of permitting cities of this class to impose license fees on trades, occupations, and professions. *Evers v. City of Mayfield*, 85 S. W. 697, 27 Ky. Law Rep. 481; *City of Covington v. Herzog*, 76 S. W. 538, 25 Ky. Law Rep. 938; *City of Carlisle v. Heckinger*, 103 Ky. 381, 45 S. W. 358.

We are therefore of the opinion that the ordinance is valid, and the judgment of the circuit court is reversed, with directions to proceed in conformity to this opinion.

LOUISVILLE GAS COMPANY v. FULLER et ux.

(Court of Appeals of Kentucky. April 17, 1906.)

1. NEGLIGENCE — PERSONAL INJURIES — CONTRIBUTORY NEGLIGENCE — EVIDENCE — QUESTIONS FOR JURY.

In an action for personal injuries resulting from the alleged negligence of defendant gas company's employé in leaving open a trapdoor in plaintiff's house, the question of plaintiff's contributory negligence held, under the proof, one for the jury.

2. DAMAGES—INSTRUCTIONS.

In an action for personal injuries, an instruction that, if the jury found in favor of plaintiff, they should assess such sum in damages as would fairly compensate her for the injuries sustained, including such sum as would reasonably compensate her for her pain and suffering, mental and physical, by reason of the injuries, and for any permanent injury, if any, which diminished her capacity for labor and enjoyment of life, caused directly by her injuries, was erroneous, as leaving to the jury to say, not only how much damages plaintiff should recover, but to consider anything they might deem proper elements of such damages; in such actions, where death does not ensue, compensatory damages being confined to the expense of cure, value of time lost, and fair compensation for physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by Charles E. Fuller and wife against the Louisville Gas Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Farleigh, Straus & Farleigh, for appellant. Chas. F. Taylor and Dodd & Dodd, for appellees.

HOBSON, C. J. Mrs. Winifred Fuller, the wife of Charles E. Fuller, resided on West Market street, in Louisville, on January 6, 1904. They applied to the Louisville Gas Company to take out the meter that was in the house and put in what is known as a "slot meter." The gas company sent a man to make the change. Mrs. Fuller met him on the porch. The meter was in the cellar; the cellar was approached through a trapdoor in the pantry; to go down into the cellar from the kitchen one had to walk over the trapdoor and then open it back toward the kitchen door. There was another door from the pantry leading out to the room in front of it. Mrs. Fuller took the man to the pantry, showed him the way down into the cellar, and said to him that she wished to lock the door behind him, as her little girl, two years old, was in the habit of running into the pantry for apples. He went down into the cellar, and she locked the pantry door. In a few moments he came up, closed the trapdoor, knocked on the pantry door, and was let out by Mrs. Fuller. He then said to her that she would have to pay the gas bill up to that time before he could make the change. She agreed to pay it, but he did not know the amount, and went out to phone to the company and learn what the bill was. She went out to the rear of the house with some garbage, and as she came back met him on the porch. He told her the amount of the bill, and she said she would pay it. He went out into the street, and she went into the kitchen. About this time there was a knock at the side door by a lady who had come to look at the house. Mrs. Fuller went to let her in and was showing her through the house. When she got to the room in front of the pantry, she went to the pantry door, and as she opened the door and stepped in fell into the cellar; the gas man having returned from his wagon, and gone through the kitchen, down into the cellar, through the trap-door, leaving it open. Her leg was badly broken by the fall, and she suffered a very severe and painful injury; both bones being fractured near the ankle and protruding through the skin. There is some conflict in the evidence between the testimony of Mrs. Fuller and the gas man; she testifying that she did not know that he had returned to the house, and that the arrangement was that he was to let her know, so that she could lock the door behind him, while he testifies in effect to the contrary. The jury gave her a verdict for \$5,000, and the gas company appeals.

It is insisted for the company that the verdict is against the evidence, and that she was guilty of contributory negligence, which brought about her injury; but under the proof these are questions for the jury.

We see no objection to instructions 1, 2, and 3 given by the court. Instruction 4 is in these words: "If the jury find in favor of the plaintiff Winifred Fuller, they should assess such sum in damages as will fairly

and reasonably compensate her for the injuries which she sustained, including such sum as will reasonably compensate her for her pain and suffering, mental and physical, by reason of said injuries, and for any permanent injury, if any, which diminished her capacity for labor and the enjoyment of life caused directly by her fall into said cellar, in all not to exceed the sum of \$10,000, the amount claimed in the petition."

In *L. & N. R. R. Co. v. Cleaver*, 89 S. W. 494, 28 Ky. Law Rep. 499, this court criticising an instruction substantially similar to the one above quoted, said: "The fault of this instruction is that it leaves to the jury to say, not only how much damages the plaintiff should recover, but to consider anything they might deem proper elements of such damages, except that the court advised them that among the elements of plaintiff's damages they should consider certain things. The jury should have been told on this point that, if they found for the plaintiff, they should award as damages such sum as would fairly compensate him for the physical and mental pain suffered by him by reason of his injuries, as well as for his loss of time, and the impairment, if any, of his power to earn money in the future, not exceeding the amount sued for." To the same effect see *South Covington Railway Company v. Nelson*, 89 S. W. 200, 28 Ky. Law Rep. 287; *L. & N. R. R. Co. v. Ward's Administrator*, 44 S. W. 1112, 19 Ky. Law Rep. 1900.

In *L. & N. R. R. Co. v. Hall*, 74 S. W. 280, 24 Ky. Law Rep. 2487, where a similar instruction was given, the court said: "This court has frequently announced, in actions for personal injuries, where death does not ensue, that compensatory damages were confined to the expense of cure, value of time lost, and fair compensation for physical and mental suffering caused by the injury and for any permanent reduction of the power to earn money. *Parker v. Jenkins*, 66 Ky. 587; *L. C. & L. R. R. Co. v. Case's Administrator*, 72 Ky. 736; *C. P. Ry. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309; *Carson v. Singleton*, 65 S. W. 821, 23 Ky. Law Rep. 1628. The instruction is erroneous, in that it does not confine the jury to the consideration of these elements of damage."

In *L. & N. R. R. Co. v. Logsdon*, 71 S. W. 905, 24 Ky. Law Rep. 1566, the following instruction was given: "You should find for the plaintiff the damages which he sustained thereby, taking into your consideration the time he has lost, or may hereafter lose, if any the pain and suffering he has endured, or may hereafter endure, if any, the disability to labor, move about, and enjoy life which he has suffered, or may hereafter suffer, if any, directly resulting to him from said injuries and the expense he has incurred, or may hereafter incur, if any, in the treatment of his said injuries, not to exceed in all the amount sued for herein, which is \$20,000." Commenting on this instruction, the court said: "This

instruction did not correctly define the measure of damages. In *L. C. & L. R. Co. v. Case's Administrator*, 72 Ky. 736, this court said: "The term 'compensation,' when applied to damages, has a fixed legal significance much more restricted than its common or general acceptation. In actions for personal injuries, where death does not ensue, it is confined to the expense of cure, the value of time lost, a fair compensation for the physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money." This was followed in *L. & N. R. R. Co. v. Fox*, 74 Ky. 509; *Muldraugh's Hill, etc., Turnpike Company v. Maupin*, 79 Ky. 101; *Kentucky Central R. R. Co. v. Ackley*, 87 Ky. 278, 8 S. W. 691, 12 Am. St. Rep. 480; *Standard Oil Company v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595; and many subsequent cases. The authorities elsewhere are uniform to the same effect. 2 *Shearman & Redfield on Negligence*, 758. The case of *L. & N. R. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, does not conflict with this rule, as the question was not considered by the court, or, so far as appears, made by counsel. The case went off on other grounds. The court here should have told the jury that, if they found for the plaintiff, the measure of damages was the reasonable expenses of his cure, including any expense that it was reasonably certain he would thereafter necessarily incur, the fair value of the time lost by him, or which it was reasonably certain he would thereafter lose, and a fair compensation for the physical and mental suffering endured by him, or which it was reasonably certain he would endure, as well as for any permanent reduction of his power to earn money by reason of his injuries."

Judgment reversed, and cause remanded for a new trial.

SHELBYVILLE WATER & LIGHT CO. v. McDADE.

(Court of Appeals of Kentucky. April 18, 1906.)

1. EVIDENCE—DECLARATIONS OF AGENT—EFFECT.

Declarations by an employé running the works of a waterworks company, made while he was near the reservoir of the company and out on its grounds, to the effect that he had no water in the reservoir, are inadmissible as against the company.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 908-915.]

2. SAME—SELF-SERVING DECLARATIONS.

In an action against a waterworks company for loss from fire on the ground of failure to furnish water, evidence that the employé in charge of the works stated to the manager of the company at the time the alarm of fire was given that he had a pressure of 50 pounds, was inadmissible.

3. WATERS AND WATER COURSES — WATERWORKS COMPANIES — FIRE — FAILURE TO SUPPLY SUFFICIENT WATER — EVIDENCE.

In an action against a waterworks company for loss from fire, based on its failure to

furnish a supply of water, as required by its contract with the city, evidence showing that the employé running the works was ordered not to apply the direct pressure at the power house unless he received orders from the manager in the city, who would give the order when the magnitude of the fire required it, and that on the occasion in question the direct pressure was applied when ordered, was admissible.

4. SAME.

In an action against a waterworks company for loss from fire for failure to supply water, as required by its contract with the city, evidence showing what pressure it usually maintained was admissible.

5. SAME.

The company was entitled to prove what pressure would be required to throw water from three separate hydrants, at one time, 50 feet high, through 100 feet of hose and a 1-inch nozzle, on the level of a street in the city, as required by its contract with a city.

6. SAME.

The company was entitled to prove by persons using faucets and hose just before the fire that they had the usual pressure, and this proof should not be confined to the main with which plaintiff was connected; it being shown that there were no cut-offs between the mains.

7. SAME—LIABILITY.

A waterworks company was required by the ordinance of a city to maintain such a pressure of water on its mains as would throw water from three separate hydrants at one time, 50 feet high, through 100 feet of hose and a 1-inch nozzle, on the level of a street. The company was sued for loss from fire on the ground that it occurred by reason of the failure to have a supply of water as required by the ordinance. *Held*, that the court should charge that if the company failed to maintain such a pressure of water as was required by the ordinance, and plaintiff's property was burned by reason thereof, when it would not otherwise have been destroyed, a verdict for plaintiff should be rendered.

Appeal from Circuit Court, Shelby County.
"To be officially reported."

Action by R. L. McDade against the Shelbyville Water & Light Company. From a judgment for plaintiff, defendant appeals. Reversed.

Willis & Todd, for appellant. Beard & Marshall, for appellee.

HOBSON, C. J. The livery stable of R. L. McDade in Shelbyville was burned on May 11, 1904, and he brought this action against the Shelbyville Water & Light Company to recover for the loss, on the ground that it occurred by reason of the company's failure to have a supply of water in its mains as required by its contract with the city. The material part of the contract is contained in the following sections of the city ordinances:

"Sec. 227. Said grantee, its legal representatives, assigns or successors shall test said works on their completion, under the supervision of the said board of council, and when said works shall throw water from three separate hydrants at one time, fifty feet high, through one hundred (100) feet of hose and a one-inch nozzle on the level of Main and Fifth street in said city, and when said test has been made, then the city agrees to ac-

cept the water service herein agreed to be supplied, and from the date of completion of said test, if successful, the hydrant rentals herein stipulated shall begin."

"Sec. 236. The city of Shelbyville agrees to use the said fire hydrants only for the extinguishment of fires, except when used as otherwise herein provided for, and to make good to the said grantee, its legal representatives, assigns and successors any injury which may happen to any of said hydrants when used by said city, or any officer or servant or agent of said city, if same is done by the fault of said city, officers, agents or servants, and hereby agrees and promises to pay rent for the said fifty-four hydrants at the rate of \$2,500 per annum for the said term of thirteen years and six months, or \$2,500 per annum for such part of the said thirteen years and six months, as said waterworks shall be operated under this ordinance, which rental the city of Shelbyville hereby agrees to pay in semiannual installments of \$1,250 each on the first days of March and September in each year during said term to said grantee, its legal representatives, assigns and successors; provided, however, that all forfeitures under this ordinance, which may be due said city at the time specified for the payment of any hydrant rental shall be deducted from the amount of such payment.

"Sec. 237. The said grantee, its legal representatives, assigns and successors shall constantly, day and night, except in cases of an unavoidable accident, keep all of said hydrants supplied with water, and at night the arc lights herein named with electricity, for service herein provided for. The city shall have the right to put upon the original mains hereinbefore mentioned, at its own cost and expense any intermediate fire hydrants free of charge for water, during the time of the rental of the said number of hydrants herein mentioned, which said hydrants shall be kept and maintained in repair by said grantee, its legal representatives, assigns and successors, charging the city therefor the actual cost of such repair. The said grantee, its legal representatives, assigns and successors shall constantly keep all hydrants rented of them or used by the city supplied with water, and the arc lights at night supplied with electricity, for service and shall maintain them in effective working order. The chief of the fire department of said city, and in case of his absence, the officer in charge thereof, shall have the charge and control of said hydrants, to be inspected and if upon inspection any of said hydrants are found to be out of working order, he shall forthwith notify the chief officer in charge of the water works, in writing, specifying the hydrant or hydrants out of working order, and said officer at the waterworks shall forthwith repair the same, and if not put in working order within three days after such notice, the rental of such hydrant or hydrants shall be stopped, and the grantee,

its legal representatives, assigns and successors shall pay to the city a forfeit of five dollars (\$5.00) per week for each, while such hydrant or hydrants remain out of repair after such notice, and ten dollars (\$10.00) per week for each arc light that remains out of repair after such notice, but such penalties shall not accrue against hydrants owned by the city."

The proof for the plaintiff on the trial showed that the second story of the livery stable had a large quantity of hay and straw stored in it; that there was a water pipe leading up from the first to the second story, with a place to attach a hose on each floor, and the hose was kept on a reel near by, both above and below. The water was turned on by means of a switch, and the evidence is a little confused as to how this worked; that is, whether it could be turned on from the upper floor alone, or whether it had to be first turned on below. When the alarm of fire was given, McDade went up to the second floor and undertook to attach the hose and turn on the water. The testimony for him is to the effect that the fire then was small, and could have been put out if he had had water, but there was none. The testimony for the company tends to show that in a few seconds after the alarm of fire was given the whole upper story of the building was in flames, as though a volcano had burst out; also that other persons using hose about the same time had adequate pressure, and that there was water in the standpipe and in the mains sufficient to comply with the contract. The evidence on this question was very conflicting, and the only matters to be determined are whether the case was fairly gotten before the jury.

The court allowed the plaintiff to prove by J. M. Hammond and Jess Russell that they were working a few hundred yards from the pumping station, and when they heard the fire alarm and saw the smoke they came right over to the water works to find out where the fire was; that Hubert Duvall was there running the works; that they met him near the reservoir out in the grounds, and asked him where the fire was, and he answered that there was a big fire in town, and he did not have a bit of water. To this evidence the defendant objected, and, its objection being overruled, excepted. When the defendant was giving its evidence, it offered to prove by the manager of the company that when the alarm of fire was given he telephoned the alarm to Duvall, and asked him what water he had; but the court would not allow him to tell that Duvall answered that he had a pressure of 50 pounds. The rule as to the admissibility of the declarations of an agent is thus stated in 1 Greenleaf on Evidence, § 126: "The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency,

in regard to a transaction then depending, et dum fervet opus. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all, and therefore it is not necessary to call the agent himself to prove it; but, whenever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it." As to all other facts in the knowledge of the agent he must be called to testify like any other witness. Section 134. The same rule is stated in 2 Wharton on Evidence, § 1173, as follows: "Whenever an agent makes a business arrangement or does an act representing his principal, what he does in respect to the arrangement or act, while it is in progress, is so far part of the *res gestæ* as to be subsequently admissible in evidence on behalf of either party. Whenever the agent's acts are so admissible, then his contemporaneous declarations, explanatory of these acts, are admissible; nor in proving such declarations is it necessary that he should be himself called." See, also, to same effect, Stephens on Evidence, art. 17, c. 4.

In *Langhorn v. Allnut*, 4 Tau. 511, the question was whether a ship remained at a port for an unreasonable time. Letters from the plaintiff's agent to the plaintiff containing admissions which would have been admissible if made by the plaintiff himself were held incompetent against him. In *Mateer v. Brown* (Cal.) 52 Am. Dec. 303, the plaintiff sued the defendant for a lot of gold which was lost. He proposed to prove that Higgins, the defendant's barkeeper, had said that the plaintiff had made his pile, and he, opening a closet and raising a bundle, said it was the plaintiff's, and was about \$6,000. The evidence was held incompetent. The court, after quoting the rule of evidence as above, said: "Were the declarations of Higgins a part of the *res gestæ*, according to the above rules? We think not. There was no act done by him, in his character of agent, at the time of making them, which would have been admissible evidence against the defendant, and which such declarations were calculated to qualify or explain. They were not made at the time he received the deposit. Had they been then made, they would, perhaps, have been competent. They were made when Higgins took the bundle out of the closet to exhibit it to a stranger. This was not done by him in the discharge of his duties as agent, and the declarations accompanying that act were but hearsay." To same effect, see 16 Cyc. pp. 1003, 1006, 1007, and cases cited in the notes; 3 Wigram on Evidence, § 1797, and note.

Duvall was not acting as agent in any sense for his employer when he made the statements to Hammond and Russell. These statements were introduced on the trial to show an admission by Duvall that he had no water in the standpipe. But Duvall had no authority from his principal to make any such admissions for it. He could not make

evidence for his company by his statements to the manager, and he cannot make evidence against it by his statements to Hammond and Russell. If at the time Duvall had been doing something for the master, and there was a dispute as to what he did, then his statements while doing the act would be competent against the master, as illustrating its character on the ground of *res gestæ*. But the evidence in question did not relate to any such matter, and was incompetent for any purpose as substantive testimony. For the same reason the court should not have admitted the testimony of John B. O'Leary as to the conversation between him and Duvall, and properly excluded it. The statements of Duvall on this subject may be used to contradict him as a witness, but they are incompetent for any other purpose.

The court refused to allow the defendant to explain how and why the direct pressure was applied to the mains. The defendant offered to show that Duvall was ordered not to apply the direct pressure at the power house unless he received orders from the manager in the city, who would give the order when the magnitude of the fire required it, and that on the occasion in question the direct pressure was applied when ordered. This evidence should have been admitted, for otherwise the jury might have inferred from the fact that the direct pressure was applied that there was want of water in the standpipe.

The defendant also offered to prove by a number of witnesses, who were using faucets or hose just before the fire, that they had the usual pressure. On another trial the defendant may be allowed to show what pressure it usually maintained; also what pressure would be required to throw water from three separate hydrants at one time 50 feet high through 100 feet of hose and a 1-inch nozzle on the level of Main and Fifth streets in the city; and it should also be allowed to show by the witnesses referred to that they, in using their faucets and hose at the time named, had the usual pressure. The proof should not be confined to the main with which McDade connected, for the proof shows that there were no cut-offs between the mains, and it is a well-known rule of hydraulics that a standing mass of water presses equally on all sides at all points on the same level. If there was a difference of level at which any of the witnesses used the water, this may go to the jury, so that they may judge intelligently as to the value of the evidence.

In lieu of instruction 2, the court on another trial will tell the jury that it was incumbent upon the defendant under its contract to maintain such a pressure of water upon its mains as would throw water from three separate hydrants at one time 50 feet high through 100 feet of hose and a 1-inch nozzle on the level of Main and Fifth streets in the city, and that if it failed to do this,

and by reason of such failure the plaintiff's property was burned, when it would not otherwise have been destroyed by fire, they should find for the plaintiff the reasonable and fair value of the property so destroyed, with interest from May 11, 1904. The instructions we have indicated, with instructions 3 and 4 given by the court, contain the whole law of the case.

Judgment reversed, and cause remanded for a new trial.

MARTIN v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. April 19, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF MASTER—QUESTION FOR JURY.

Evidence in an action for injuries received by an employé while in a well engaged in uncoupling a piston rod, in consequence of a piece of timber placed on the platform covering the well to support the piston falling into the well, examined, and *held* that the question of the negligence of the employer arising from its failure to furnish a safe place in which to work was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1010.]

2. EVIDENCE—RES GESTÆ.

A statement of a foreman made from half an hour to an hour after the happening of an accident resulting in an injury to an employé was not admissible as a part of the *res gestæ*.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 365.]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by William I. Martin against the South Covington & Cincinnati Street Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Howard M. Benton, for appellant. L. J. Crawford, for appellee.

PAYNTER, J. The appellant, Martin, was employed as a laborer at a pumping well of the appellee. The well was 50 or 60 feet deep and 18 feet in width and about 10 feet apart there were wooden platforms each of which covered about two-thirds of the horizontal area of the well, the remaining space being open from bottom to top. There was an iron piston rod running through the platforms near the open space from the top to the bottom of the well. It was constructed in sections which were coupled together. The appellant with other laborers was sent down in the well to uncouple the piston rod with a view of replacing it with a new one. They were engaged in separating the rod by means of a wrench preparatory to the removal of the lower sections of the rod from the well. While thus engaged a square stick of timber about 2½x4x4 inches fell from a platform above, and struck the ap-

pellant upon the head, inflicting an injury which was alleged to have been serious and of a permanent character, and to recover damages thus occasioned this action was instituted. It is insisted by the appellant that the timber was placed by the agents or servants of the appellee on its end on a platform above to support the section of the rod when the lower end was detached, and that it was gross negligence to have so placed the timber, therefore, he is entitled to recover in this action against the appellee. The court below gave a peremptory instruction to the jury to find for the appellee, and that action of the court is here for review.

It is the duty of the master to furnish the servant a reasonably safe place in which to labor. If the piece of timber was negligently placed on the platform to support the rod, and for that reason it fell and injured the appellant, the appellee did not furnish appellant a reasonably safe place in which to work. The evidence conduces to show that while appellant was engaged in performing his labor something fell from above and caused the injury. A careful examination of the bottom of the well showed that the timber was the only thing which could have fallen upon the appellant's head and inflicted the injury of which he complains. He had been at work but a few minutes when the accident happened, and the evidence shows that he was not guilty of any negligent act which could have caused the timber to fall. It is insisted for the appellee that there was no competent evidence tending to show that its agents or servants had placed the timber on the platform to support the upper sections of the piston rod. The appellee in its answer expressly admits that the timber was so placed under the piston rod by its agents and servants and seeks to avoid responsibility upon the ground that the appellant assisted in placing it there, and was well aware of its position when he went below to work. The court allowed a witness for the appellant to prove that the foreman of the appellee admitted that he had placed the timber under the piston rod, but this admission was made from a half to an hour after the accident happened. It was not made under circumstances which made it part of the *res gestæ*. Therefore, the court erred in admitting these statements as substantive testimony. We are of the opinion that the appellant was entitled to have the jury pass upon the facts of the case, because there was evidence from which the jury might have inferred negligence upon the part of the agents and servants of the appellee.

We do not pass upon the question as to the effect of the appellant's act in aiding, if he did so, in placing the timber under the piston rod, because that question does not properly arise on this appeal.

The judgment is reversed for proceedings consistent with this opinion.

HUFF v. WOOSLEY.

(Court of Appeals of Kentucky. April 19, 1906.)

1. BOUNDARIES—COURSES AND DISTANCES.

Where there is a conflict between courses and distances and well-known corners, the latter must control.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 88.]

2. SAME—AGREEMENTS BETWEEN PARTIES—SURVEY—EFFECT.

Plaintiff and defendant having disagreed as to the boundary line between their lands, agreed that a surveyor should locate the line, and he surveyed the same, which was satisfactory to plaintiff, but not to defendant, who insisted that the lines of the respective tracts be surveyed, and against the objection of plaintiff the surveyor proceeded to survey one of the tracts. He gave plaintiff the report of his first survey and gave defendant the report of the second. *Held*, that neither party was bound by the action of the surveyor.

Appeal from Circuit Court, Butler County.
"Not to be officially reported."

Action between S. A. Huff and J. S. Woosley. From the judgment, the former appeals. Affirmed.

Milton Clark and Helm & Willis, for appellant. Jno. M. Wilkins, for appellee.

PAYNTER, J. The real issue in this case is as to the location of the division line between a tract of land owned by the appellant, known as the A. Nash 117-acre tract, and the land owned by the appellee, known as the G. W. Woosley 84-acre tract of land. The deed, under which the appellant claims the land, describes the division line between the tracts, and it calls for the "corner of the G. W. Woosley tract of land on the Bowling Green and Cloverport road; thence S. W. 108 poles, to a beech; thence N. 83° W. 150 poles, to a white oak." The papers of appellee claiming boundary to his land describes the above line as follows: S. 70° W. 108 poles, to a beech and elm, another corner of the same; thence with another line of same N. 83° W. 150 poles, to the beginning, which corner is described as being a white oak and black oak, corner to A. Nash's survey. The uncontradicted testimony establishes the location of the beech and elm corner. It likewise establishes the white oak and black oak corner. In fact there is no dispute about the location of these corners. The controversy arises over a difference of opinion as to the location of the division line between these points. The location of the line only involves the title to three or four acres of land worth \$4 or \$5 an acre and the value of a little timber taken therefrom. According to the title papers, under which both parties claim the land, a straight line is called for between the beech and elm corner (sometimes called the beech corner) and the white oak and black oak corner. The common mind must know this from the reading of the calls. To follow the course called for in the papers relied on to show boundary,

the white oak and black oak corner would not be reached by running from the beech and elm corner. Both corners are well established, and both parties recognize their existence and are familiar with their location. It is a familiar rule that courses and distances must yield under such a state of case, and the well-known corners must control in the location of the line between them.

There is some evidence tending to show that G. W. Woosley recognized that the line between these corners was not a straight one, but there is no satisfactory evidence that there was a well-defined marked line between the corners, or that there was any recognition of it by the owners on either side of it, so as to fix the location of it at a place other than that fixed by the title papers. In fact, the surveyor testified that he could not find any trees marked as line trees between the corners. While this controversy was going on between the parties, they entered into an agreement by which John B. Floyd, a surveyor, was to locate the disputed line. He went upon the land at the instance of the parties and surveyed the line between the white oak and black oak corner and the beech and elm corner, and the appellant seemed to be satisfied with the line thus run. The appellee was not, and he then insisted that the lines of their respective tracts be surveyed with a view of determining the location of the disputed line. To this proposition appellant objected, but the surveyor proceeded to survey the tract of land claimed by the appellee. He gave the appellant alone the report of his work between the corners mentioned and he gave the appellee alone a report of the work done at their instance and thus the matter ended. The controversy continued which culminated in this action. Neither party was bound by the action of the surveyor.

It is insisted, on this appeal, that the appellee did not show the title to the land derived from the commonwealth. It was not necessary to do so, because it is admitted by the pleadings that the appellee owned the land on the side of the true line between the boundaries, and the appellant on the other side of it.

The judgment is affirmed.

WILSON'S ADM'R v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. April 19, 1906.)

LIMITATION OF ACTIONS—PERSONAL INJURY—ACTION BY ADMINISTRATOR.

Under Ky. St. 1903, § 2516, providing that an action for a personal injury shall be commenced within one year after the accrual of the cause of action, an action for a personal injury received by a decedent is barred when more than one year elapsed between the day of decedent's death from the injury and the qualification of his administrator and the institution of the action.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by J. H. Wilson's administrator against the Illinois Central Railroad Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Hendrick & Miller, for appellant. Wheeler, Hughes & Berry, J. M. Dickinson, and Trabue, Doolan & Cox, for appellee.

BARKER, J. This action is for the recovery of damages for personal injury received by the decedent, J. H. Wilson, in a railroad collision. Among other things, the defendant railroad company pleaded the one-year statute of limitation. The petition shows that Wilson was hurt, and died on the 6th day of February, 1901. The appellant was appointed and qualified as the administrator of his estate, as shown by the order of the county court filed with the petition as an exhibit, on the 6th day of February, 1902, and the record shows that the action was instituted on the day of the appointment of the personal representative. More than a year had expired between the day of Wilson's death and the qualification of his administrator and the institution of the action. The cause of action set up in the petition was barred by the statute. *Carden v. Louisville & Nashville R. R. Co.*, 101 Ky. 118, 39 S. W. 1027; *Chesapeake & Ohio Ry. Co. v. Kelley's Adm'r*, 48 S. W. 993, 20 Ky. Law Rep. 1238; *Louisville & Nashville R. R. Co. v. Brantley's Adm'r*, 106 Ky. 849, 51 S. W. 585; section 2516, Ky. St. 1903.

The judgment dismissing the petition must be affirmed, and it is so ordered.

HAGER, Auditor, v. JUNG BREWING CO.
(Court of Appeals of Kentucky. April 20, 1906.)

INTOXICATING LIQUORS—LICENSE—ISSUANCE.

Neither the Auditor of Public Accounts, nor any other official or tribunal, can lawfully issue a license to a brewer to establish a depot or agency for the sale of beer in a local option community.

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Injunction proceedings by the Jung Brewing Company against S. W. Hager, as Auditor of Public Accounts. From the judgment, defendant appeals. Reversed and remanded, with directions to dismiss the petition.

N. B. Hays, Atty. Gen., and C. H. Morris, for appellant. Hazelrigg, Chenault & Hazelrigg, for appellee.

O'REAR, J. This appeal presents the identical question decided in *Hager, Auditor, v. New South Brewing Co.*, 90 S. W. 608, 28 Ky. Law Rep. 895. On the authority of that case the judgment appealed from is held to

be erroneous. It was not intended by that opinion, nor do we mean to have it inferred now by the necessarily limited scope of this one, that the Auditor of Public Accounts, or any other official or tribunal, could lawfully grant or issue a license under any circumstances to a brewer to establish a depot or agency for the sale of its beer, by wholesale or otherwise, in a local option community.

The judgment is reversed, and cause remanded, with directions to dismiss the petition.

CLARK v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 20, 1906.)

1. RAPE—EVIDENCE OF AGE OF FEMALE.

Testimony of the mother, on prosecution for statutory rape, that the female was only 10 years old, supported by entries in the family Bible showing the date of the child's birth, is sufficient to show the child was under the age of 12 years.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Rape, § 76.]

2. SAME—EVIDENCE OF CHARACTER.

Even if defendant, on a prosecution for carnally knowing a female under the age of 12 years, may show the bad character of the child, evidence that she had been seen on the streets at night drinking is not competent.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Rape, § 55.]

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

J. H. Clark appeals from a conviction. Affirmed.

Thos. L. Michie and J. B. O'Neal, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

CARROLL, C. The appellant, under an indictment charging him with having committed rape upon the person of a child under 12 years of age, was convicted, and his punishment fixed at confinement in the penitentiary for a term of 10 years. We have not been favored with a brief for the appellant, and consequently are unable to specify with particularity the grounds upon which his counsel relies for reversal; but it was suggested in open court by counsel that only two errors are relied on: First, the refusal of the trial court to permit evidence attacking the reputation of the prosecuting witness for morality and virtue; and, second, that the evidence failed to show that she was under 12 years of age at the time the accused had carnal knowledge of her.

Appellant was convicted under section 1155 of the Kentucky Statutes of 1903, which provides that "whoever shall carnally know a female under the age of twelve years, or an idiot, shall be confined in the penitentiary for not less than two or more than twenty years"; an offense against this statute being a degree of the crime denounced by section 1152, which provides that "whoever shall be guilty of the

crime of rape upon the body of an infant under twelve years of age shall be punished with death or confined in the penitentiary for life, in the discretion of the jury." *Fenston v. Com.*, 82 Ky. 549. The mother of the prosecutrix testified that the child at the time the rape was committed was only 10 years of age, and, whilst there is some evidence tending to show that she was more than 12 years of age, the jury evidently accepted the testimony of the mother on this question, as she had better opportunities to know the age of the child than any other witness who testified concerning it, and her evidence was supported by entries made in the family Bible, showing the date of the child's birth.

The only evidence offered by appellant casting a doubt upon the morality of the prosecutrix is an avowal made that a witness, if permitted to answer, would say that she had seen her on the streets at night drinking. This evidence was properly excluded by the trial judge, as it was not competent upon the issue attempted to be raised that the child was of bad character. Whether or not competent evidence of the bad character of a female under the age of consent can be introduced by the accused in a prosecution for rape of or carnally knowing an infant is not before us for adjudication in this case.

The appellant was four times tried for this offense; the first jury fixing his punishment at 20 years' confinement in the penitentiary. Upon being granted a new trial by the lower court, he was again convicted, and his punishment fixed at a term of 15 years. For the second time the trial judge set aside the finding of the jury, and on the third trial of the case the jury failed to make a verdict.

We have carefully examined the record, and have not found in it any error prejudicial to the rights of the accused; and the judgment of the lower court is affirmed.

CROCKER v. HALEY.

(Court of Appeals of Kentucky. April 24, 1906.)

1. CONTINUANCE — ABSENCE OF COUNSEL — MISUNDERSTANDING.

Where there was a misunderstanding between counsel as to whether the case was to be tried on the fifth or eighth day of the term, it was error to force plaintiff, an infant, to trial, in the absence of his leading counsel and main witnesses.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, § 13.]

2. ASSAULT—DAMAGES—PUNITIVE DAMAGES—INSTRUCTIONS.

Where defendant assaulted plaintiff and by force took him to the county seat, and turned him over to the county judge, he was entitled to such damages as would reasonably compensate him for the physical and mental suffering caused thereby, and might in the discretion of the jury recover such sum as punitive damages as to them under all the circumstances seemed right.

Appeal from Circuit Court, Calloway County.

"Not to be officially reported."

Action by Alfred Crocker against E. H. Haley. Judgment for defendant, and plaintiff appeals. Reversed.

Hendrick & Miller and Will Linn, for appellant. J. H. Coleman and Wells & Wells, for appellee.

HOBSON, C. J. Appellant, Alfred Crocker, a boy 16 years old, lived near Springfield, Tenn. In September, 1902, he was at his step-grandmother's, at New Providence, Ky. Some one had cut the fender of appellee Haley's rubber tired buggy. He met the boy on the street going on an errand for his grandmother, and said to him, "Come and go with me." He took him over to his buggy house and told him to go in there and see what he had damaged him by cutting up his buggy. The boy said he did not cut it and started to run. Haley ran after him. After running some distance Haley went back and got his horse. The boy went on and got his gun and started hunting. When he had gone some distance, seeing Haley following him, he threw his gun down and got over the fence and ran. Haley pursued him and caught him. The boy says he knocked him down and choked him, cursed him, and told him he would go to the penitentiary. took him by the arm and took him back to New Providence. After taking him around New Providence, and the boy failing to get money to pay for the cutting of the buggy, Haley took him in his buggy and took him over to the county seat, where he was turned over to the county judge. The statements of the boy are confirmed by witnesses testifying in his behalf. On the other hand, the defendant testified that the boy went with him voluntarily, and that he used no violence or force and did nothing to put the boy in fear. The jury to whom the case was submitted found for the defendant under the instructions of the court, and the plaintiff appeals.

The court erred in forcing the boy to try the case on the fifth day of the term, when his leading counsel was not present, for the reason that it was understood that the case was to be set for the eighth day of the term. It is clear from the affidavits filed on the motion for a continuance that there was at least a misunderstanding here, and the court should not have forced the trial of the infant's case under such circumstances when his leading counsel and his main witnesses were absent. In lieu of instructions 1, 2, 3, 4, and 5 given by the court on the trial, the court should have instructed the jury that if the defendant seized or struck the plaintiff, or in any manner restrained him of his liberty by force or by putting him in fear, or so compelled him to go with the defendant, they should find for the plaintiff such sum as would reasonably compensate him for the physical and mental suffering, loss of time, or humiliation caused thereby,

and that they might in their discretion, in addition to compensation, award such sum as punitive damages as to them under all the circumstances seemed right, not exceeding in all \$10,000.

Judgment reversed, and cause remanded for a new trial.

GOFF v. BOLAND.

(Court of Appeals of Kentucky. April 24, 1906.)

PARTIES—TRUSTEES OF EXPRESS TRUST.

One holding the legal title to land as agent for a principal is a trustee of an express trust, and he may, under the express provisions of Civ. Code Prac. § 21, maintain a suit in his own name to restrain a third person from cutting timber on the land and for the value of timber previously cut thereon.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 9-11.]

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by J. W. Boland, agent, against Crawford Goff. From a judgment for plaintiff, defendant appeals. Affirmed.

James Denton and H. S. Robinson, for appellant. O. H. Waddle & Son, for appellee.

NUNN, J. The appellee instituted this action, and obtained an injunction restraining the appellant from cutting timber on his land and for the value of timber previously cut thereon. The appellant by his pleadings denied the ownership of the strip of land in controversy, by appellee, and alleged that he was the owner, and set up a counterclaim for damages for the cutting of timber on the land by appellee. The strip of land in dispute is about 13 poles in width, lying on the east side of the Bryant survey, which is owned by the appellant, and on the west side of the Porter survey, owned by appellee. The court below found in favor of the appellee, and from this judgment this appeal is prosecuted.

The patent to the Porter land is of later date than the Bryant patent, and calls for three corners in the Bryant patent. The question in this case is the establishment of the division line between the Porter and Bryant surveys. That part of the calls of the Porter patent that has reference to the question involved reads as follows: "Beginning on a black walnut and ash near the mouth of the river hollow branch, and corner to Bryant's survey; thence with his line N. 36° E. 60 poles, to a white oak, his corner; thence with his line N. 8° E. 100 poles, to an ash and white oak, Bryant's corner."

The appellant contends that each of the three corners named are situated near 13 poles east of where appellee claims them to be. The parties took the depositions of many witnesses, filling about 400 pages of the record. It would be of no benefit to give a synopsis of this mass of evidence; that produced by the parties, tended strongly to

support their contentions; and was nearly equiponderant, but after a careful consideration of it we are of the opinion that it slightly preponderates in favor of appellee, at least we do not feel authorized to disturb the finding of the lower court thereon. The appellant contends that the court erred in refusing to sustain a special demurrer, because of a defect of parties plaintiff; he suing as agent; his principal, the real party in interest, not being a party thereto. There is not anything in the record, tending to show that any person owns or has an interest in the land in controversy, other than the appellee, except the word agent, used in the caption of the pleadings after his name. The conveyance of this land to appellee was made in the same way—that is, to "J. W. Boland, agent"—without stating for whom he was agent, if any one. If appellee was agent for another, he holds the property in trust, and by virtue of section 21 of the Civil Code of Practice he was authorized to maintain this action, without joining with him the person for whose benefit the action was prosecuted. In such event he was trustee of an express trust. See the case of *Krieger v. Bissell*, 80 Ky. 330, and also the notes to section 21 of the Civil Code of Practice. Admitting that appellee was an agent and holding this real estate for his principal, it was his right and duty to protect and save the property from waste for the benefit of his principal. The title to this property is in the appellee, and it is immaterial to the appellant whether he is the real owner, or whether he holds it as trustee for another.

For these reasons, the judgment of the lower court is affirmed.

COMMONWEALTH v. LOVING.

(Court of Appeals of Kentucky. April 24, 1906.)

BANKS AND BANKING—INVESTMENT COMPANIES—FAILURE TO PROCURE LICENSE—INDICTMENT OF AGENT—SUFFICIENCY OF ACCUSATION.

Under Cr. Code Prac. § 122, requiring an indictment to contain a statement of the acts constituting the offense in ordinary and concise language, an indictment charging a violation of Ky. St. 1903, § 2223a, subsec. 11, making it a misdemeanor for any officer or agent of an investment company which has no license to transact business for it, is defective, where it fails to allege what office the accused held, or whether he was an ordinary agent of the company.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

H. H. Loving was indicted for transacting business for an investment company which had not procured a license. From an order sustaining a demurrer to the indictment, the commonwealth appeals. Affirmed.

N. B. Hays, C. H. Morris, and Jno. L. Lovett, for the Commonwealth. J. C. Flournoy for appellee.

NUNN, J. The appellee was indicted by the grand jury of McCracken county, charging him with the offense of transacting business for an investment company, which company had not procured the requisite license. Omitting the formal parts, the indictment reads as follows: "The grand jurors of the county of McCracken, in the name and by the authority of the commonwealth of Kentucky, accuse H. H. Loving of the offense of acting as an officer and agent of an investment corporation doing business in this state without license so to do; committed in manner and form as follows, to wit: The said H. H. Loving in the said county of McCracken on the 23rd day of September, 1905, and within one year before finding this indictment, did unlawfully act as an officer and agent of the People's Home Purchasing Company, a corporation, doing business in this state and what is generally known as the investment plan and with its home, or principal home office in the city of Paducah, Ky., and as such officer and agent did aid and assist said corporation in the transaction of its business, whose business it was to place and sell certificates, bonds, debentures, certificates of interest, or other investment securities to be paid for by the purchaser on the partial payment and installment plan and providing for the redemption and retirement of same and parts thereof, or any part thereof, without first having and procuring a license from the Treasurer of this commonwealth to transact such business." The court sustained a demurrer to this indictment, and the commonwealth has appealed.

It is provided by section 122 of the Criminal Code of Practice that it is essential that an indictment contain a statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. The defendant is entitled to this, that he may prepare to meet the charge made against him by the commonwealth. This indictment was drawn for the violation of section 2223a, Ky. St. 1903, entitled "Investment Companies," which provides for the organization of such companies for the purpose of conducting the business of placing or selling certificates, bonds, debentures, certificates of interest, or other investment securities of any kind. Subsection 2 of that section requires such company to procure a license. Subsection 7 fixes

the license fee. Subsection 11 reads as follows: "Any corporation, company, partnership or association, or any officer or agent of same, who shall attempt to place, or transact business as herein defined, when the corporation, company, partnership or association has not license to do so, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five-hundred dollars nor more than one-thousand dollars, for each offense."

It will be noticed that this statute requires the company or corporation to obtain the license. And it is alleged in the indictment that the company failed to procure a license. It is in substance alleged in the indictment with reference to the offense of appellee that he acted as an officer and agent of the corporation, and did aid and assist the corporation in the transaction of its business, and the business of the corporation was to place and sell certificates, bonds, debentures, certificates of interest, or other investment securities. We are of the opinion that this indictment does not satisfy the requirements of the Code. It did not give the appellee a statement of the acts constituting the offense with sufficient certainty to apprise him of the particular acts that the commonwealth would attempt to prove to show his guilt. If the commonwealth expected to prove that the appellee was the acting president, secretary, or treasurer of the corporation, it should have been alleged in the indictment, or if an ordinary soliciting agent, whose duty it was to place and sell securities, bonds, and other things named in the statute, then it should have been so charged in the indictment, giving the name or names of the person or persons to whom he sold or with whom he attempted to place any of the bonds or securities named. The appellee was entitled to sufficient certainty in the description of the offense to understand the acts the commonwealth would attempt to prove against him to enable him to prepare his defense.

Considering the charges in the indictment, it was impossible for the appellee to know what official position the appellant would attempt to prove he held with the corporation, or to whom he attempted to place or sell the securities, bonds, debentures, etc., for the company.

For these reasons, the judgment of the lower court is affirmed.

COLLINGS et al. v. COLLINGS et al.
(Court of Appeals of Kentucky. March 29,
1906.)

**1. DOWER—CONVEYANCES BEFORE MARRIAGE
IN FRAUD OF WIFE.**

On the issue whether a conveyance was in fraud of the wife's marital rights, it appeared that her husband before his marriage conveyed the premises, retaining a life interest. The deed was recorded. At the time of his marriage he was in possession of the premises. There was no evidence showing that at the time of the execution of the deed he contemplated marriage. *Held*, that the conveyance was not in fraud of the wife's marital rights.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, § 15.]

2. FRAUDULENT CONVEYANCES—PERSONS ENTITLED TO ASSERT INVALIDITY—SUBSEQUENT CLAIMANTS.

That a grantor executed a deed for a fraudulent purpose does not affect his subsequent creditors or persons whose claims arose subsequent to the conveyance, in the absence of a showing that he also contemplated by the execution of the conveyance a fraud on them.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 631, 632.]

3. DEEDS—DELIVERY—PRESUMPTIONS.

Where a deed appears to be beneficial to the grantee, and the grantor has caused it to be recorded, the presumption is that he had delivered it and that it was accepted by the grantee.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 580.]

4. SAME.

A father conveyed land to a daughter in taining a life interest. He delivered the deed to the county court clerk and caused it to be recorded. It was left by him in the clerk's office. After the death of his daughter, her husband subsequently obtained the deed from the clerk. *Held*, that the deed was delivered.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 136-138.]

5. LIMITATION OF ACTIONS—ASSUMPTION BY GRANTEE OF GRANTOR'S DEBTS.

A provision in a conveyance which imposes on the grantee the payment of certain debts of the grantor, creates an express assumpsit, an action on which is barred by limitations after five years, as between the grantee and the grantor.

6. SUBROGATION—VOLUNTARY PAYMENT.

A father conveyed land to a daughter in consideration of her assumption of the payment of certain of his debts. The daughter failed to pay the debts, and the father after five years borrowed money from a third person and used the same to pay the debts. *Held*, that the third person was not subrogated to the lien of the debts assumed by the daughter; there being no legal obligation existing either against the daughter or the land conveyed to her.

Appeal from Circuit Court, Shelby County.
"Not to be officially reported."

Action by Mary L. Collings and others against Elisha Collings, administrator, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Gilbert & Gilbert, for appellants. Willis & Todd, for appellee Alloway. P. J. Beard, for appellee Walters.

O'REAR, J. Elisha Collings, while a widower, in 1885 conveyed to his unmarried daughter, an only child, who was then living

with him, certain of his lands, retaining a life estate therein to himself. On the same day that the deed was executed by the grantor he delivered it to the county court clerk and caused it to be recorded. The deed was left by him in the clerk's office. Within a year his daughter married, and within a year after her marriage she died, leaving her infant daughter, appellee Annie C. Alloway, her only heir. Her husband survived her and is yet living. Elisha Collings continued to use the land till his death. In the meantime he had married appellant Mary A. Collings, and had executed two or more mortgages on the land, which were unpaid at his death, which occurred in 1904. In this suit to settle his estate his widow and the mortgagees, as well as some other creditors, attack the deed of 1885 to his daughter upon two grounds: (1) That it had never been delivered; and (2) that it was fraudulent and void. In the deed of 1885 the consideration recited was in part that the grantee should pay certain named debts then owing by the grantor. One of the mortgages set up in this case was executed for money borrowed recently by decedent Elisha Collings, part of which went to pay one of the debts named in the deed. This mortgagee contends that he should be subrogated to the lien created by the deed in favor of the creditor named, at least to the extent that the mortgagee's means went to pay that debt. The circuit court held the deed to be valid, and rejected all the mortgages as liens upon the land embraced in the deed of 1885.

The widow of Elisha Collings bases her attack on the deed on both the grounds named. She says that when she married decedent (which was several years after the deed was executed) she believed he owned all the land in fee simple, and would not have married him otherwise; that he was in the actual possession of the land as ostensible owner; and that he concealed from her the execution of the deed to his daughter. She asserts that the deed was fraudulent as to her, in view of her early subsequent marriage to decedent. It is not contended, though, and does not appear to be a fact, that when the deed was executed Elisha Collings was then even acquainted with appellant Mary A. Collings. Certain it is there is no evidence that they then contemplated marrying. The previous conveyance, whatever else may have been the motive for it, cannot be said, in view of that condition, to have been in fraud of Mary A. Collings' marital rights. The deed was on record where it should have been recorded, and was constructive notice to her, as to everybody else, of the facts it recited. Elisha Collings' possession was not inconsistent with the deed, as he had retained a life estate. His possession under the circumstances was not an assertion of right or title incompatible with the existing condition of the title.

It is contended, in addition, that Elisha Collings had been engaged to marry another woman at the time the deed was executed to his daughter; but, having broken the engagement and fearing a breach of promise suit by her, he had executed the conveyance with the fraudulent design to hinder and delay her in the collection of any judgment she might obtain. There is no competent evidence in the record that he was ever engaged to marry the other woman, or that she had a valid cause of action against him. Nor, had there been such fraudulent purpose on his part, could it have affected subsequent creditors, or persons whose claims arose subsequent to that occurrence, unless it had been further averred and proved that he also contemplated by the execution of the deed a fraud upon such complainant. *Rose v. Campbell*, 76 S. W. 505, 25 Ky. Law Rep. 885. Nothing of the kind is shown in the record. This applies equally to all the complainants, the appellants.

While acceptance by the grantee is as essential as a delivery by the grantor, to make a deed conveying real estate effectual, when the deed appears to be beneficial to the grantee, and the grantor has caused it to be recorded, the presumption is that he has delivered it, and that it was accepted by the grantee. *Young v. Milward*, 109 Ky. 123, 58 S. W. 592, 598; *Boyd v. Bethel*, 9 S. W. 417, 10 Ky. Law Rep. 470; *Bunnell v. Bunnell*, 111 Ky. 577, 64 S. W. 420, 65 S. W. 607; *Jones v. Hightower*, 107 Ky. 5, 52 S. W. 826; *Shoptaw v. Ridgeway*, 22 Ky. Law Rep. 1495, 60 S. W. 723; *Colyer v. Hyden*, 94 Ky. 180, 21 S. W. 868; *Waller v. Logan's Heirs*, 5 B. Mon. 521. After the death of the grantee, and while Elisha Collings was still alive, the husband of appellee returned to Kentucky (they had removed to Missouri directly after their marriage) on a visit to his father-in-law. On that visit he went to the clerk's office at Shelbyville, when the clerk delivered to him the recorded deed in his deceased wife's favor. Had anything been lacking before, we think this would have completed the acceptance, in view of the authorities cited above.

While it is true the deed imposed on the grantee the payment of the debts named in it, which became thereby a lien on the land in favor of the respective creditors to whom owing, it was an express assumption, barred by limitation after five years, so far as the grantee was concerned, although as between the original debtor, Elisha Collings, and his creditors, the debts may not have been barred. When the debts became outlawed, so far as they affected the grantee, the lien was likewise discharged. It was not competent for Elisha Collings and his creditors by any subsequent agreement between themselves to prolong the lives of these debts, so as to affect Mrs. Alloway or her land, without her consent. So,

when about 15 years after her death Elisha Collings paid off one of the debts named in the deed to his daughter, it was a voluntary act so far as she was concerned, and raised no implication on her part to repay it, even had she been then alive, as it had been long since barred by limitation. It is not true, therefore, that appellant Bell (subsequent mortgagee) was entitled to be subrogated to the lien debt assumed by Mrs. Alloway and which his money discharged, for the reason that there was no such legal obligation then existing against either her estate or her land.

Elisha Collings held the 91-acre tract of land, two-thirds in fee simple as purchaser, and one-third (his deceased wife's share) as tenant by the curtesy, as adjudged by the circuit court.

Judgment affirmed on original and cross appeal.

SOUTHERN RY. CO. IN KENTUCKY v. THOMAS.

(Court of Appeals of Kentucky. April 11, 1906.)

MASTER AND SERVANT—SERVANT'S INJURIES—CONTRIBUTORY NEGLIGENCE.

Where a laborer employed by a railroad found it necessary in the discharge of his duties to cross certain tracks, which were obstructed by a train of cars, and he was injured by the train moving while he was attempting to climb between cars, he was guilty of contributory negligence.

Appeal from Circuit Court, Anderson County.

"Not to be officially reported."

Action by William Thomas against the Southern Railway Company in Kentucky. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Humphrey, Hines & Humphrey and Willis & Todd, for appellant. Geo. A. Williams and Chas. Carroll, for appellee.

HOBSON, C. J. Appellee, William Thomas, was in June, 1904, a laborer in the service of the Southern Railway in Kentucky, in its yards at Lawrenceburg, working under a boss named Adams. He was directed by Adams to go to the office and tell a man there to send a rake. When Thomas got to the depot, he received information that the man was at the office on the opposite side of the railroad tracks. A foot crossing about 2½ feet wide ran across the tracks from the depot over to this house, and there was placarded on a post a notice from the superintendent that this crossing must not be obstructed, but at the time referred to they were loading some lambs from the stock pen into some cars just above. The engine stood beyond the stock pen. The car into which they were loading the lambs was at the chute, two or three cars being between it and the engine, and below this car there were two other cars standing on the track which ob-

structed the crossing referred to. Thomas saw that the car at the cattle chute was not more than half loaded, and supposed that the car would stand there until it was loaded. There was a space of 8 or 10 inches between this car and the one behind it. So he climbed over the bumpers and went over to the freight office. Not finding his man there, he undertook to return as he had gone over, but, just as he got upon the bumpers between the cars, the cars moved back, catching his ankle and mashing it badly. None of the railroad men knew that he was there. The cars only moved about 18 inches. The movement of the cars, according to the proof, was not due to a movement of the engine, but simply to the fact that the brakes were not sufficiently set to hold them still. The defendant asked a peremptory instruction, which the court refused to give, and in effect told the jury that the plaintiff in the discharge of his duty had a right, if he could do so safely by the use of ordinary care, to pass between the cars, and that it was the duty of the defendant's agents to give some signal or notice of the movement of the car before moving it, and to have it properly braked. The jury found for the plaintiff in the sum of \$500, and the defendant appeals.

If the train had been cut in two, so as to leave the crossing unobstructed, and the plaintiff had been injured while using the crossing under the implied invitation thus held out, the instruction of the court would have been proper. In that state of case the rule laid down by this court in *L. & N. R. Co. v. Lowe*, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122, would have been applicable; but that is not the case we have. While the cars were not coupled at the point where the plaintiff undertook to climb over, there was only a space of 8 or 10 inches between them, and this was some 25 or 30 feet from the crossing. There was nothing in the situation from which an invitation to cross between the cars at that point could be implied, and there was nothing from which those in charge of the cars should have anticipated that anybody would go between the cars there. If a person who was in no way connected with the road had gone up to the station on business with it, and had climbed between these cars for the purpose of getting over to the office, and had been hurt just as the plaintiff was, it could not be maintained that the company would be liable to him. In such a state of case, though there on business, he would be at a place where he had no right to be, and where his presence was not reasonably to be anticipated. The engine attached to these cars was in plain view, and every one who sees a train of cars with an engine attached must know that they are liable to move, and that it is hazardous to go between them. The fact that the plaintiff was in the employ of the railroad company gives him no better standing in court than if he had been in the

employ of some third person, who had sent him up there to get a rake. The fact that he was sent after a rake gave him no right to get between these cars. He had no more right to get upon them than if he had not been in the employ of the railroad company at all. While he was not a trespasser upon the grounds of the company, he took the risk when he undertook to climb between the cars of the train. If a person intending to take passage on the train had done the same thing, and had been hurt, if he would not be held a trespasser, it would be held that he was at a place where he had no business to be, and that he took the risk. *L. & N. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119; *Kendall v. L. & N. R. Co.*, 76 S. W. 376, 25 Ky. Law Rep. 793. On the plaintiff's own testimony, the court should have instructed the jury to find for the defendant.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

BRANN v. FALMOUTH RIVERSIDE CEMETERY CO.

(Court of Appeals of Kentucky. April 12, 1906.)

VENDOR AND PURCHASER—CONTRACT—PAYMENT OF PRICE—MODE OF PAYMENT.

A contract between the owners of land and a cemetery company recited that the land had been sold to the company and that, while the deed recited a consideration of \$1,000, no part of the money had been paid, and that the vendors were to be appointed a committee to act for the company and to plat the land and sell lots, and that their appointment should not be revoked until they had been fully paid the purchase price; that the ground purchased "must pay the whole expenses upon that portion of the cemetery, * * * and they are to have all profit, if any." *Held*, that the contract meant that the vendors had authority to sell and retain the proceeds until the proceeds of sales amounted to \$1,000, and that the cemetery was entitled to the surplus land.

Appeal from Circuit Court, Pendleton County.

"Not to be officially reported."

Action by the Falmouth Riverside Cemetery Company against J. J. Brann and another. From a judgment in favor of plaintiff, defendant Brann appeals. Affirmed.

Jno. H. Barker, for appellant. Leslie T. Applegate, for appellee.

HOBSON, C. J. On September 13, 1889, the following written contract was entered into between the Falmouth Riverside Cemetery Company and C. A. Robbins and J. J. Brann: "Whereas, C. A. Robbins and J. J. Brann have this day sold to the Falmouth Riverside Cemetery Company, of Falmouth, about ten acres of land adjoining said Riverside Cemetery, and the deed conveying recites a consideration of \$1,000 and acknowledges the receipt of it, when in fact no money has actually been paid by said com-

pany for said land: Therefore, the effect of this writing is to enter into a contract between said company, of the first part, and said Robbins and Brann, of the second part, whereby said Robbins and Brann are to be appointed by said company a committee to act for the company, and they are to have surveyed and platted all of said ground purchased from them, in accordance with the fourth section of the company's charter, approved by the General Assembly of Kentucky April 1, 1882, and as such committee they are to sell and dispose of the lots so laid off as soon as practicable, and apply the proceeds arising from such sales to the purchase price of said ground, and the order of their appointment shall never be revoked until they are fully paid the amount of said purchase price, over and above what they may expend under said section 4 of the charter. They are to defray all necessary expenses upon said division, and if they fail to realize upon said ground as much as the price recited in the deed, the company will not be bound to them, or in any way be liable to them for any sum whatever. In other words, the ground purchased from them must pay the whole expenses upon that portion of the cemetery, and it is incumbent upon said Robbins and Brann to make it do so, and they are to have all profit, if any. On the southeast corner of this subdivision there is 4.69 square poles, heretofore conveyed to W. W. Clarke by John W. Robbins, to which this writing does in no way apply. Reference is also made to the one acre on the northwest corner of said subdivision named in the deed from Robbins and Brann to this company for a public burying ground, over which the company is to take control and pay all expenses that may hereafter occur upon same, so that said one acre shall not hereafter be of any expense to said Robbins and Brann. At any time, in case of death or resignation, the company will appoint on said committee as they, or their personal representatives, or either of them, may direct."

Robbins and Brann caused about half of the tract of land to be cut up into lots and sold; the most desirable portion of them, 15 or 20 lots, being still unsold. After this Robbins died. In September, 1900, the cemetery company filed this action against Brann and J. E. Bohannon, as the executor of Robbins, alleging that enough lots had been sold to pay the \$1,000, with interest and cost of laying out the lots. It prayed a settlement, and that, if enough lots had not been sold to pay Robbins and Brann, a sale be made of enough to pay them and that the remainder of the land be adjudged to it. Bohannon, as the executor of Robbins, filed an answer, which he made a cross-petition against Brann, charging that Brann had collected all the money for the lots that were sold and had made no settlement. He prayed that a settlement be made, and

for judgment against Brann for his part of the money. Brann answered, setting out the fact that lots had been sold to the value of \$1,035, but that of this only \$477 had been paid. He also charged that he had paid out considerable sums for clearing the land, laying off the lots, staking them out, fencing the land, and the like. Brann gave his deposition in the case, and, no other proof being taken, the court appointed a commissioner to lay off into lots the unsold land. The commissioner's report laying on the land into lots having been filed and confirmed, and the case being submitted for judgment, it was adjudged that the defendants Brann and Bohannon, as executor of Robbins, had the right to sell enough of the lots to pay them the sum of \$1,000, with interest from September 13, 1889, together with the cost of having the land surveyed and laid off into lots; that, when they have sold that amount of lots, their interest in the land and right to sell any more lots ceases; that the cemetery company is the owner of all the land above that required to raise the amount going to Brann and Bohannon, as executor, fixed by the judgment; and that Brann and Bohannon, as executor, are each entitled to one-half of the \$1,000, with interest. The defendants were ordered to report the lots sold by them, or either of them, and the expense incurred in surveying and laying the land off into lots. From this judgment Brann appeals.

The rights of the parties are fixed by the contract above quoted. The testimony of Brann as to how he came by the property or as to what title he had to it is immaterial. He testifies that he had bought the land at an execution sale made by the sheriff, who had levied on it as the property of Robbins. But it is immaterial now what rights he and Robbins had in the land before the contract was made. They fixed their mutual rights by the contract, which entitles them to \$1,000 out of the land, to be shared equally by them. No expense incurred by Brann about the land previous to the making of the contract can be considered for the same reason, for the contract does not provide for any such expense. Any necessary expenses incurred by Brann thereafter in keeping the land cleared or protecting it by fence, so that the scheme could be carried out, he may have credit for. The land had to be kept clear and had to be kept inclosed if the lots were to be used for cemetery purposes. If Brann used the land by cultivating it, he must account for the reasonable value of such use. Brann and Bohannon, as executor, are entitled to have the \$1,000, with interest, and the necessary expenses incurred in laying off the lots, or in preparing them for sale, or other necessary expenses in carrying out the contract. The remainder of the land belongs to the cemetery company. The court has not yet made a settlement between the cemetery

company and Brann and Bohannon, as executor, or between Brann and Bohannon, as executor. In making this settlement, the court will proceed upon the principles we have laid down. The judgment of the court, which determines that the cemetery company is entitled to the surplus land, is correct; for, if the contract does not mean this, then the cemetery company got nothing by the deed or the contract. Robbins and Brann by the contract are to have authority to sell the lots and apply the proceeds to the purchase price of the ground; this authority not to be revoked until they are fully paid the amount of the purchase price. But by necessary implication the authority to sell may be revoked by the company when the purchase price has been paid. In other words, the authority to them to sell is only an authority to sell to pay the purchase price. They are not authorized to sell for any other purpose than to pay the purchase price and the necessary expenses. When these are paid, their authority to sell ends. The clause in the contract in which the writer undertakes to explain what he has just said simply means that the land is to pay the purchase price and all the expenses, and when it provides that Robbins and Brann are to have all profit the meaning is that they are to have all the profit on what they sell over and above the expenses. This clause does not enlarge the power to sell which was given by the preceding clause. If it had been intended that the cemetery company was to have no interest in the land, and that Brann and Robbins might sell it all, without regard to the amount it brought, then it was meaningless to express in the contract and in the deed the consideration of \$1,000, and to provide that they might sell the lots and apply the proceeds to the purchase price. If the meaning was that they had unrestricted power to sell, then a large part of the contract might have been omitted altogether, and a very short and simple provision used in lieu of it. In construing a contract, the court must give, if possible, some effect to all its provisions, and all of them must be read together. The contract contemplated that the lots were to be sold as soon as practicable. It did not contemplate that the arrangement was to run on indefinitely and could never be closed up.

The judgment of the circuit court, in so far as it adjudges to the cemetery company the surplus land, is correct; and, this being the only matter presented for decision at the time of the judgment, the same is affirmed.

CALLAHAN, Sheriff, v. SINGER MFG. CO.
(Court of Appeals of Kentucky. April 19, 1900.)

1. TAXATION—PERSONALTY—STATUTORY PROVISIONS—REPEAL.

Acts 1894, p. 212, c. 95, as amended by Acts 1900, p. 39, c. 10, relative to the taxation of personal property, was repealed by Gen.

eral Revenue Law March 29, 1902, incorporated in Ky. St. 1903, p. 1414, regulating in a general way the whole subject of revenue and taxation.

2. SAME—NOTES AND MORTGAGES—WHERE TAXABLE.

In Ky. St. 1903, § 4039, declaring that it shall be the duty of all persons owning any real or personal property to list the property for taxation with the county clerk of the county where the property is located, etc., the words "any real or personal property" are to be read in connection with other words in the section, and refer to things of like character to those named; and notes and mortgages on property in the state, but which notes and mortgages are kept in another state, are not taxable in the county where the mortgaged property is situated.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 190-195.]

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Action by the Singer Manufacturing Company against Ed. Callahan, as sheriff. Judgment for plaintiff, and defendant appeals. Affirmed.

N. B. Hays, O. H. Morris, and Hazelrigg, Chenault & Hazelrigg, for appellant. Kelly Kash, for appellee.

HOBSON, C. J. This proceeding was instituted in the Breathitt county court by the Singer Manufacturing Company under section 4250, Ky. St. 1903, upon the ground that it was erroneously charged with the tax upon certain notes and mortgages amounting to \$4,125. The county court refused to make the correction; but on appeal to the circuit court judgment was entered in favor of the company, and the sheriff appeals.

The Singer Manufacturing Company is an Ohio corporation, with its main office in Cincinnati, Ohio. It has sold by its agents in Breathitt county a number of sewing machines, and held notes and mortgages against people in the county to the amount of \$4,125. It gave in all its tangible property in the county to the assessor, but declined to give in the notes and mortgages, on the ground that they had been forwarded to the main office at Cincinnati, Ohio, and were not taxable in Breathitt county. The assessor, however, included them in his list. The power to correct an erroneous assessment is expressly lodged by section 4250, Ky. St. 1903, in the county court, and the right of appeal from all orders of the county court under the section is conferred by it. The section is in these words: "Any person or corporation claiming to be erroneously charged with any tax upon property not owned by them, may, at any time not later than next regular county court after they have received notice of the same, by demand made upon them to pay the tax, or for evidence in support of said complaint to the county court of the county in which the assessment was made; and if said court, after due consideration of the evidence, finds that they were not the owners of the property assessed, it may correct the same by releasing

them from the payment of the tax thereon; and it shall be the duty of the court to have the property immediately listed as against the rightful owner thereof. County courts shall have authority, after giving notice to the sheriff and assessor, to correct any mere clerical errors in the assessment, and any correction made without such notice shall be void. The right of appeal from the decision of the court as herein provided shall apply to all final orders of court made under this section; and it shall be the duty of said court to certify its action to the Auditor of Public Accounts and sheriff, as provided in said preceding section." It was held by this court in *Board of Councilmen v. Fidelity Safety Vault & Trust Company*, 64 S. W. 470, 23 Ky. Law Rep. 908, that money lent by a nonresident in this state or due to him in this state was not taxable here, as the Legislature had not provided for the taxation of this class of property. In that case it was pointed out that the Legislature might give such property a situs and provide for its taxation, but it was held that the Legislature had not done this. That case has since been followed by the court.

The learned Attorney General calls our attention to the act of March 19, 1894 (see Acts 1894, p. 212, c. 95), and the act of March 19, 1900 amending it (see Acts 1900, p. 39, c. 10); but these acts were repealed by the general revenue law of March 29, 1902 (see Ky. St. 1903, p. 1414). By section 4039, Ky. St. 1903, which is a part of this act, the Legislature undertook to regulate the entire matter covered by the two acts referred to. In *Morgan v. Southern Lumber Company*, 89 S. W. 120, 28 Ky. Law Rep. 190, the court had before it the construction of the section, and held that the statute only referred to personal property having a situs in the county, and did not change the rule as to where intangible personal property is to be assessed. Upon reconsideration of the subject we are satisfied that the words "any real or personal property," in the section, are to be read in connection with the other words of the section, and refer to things of like character to those named which may have a local situation. There is nothing in the statute to change the rule theretofore declared as to choses of action held by a nonresident of the state. The Legislature, as shown by the Attorney General, has the power to tax this species of property and to prescribe where it shall be taxed; that is, whether it shall be taxed at the residence of the debtor, or in the county where the property lies which is mortgaged, or where the notes and bonds are kept in this state. The tangible property of a nonresident is taxable in this state (*Ayer & Lord Tie Company v. Keown*, 89 S. W. 116, 28 Ky. Law Rep. 238, and cases cited); but, until the Legislature provides for the taxation of intangible property and gives it a situs, it is not liable to assessment.

Judgment affirmed.

CALLAHAN, Sheriff, v. DEAN TIE CO.
(Court of Appeals of Kentucky. April 19, 1906.)

TAXATION—ASSESSMENT OF PERSONAL PROPERTY—DESCRIPTIVE LIST.

Ky. St. 1903, § 4039, requires owners of standing trees on the lands of another in any county other than that in which the owner resides to file a descriptive list with the clerk of the county where it is located, and section 1409, subsec. 14, provides that the title to timber shall pass when it is branded. *Held*, that the statute does not apply to all standing trees, but only to those which are branded.

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Action by Ed. Callahan, as sheriff of Breathitt county, against the Dean Tie Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

N. B. Hays, C. H. Morris, and Hazelrigg, Chenault & Hazelrigg, for appellant. Fleenor & Patton, for appellee.

HOBSON, C. J. This is a proceeding by the sheriff of Breathitt county to assess for taxation in Breathitt county against appellee the Dean Tie Company a lot of standing trees, a steam sawmill, and a lot of railroad ties and lumber, all of the value of \$9,000. The circuit court dismissed the proceeding, and the sheriff appeals.

As to everything referred to in the statement except the standing trees, the case is governed by *Morgan v. Southern Lumber Company*, 89 S. W. 120, 28 Ky. Law Rep. 190. The Dean Tie Company is a Kentucky corporation having its headquarters in Breckinridge county, where it is alleged that all the property was given in for taxation. Appellant relies on section 4039, Ky. St. 1903, which is construed in the case referred to. But the allegations of the petition are not sufficient to bring the case within that section. It embraces "standing (branded) trees of any kind whatever." We must give the word "branded" some effect. The statute can only mean standing trees which are branded, and must be read in connection with section 1409, Ky. St. 1903, subsection 14 of which provides that the title to timber shall pass when it is branded. In other words, the statute does not apply to all standing trees, but only to such standing trees which are branded. This shows that the Legislature did not have in mind in this section all personal property, but only certain classes of property which have a situs and some degree of permanence; for it is well known that it is common to buy trees and brand them when the purchaser expects to hold them indefinitely. It is not alleged in the petition here that the trees referred to are branded. On the contrary, it is alleged in the answer that they were bought with a view to their immediate severance from the land. It is not alleged that the steam sawmill is a stationary mill.

Judgment affirmed.

BROWN'S ADM'R v. CINCINNATI, N. O. & T. P. RY. CO.

(Court of Appeals of Kentucky. April 19, 1906.)

1. DEATH—ACTIONS—PLEADING.

In an action for wrongful death, it was unnecessary for plaintiff to aver that the deceased did not know or could not know of the danger resulting in his death by the use of ordinary care on his part.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 60, 62.]

2. MASTER AND SERVANT—DEATH OF SERVANT—ASSUMPTION OF RISK—PLEADING.

In an action for the death of a brakeman, a petition alleging that the brakeman was required to uncouple and switch and move cars on a trestle 80 to 90 feet high, and that by reason of the company's negligence in failing to place guard rails on the trestle he fell, while in the discharge of his duties as a brakeman, and was killed, does not show that he assumed the risk, so as to render the petition demurrable on that ground.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by James G. Brown's administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

W. A. Morrow and J. W. Colyar, for appellant. Jno. Galvin and O. H. Waddle, for appellee.

HOBSON, C. J. James G. Brown was killed while in the service of the Cincinnati, New Orleans & Texas Pacific Railway Company as a brakeman on January 24, 1903. Elizabeth Brown qualified as his administratrix and brought this suit to recover for his death. The circuit court sustained a demurrer to her petition.

The material part of the petition, omitting the formal averments, is as follows: "She states that at the time James G. Brown lost his life he was in the employment of said defendant as a brakeman between Somerset, Ky., and Oakdale, Tenn., and was required by his duties as such brakeman to couple and uncouple cars and aid in switching cars at any and all points between said stations. She says he lost his life at a point on the main track on the said road near where a spur or switch runs off to a coal mine, from which cars were taken to the main track on the defendant's road. Now she avers that at the said point the brakeman and employes of the said company were required to couple and uncouple and switch and move cars on a trestle from 80 to 90 feet high, and in doing so were compelled to walk on a running board from 12 to 14 inches wide, and she avers that said company negligently and carelessly failed and refused to place banisters or guard rails, or protection of any kind, on the outside of the trestle for the protection of its employes. She states that all employes of said company in the same line of service as deceased were required and

compelled to perform those duties on said trestle or be discharged. The said James G. Brown, while in the discharge of his duties as a brakeman on the day and date before set out, by reason of the negligence of said company in failing to properly guard and protect said trestle, either slipped or fell from same and was killed. Now she avers that the death of said decedent resulted from the carelessness and negligence of the defendant company in requiring said deceased to work in a dangerous place, so known by it to be dangerous and which by the use of ordinary care it could have known to be dangerous, and the said defendant provided unsafe and insecure premises for its employes, and required said employes to work thereon, and by reason of said negligence on the part of said company and the servants of the said company whose duty it was to care for and maintain the track and equipment of said road, the deceased lost his life." She also filed an amended petition, which is in these words: "Now comes plaintiff, and for amendment to her original petition, and adopting all and singular the allegations thereof as part hereof as fully as if herein set out, states that the train on which deceased was engaged at the time of receiving his injuries was partly on the ground and partly on the trestle set out and described in the petition, and that his duties at the time of receiving said injuries were such as to necessarily absorb his whole attention and leave him no reasonable opportunity to look for defects. She further avers that he was injured while it was dark and the lights were defective. Wherefore she prays as in her original petition, and for all proper and general relief." The action being brought under the statute to recover for the loss of the decedent's life, it was unnecessary for plaintiff to aver that the deceased did not know or could not have known of the danger by the use of ordinary care on his part. *Lexington & Carter County Mining Co. v. Stephens' Administrator*, 104 Ky. 504, 47 S. W. 321; *Willie v. East Tennessee Coal Company*, 84 S. W. 1166, 27 Ky. Law Rep. 335. In the statutory action to recover for the death of a person, this is matter of defense, to be pleaded by the defendant.

It is insisted for appellee, however, that there is enough in the petition to show that the decedent knew the trestle and took the risk. While there are statements in the petition from which it would seem that the pleader anticipated such a defense would be made, there are no allegations in the petition of facts sufficient to make the petition demurrable on this ground. Although the deceased knew the trestle was there, he may have acted in an emergency and not have known that he was on the trestle, or there may be other facts developed taking the case out of the ordinary rule that the servant assumes the known risks of the service. The only question now presented is whether the

petition states a cause of action. We think it sufficiently charges that the deceased fell from the trestle and was killed by reason of the negligence of the defendant. We only determine now that the petition states a cause of action.

Judgment reversed, and cause remanded, with directions to overrule the demurrer to the petition.

ORIENT INS. CO. v. J. A. MEERS & SON.
(Court of Appeals of Kentucky. April 25, 1906.)

1. APPEAL—PRESENTATION OF QUESTIONS IN LOWER COURT—MOTION FOR NEW TRIAL.

In the absence of motion and grounds for a new trial, there is nothing for the appellate court to consider, except whether pleadings stated a cause of action.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1650.]

2. SAME—CONCLUSIONS OF LAW AND FACT—MOTION.

In an action on insurance policies, tried by the court, where there was no motion to have a separation of the conclusions of law from the conclusions of fact, no separate finding of the law of the case, and no exception to the conclusions, the appellate court cannot review the finding of the trial court on the law of the case.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 3356.]

Appeal from Circuit Court, Hart County.
"Not to be officially reported."

Action by J. A. Meers & Son against the Orient Insurance Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

C. H. Shield, for appellant. D. A. McCandless, for appellees.

PAYNTER, J. The appellant issued to appellees two policies of fire insurance, one for \$1,000, and the other for \$800, on a stock of merchandise. It was destroyed by fire. The appellant refused to pay the loss, whereupon appellees instituted this action to recover on the policies. The defense relied upon by the appellant is the alleged violation by appellees of the "iron-safe clause" in the policy, which required them to keep an iron safe, together with an invoice of stock, account books, cash books, etc. It pleaded that their failure to comply with this clause of the policy was a violation of a warranty and prevents a recovery upon the policies. The appellees in their reply pleaded a waiver of the clause by an agent of the appellant who issued and delivered the policies to them. The reply was traversed. Upon the issues thus formed the law and facts were submitted to the court, and it gave judgment against the appellant on the policies.

An earnest argument is made by the attorney for the appellant that the "iron-safe clause" of the policy is enforceable and that there was no waiver of it. The record on this appeal does not raise these issues for review. This is a common-law action, and

the law and facts were submitted to the court. There was no motion and grounds for a new trial entered. There was no motion made that the court separate its conclusions of fact from its conclusions of law. In the absence of motion and grounds for a new trial, there is nothing before the court except the question as to whether the pleadings stated a cause of action. *Helm v. Coffey*, 80 Ky. 176; *Jenne v. Matlack*, 41 S. W. 11, 19 Ky. Law Rep. 503; *Brown v. Bennett*, 102 Ky. 522, 44 S. W. 85; *Beeler v. Sandidge*, 49 S. W. 533, 20 Ky. Law Rep. 1581. The pleadings do state a cause of action.

As there was no motion to have a separation of the conclusions of law from the conclusions of fact, there was no separate finding of the law of the case, and no exception to such conclusion. Therefore this court cannot review the finding of the court upon the law of this case. *American Mutual Aid Society v. Bronger*, 91 Ky. 406, 15 S. W. 1118. It may be added that there was neither a bill of exceptions or an attested transcript of the evidence here in the case.

The judgment is affirmed.

HAZELRIGG v. BOARD OF COUNCILMEN OF CITY OF FRANKFORT.

(Court of Appeals of Kentucky. April 25, 1906.)

1. MUNICIPAL CORPORATIONS — TORTS — OBSTRUCTIONS IN STREETS.

Where a pile of rock was placed partly in a street at 5 o'clock, and plaintiff was injured by driving over it at 8 o'clock the same evening, the city is not charged with notice of the obstruction, so as to render it liable for the accident.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1648.]

2. SAME—LIGHTING STREETS.

A city is not required to light its streets at night, so that obstructions of which it has no knowledge may be seen at all points by persons traveling on the street.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1656.]

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Action by Claude S. Hazelrigg against the board of councilmen of the city of Frankfort. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

B. G. Williams and Elwood & Hamilton, for appellant. Greene & Van Winkle, for appellee.

HOBSON, C. J. In July, 1904, Claude S. Hazelrigg, while driving in a trap along Main street in South Frankfort, about 8 o'clock in the evening, ran over a pile of rock, which turned his vehicle over, throwing him out. The horse ran off and broke up the vehicle, and he himself was bruised by the fall. He brought this suit to recover for the injury against the city. At the conclusion of

the evidence offered by him the court peremptorily instructed the jury to find for the defendant, and he appeals.

The pile of rock was in part on the side of the street and in part in the traveled way. It was 3 feet high, 8 feet wide, and 11 feet long. He proved by one witness that the rock was hauled there about 5 o'clock that evening. He proved by several other witnesses that they saw the rock there about 5 o'clock that evening. No witness testifies to its being there before that time, although a number of persons who lived in the neighborhood were examined, and would reasonably have known of so large a pile of rock, if it had been there before. The testimony of George Salender is relied on to show that the rock was there before; but, after examining his testimony carefully, we are satisfied from his whole evidence that he means to say that he saw the rock there about 5 o'clock, but is unable to say what day he saw it. His testimony is in no sense in conflict with the other witnesses in the case.

In order to render the city liable, it must be shown that it by exercising ordinary care could have known of the existence of the obstruction in the street and removed the danger. We cannot say that it is actionable neglect for the city to fail to discover in three hours an obstruction in one of its streets caused by a lot of rock screenings being dumped there. There is no evidence that the city knew of the obstruction, and the bare fact that it had been there for three hours is not sufficient to charge it with liability. *Canfield v. Newport* (Ky.) 73 S. W. 888, 24 Ky. Law Rep. 2213; *Bell v. Henderson* (Ky.) 74 S. W. 206, 24 Ky. Law Rep. 2434; *Brell v. Buffalo*, 144 N. Y. 163, 38 N. E. 977; *Reed v. Detroit*, 99 Mich. 204, 58 N. W. 44; *Davis v. Omaha*, 47 Neb. 836, 66 N. W. 859; *Warsaw v. Dunlap*, 112 Ind. 576, 11 N. E. 623, 14 N. E. 568. It is not shown that the street lights were not burning, nor is it shown that the city operated the lighting plant. It is not shown that the lights were not sufficient for all ordinary purposes. A city is not required to light its streets at night, so that obstructions of which it has no knowledge may be seen at all points by persons traveling on the street. No system of lighting streets that we know of has yet accomplished this. Judgment affirmed.

AMERICAN NAT. BANK v. WARREN DEPOSIT BANK.

(Court of Appeals of Kentucky. April 25, 1906.)

1. BANKS AND BANKING—DISCOUNT OF NOTES—REPRESENTATIONS BY OFFICERS—LIABILITY OF BANK.

The president of defendant bank took to plaintiff bank a note executed by third persons, and asked plaintiff to discount it. Plaintiff's directors asked the president if the signers of the note were good, and he said they were. They then agreed to discount the note if the president would indorse it, which he did; the

proceeds being credited to defendant bank on account of the signers of the note. The signers were financially involved at the time the note was issued, and later failed. *Held*, that defendant's president was acting individually in the matter, and that defendant was not liable on the ground that it had practiced a fraud upon plaintiff in procuring it to discount the note.

2. BANKS AND BANKING—PAYMENTS TO CASHIER—MISAPPLICATION—LIABILITY OF BANK.

Plaintiff bank held a note, which it had discounted upon the request of the president of defendant bank; the note being indorsed by both president and cashier of defendant bank. Defendant had a first mortgage on certain cattle belonging to the maker of the note, and, when the proceeds of the cattle were turned over to defendant's cashier, he paid a portion thereof to plaintiff, and a portion to the holder of another note executed by the same parties, and on which he was also a surety. Defendant bank, though it had a first lien on the cattle, received nothing. *Held*, that plaintiff had no cause of action against defendant because of the manner in which the money was applied.

Appeal from Circuit Court, Warren County. "Not to be officially reported."

Action by the American National Bank against the Warren Deposit Bank. From a judgment for defendant, plaintiff appeals. Affirmed.

W. B. Gaines and Henry Burnett, for appellant. Lewis McQuown and C. U. McElroy, for appellee.

HOBSON, C. J. In the year 1897 E. A. Porter & Bros. were doing a considerable business in Warren county, and were supposed to be wealthy. Luther Porter was cashier of the Warren Deposit Bank. He was not a member of the firm of E. A. Porter & Bros., but was a kinsman of E. A. Porter. C. B. Smallhouse was president of the bank. In November, 1897, E. A. Porter & Bros. borrowed \$7,500 from Trigg & Co., who were bankers at Glasgow, for which they executed a note due in four months. When this note fell due Porter Bros. had no money to pay it. They owed the Deposit Bank between \$20,000 and \$30,000. They thereupon prepared a note, which was signed by them as a firm and individually, and also by L. R. Porter, C. S. Donaldson, and E. B. Donaldson. Smallhouse took this note to Louisville and asked the American National Bank to discount it. The bank directors asked him if the parties were good. He said that they were. They then said to him that they would discount the note if he would indorse it. He did this, and they discounted the note. Among other things, he told them that the Porters had not presented the note to the Warren Deposit Bank for discount, and that one reason they had not done so was that that bank handled considerable paper of theirs. The proceeds of the note were credited to the Warren Deposit Bank on account of Porter & Bros., and that bank then sent its checks to Trigg & Co. in payment of the note for \$7,500 held by Trigg & Co. The note held by the American National Bank was renewed a number of times on

the application of the Porters, and, they having failed, this suit was brought by the American National Bank against the Warren Deposit Bank to recover of it the amount of the note, on the ground that a fraud had been practiced upon it in this: that Smallhouse knew the extent to which Porter & Bros. were involved, and, knowing that it would not discount the note if he had disclosed the facts, withheld this information from that bank when he induced it to discount the note.

Smallhouse seems to have acted in perfect good faith. He indorsed the note himself simply to show them that he thought it was all right. He was in no way interested in the matter. The Warren Deposit Bank was connected with the transaction in no way. It is true that Smallhouse was the president of that bank, and Porter was the cashier; but Porter signed the note individually, and Smallhouse indorsed it individually. The note on its face showed that it had not passed through the Warren Deposit Bank. While the proceeds of the note were credited to the Warren Deposit Bank, it was so credited on account of Porter & Bros., and the bank thereupon gave its checks to Trigg & Co. in payment of the note of Porter & Bros. to Trigg & Co. A bank is controlled by its board of directors. Nobody understood this better than the directors of the American National Bank when they discounted this note on the application of Smallhouse. If he deceived them, and we are satisfied he did not mean to do so, the Warren Deposit Bank is in no way responsible for it. He had no authority to act for it in the matter. The transaction was simply a discounting by the American National Bank of a note of Porter & Bros. The written correspondence which is in the record shows beyond question that both parties well so understood.

After the note had been renewed several times, E. A. Porter pledged to the bank as security for the note some cattle. These cattle were mortgaged to the Warren Deposit Bank. E. A. Porter sold the cattle for \$4,500, and turned over the checks to L. R. Porter, who paid \$2,000 of the money to the American National Bank on the note above referred to, on which he was surety, and paid the balance of the fund on another note to another bank, on which he was also surety for E. A. Porter & Bros. The Warren Deposit Bank got none of this money, although it had the first lien on the cattle. The American National Bank complains that it was not notified of the mortgage held by the Warren Deposit Bank, and complains that all of the fund was not paid to it. L. R. Porter's conduct in paying out this money on the notes on which he was surety, instead of turning it over to his own bank, that was entitled to it under its mortgage, was a wrong on that bank; but we are unable to see any reason in the transaction for holding it responsible to the American National

Bank. It had nothing to do with the pledging of the cattle by Porter & Bros. to the American National Bank. The debt to the Warren Deposit Bank is still unpaid. E. A. Porter, when he got the cattle money, seems to have allowed L. R. Porter, who was heavily bound as his surety, to do with it as he pleased. The Warren Deposit Bank at no time waived its mortgage. It had no interest in waiving it, and was in no way responsible for what L. R. Porter and Smallhouse did in regard to the cattle, as they were acting throughout the whole transaction for themselves, and not for the Deposit Bank.

Judgment affirmed.

FITCH v. GENTRY.

(Court of Appeals of Kentucky. April 26, 1906.)

1. JUDGMENT—PRESUMPTIONS.

Where a trust created by a deed of assignment in bankruptcy may have been terminated at a certain time, but a perfect *lis pendens* may also have been maintained in the action in the federal court, so that the title of the bankrupts may have passed by a deed made under the court's authority, it would be presumed, in the absence of the record of the proceeding, that the court had before it the necessary parties and facts to authorize its judgment and action in the matter.

2. ESTOPPEL—ADVERSE POSSESSION—PURCHASING HOSTILE TITLE.

One holding real property adversely and under color of title by virtue of a tax deed was not estopped, by reason of purchasing from the record owners their outstanding title, to afterwards deny the validity of the latter title and to claim under her own previous one.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, §§ 198, 203.]

3. ADVERSE POSSESSION—CLAIM UNDER TAX DEED.

Adverse possession of real property for over 15 years under color of title based on a tax deed tolled the right of entry of the record owner of the property.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 459-462.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Action between James F. Gentry and W. A. Fitch. From the judgment, said Fitch appeals. Affirmed.

Thos. A. Barker, for appellant. Boldrick & Gocke, for appellee.

O'REAR, J. Appellant, being the accepted bidder of a lot in Louisville sold at judicial sale, excepted to the report of sale on the ground that no title passed by the sale. Whether the title to the lot did pass depends on its ownership by the defendant in the suit. Her remote vendor was E. Laura Fitch, who in 1889 took actual adverse possession of the lot, by fencing it, claiming it as her own, and assuming control over it. It seems she had bought it in at a tax sale prior to that time. She and her vendees have continued in the actual adverse pos-

session of it ever since. In 1873 the lot appears to have belonged to Morris & Southwick, who became bankrupts. This lot seems to have been not disposed of by the trustee in bankruptcy. Before the discharge of the trustee, and in 1901, Mrs. E. Laura Fitch, then being in the adverse possession, claiming the lot as owner under color of title, offered to the trustee in bankruptcy to buy her peace in said lot and accept a quitclaim deed for it. The trustee, under permission of the United States District Court at Louisville, accepted the proposition and executed the deed. Appellant fears the title is not good for the following reasons: (1) That the trust was discharged by limitation, and the powers and title of the trustee divested long before 1901. He relies on *Farnsworth v. Doom*, 109 Ky. 794, 60 S. W. 712. (2) That the statutes of limitation cannot avail E. Laura Fitch, or her privies in title, because before the necessary 15 years of adverse possession had ensued, she admitted the validity of an adverse title by attempting to buy it.

Of the first objection, this record is not full enough to enable the court to pass on it satisfactorily. The trust created by the deed of assignment of Morris & Southwick may or may not have been terminated in 1901. Probably it was. But a perfect *lis pendens* may have been maintained in the action in the United States District Court for Kentucky, so that the title of the assignors, the bankrupts, as well as of their creditors, may have passed by the deed made under the court's authority in December, 1901. In the absence of the record of that proceeding, we must presume that the District Court had before it the necessary parties and facts to authorize its judgment and action in the matter.

But, beyond that, E. Laura Fitch's possession was adverse to the title of Morris & Southwick and of their trustees. Being such, she had the right to acquire an outstanding title without being estopped to claim under her own previous one. She did not enter under the title of Morris & Southwick's trustee; hence is not estopped to assert another title to the lot. She got her title from the state, through the tax proceeding. Whether it was sufficient in itself is not material at this time. She could buy her peace from an adverse claimant without relinquishing what she already had, or being estopped thereby. The principle on which one who claims under a particular title is estopped to thereafter deny it rests upon the fact that, having admitted its sufficiency for the purpose of being let into possession of the premises, he will not afterward be heard to say that it was an insufficient title. But the reason for the rule is wanting when one already in possession under color of title from another source merely buys an outstanding title or claim to

get peace. He buys that probably to settle a dispute or possible lawsuit, not admitting its validity for any purpose, but choosing that method as the simplest and cheapest way of avoiding litigation. *Dembitz on Land Titles*, 1020; *Shockley v. Starr*, 119 Ind. 172, 21 N. E. 473; *Henderson v. Bonar* (Ky.) 11 S. W. 809, 11 Ky. Law Rep. 219; *Dashiel v. Collier*, 4 J. J. Marsh. 601; and *Judson v. Bowser* (Ky.; opinion delivered March 16, 1906) 91 S. W. 727.

The adverse possession of Mrs. Fitch and her vendees for more than 15 years tolled the right of entry of Morris & Southwick, even if their title was not conveyed by the deed of their trustee made in 1901. The title sold appears to have been vested in the defendants, who created the lien upon it under which it was sold in this action, and there appears no reason why the purchaser did not acquire a good title by his purchase. Judgment affirmed.

SMITH v. WYATT.

(Court of Appeals of Kentucky. April 26, 1906.)

APPEAL—REVIEW—FINDINGS BY COURT—CONFLICTING EVIDENCE.

Findings by the court based on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3983-3989.]

Appeal from Circuit Court, Calloway County.

"Not to be officially reported."

Action by H. L. Smith and J. W. Wyatt. From the judgment, the former appeals. Affirmed.

Will Linn and J. C. Speight, for appellant. J. H. Coleman, for appellee.

NUNN, J. Appellant and appellee own adjoining farms in Calloway county, Ky. Between these farms runs Clark's river. Appellant's land lies upon the west, and appellee's upon the east side of this river. The appellant instituted this action to recover of the appellee about two acres of land, which lies upon the east bank of the river as the river now runs. The land of both parties once belonged to one John Rule; appellee purchased his land from Rule 1841; Rule by his conveyance to the appellee, called to the east bank of Clark's river, and with the meanders thereof. In 1861 the remaining lands of Rule were divided between his heirs. Appellant is the owner of one of the shares made in that division. One of the corners in the allotment now owned by the appellant, an elm corner was called for, which was situated on the east, and about 60 to 100 yards from the present bank of the river; thence to another corner on the east side of the river, and within these two corners and the present banks of Clark's river is situated the land in controversy.

Appellant's contention is that when Rule made the appellee the deed referred to in 1841, the bank of Clark's river was located at the place where this elm and the other corner stood, and that since that time the channel of the river suddenly changed to its present location; that the change did not take place by accretions. Appellee controverts this alleged change of channel. This issue of fact is the only question to be considered upon this appeal. The parties took the depositions of many witnesses. Some of them residing in the vicinity of the land from 70 to 75 years. Appellant's evidence conduces to show or support his contention that the channel of Clark's river was changed, as claimed by him. The evidence of appellee shows that if there ever was a change of channel at that place it must have occurred long prior to the year 1841, the date of his deed from Rule. We are of the opinion that it would be useless to detail the evidence produced by the parties, it would answer no beneficial purpose. It is sufficient to say that the evidence was so nearly equal that we are unwilling to disturb the finding of the lower court thereon.

For these reasons, the judgment of the lower court is affirmed.

PALMER v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 27, 1903.)

1. OFFICERS—USURPATION OF OFFICE—CRIMINAL RESPONSIBILITY.

One holding the office of a notary public, who continued to exercise the functions of that office after he was appointed and qualified as postmaster, was not guilty of usurpation, within Ky. St. 1903, § 1364, making usurpation of office a misdemeanor.

2. SAME.

One continuing to exercise the functions of the office of notary public after his appointment and qualification as a postmaster is not guilty of violation of Ky. St. 1903, § 1364, making it a misdemeanor to hold and pretend to exercise an office after his term has constitutionally or legally expired.

3. SAME.

One who continues to exercise the functions of the office of a notary public after his appointment and qualification as a postmaster is not guilty of violation of Ky. St. 1903, § 1364, making it a misdemeanor to hold and pretend to exercise an office after his election or appointment thereto shall have been declared by a court of competent jurisdiction illegal or void, in the absence of a showing of such an adjudication.

Appeal from Circuit Court, Hardin County.

"To be officially reported."

A. B. Palmer was convicted of usurpation of office, and appeals. Reversed and remanded.

Du Relle & McHenry and W. A. Barry, for appellant. N. B. Hays, Atty. Gen., Chas. H. Morris, J. R. Layman, and L. A. Faurest, for the Commonwealth.

BARKER, J. The appellant, A. B. Palmer, was indicted by the grand jury of Hardin county, charged with the offense of usurpation of office. A trial resulted in his being found guilty, and his punishment fixed by a fine of \$500. To reverse the judgment enforcing this verdict, he is here on appeal.

Section 1364 of the Kentucky Statutes of 1903, under which the indictment was had, is as follows: "If any person shall usurp any office established by the Constitution or laws of this commonwealth, or shall knowingly hold and pretend to exercise such office, after his election or appointment thereto shall have been declared by a court of competent jurisdiction illegal or void, or after his term of office has constitutionally or legally expired, he shall be guilty of a misdemeanor, and fined in a sum not less than five hundred nor more than fifteen hundred dollars." The facts constituting the offense charged against the appellant are these: He was holding the office of notary public under appointment by the Governor of the state. While holding this office he was appointed and qualified as postmaster of the town of Stithton, in Hardin county. After accepting office under the United States, he continued to exercise the functions of the office of notary public.

An analysis of section 1364 shows that it provides for three distinct offenses: First, the usurpation of an office; second, knowingly holding and pretending to exercise an office after the election or appointment of the incumbent has been declared illegal by a court of competent jurisdiction; and, third, holding over after the term of the incumbent has constitutionally or legally expired. The appellant was not a usurper. At the time he took possession of the office of notary public he was eligible, and was duly and legally appointed; and while it is true he became ineligible afterwards by the acceptance of and qualification to the office of postmaster, he did not thereby become an usurper. Webster defines the word "usurp" as follows: "To commit seizure of place, power, function, or the like, without right; to seize and hold it in possession by force or without right; as, to usurp a throne," etc. Bouvier, in his Law Dictionary, defines "usurper" to be: "One who intrudes himself into an office which is vacant, and ousts the incumbent without any color of title whatever; his acts are void in every respect." Anderson gives the same definition, and derives it from "usurpare"—"to seize to one's own use." To usurp an office, then, is to seize it by force, actual or constructive, without any color of right or title. Usurpation is entirely different from holding an office originally rightfully possessed, but to which the incumbent becomes ineligible by the happening of some extraneous fact or circumstance. This difference between the offenses provided for by section 1364 of the Kentucky Statutes of

1903 is enunciated in the case of *Wayman v. Commonwealth*, 14 Bush, 466.

Appellant does not fall within the third class of offenses provided by the statute, because his term of office did not legally or constitutionally expire. He was appointed for four years, or until the next session of the Legislature. It is not pretended that his term of office had expired. There is a difference between the right of incumbency and the term of office. If one who is in office becomes ineligible to hold it longer—as that he moves out of the district—his term of office does not thereby expire, although his right of incumbency ceases. His successor is elected or appointed to fill out his unexpired term.

Appellant, if his case comes within the language of the statute at all, falls within the second class of offenses; and, in order to convict him under this, it is necessary that he should knowingly hold his office after a judicial declaration vacating his election or appointment. This judicial determination is not pretended in this case. There are but three offenses punishable under the statute: First, when the defendant usurps the office by force—seizes it without color of right or authority; second, when he holds it knowingly after adverse adjudication upon his title to hold it longer; and, third, when he holds it after his term has expired. The Legislature, in section 1364, undertook to, and did, provide punishment for each of these. To constitute one a usurper, it is not necessary to allege scienter, because, as the offender has no color of right or authority, he is bound to know his act of seizure to be unlawful. Nor is it necessary to allege scienter as to the third class, because one who accepts office for a given term is bound to know when that term legally expires, and therefore the statute has not made it necessary that the scienter should be alleged as to him. But the second class involves more doubt, and admits of question as to whether or not any given fact or circumstance is legally so incompatible with the further holding of the office in question as to render the incumbent ineligible to continue to perform its functions. Consequently, as the statute is a severe one the Legislature has made it necessary that there should be a wrongful holding of the office after a judicial determination that the incumbent is ineligible as a condition precedent to the existence of an offense.

If we are in error of the appellant's case falling within the second class of offenses provided for by the statute, then it is clear that the acts committed do not constitute an offense under the statute at all; and in either case he was clearly entitled, at the close of the commonwealth's evidence, to a peremptory instruction to the jury to find him not guilty.

The judgment is reversed for proceedings consistent herewith.

PEARSALL v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 27, 1906.)

1. CRIMINAL LAW—CONFESSION—ADMISSIBILITY—AUTHORITY OF COURT TO DETERMINE.

It is the province of the court to determine whether a confession under the facts of a particular case is admissible.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1219.]

2. SAME.

On the issue whether a confession was voluntary, the evidence showed that, as accused was being conveyed from a depot to a jail, an officer told him to tell the truth about the affair and that it would be better for him to do so. Subsequently another officer had a conversation with accused, in which he confessed. This officer did not put the accused in fear, or create any belief that it would be better for him to make a confession. Several hours elapsed between the time the first officer talked with accused and the time the second officer talked with him. *Held*, that the court was authorized to find that the confession was voluntary.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1215.]

3. SAME—APPEAL—VERDICT OF JURY—CONCLUSIVENESS.

A verdict in a criminal case, supported by evidence, is conclusive on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3074-3076.]

4. SAME—PUNISHMENT—DISCRETION OF JURY—INTERFERENCE BY COURT.

Where the Legislature, within its power to fix the punishment for rape, authorized the jury to fix the punishment by death, the action of the jury in imposing the death penalty on one found guilty of rape, could not be interfered with by the court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2107.]

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

James Pearsall was convicted of rape, and he appeals. Affirmed.

Shanklin & Worthington, B. T. Southgate, and Geo. C. Webb, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

PAYNTER, J. The appellant was indicted for the offense of rape upon the person of Lizzie Wagner. On the night of January 21, 1905, a man broke into the Wagner house in the city of Lexington, and entered the room where Mrs. Wagner and her husband slept. His presence was discovered by Mrs. Wagner, and she informed her husband. When this was done, the intruder shot Mr. Wagner, and then forced Mrs. Wagner into another room, where he committed the offense with which appellant is charged. The Wagners did not recognize their assailant. Several facts and circumstances were proven which tended to establish that the appellant was the offender. Among other facts it was shown that he had on his person the day after the commission of the offense a pocket knife which was taken from Wagner at the time the offense was committed, but we will not here detail all the incriminating facts and circumstances developed on the trial. The feeling against appellant was such that the authorities of Fayette county thought it best to send him to

Louisville for safe-keeping, and thus protect him from the probability of mob violence. He arrived in Louisville about 8 o'clock, and was placed in the charge of the authorities there. About half past 9 o'clock he was taken to the office of Detective Maher, who intended to talk to him with a view of ascertaining whether or not he was guilty of the crime with which he was charged. After talking to him for some time, and after he had taken a nap and had time for reflection, he finally confessed. He was at the detective's office from about half past 9 to 12 o'clock before his written statement was completed. The detective claimed that there was considerable delay in getting a notary public.

It was claimed on the trial, and is here claimed, that the confession was not voluntary, and that it was superinduced by fear or hope of reward. The trial court heard the testimony of the officers, and also of the appellant, and determined that the confession was not improperly obtained, and that it was admissible as evidence against the appellant. Chief Detective Marshall, of the Lexington police force, assisted by two other officers, conveyed the appellant to Louisville. The evidence tends to show that, as the appellant was being conveyed from the depot to the jail in Louisville, Marshall told him to tell the truth about the affair, and that it would be better for him to do so, and perhaps the same advice was given to him before he reached Louisville. Detective Maher denies that he put the defendant in fear, or created any hope in him that it would be better for him to make a confession. He insists that all he said to him was that he thought it would relieve his conscience if he would make a statement. The appellant testified to a state of facts, if true, that would have rendered the confession inadmissible as evidence. Under the repeated adjudications of this court, it was the province of the court to determine whether a confession under the facts of the particular case is admissible as evidence. *Laughlin v. Commonwealth*, 37 S. W. 590, 18 Ky. Law Rep. 640; *Dugan v. Commonwealth*, 102 Ky. 251, 43 S. W. 418; *Whitney v. Commonwealth*, 74 S. W. 257, 24 Ky. Law Rep. 2524. We are of the opinion that the court did not err in admitting the confession. It was made several hours after Detective Marshall had told the appellant that it would be better for him to make a truthful statement of the affair. The lower court found that that statement, or any other statement made by Detective Marshall to him of the same character, did not dominate appellant's mind, so as to superinduce the confession. The court also reached the conclusion that Detective Maher did not improperly obtain the confession. After considering the evidence, and the ruling of this question, we are not disposed to disturb the finding of the lower court thereon.

Counsel for appellant also discussed the

testimony of Mrs. Wagner, and claimed that the cross-examination of her cast a doubt upon the correctness of her story as to the rape, etc. Her evidence leaves no doubt upon the mind of the court that she detailed truthfully the facts relating to the crime; besides, that was a question for the jury to determine, and its conclusion cannot be disturbed.

The extreme penalty was inflicted by the jury. If it is imposed, the appellant forfeits his life for the crime. The General Assembly has allowed the jury to impose that penalty, and, if we concluded that it was severe under the facts of the case, we could not change it; for the lawmaking department of the government was authorized to denounce such a penalty, and it was the province of the jury to impose it, if they thought the facts justified it.

The judgment is affirmed.

GAY v. STEELE'S ADM'RS.

(Court of Appeals of Kentucky. May 1, 1906.)

NEW TRIAL—GROUNDS—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Where alleged newly discovered evidence consisted of the testimony of persons who lived in the same neighborhood with the applicant and might have been produced at the original trial by the exercise of diligence, a new trial was properly denied.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 210.]

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action for a new trial by Susan Gay against the administrators of G. H. Steele. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. O. Faulkner, Wm. Lewis, B. B. Golden, and W. B. Hanford, for appellant. Logan & Jeffries, for appellees.

HOBSON, C. J. G. H. Steele's administrators instituted an action against Susan Gay in the Leslie circuit court to enforce a vendor's lien on a house and lot in Hyden. The circuit court dismissed their petition, but on appeal to this court the judgment was reversed, with instructions to the circuit court to enter a judgment as prayed in the petition. See *Steele's Administrators v. Gay*, 58 S. W. 586, 22 Ky. Law Rep. 689; *Id.*, 59 S. W. 512, 22 Ky. Law Rep. 836. After judgment had been entered in that case as directed by the mandate, Susan Gay brought this action for a new trial, alleging that since the trial of that case she had discovered new evidence which sustained her side of the controversy. The defendants filed an answer denying the allegations of the petition. Proof was taken, and on final hearing the court dismissed the action, and she appeals.

The newly discovered evidence consists of the testimony of Lettie Baker, Carr Couch, G. M. Morgan, Nannie Roberts, the wife of James A. Roberts, J. C. Jones, Wm. Hall,

Wm. Couch, and John Couch. The deposition of James A. Roberts, the husband of Nannie Roberts, was taken before the first trial. Mrs. Roberts is the aunt of Mrs. Gay. Morgan was a witness for her in another suit which she had with the administrators about the same time, and is also a relative. All the witnesses now relied on either live in in Hyden or in the neighborhood. None of them were strangers to Mrs. Gay. They are introduced now to prove certain statements made to them by Steele; but they were known to be friends of his, and proper diligence required that evidence of this character should have been looked up and produced on the first trial of the case. We know that Hyden is a very small place, and the circumstances show that by diligence most, if not all, of this evidence might have been obtained on the first trial. The court will rarely grant a new trial for newly discovered parol evidence, especially where the witnesses live in the vicinity and were known to the party applying for the new trial. The defendant introduced little or no evidence on the first trial, contenting herself evidently with what the record showed and taking her chances with the court. If new trials were granted for such newly discovered evidence as was offered in this case, where evidently no diligence was used to procure evidence on the first trial, litigation would be well-nigh interminable. The case which she now makes does not commend her to the court, and in view of all the facts we see no reason for disturbing the chancellor's conclusion.

Judgment affirmed.

CENTRAL PLANING MILL & LUMBER CO. v. BETZ et al.

(Court of Appeals of Kentucky. May 1, 1906.)

MECHANICS' LIENS—MATERIALS FOR PARTICULAR BUILDING.

The contractor, building defendant's house, paid plaintiff, who furnished lumber for the house and for others that the contractor was building, out of the proceeds of defendant's checks, a greater amount than the price of the lumber used in defendant's house, and plaintiff sought a lien on defendant's house for the balance of the contractor's general account with plaintiff. The evidence was conflicting as to whether plaintiff was notified that the money paid him by the contractor came from defendant, and as to whether the contractor requested plaintiff to apply the money to defendant's account. *Held*, that it was proper to dismiss the petition.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by the Central Planing Mill & Lumber Company against Mary Betz and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Jos. E. Conkling and C. B. Seymour, for appellant. Matt O'Doherty, for appellee.

HOBSON, C. J. Charles Betz had a house built on a lot in Louisville belonging to his mother, Mary Betz, under an arrangement with her that he might build the house at his expense and live in it. He made a contract with a firm of contractors doing business in the name of Siemens & Hommrich to build the house for something over \$1,000. They bought the lumber for the house from the Central Planing Mill & Lumber Company. Betz paid them for building the house, and the planing mill and lumber company afterwards instituted this suit to enforce a mechanic's lien on the house for the price of the lumber which it sold Siemens & Hommrich and Siemens & Hommrich put into the house. The proof shows that at the time the contractors were building this house for Betz they were building several other houses, for which they got the material from the Central Planing Mill & Lumber Company, and that they were indebted to it on other accounts. The proof also shows that, as they were building the house, Betz paid them in checks from time to time, and that out of these checks they paid to the planing mill and lumber company a greater amount than the bill of lumber came to which they bought for the Betz house, but that the company applied these payments to the debts which Siemens & Hommrich owed it on other accounts, and thus left a balance due from him to it. The sum which the company now sues for is really the balance which Siemens & Hommrich owe it on account of all their dealings with it, and this balance is asserted as a lien against the Betz house. There is some conflict in the evidence as to whether the mill and lumber company was notified that the money paid it by Siemens & Hommrich came from Betz, and whether they requested it to apply the money to the Betz account. The chancellor dismissed the petition, and on all the facts we see no reason for disturbing his judgment.

Judgment affirmed.

PHYTHIAN v. RAISON.

(Court of Appeals of Kentucky. May 2, 1906.)

LIBEL—WORDS ACTIONABLE—PLEADING.

In an action for libel, where the petition alleges a publication by defendant to the effect that the books kept by the trustees of a hospital, of whom plaintiff was one, did not contain certain items, nor present proper data from which to make a proper comparative statement, and further alleges that defendant thereby intended to charge the trustees with having falsified their books, it is insufficient to show libel; the words published not being capable of a construction charging wrongdoing on the part of the trustees.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by John L. Phythian against C. L. Raison, Jr. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Hodge & Wolff, for appellant. C. L. Raison, Jr., pro se.

HOBSON, C. J. John L. Phythian has been for some years one of the trustees of the Speers Memorial Hospital in Dayton, Ky. He brought this action to recover damages of C. L. Ralson, Jr., for writing and publishing concerning the acts and doings of Phythian and his co-trustees, and reviewing their conduct, in which occurred the following words: "Of course, Mr. Kennedy had to make his statement from the books as they appear; but it occurs to me that the proper entries were not made in the books as to certain items, or were omitted to be made, so that the books do not present proper data from which to make a proper comparative statement." He charged that thereby the defendant intended to charge the trustees with having falsified their books, thereby charging him with malfeasance in his trust. He alleged that the charges were utterly false, and made with the design to discredit him and his co-trustees in character. The circuit court sustained a demurrer to the petition, and he appeals.

In a written opinion, the learned circuit judge said: "Many words and statements are libelous that would not be actionable as slander. It is not necessary that the language impute to a person about whom it is made the commission of a crime, or anything that would subject him to penal or criminal prosecution. It is sufficient if the language tends to disgrace or degrade a person, or make him odious, ridiculous, or contemptible. It is elementary doctrine that the words charged to be libelous must be taken in their natural meaning, and be considered according to the ordinary usage of the language employed, and that the meaning or import of the language cannot be enlarged or extended by the pleader, so as to make that actionable which otherwise would not be. In my opinion, the language alleged to be libelous is not actionable. It does not charge that the books, or any entries therein, were intentionally or fraudulently or with any improper purpose kept or made; nor does it charge any lack of good faith or honesty on the part of plaintiff in making the entries or in keeping the books; nor is there in the language any intimation or suspicion of intentional wrongdoing. There is nothing in the language that can be fairly construed to degrade or disgrace plaintiff, or to make him odious or ridiculous or contemptible; nor does it impute to him the commission of any crime, or the violation of any law. Giving to the language used its natural and ordinary meaning, it simply charges that the plaintiff was not a good bookkeeper, or that the books were not well kept. It is true that the petition avers that the defendant by the language used intended to charge plaintiff with falsifying the books, and making therefrom false and dishonest statements;

but this is a mere conclusion of the pleader, not warranted by the language used."

We think this is a correct statement of the law of the case, and adopt it as our opinion. Judgment affirmed.

MOORE v. FARIS.

(Court of Appeals of Kentucky. May 2, 1906.)

1. VENDOR AND PURCHASER — CREDITORS OF VENDOR — ASSUMPTION OF DEBT BY PURCHASER.

On the issue whether a purchaser contracted to pay a creditor of the vendor, the creditor testified that the purchaser stated that he had bought the vendor's land and was to pay the creditor, that the vendor had stated that the claim was about \$35, that the creditor informed the purchaser that his claim was \$70 or \$75, and that the purchaser stated that if that was the amount of the claim he would not pay it. The purchaser stated that after he bought the land the vendor stated that he was indebted to the creditor to the amount of \$30, and that the purchaser intended to pay the creditor if the debt was not more than \$40. *Held* insufficient to show that the purchaser assumed to pay the claim of the creditor.

2. EXECUTION—SALE—TITLE OF PURCHASER.

A bona fide purchaser under an unrecorded deed is protected against the claim of an execution creditor of the vendor subsequently purchasing the premises at the execution sale with notice of the purchaser's rights.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, §§ 781, 783.]

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by James Moore against J. B. Faris. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

R. A. Dyche and Brown & Brock, for appellant. Sam C. Hardin, for appellee.

HOBSON, C. J. A. J. Ball died intestate, owning a tract of land in Laurel county, on which he resided. He left surviving him ten children. M. M. Ball, one of his sons, owned 11½ acres of land adjoining his father. On March 28, 1899, he sold to James Moore his undivided interest in his father's tract and the 11½ acres which he owned in his own right, and executed to him a title bond, in consideration of \$150-\$100 paid then in a mare, \$10 paid in cash, and for the balance, \$40, Moore executed a note to Ball. On April 10, 1899, Ball executed to Moore a deed for the property, which was acknowledged before the clerk on that day, but not recorded until June 26, 1899. John B. Faris had a debt against M. M. Ball, for which he sued him in the London police court and recovered judgment on April 8, 1899. Execution was immediately issued on the judgment, and returned "No property found," on April 10th. On April 11th Faris filed a transcript of the judgment, execution, and return in the clerk's office of the Laurel circuit court, and caused an execution to issue, which was levied by the sheriff on the undivided interest of M. M. Ball in the tract of land left by his father.

The levy was made on June 22d. The sale was made on July 10th, and Faris became the purchaser. After this Faris brought suit and obtained a partition of the tract between him and the other heirs of A. J. Ball; Moore not being a party to the suit. After this Moore brought this action against Faris to have his title quieted, and, the court having dismissed his petition, he appeals.

We see nothing in the record to justify the conclusion that Moore contracted with M. M. Ball to pay the debt of Faris. Faris testifies that Moore came to him and told him he had bought the land, and was to pay the debt he had, and that Marshall Ball had told him that it was \$35 or \$40; that he then told Moore the debt was \$70 or \$75, and he said, if it was that much, he would not pay it. Moore says that after he bought the land Ball told him he owed Faris \$30, and he went to see Faris, and intended to pay him if the debt was not more than \$40; that after this Ball sold his note for \$40 to Andy Webb, and he paid the debt to Webb. The proof clearly shows that the land was not worth over \$150, and that Moore paid the horse at \$100 and \$10 in cash when the trade was made, and executed a note for \$40. The proof by both Ball and Moore is that the land was sold for \$150, and their testimony is sustained, not only by the written contract, but by the testimony of another witness. Faris does not plead this defense. He does not plead or prove that he had a lien on the land. The deed to Moore must be read in connection with the bond, and, when so read, is sufficient. The proof leaves no doubt that Faris knew of Moore's claim to the land long before the sale under execution. The conversation referred to between him and Moore took place after the levy and before the sale. When the sale was made, Moore was present and forbade the sale. The rule is that the older equity prevails, and that the purchaser by unrecorded deed will be protected against the execution creditor, who purchases at the execution sale, if he has notice of the older equity before the sale. *Low v. Blinco*, 10 Bush, 334. We see nothing in the record to show that Moore's purchase was not in good faith, or was fraudulent.

Judgment reversed, and cause remanded for a judgment in favor of Moore, quieting his title to the land.

EVERSOLE et al. v. VIRGINIA IRON, COAL & COKE CO.

(Court of Appeals of Kentucky. April 19, 1906.)

1. PLEADING—MOTIONS—ELECTION BETWEEN CAUSES OF ACTION.

Where a petition states a cause of action in different ways and seeks a diversity of relief, but the only substantial cause of action set up is that the plaintiff be adjudged the owner of the mineral right in certain land, a

motion to require an election between causes of actions was properly denied.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1199.]

2. QUIETING TITLE—POSSESSION BY PLAINTIFF.

Ky. St. 1903, § 11, authorizing suit by any person having both the legal title and possession of land to quiet title thereto, does not apply where a deed of the mineral right claimed by plaintiff was on record before the defendants acquired any title to the land, and by conveyance between them they attempted to convert the mineral right to their own use; and in such case it is not necessary for plaintiff to show that he is in possession of the land.

3. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NOTICE—RECORDS.

Where purchasers of land knew that the vendor was in possession when he sold it, they are bound by constructive notice of a prior deed from him of the mineral rights in the land, recorded before they made their purchase, though he never held legal title to the land, so that his deed did not lie in the regular chain of title.

Appeal from Circuit Court, Perry County.
"To be officially reported."

Action by the Virginia Iron, Coal & Coke Company against James Eversole and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

P. T. Wheeler and G. J. Eversole, for appellants. Wootton & Morgan and Greene & Van Winkle, for appellee.

CARROLL, C. This controversy grows out of conflicting claims of appellant M. C. Eversole and appellee coal and coke company to the mineral rights and privileges in about 300 acres of land in Perry county. The facts are substantially as follows: In 1884 Thomas Milam purchased the tract of land from William Stacey, paying him therefor \$400 and taking a bond for title. This bond was not put to record, but soon after the purchase Milam moved on the land and lived there until 1890, when he sold the tract to appellant James Eversole for \$1,000. In 1887 Milam, being then in possession of the land, sold and conveyed the mineral rights therein to one Trigg, a remote vendor of appellee, and the deed to Trigg was put on record in the proper office in July, 1887. Milam, at the time he sold the land to James Eversole, had not obtained a deed for it, although the purchase money had been fully paid some years before, and Eversole, in order to perfect his title, obtained a deed from William Stacey, the vendor of Milam, as well as Milam, and Ab. Eversole, his brother, joined in the deed, because Stacey, previous to his sale to Milam, had sold and conveyed the land to Ab. Eversole, who, failing to pay the purchase price, afterward and before the sale to Milam surrendered the land to Stacey, but did not make him a deed. In 1890 James Eversole had his deed recorded, and in 1908 he sold and conveyed to his son, the appellant M. C. Eversole, all the mineral rights in said land. In 1904 the appellee company brought this suit against James Eversole and

M. C. Eversole, alleging that it was the owner of the mineral rights in the land by virtue of the conveyance made to its vendor by Milam in 1887, and that appellant M. C. Eversole was asserting title to the mineral rights in the land under his deed from James Eversole, which it averred was made with the fraudulent purpose of cheating and depriving it of its ownership and title to said mineral right; that Eversole was setting up claim to the property which cast a cloud upon its title and impaired its enjoyment of its rights, as well as the vendible value of the property; and it prayed the court to adjudge it to be the owner of the mineral rights in the land and for cancellation of the deed from James Eversole to M. C. Eversole, and all proper relief.

After interposing various motions and demurrers to the pleadings, the appellants answered, setting up their title to the property and the right to its possession. Other pleadings were tendered that completed an issue between the litigants, and upon a hearing of the case the circuit court sustained the appellee and granted the relief prayed for. Appellants complain of error committed by the court in failing to require appellee to elect which one of the causes of action asserted by it it would prosecute, and in overruling the demurrer to the petition. In answer to the first contention we may say that, although appellee stated in different ways its cause of action and sought a diversity of relief, only one substantial cause of action was set up, and that was that it be adjudged the owner of the mineral right in this land. The other allegations were merely incidental to this chief contention, and we do not think the court erred in overruling the motion to require it to elect.

It is urged that the demurrer should have been sustained, because, as argued by counsel, this is an action to quiet title, and the petition should charge that appellee had the legal title and was in possession of the property. This argument rests on the assumption that appellee's action was for the purpose of quieting its title to the property, and therefore these allegations were necessary. It has been held that, to entitle a party to maintain an action to quiet his title, he must show possession in himself as well as title. *Webb v. Adams*, 58 S. W. 585, 22 Ky. Law Rep. 683; *Gateley v. Wilder*, 14 S. W. 680, 12 Ky. Law Rep. 622; *Cornellison v. Foushee*, 40 S. W. 680, 19 Ky. Law Rep. 417. But in our opinion the principle of law announced in these cases is not applicable to the question here involved, which falls within the rule laid down in *Herr v. Martin*, 90 Ky. 377, 14 S. W. 356, where it is said that section 11 of the Kentucky Statutes of 1903, invoked by appellants in this case, "does not relate to an effort to deprive one of his title by converting it to the other party's use. Such effort is not clouding the other person's title by asserting a superior hostile title to

the property, but is a deprivation of the title by converting the same to the use of the person seizing it. It is the wrongful seizing of his title that is the foundation of the action. Asserting a paramount adverse title to the land is a cloud upon the title of the other party, but to seize his title is to deprive him of his right to his estate. In the first-named case the person must have the legal title and the possession in order to maintain his action to remove the cloud from his title. In the latter case he can maintain his action, although not in the possession, as readily as if the injury were done to the corpus of his estate." *Packard v. Beaver Valley Land & Mining Co.*, 96 Ky. 249, 28 S. W. 779; *Kant v. Hall*, 23 S. W. 954, 15 Ky. Law Rep. 511. Here, as in that case, the appellants are seeking to deprive the appellee of its title to this property by converting the same to their use, and the relief sought by appellee is the cancellation of the conveyance under which appellants claim title and that it be adjudged the owner. Therefore the demurrer to the petition was properly overruled, as it was not necessary to maintain this action that appellee should be in possession of the property.

Appellants also insist that James Eversole, when he obtained the conveyance from Stacey and others, did not have actual or constructive notice of the previous sale of the mineral rights therein by Milam to Trigg. In support of this proposition our attention is called to the fact disclosed by the evidence that James Eversole, when he purchased the land, had the title examined by a lawyer, who pronounced it good; the attorney overlooking or failing to discover the deed previously made by Milam to Trigg. The evidence does not establish that James Eversole, at the time he purchased, had actual notice of the conveyance by Milam to Trigg; and appellants insist that, as the deed from Milam to Trigg did not lie in the regular line or chain of title to be examined in tracing the title of the land, James Eversole was not affected with constructive notice of this deed. They argue that Milam had no title of record; that the legal title to the land was in his vendor, Stacey, or Ab. Eversole, to whom Stacey had sold; and that, as there was no record of any deed to Milam, Eversole was not charged with notice of any conveyance made by Milam. As a distinct legal proposition, there is considerable authority in support of this proposition. In *Dembitz on Land Titles*, a valuable work prepared after extensive and accurate research and laborious industry by a distinguished Kentucky lawyer, the rule is thus stated by the learned author: "But the constructive notice of the deed arising from its registry operates only on those against whom the statute makes it notice. If it be not a deed from the same grantor under whom the purchaser takes title, he need not look at it. Hence, when the record

leaves title in A., the appearance of a deed from B. to C. does not set purchasers on inquiry to find the unrecorded transfer from A. to B. And it would be the same if there were a deed from B. back to A. reserving the vendor's lien." The doctrine of the text is supported by *Corbin v. Sullivan*, 47 Ind. 356; *Peterson v. McCauley* (Tex. Civ. App.) 25 S. W. 826; *Satterfield v. Malone* (C. C.) 35 Fed. 445, 1 L. R. A. 35; *Woods v. Farmer*, 7 Watts (Pa.) 882, 32 Am. Dec. 772; *Leiby's Ex'rs v. Wolf*, 10 Ohio, 83, and many other cases. But this principle of law, new as it is in the jurisprudence of this state, however correct, has no applicability to this case, because James Eversole purchased the land from Milam, who was in possession, with the equitable title, and had the right to convey, and paid Milam the purchase price, with the understanding that Stacey and Ab. Eversole would make him a deed, and at the time of his purchase Milam was living on the land. These facts were sufficient to put Eversole upon notice that in investigating the title he must look to any conveyance that may have been made by Milam. If he had bought the property from another person than Milam, and without any knowledge of Milam's ownership or possession of the premises, a different question would be presented. As said in the work on Land Titles before quoted: "Generally, whenever the proposed purchaser learns anything which renders the vendor's title suspicious, he is thereby put on inquiry, and must pursue this inquiry at his peril until he finds the unrecorded grant or incumbrance, or until he has exhausted all means of finding it." The deed from Milam to Trigg had been recorded in the manner provided by the statute, and Eversole was bound to take notice of it, and he cannot escape the responsibility for his failure to find it by sheltering himself under the technical rule that it was outside the regular chain of title that he was investigating.

It is not denied that the appellant M. C. Eversole, before his purchase of the mineral right from his father, had notice that appellee was claiming the mineral right under its purchase from Milam; but appellants insist that, although M. C. Eversole did have notice of appellee's chain of title to the land, he is not affected by it, because his immediate grantor, James Eversole, acquired the title without notice of appellee's claim; and in support of this proposition they cite numerous authorities holding that a purchaser without notice may sell and convey a good title to one having notice—the rule as stated in *Pomeroy's Equity* being that, "if a second purchaser with notice acquires title from the first purchaser who was without notice and bona fide, he succeeds to all the rights of his immediate grantor." *Lindsey's Heirs v. Rankin*, 4 Bibb, 482; *Moore v. Dodd*, 1 A. K. Marsh. 140. But, as we have seen, the immediate

vendor of M. C. Eversole did have notice of appellee's claim before he purchased; therefore appellants cannot invoke this doctrine in their behalf.

Having noticed all the material questions raised by appellants, we do not think that any good purpose would be subserved in extending this opinion further.

The judgment of the lower court is affirmed.

HUGHES v. OWENS et al.

(Court of Appeals of Kentucky. April 19, 1906.)

1. ADVERSE POSSESSION—ESSENTIALS OF POSSESSION.

In order to constitute adverse possession it is necessary, not only that claimant should have been in possession of the boundary for 15 years, but that the possession should have been adverse, open, and continuous to a well-defined, marked boundary.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 65, 66.]

2. SAME—TACKLING POSSESSIONS.

Those claiming by adverse possession are entitled to add to their possession that of those under whom they claim.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 213-220.]

3. SAME—HARMLESS ERROR.

Where, on an issue as to adverse possession, it did not appear that those under whom defendants claimed had ever asserted an adverse possession, an erroneous instruction that, if defendants "or" those under whom they claimed had been in possession, etc., the finding should be for defendants, was harmless.

4. TAXATION—TAX DEEDS—EFFECT AS EVIDENCE.

Where a tax deed, regular on its face, is introduced in evidence, it carries a presumption that no essential to its validity was omitted.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1556, 1559.]

Appeal from Circuit Court, Edmonson County.

"Not to be officially reported."

Action by M. W. Owens and others against C. M. Hughes and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Milton Clark and J. S. Wortham, for appellants. M. M. Logan and Ora E. Hazelip for appellee.

CARROLL, C. This action was brought in March, 1903, by appellees, setting up ownership under title from the commonwealth to about 635 acres of land, seeking to obtain possession of certain parcels of the land within the boundary that appellants and others had taken possession of several years before and were claiming right to by virtue of their adverse possession of the premises. On the trial of the case the jury found in favor of some of the claimants and against the appellants Hughes, Kidwell, and Constant. The appellees are nonresidents of the state, and relied exclusively upon a paper title from the commonwealth. On this

appeal the appellants' contention is that the court erred in refusing to peremptorily instruct the jury to find for them, in giving instructions, and in failing to sustain objections to certain title deeds introduced as evidence by the appellees. The evidence conducted to show that in 1887 the appellants, and those under whom they claim, without right or authority so to do, took possession of the premises now claimed by them, and have been in the occupancy thereof since that time. In order to hold land by adverse possession, it is necessary, not only that the claimant should have been in possession of the boundary for 15 years, but that this possession was adverse, open, and continuous to a well-defined, marked boundary; and, although the appellants proved that they had been in possession of the land in question, they failed to establish to the satisfaction of the jury that their possession was open, adverse, and continuous, and to a well-defined, marked boundary, and on this issue of fact we are not disposed to disturb the verdict of the jury.

The only complaint made as to instructions is to the use of the word "or" in place of the word "and" in the instruction saying to the jury that "if they believed from the evidence that defendants or either of them, or those from whom or under whom they claim possession, have been in the actual adverse and continuous possession of the land they claim as against plaintiffs, and all others, openly claimed to a well-defined and marked boundary for as long as 15 years consecutively before March 6, 1903, when this suit was filed, they should find for the defendants." The word "and" should have been used in place of the word "or" in this instruction, as the appellants were entitled to add to their possession the possession of those under whom they claimed, for the purpose of extending the possession as far back as it might be. The adverse holding may have commenced when the first person under whom the appellants claim entered upon the land. But we do not believe that the jury were misled by the misuse of the word "or" in this instruction, or that the substantial rights of appellants were prejudiced by this error, because it does not appear that the persons under whom appellants claimed had ever asserted an adverse possession to entitle them to hold the land.

The principal ground upon which appellants ask a reversal grows out of alleged defects in the paper title of appellees, manifested by the deed of Mart. Hardin, register of the land office, to James Coleman, in December, 1805, and the deed from B. F. Cockrell, auditor's agent, to J. W. Dickey, made in June, 1852. It is urged that these deeds and the evidence offered in connection with them fail to show that all the requirements of the law in reference to tax deeds had been complied with. In fact, no evidence was offered by appellees in support of these

deeds, and their competency, therefore, depends upon the question whether or not the deeds in and of themselves, unsupported by extraneous proof, should have been permitted to go to the jury as evidence of the chain of title of appellees, who are seeking to trace back to the commonwealth. In respect to the deed from Hardin, register of the land office, to Coleman, an inspection of it shows that in December, 1805, Hardin, as register, in pursuance of the provisions of the acts of the General Assembly in such cases made and provided, did expose for sale at public auction the tract of land mentioned in the deed for the purpose of paying the tax due thereon by one John Wilcox, when James Coleman became the purchaser for the amount of the tax and interest due, and thereupon the register made to him the deed in controversy. In *Alexander v. Aud*, 88 S. W. 1103, 28 Ky. Law Rep. 69, in speaking of the effect of the certificates of public officers to tax deeds, this court said: "Public officers, who are required to discharge an official duty and to make a certificate or return thereof, are presumed to have truly done all that is certified, and all they were required to do to make this certificate true. This is true of tax collectors, as it is of other officers. When it is said, therefore, that the tax collector has certified to certain facts, they are deemed to have been done, as well as all other acts necessarily required to have been done to support them until the contrary is shown. A pleading which attacks the validity of an official act is bad, unless it shows affirmatively that the act was not done, or that some essential was omitted which goes to the vitality of the act." In support of this doctrine numerous cases are cited in the opinion.

Applying the principle announced to the deed in this case, which appears regular on its face, if the appellants desired to attack the deed or to question its efficiency to pass title, the burden was upon them to show in what particulars it was deficient; and having failed to introduce any evidence showing the defects in this deed, the presumption must be indulged in that every requisite essential to its validity was complied with by the officers who made the tax sale and executed the deed in pursuance thereof. The older a deed is, the greater the reason and necessity for holding that the officer who made it performed fully his duties. As an illustration, take the deed here in question. It was made more than 100 years ago. All of the persons connected with its execution, or who were familiar with the facts growing out of the transaction, have long since died; and it is more than probable that all the records and exhibits made by the officers of the state in connection with the tax sale, save and except the deed itself, have been destroyed for many years. If, therefore, it was necessary that the person relying upon a deed like this as a chain in his title should be required to

affirmatively prove that every material condition of the law in reference to its making had been complied with by the officers, the person introducing it, however meritorious his case or deserving his contention, would fail, because of inability to show by extraneous proof the required facts. The reasons here stated apply with equal force to the deed made in June, 1852, by Cockrell, auditor's agent, to J. W. Dickey; and without extending this opinion further upon this question, or discussing the authorities to which our attention has been called by counsel for appellants, we are of the opinion that the case of Alexander v. Aud, *supra*, supported as it is by reason and authority, is conclusive of the question here involved.

The judgment of the lower court is affirmed.

BOHANNON v. BOHANNON'S ADM'X.

(Court of Appeals of Kentucky. April 19, 1906.)

1. HUSBAND AND WIFE—WIFE'S PROPERTY—RIGHTS OF HUSBAND—WAIVER.

A husband may waive whatever marital rights he has in his wife's estate, and settle it upon her to her separate use, and an agreement to this effect will be upheld in equity without the intervention of a trustee.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 27, 232.]

2. LIMITATION OF ACTIONS—RECOGNITION OF OBLIGATION.

Where a husband received the proceeds of his wife's property under an agreement that he would hold it in trust for her, and during a period of 30 years recognized the existence of the obligation, limitations did not run against the wife's right to enforce the trust, nor did this right become stale.

3. HUSBAND AND WIFE—WIFE'S PROPERTY—AGREEMENT TO HOLD IN TRUST—CONSIDERATION.

An agreement by a husband to hold the proceeds of his wife's property in trust for her is based upon a valid consideration, and will be upheld and enforced in equity.

4. TRUSTS—PAROL PROOF.

Where a husband took the proceeds of his wife's property under an agreement to hold it in trust for her, he held the property under an express trust relating to personalty, which was capable of being established by parol and was not affected by the statute of frauds.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 15-24.]

5. HUSBAND AND WIFE—WIFE'S PROPERTY—AGREEMENT TO HOLD IN TRUST—ENFORCEMENT.

Where a husband took the proceeds of his wife's property under an agreement to hold it in trust for her, she was, on his decease, entitled to the trust fund from the residue of his estate after the payment of his debts.

Appeal from Circuit Court, Henry County.
"Not to be officially reported."

Proceedings by W. A. Bohannon's administratrix for the settlement of his estate and for a sale of his real property for the payment of debts. From a judgment for the administratrix, Mary E. Bohannon appeals. Reversed and remanded, with directions for judgment.

W. S. Pryor, Wm. P. Thorne, and John L. Woodbury, for appellant. Wilson D. Crabb, Carroll & Carroll, and Nat. C. Cureton, for appellee.

BARKER, J. W. A. Bohannon died intestate, domiciled in Henry County, Ky., leaving his widow, Mary E. Bohannon, his daughter, Lottie Woods, and two infant grandchildren, the children of a deceased daughter, as his only heirs at law. The appellee, Lottie Woods, was appointed and qualified as administratrix of his estate, and, finding that the personal property left by her father was insufficient to pay his debts, instituted this action for the purpose of settling his estate, for a sale of his real property, and the payment of his just debts. The widow, Mary E. Bohannon, and the two infant grandchildren, were made defendants, and properly brought before court. After the payment of the admitted debts of the decedent there will remain between \$7,000 and \$8,000 for distribution. Appellant, at the time of her marriage with W. A. Bohannon, was the owner of property, real and personal, worth in the aggregate between \$10,000 and \$14,000. After marriage, she and her husband sold and conveyed all of her property, realizing certainly more than \$10,000, which, it is conceded, the husband invested in real estate the title of which he took to himself, or with it improved real estate the title of which was already in himself. His widow now claims that all this was done under agreement with her that the money realized by the sale of her property was to be her separate estate, to be held in trust for her by her husband, and to constitute a debt from him to her. These facts she alleged in her answer, which was made a cross-petition against her daughter, Lottie Woods, the administratrix, and her two infant grandchildren, and prayed for a judgment in accordance with her rights. Issue was joined upon this claim, and on final hearing the chancellor dismissed the cross-petition, of which appellant now complains.

There is no question that at the time of the marriage the wife owned property, real and personal, of the value claimed by her, or that it was sold by her and her husband, and the proceeds turned over to and used by him as she now asserts. Nor do we think there can be any reasonable doubt that the evidence fully sustains in every particular the agreement by the husband to hold the money in trust for his wife; that he always regarded it as a debt due from him to her, and frequently promised to make a settlement upon her by which she should be reimbursed the sum loaned by her to him. The evidence on this subject is largely made up of his admissions to various parties to whom he talked of the transaction. These witnesses, in the main, are not the partisans or relatives of the widow, but are the relatives of the husband. Harvey Radford, the father of

the two infant grandchildren, admitted in his testimony that he had heard his father-in-law say that his wife had money invested in the home place. In answer to the question, "You knew, though, Mrs. Bohannon had money in that house?" He said, "I heard that. Q. Whom did you hear say that? A. Mr. Bohannon." And again: "Q. What did he say? A. He said that there was \$10,000 of that money there. Q. What money? A. I don't know. I supposed it was his wife's money." The appellee, Lottie Woods, in her testimony, said: "I heard my father and mother have conversations over this question about the money. He said he held money for mother. He said he held money for her and she said he had to make it safe for her; that he held her money. Q. How often have you heard him make that statement? When was the last time you heard him make that statement before his death? A. I have heard him speak of it several times; on Sunday afternoon before his death. Q. What was said at that time? A. Well, he told her he expected to make her safe for the money he held for her, and she told him he had promised to do that; that he had her money. Q. How much money did your father state in your presence at any time he had of your mother's? A. About \$10,000, I think." W. A. Netherton, a nephew of the deceased, said: "Just before his death I had two conversations. About six weeks before he died I had a conversation with him at Smithfield. He was over there. * * * We spoke about the money owing on my mother's land; his mortgage. He was standing good for it. He told me he was going to settle the mortgage and wanted that business straightened up. He said he had Mary's [his wife's] money, and he wanted to make her good and safe for her money; that he had used it and wanted to get it up. Q. Do you know how much money of Mrs. Bohannon's he had? A. I know of \$5,000 or \$10,000. I know he told me a half a dozen times. I don't know how much more. Q. Did he state to you that he held it as her trustee, or words to that effect? A. No; he said she put it into his hands to use, and he was to repay her. He was to give it back, and he was going to do that and make it all satisfactory, because he didn't believe he was going to live very long."

We give this as a fair specimen of a great deal of testimony of the same tenor, and against which there is no contradictory evidence whatever. It is now too well settled to be successfully questioned that a husband may waive whatever marital rights he has in his wife's estate, and settle it upon her to her separate use, and that an agreement to this effect will be upheld in equity without the intervention of a trustee. Here the wife's property was turned into money upon the agreement that the proceeds of the sale should belong to her, just as the property had before the conversion. The evidence

shows conclusively to our minds that the husband in good faith made this agreement with his wife, and always recognized her claim as a subsisting and valid obligation on his part. Although the time between the sale of the wife's property and the death of the husband was long—more than 30 years—yet the statute of limitations never bars a claim that is constantly recognized as a subsisting and valid obligation; nor will equity regard it as stale under the same circumstances. *Owsley v. Sarah Owsley*, 77 S. W. 394, 25 Ky. Law Rep. 1194.

We think the establishment of the debt claimed by the wife in this case is as conclusive as human evidence can make it, and the contract, based as it is upon a good and valid consideration, will be upheld and enforced in equity. *Maraman's Adm'r v. Maraman*, 4 Metc. 84; *Campbell v. Galbreath*, 12 Bush, 459; *Thomas v. Harkness and Wife*, 13 Bush, 23; *Miller and Wife v. Edwards*, 7 Bush, 394; *Hill v. Cornwall & Bro.'s Assignee*, 95 Ky. 531, 26 S. W. 540; *Chorn v. Chorn's Adm'r*, 98 Ky. 631, 33 S. W. 1107. The widow in this case is not seeking to establish an express trust in the husband to acquire and hold real estate for her benefit. She is simply claiming that the husband took her money, and agreed to hold it in trust for her separate use. This is an express trust relating to personalty, and may be established by parol, and is unaffected by the statute of frauds. *Owsley v. Sarah Owsley*, supra; *Woolfolk v. Earle*, 40 S. W. 247, 19 Ky. Law Rep. 343; *Berry v. Norris*, 1 Duv. 303; *Kemper v. Kemper*, 7 Ky. Law Rep. 98.

We are not impressed with the argument that the establishment of the widow's claim results in sweeping from the infant grandchildren all interest in their grandfather's estate, which would otherwise descend to them. In the first place, they only take an interest in their grandfather's estate subject to the payment of his just debts. If, after the payment of these, there is nothing for distribution, no hardship is worked upon them. It is not a hardship to be deprived of what is not one's own. We see no reason to so sympathize with the infants as to strain the law to deprive their aged grandmother of what justly belongs to her, and which is necessary to keep her from want in her old age and widowhood. At best, it was a harsh rule (prior to 1894) which enabled the husband to convert the whole of his wife's estate to his own use, and at death either devise it by will to strangers or allow it to descend by operation of law to others than the real owner; and we see no hardship in upholding the contract of the husband, when he does so convert his wife's property, that he will hold it in trust for her benefit, and not leave her penniless when he dies. The record before us shows that W. A. Bohannon always recognized that the money he took from the sale of his wife's estate belonged to her, and constantly promised

to settle with her; but, like many another good man, his intentions and promises outran his performance. He postponed the time of settlement from day to day, until finally, without warning, he was stricken by death, and thus prevented from doing that which all natural right and justice required he should do. That which the husband so faithfully promised and failed to do, equity will now require his personal representative and heirs at law to do.

The appellant does not claim to be paid until after her husband's other creditors are satisfied. She, as we understand it, only claims the residue of the estate as against the distributees of her husband. This is the extent to which she can enforce the trust. *Long v. Deposit Bank*, 90 S. W. 961, 28 Ky. Law Rep. 913.

The judgment is reversed, with directions to enter a judgment in accordance with this opinion.

KEITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 20, 1906.)

1. HOMICIDE—EVIDENCE—SUFFICIENCY.

In prosecution for murder, evidence held sufficient to support a conviction.

2. SAME—ADMISSIBILITY OF EVIDENCE.

In a prosecution for murder, a dying declaration of the deceased, made when she was past hope of recovery and under a sense of approaching dissolution, was competent, notwithstanding evidence that she was at times delirious, where the statements made by her were rational.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 446.]

Appeal from Circuit Court, Larue County.

"Not to be officially reported."

Millard Keith was convicted of murder, and appeals. Affirmed.

Sam Y. Jones, for appellant. N. B. Hays and C. H. Morris, for appellee.

HOBSON, C. J. On Sunday evening, August 27, 1895, about an hour before sunset, Millard Keith came to the house of James Johnson, in Larue county. Johnson's family were present, and Johnson said to him: "If your purpose here is to carry news, and to make a disturbance in my family, I want you to get away from here." When he got to the yard gate going out, he said: "I will be back here. I am going to fix myself." About dark Keith returned to the house, and hollloed a couple of times. Johnson did not go out at once. He finally said to Keith: "I told you to stay away from here. What will you have?" Keith said he had a note for Norma, Johnson's daughter. Johnson's wife about this time came out of the cook room. To use Johnson's expression, Keith was "rearing and tearing." Mrs. Johnson went up to the gate where Keith was, and Johnson went into the house and got his rifle. Mrs. Johnson, when she got up to Keith said: "You

go off from here, and don't have any fuss here. I have got heart disease, and I have smothering spells." He answered with an oath: "Throw up your hands, or I will shoot your brains out." About this time Johnson came out of the house with the rifle. Keith fired two shots at him, and Johnson fired one shot at Keith. One of Keith's shots struck Mrs. Johnson in the breast, the ball passing downward, and she died of the wound the next day; her death being due to internal hemorrhage. The above is the testimony in substance for the commonwealth. Keith's statement is that he, Curt Bell, and Tom Underwood had been drinking whisky that Sunday. They separated about 10 o'clock Sunday morning, and met again at 3. Curt Bell, after they had been together drinking awhile Sunday evening, sent Keith to Johnson's to tell Norma Johnson to come out; that he wanted to see her. He also sent for some whisky, saying that he would want some whisky for him and the girl that night, if she came out. He says that, when he got down to Johnson's, Johnson asked him if he came to deliver any message, and told him to get away from there; that Johnson had a knife in his hand, and said, "I would just as soon cut your head off as to look at you;" that he then left, and went and reported to Curt Bell, who asked Underwood to go and take his message to the girl. Underwood went, and came back saying that he had not been able to see her. Bell then told him to go to the gate and call for Norma. He told Bell that Johnson would raise a racket with him. Bell gave him a pistol, and told him to "go down there and get that girl." He took the pistol, and went to Johnson's gate, and called for Norma. Her father answered, and said, "What are you doing back here?" Keith told him he wanted to see the girl, and Johnson told him to get away from there. Johnson went into the house, and Keith says that he then started away, and about that time Mrs. Johnson came out to the gate and said to him, "You go away from here, and go now," and he said, "All right;" that just then Johnson's gun fired from the corner of the house, the ball striking him in the right arm, and he shot with his pistol at Johnson, and killed Mrs. Johnson.

It will thus be seen that there is very little contradiction between the evidence for the commonwealth and the defendant's own testimony. Where the evidence does conflict, the weight of the evidence and the surrounding circumstances sustain the testimony for the commonwealth. On these facts, the jury found the defendant, Keith, guilty of murder, and fixed his punishment at confinement in the penitentiary for life. Both Bell and Keith were married men. According to Keith's own evidence, he went to Johnson's house as a procurer to get Johnson's daughter out of the house for Bell, and when Johnson, suspecting his purposes were not good, told him to leave the premises and stay

away, he left making a threat, and in a short time returned to Johnson's house, armed with a pistol to carry out his wicked purposes. His conduct is without extenuation or excuse. The proof for the commonwealth is that he fired the first shot; but, whether he did or not, he was evidently at Johnson's house armed, and Johnson had a right to believe that he had returned to execute the threat he had made.

The court allowed the dying declaration of Mrs. Johnson as to the circumstances attending the shooting of her by the defendant. The proof clearly shows that at the time she made the statements she was past hope of recovery, and that she made them under the sense of approaching dissolution. They were therefore competent as dying declarations. It is true that one witness says at one place in her evidence that at times Mrs. Johnson was unconscious or delirious, and in answer to a leading question as to whether she knew what she was saying, when she made the statements, the witness answered, "No, indeed." But the witness, immediately following, said that she was talking rationally when she made the statements. So that, taking all the testimony of the witness, we conclude that the witness, when she said, "No, indeed," to the question of counsel implying that Mrs. Johnson was out of her head, meant to differ from the view the counsel had intimated. No other witness testifies to her being out of her mind when she made the dying declarations. She made the same statements to several other witnesses and at different times. Her statements as testified to by the witnesses show no signs of deliriousness, but are rational. So we conclude that, taking all the testimony, her dying declaration was properly admitted; for, under the evidence, it was at least a question for the jury what weight they would give her statements.

The instructions fairly submitted the issues of fact to the jury, and on the whole case we see no reason for disturbing the verdict.

Judgment affirmed.

CARTER v. DOTSON.

(Court of Appeals of Kentucky. April 20, 1906.)

TRUSTS—SALE OF LAND—REDEMPTION—EVIDENCE.

Evidence held to require a finding that plaintiff and defendant agreed that the latter should redeem plaintiff's land, which had been sold on execution, hold the title in himself to secure what he advanced for that purpose, and that defendant therefore held the title as trustee for plaintiff, and should be compelled to reconvey the same on payment of the balance due on such advancement and interest.

Appeal from Circuit Court, Pike County.
"Not to be officially reported."

Action by H. S. Carter against G. W. Dotson. From a judgment for defendant, plaintiff appeals. Reversed.

W. S. Pryor and Roscoe Vanover, for appellant. J. M. Roberson, for appellee.

O'REAR, J. Appellant owned a tract of land in Pike county on which he had lived for 20 or 25 years. He had been engaged in merchandising. He failed in business in 1891. In May of 1891 an execution for some \$1,300 issued against his estate in favor of a creditor, which was levied on this land. A homestead was allotted out of it to appellant, and the balance was sold by the sheriff at public sale to A. W. Campbell for \$802. The land was appraised before the sale at \$1,400. Appellant then, or about that time, made a deed of assignment for the benefit of all his creditors generally to Bart Belcher. He continued to live upon the land and to use it as his own. He had reared a young woman, whom he had adopted as a child, and who married appellee, G. W. Dotson. At that time, and until a short time before the institution of this suit, the relations existing between appellant and appellee were altogether friendly, if not intimately cordial. Although appellant was then an old man—about 70—he did not quit work. Appellee had contracted with A. W. Campbell to drive a large quantity of saw logs by hauling and splashing. Appellant was let into this contract with Campbell's consent as a partner with appellee in doing the work. This contract was made in January, 1892, and the agreement between appellant and appellee, by which the latter was let into the contract as a party, was made directly afterwards. A short while after that Campbell assigned his purchase of appellant's land to appellee; the latter agreeing to pay to Campbell the purchase money and interest. Appellant claims that he and appellee agreed that appellee was to redeem the land for him from Campbell, and that appellant was to, and did, furnish the means with which to do it; that appellee was to hold the title for him till he was requested to convey it, when he was to execute deed to appellant, or to whom he might direct. Appellee denies that such agreement was made, and denies that appellant paid or furnished the means to pay for the redemption of the land. This was the issue. The greater part of the testimony was introduced to impeach or sustain the general reputation of appellant affecting his credibility as a witness. But, if it should be allowed that the effect of all this evidence was to leave a doubt upon appellant's credibility, still there is enough evidence in the record to show with reasonable certainty what the truth concerning the matter at issue really is. We do not mean to say that appellant was effectually impeached. Much of the impeaching testimony was of a doubtful character, emanating from the family of appellee, and some of it doubtless from personal enemies, while by far the greater part of it was the echo of what

busy partisans of appellee in that neighborhood had been circulating. This much is established by appellee's own evidence, or is undenied by him: The land was owned and occupied by appellant when sold by the sheriff to Campbell for \$802. It was appraised at \$1,400. Appellant went to work for Campbell within a year after the sale, and actually paid Campbell \$525 toward the redemption of the land. He continued to live upon it without paying rent, and using it as he chose to do, for 10 years. During that time appellee did not claim or assert title to it. The assignment of his purchase by Campbell to appellee was before the expiration of the year in which appellant had the right to redeem the land from the sheriff's sale. Appellant and appellee had then begun upon the contract for moving the logs for Campbell. When the assignment of the purchase was made by Campbell, it recited the payment of \$671.80, of which sum appellee paid only \$347. Appellant and appellee then executed their note to Campbell for the balance of the purchase money, which appellant subsequently paid off. The disputed matters are: (1) That it was agreed that appellant might redeem the land from appellee; (2) that appellant paid any of the redemption money to Campbell except \$525; (3) that appellant paid the \$525 for appellee on account of an indebtedness owing by appellant to appellee for hauling logs.

Of the first of these matters, there was no writing between the parties. There was no witness to their agreement. They contradict each other in their testimony on this point. It will be remembered that the relationship between these men was cordially friendly. It was evidently regarded by them as equivalent to father-in-law and son-in-law. Appellant's age and state of finances negative the idea that he was undertaking that logging contract just to pay off an old debt, contracted according to appellee in 1885 or 1886. Appellee admitted in testifying that he at one time offered to appellant to let him have the land back if he would pay the purchase price for it. This circumstance shows that they were discussing and considering the question, and that appellee was then willing to suffer appellant to do precisely what he now claims he then agreed to and did. Because of appellant's financial embarrassment he was unable to contract and obtain credit. Campbell would not, probably, have contracted with him alone. But, with appellee as the responsible party, he was willing that appellant might do as much of the work as they were willing he should do, and that he might out of it repay the money to redeem the place. Appellee's security against possible loss in the transaction was having the purchase assigned to him till he was relieved from all liability. When we find that appellant did pay all the purchase price to Campbell, it materially strengthens the

probability of the truth of his testimony that the agreement was entered into between him and appellant that he claims. Of the second disputed proposition, Campbell testified that appellee paid him \$347 on the redemption price of the land. He also testified that appellant paid him for appellee, and that he paid it to appellee, \$300 subsequently; that his books show that such payment was made, but he could not recollect what it was for. His inability to remember that was probably because it did not concern him. Appellant testified that he in that way paid back that much of the \$347 which appellee had advanced. Appellee was unable to explain that payment of \$300. We think the proof sustains appellant's claim that it was paid to appellee on account of the \$347 payment by him to Campbell.

Of the third disputed point, the circuit court found the fact against appellee. Appellant denied owing appellee any sum except the \$347 just discussed. Appellee's claim that \$525 was owing him for hauling logs in 1885 or 1886, which had been uncollected and no effort to collect till 1892, when his alleged debtor, whose circumstances he was in a position to know perfectly, was failing, and being sued by foreign creditors, and his property levied on and sold by them, and he taking no step whatever to collect his debt, is too improbable. It is equally unlikely that appellant, who did not pay appellee that alleged debt when he could have done so, or could have been compelled to, should have worked it out in the most laborious toiling at his advanced age, when he was not compelled to do so. If appellant was so anxious to favor the husband of his adopted daughter, by paying off a debt outlawed by time, he could have done it more easily by conveying him the property before it had been seized for his other debts. But there was no proof that such a debt ever existed. It was a matter capable of being proved by other witnesses, when disputed by appellant. But no effort was made to sustain it. There was an utter failure of the proof on that point, as the circuit judge held.

Appellee's claims are inconsistent with the nature of men. A farm worth \$1,400 is not willingly let go at \$800. The owner will naturally strive to redeem it. So the law, to accommodate the just desire, allows a reasonable time in which to redeem. It was natural that the oppressed debtor should apply for help from, and give his confidence to, the person who was nearest to him, who stood nearly as close as a son. He did apply to him. It was natural that the son-in-law should lend his credit under the circumstances, inasmuch as he took no risk in the matter. It was in keeping with the probabilities that the real owner would use and occupy the property, and not pay rent to one not the owner. It was not unnatural that appellant let the title remain in his son-in-law's name pending the settlement with his

creditors and his assignee. During the time appellant sold his homestead for \$850, with which to pay off his creditors and to relieve his assignee. If appellee's theory is correct, appellant then owned no other property. Having once claimed this homestead against those very creditors, it is not likely he would have relinquished it to them at his then advanced age, about 81, leaving himself and wife homeless, unless there was some other good reason for doing so. That reason is found, in this case, in the fact that by so doing he could be free from debt, and the farm which had been redeemed from the sale to Campbell would serve as a home and support for the remainder of his life. Appellant's admissions, proved by witnesses called by appellee, that the property belonged to appellee, are not convincing. They are not necessarily inconsistent with what ordinarily one similarly situated, actually owning the property as appellant claims to have owned it, would have done. Admissions are not estoppels necessarily; and, unless they are, they are not conclusive against the truth. Upon the whole case we are satisfied that appellant and appellee agreed, in or about January, 1892, that appellee should redeem the land from Campbell, and hold the title in himself to secure him in what he advanced or might advance for the purpose; that appellant then paid off all the purchase money except \$47. Under those circumstances, appellee held the title as trustee for appellant, and should be compelled to reconvey it to him on the payment of the \$47 and interest.

Judgment reversed, and cause remanded for entry of a judgment in conformity herewith.

WILSON v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. April 20, 1906.)

JUDGMENT—CONCLUSIVENESS—FORMER RECOVERY—RAILROADS—CROSSINGS FOR LAND-OWNERS—IMPLIED RESERVATIONS.

Where, from a deed of a railroad right of way, a reservation of a right to all necessary farm crossings is to be implied, such right is not affected by recovery of damages for refusal of the grantee to put in the crossings, the measure of such damages being merely such sum as would enable the grantor to put in the crossings, together with compensation for being deprived of their use from the time the grantee should have put them in up to the time of the trial, so that such recovery does not bar recovery by the grantor of damages on account of the grantee thereafter preventing the grantor putting in a crossing.

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by Caleb Wilson against the Illinois Central Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

Heavrin & Woodward, for appellant. J. M. Dickinson, Trabue, Doolan & Cox, and H. P. Taylor, for appellee.

O'REAR, J. Dan T. Wilson and wife conveyed to the Owensboro, Falls of Rough & Green River Railroad Company, in 1892, a strip of land for railway right of way 11,680 feet long. In the deed was this covenant: "The party of the second part [the railroad company] agrees to fence the entire line through said land, and put in the necessary farm crossings, which the first party may require." Other covenants were contained in the deed relative to the company's putting in a side track for the grantor's use. The railroad company built its road and fenced the right of way. It put in some, but not all, the crossings required. It did not put in the siding as agreed. Subsequently Dan T. Wilson and wife conveyed a parcel of the land through which the railroad right of way had been granted to their son, appellant, Caleb Wilson, and the railroad company transferred its property rights to the Chicago, St. Louis & New Orleans Railroad Company, which had leased the road to, and it is now being operated by, appellee. The road traverses appellant's farm, conveyed to him as above stated, so that his dwelling, barn, and other outbuildings are on one side of the road, and the tillable land, and, indeed, the greater part of the farm, is on the other side. The land lays so that there is but one practicable way to reach one side from the other by wagons, without going over other persons' property. This only route appellant had been using some time, and finally put in gates and was attempting to fix a crossing upon the railroad track, so as to pass over it with convenience and safety, when appellee's servants closed up the openings he had made in the fences and removed his lumber from the railroad track, refusing to let him use the crossing at all, or to construct a crossing at that point. Appellant brought this suit to recover damages from defendant because of the acts complained of.

The principal defense relied on, and the one presumably upon which the trial court based its judgment, is an estoppel, which was thought to be sufficient, and grows out of this state of case: Some years ago, Dan T. Wilson and wife sued appellee and its lessor for damages for the refusal to put in and maintain all required farm crossings and for the failure to put in and maintain the switch for their use. That suit was begun after the conveyance to appellant. Appellant was made a party plaintiff in the suit and joined in the prayer for relief therein sought. A judgment for \$2,000 was recovered by the plaintiffs, which was affirmed on appeal. Chicago, St. Louis & N. O. R. R. Co. v. Dan T. Wilson, 76 S. W. 138, 25 Ky. Law Rep. 525. The judgment was paid off. This suit was then begun, because of the action of appellee in obstructing and closing the passway described in this suit. Appellee claimed in its answer that this last-named passway was part of the sub-

ject-matter of the former suit, and, as it had once been required by the judgment of the court to pay for that act, it cannot again be compelled to do so. The proof is not clear whether the passway now in question was constructed before the former judgment was rendered. But it is certain that, if it was not, then it was one of the crossings which the railroad company had failed to put in, and for which the recovery was in part allowed. The question now for decision is, does the former recovery constitute a bar to the maintenance of this suit on the same covenant? The circuit court having dismissed appellant's petition, it would seem that it construed the former judgment as an efficient estoppel.

In the opinion in the former case (76 S. W. 138, 25 Ky. Law Rep. 525) it is settled that the covenant quoted runs with the land and is available to any subsequent vendee who may be aggrieved by its breach. Likewise it was held that it attached to the realty conveyed to the Owensboro, Falls of Rough & Green River Railroad Company, and was binding upon its grantees and their lessees. So the question comes down to this: What was the scope and effect of the former suit, to which appellant and his grantor were parties? Obviously they should not be allowed to recover twice for the same thing. The grant of the right of way to the railroad company was not the fee, but an easement in the land. It was subject to the rights therein which the owner expressly reserved, as well as to those not conveyed or necessarily implied in the grant for the proper enjoyment of the use conveyed to the railroad company. It was stipulated by the language quoted, clearly by implication, if not exactly by the express words employed, that the owners of the fee reserved to themselves the right of passway for the use of their land and its occupants from one part of the farm to another, and reserved as many of such passways as were necessary to the reasonable use of the farm, to be selected by the owners of the land. These reserved rights did not pass by the deed to the railroad company. The latter, in addition agreed by the covenant quoted to construct the necessary farm crossings for the use of the owners of the farm at the cost of the railroad company. It had to do the work and furnish the material for that purpose. When it failed, or whenever its vendee or lessee failed, to do so, there was a breach of its contract, which was part of the considera-

tion upon which rested its conveyance of the right of way. The measure of damages for such breach was, not the value of the passway so withheld, as seems now to be assumed, but was such sum as would enable the owners of the land to themselves put in the crossings, and such additional sum as would compensate them for damages sustained for having been deprived of their use from the time they were required to be put in up until the trial.

By their suit the owners of the land did not in any sense attempt to recover for the value of the land occupied by the passways not opened. It was not intended that they would in the future forego the right to go from one side of the farm to the other; the railroad traversing it, as is seen, for a distance of more than two miles. The just measure of damages in that suit did not include the diminished value of plaintiff's lands on either side of the railroad because their right of crossing to such side was totally destroyed and forever tolled. They continued to own their land on both sides of the railway right of way, as well as owned the servient estate in the right of way, with the reserved right to pass over the right of way at all necessary points to reach one side of the farm from the other. The suit was not to relinquish anything or any right the plaintiffs had, but to get compensation for such time as they had been deprived of their use by the defendants, and so as to enable them (the plaintiffs) to themselves put in the crossings which the defendants had refused to put in for them as they had agreed to do. This rule as to the proper scope of the action and measure of damages is clearly stated in *Cincinnati Southern Ry. Co. v. Hudson*, 88 Ky. 480, 11 S. W. 509. It follows that appellant was entitled to a crossing at the point at which he opened it. But, as he had once recovered from appellee the cost of constructing it, it was incumbent on him to build it at his own expense, which he was doing when stopped by appellee. This suit, then, in view of the plea of the other judgment, must be limited in its recovery to such sum as will compensate appellant for the denied reasonable use of the passway now in litigation since the date of the trial in the *Dan T. Wilson Case*. And, as this action is on the equity docket, the judgment should furthermore require appellee to suffer appellant to open up and maintain in safe manner the passway in dispute.

Judgment reversed, and cause remanded for proceedings consistent herewith.

WILLIS et al. v. MAYSVILLE & B. S. R. CO. et al.

(Court of Appeals of Kentucky. April 24, 1906.)

1. RAILROADS—INJURY TO PERSON NEAR TRACK—CONTRIBUTORY NEGLIGENCE.

A boy standing in a street, at a point where there was no danger of being struck by a passing train, was injured by being struck with a piece of ice kicked by a brakeman from the platform of a passing caboose. *Held*, that the boy was not guilty of contributory negligence, precluding a recovery, by reason of his being in the street.

2. SAME—NEGLECT—QUESTION FOR JURY.

Whether a brakeman, kicking a piece of ice from the platform of a caboose passing over a street, and injuring a boy standing there, was negligent, *held*, under the evidence, for the jury.

3. MASTER AND SERVANT—LIABILITIES FOR INJURIES TO THIRD PERSONS—ACT OF SERVANT—SCOPE OF EMPLOYMENT.

Whether a brakeman, kicking a piece of ice from the platform of a caboose passing over a street, and injuring a boy standing there, was acting within the scope of his authority, so as to make his employer liable for his negligence, *held*, under the evidence, for the jury.

Appeal from Circuit Court, Greenup County.
"To be officially reported."

Action by Otto Willis and another against the Maysville & Big Sandy Railroad Company and another. From a judgment for defendants, plaintiffs appeal. Reversed.

Allan D. Cole and W. T. Cole, for appellants. W. H. Wadsworth, for appellees.

SETTLE, J. This case is before us on a second appeal. On each of the two trials in the circuit court the jury found for appellees in obedience to a peremptory instruction from the trial judge to that effect. The facts of the case are fully set forth in the opinion of this court on the former appeal (*Willis v. M. & B. Sandy R. R. Co.*, 85 S. W. 716, 27 Ky. Law Rep. 459), and need not be repeated, except to say that the action was brought by appellant, an infant, and his next friend, to recover of appellees damages for injuries sustained by the infant to his person inflicted by a lump of ice that fell or was thrown upon him by one of appellee Chesapeake & Ohio Railway Company's freight trains as it passed through the town of Greenup and over a street thereof, in which appellant was at the time standing or walking near the railroad track. There was no doubt of appellant's right to be on and use the street, as it was a public street and was so used by the public generally.

The defense presented by the answer of appellees and now relied on is that those in charge of the train did not at the time and place of the accident owe appellant any duty; that the brakeman by whose act the ice was thrown from the train was not in the performance of that act discharging any duty for appellee, or that appellant to his employment, or the apparent scope thereof; and, finally, that appellant in receiving his injuries

was himself guilty of contributory negligence, but for which he would not have been injured. In the former opinion it is said: "The boy, in common with the public, had the right to use the street. Under the law enunciated by this court, there is a duty imposed upon those operating trains through towns to keep a lookout for persons upon streets, and especially at street crossings. It certainly would be negligence in a railroad company to have its agents and servants throwing substances from a train into the streets as it passes along or across them. If the agents or servants do so by authority of the master, and an injury is inflicted on persons using the street, it would be an actionable wrong. It is the duty of railroad companies to exercise proper care so as to avoid injuring persons on streets of towns over which they pass. A failure to observe such care is certainly a breach of duty." We fail to find in the evidence any proof that appellant was swinging on the train at the time he was injured; nor do we find that there was any testimony to authorize the inference that he was then about to swing on the train. Indeed, according to the evidence, he was not, though only a few feet away, close enough to the train to have enabled him to do so. By the former opinion it was held that the infant appellant was not negligent in merely standing in the street at a point where there was no danger of being struck by the train, and that he was not required to anticipate that persons connected with the train would throw large lumps of ice from it as it passed across the street. We now concur in that conclusion, for a careful examination of the record convinces us that the evidence on the two trials as to the conduct and position of appellant with respect to the train was practically the same. We are therefore of opinion that there was no evidence of contributory negligence on his part.

With respect to the question as to whether appellee's brakeman was guilty of negligence in throwing or causing the ice to fall from the train, the former opinion has this to say: "It is a matter of common knowledge that property is transported on freight trains. The evidence excludes the idea that the brakeman intentionally hurled the cake of ice from the train to injure the boy. It is possible that the ice was being carried for or without compensation, and, as an easy means to discharge it, it was thrown from the train at its destination. It is not essential, for the plaintiff to make out his case, to prove that the lump of ice was placed on the car with the knowledge of the master, or that it was thrown from the train with his knowledge or direction. The case is sufficiently made out if a reasonable inference might be drawn from the facts that the servant was acting within the scope of his authority. * * * We are of opinion that the evidence was sufficient to warrants the submission of the case to the jury." We are unable to see that the evi-

dence adduced upon the last trial will authorize a departure from the foregoing conclusion, as it was substantially the same as that of the first trial, except that appellee's brakeman, Truett, who did not testify on the first trial, was a witness in the last. He testified, in substance, that it was his duty as a rear brakeman of the train to look over the train and see that it was in proper order; that, noticing the door of a refrigerator car in the train open, he went to close it, and found in the car some abandoned ice, four pieces of which he took to the caboose to make ice water for the use of the train crew; that he put three lumps of ice in a 16-gallon water keg in the caboose, and left the fourth piece on the rear platform of the caboose; that upon reaching Riverton he found that the ice had melted considerably, and made the caboose platform wet and slippery. Thinking it unnecessary to let the ice waste, he concluded to give it to Timberlake, a section hand of appellee, whom he saw standing by a fence in Greenup, and for that purpose stepped to the rear platform of the caboose, and, standing on the first step thereof, attempted with his left foot to pull the ice out to the edge of the platform, in order that he might pick it up, and, after passing the cattle guard, throw it off the train on soft ground to prevent its breaking; but that, in moving the ice with his foot to the edge of the platform, it slipped, or, to use his language, "shot off," to the street below and struck appellant. It further appears from the testimony of Truett that he was well acquainted with the streets of Greenup over and along which trains passed, and it must therefore be presumed that he knew, at the time of moving the ice on the platform of the car, the train was on or near the street, and of the danger to those on the street from objects that might be thrown or fall thereon from a passing train. The witness ventured the opinion that the two refrigerator cars attached to the train did not belong to appellee company; but he did not seem to be positive that this was true, as he had never seen the contract between the shipper and the company.

The question here presented is, was the brakeman, in removing the ice from the caboose platform, acting in the performance of a duty arising from his employment, or the apparent scope thereof? If he was, and his act in ridding the train of the ice was so negligently performed as to result in injury to appellant, the appellee would be liable therefor. It is usually a matter of some difficulty to determine what acts of an agent are or are not within the apparent scope of his agency of employment, for which reason courts generally hold that the question is one of fact, to be determined by a jury. We find the rule thus stated in Thompson on Negligence: "It is obviously a question of fact for the determination of the jury whether, at the time of the particular act or omission

by the servant which caused the injury, the plaintiff's servant was acting within the scope of his employment, or acting outside of it to effect some purpose of his own." This doctrine is so universally recognized that a citation of further authority in support of it is deemed unnecessary.

It appears from the testimony of the brakeman, Truett, that it was his duty to provide the train crew with ice water, and, though without express authority to get the ice for that purpose from the refrigerator car, the fact that it had been abandoned, and left to melt and waste by the owner—if owned by another than appellee Chesapeake & Ohio Railway Company—did not make it improper for the brakeman to appropriate it to the use of the train crew, or remove the act of his doing so without the scope of his employment. Besides, if, as he stated, it was his duty "to look over the train and see that the train was in proper order," did not such duty require him to remove abandoned or refuse matter from the refrigerator car, as from any other of the train? It is not wide of the mark to say that the duty required of the brakeman "to look over the train and see that the train was in proper order" authorized him to remove from the platform of the caboose the lump of ice left after supplying the water keg; for a lump of ice weighing from 20 to 50 pounds was an obstruction to the use of the platform by the train crew in entering or leaving the caboose, and in melting it was calculated to make the platform wet and slippery, and by reason thereof less safe for use. Manifestly, his purpose in getting the ice from the refrigerator car was not to give it to his friend Timberlake. If such had been his purpose, and in carrying it out, by throwing it to the latter from the car, appellant had been injured, it might with greater reason be argued that neither in getting the ice from the refrigerator car, nor in throwing it from the car to Timberlake, was he acting for the master; but such was not his purpose. The ice was obtained by the brakeman for the use of the train crew, and the idea of giving it to Timberlake was an afterthought, which in fact first occurred to him when he saw Timberlake standing near the track as the train passed through Greenup, and this was after he had supplied the train crew with ice water, and placed the superfluous piece of ice on the platform of the caboose. There being some evidence to justify the inference that it was as much his duty under the circumstances to remove the ice from the caboose platform as it was to supply the crew with ice water, we fail to see that the mere act of giving it to his friend, instead of allowing it to waste by the roadway, should be taken as altering his relations with the railroad company as agent.

The case should have gone to the jury, for there was some evidence from which they might have reasonably inferred that the

brakeman, Truett, was, at the time appellant received his injuries, acting within the scope of his authority. Moreover, it was their province to determine from the evidence whether or not, in moving the ice on the platform with his feet, whereby it was caused to fall to the street and strike appellant, instead of taking it in his hands and throwing it to the ground, before or after the car passed the street, the brakeman was guilty of negligence; and there was also some evidence tending to prove such negligence on his part. We do not think the cases of *Smith v. L. & N. R. R. Co.*, 95 Ky. 15, 23 S.W. 652, 22 L. R. A. 72, and *Sullivan v. L. & N. R. R. Co.*, 115 Ky. 447, 74 S. W. 171, 103 Am. St. Rep. 330, are in conflict with the views expressed in this opinion. These cases merely hold, as we here concede, that the master is not liable for the negligent or wrongful act of the servant when the latter steps aside from his employment and assumes to act and does act solely on his own account in a matter with which the master has no connection. But we do not think this principle applicable to the facts of the case at bar; for, according to the brakeman's own testimony that it was his duty to look after the train and see that it was kept in order, his acts in providing for the comfort of the train crew, placing the surplus ice on the car platform to prevent its melting within, and in removing it as an obstruction from the platform, all appertained to his employment, and were within the apparent scope thereof. This view of the matter constrains us to hold that the peremptory instruction should not have been given.

It is contended by counsel for appellees that the judgment complained of is not one from which an appeal will lie, as it is only a judgment for costs. It appears from the record that, instead of entering judgment upon the verdict of the jury, containing the recital that by reason thereof the petition was dismissed and appellees allowed costs, the judgment entered was only for appellees' costs. However, by separate orders the giving of the peremptory instruction and return of the verdict in favor of each appellee are shown, and by yet another order it is also shown that appellants' motion for a new trial was overruled, and an appeal prayed and granted. It is true that an appeal will not lie from a mere judgment for costs; but the various orders and judgments referred to, when considered together, show that this case was finally disposed of. "A final order either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such a manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition." *M. & L. Ry. Co. v. Punnett*, 15 B. Mon. 48. "No technical form is required to constitute an appealable judgment or decree. Its effect determines its appealability; and, if it con-

cludes the litigation in the trial court, it is sufficient." *Ency. Pld. & Prac.* vol. 2, p. 61.

We think the contention of appellees that an appeal does not lie in this case is fully answered by the authorities supra. If the judgment in favor of appellees for costs is not a final order, that and the subsequent order of the lower court overruling the motion of appellants for a new trial, and denying them further relief, should together be treated as such. The motion to dismiss the appeal is, in our opinion, without merit.

Judgment reversed, and cause remanded for a new trial and further necessary proceedings consistent with the opinion.

THRELKELD v. BOND et al.

(Court of Appeals of Kentucky. April 24, 1903.)

1. WITNESSES—IMPEACHING OWN WITNESS.

Where a witness does not testify to the facts which the party calling him expected him to prove, it is not competent to prove that he had stated out of court the facts to which the party calling him expected him to testify.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1094, 1214.]

2. WILLS—TESTAMENTARY CAPACITY—EVIDENCE.

Testamentary capacity depends upon the condition of the testator's mind at the time the will is made, and evidence of the condition of his mind at a previous time is only to be considered in determining the condition when the will was made.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 49, 138.]

Appeal from Circuit Court, Scott County. "Not to be officially reported."

Proceeding by Mrs. Francis Bond and others to probate the will of Elijah Threlkeld, deceased, in which Moses W. Threlkeld appeared as contestant, and appealed to the circuit court from an order admitting the will to probate. From a judgment in favor of proponents, contestant appeals. Affirmed.

Montgomery & Lee, for appellant. Victor F. Bradley & Son, for appellees.

HOBSON, C. J. Elijah Threlkeld died a resident of Scott county on February 21, 1903, the owner of an estate worth about \$10,000. Shortly after his death a paper purporting to be his will was probated in the Scott county court. On April 8, 1903, appellants took an appeal to the Scott circuit court from the order of the county court probating the will. The case coming on for trial in the circuit court at the October term, 1904, the court, at the conclusion of the evidence for the contestant, peremptorily instructed the jury to find the paper to be the will of Elijah Threlkeld. Judgment having been entered upon the verdict, the contestants appeal.

The two attesting witnesses testify, in substance, that the testator signed the paper in their presence and that they signed it in his presence; that he signed it as his last

will and was at the time rational. They also stated that the will was made between 10 and 11 o'clock in the morning, and that the testator died that evening; that he had pneumonia. One of them states that Squire Triplett wrote the will; that after he wrote it he read it to the testator, but he did not sign it then, and he could not say how long it was after that before he did sign it. The other witness says that Squire Triplett took the notes down and went out and wrote it, and came back and read the will to the testator, and he said it was all right and signed it. They both say he was sitting up in bed when he signed it, but one of them supported him. The contestants introduced Pat Gayle, who testified, on being shown the paper offered as the will that it was in his handwriting and that he wrote it at Stamping Ground about two miles from the testator's residence. It is not material who wrote the paper, if the testator executed it in the manner provided by the statute. The testimony of Gayle is not inconsistent with the testimony of the attesting witnesses, for it is pretty clear from their testimony that Triplett only made notes of what the testator wanted in his presence, and then went out for a while, returning with the will, when it was read to the testator, and signed by him and by them.

The contestants introduced Robert Jones, and undertook to prove certain facts by him, which he failed to testify to. They then introduced several witnesses to show that Jones had stated out of court the facts he had failed to prove in court. The court properly refused to allow this evidence. Where a party introduces a witness who simply fails to prove a fact which he wishes to establish, it is not competent to prove that the witness has stated out of court that such is the fact.

Appellants also introduced Ben Emerson, who testified that he sat up with the testator on the second night before his death; that when he would rouse him up that night he was rational, but you would have to rouse him, and that in his judgment he was not in a condition that night to make a will. This witness did not see the testator on the morning the will was made, or for something like 30 hours before it was made. Two of the other witnesses introduced by the contestants on other points who saw the testator at the time the will was made, testified to his capacity. There was no evidence of undue influence, and there was no evidence that the testator at the time the will was made was in the same condition as when the witness Emerson saw him. Testamentary capacity depends upon the condition of the testator's mind at the time the will was made, and while the condition of his mind at a previous time, or at a subsequent time, may be shown, it is only a circumstance to be weighed with other facts in determining what the condition of his mind was at the time the

will was made. The testator was a man of good intelligence naturally. None of the physicians who attended him were called by the contestants, and none of the persons who nursed him, or cared for him subsequent to the night that Emerson stayed there, were called, although several appear to have been present. The law does not presume incapacity, and, in view of all the proof, to allow this case to go to the jury would be to submit it to them without evidence showing incapacity or undue influence.

Judgment affirmed.

CARPENTER et al. v. LAMBERT, Marshal, et al.

(Court of Appeals of Kentucky. April 24, 1906.)

1. MUNICIPAL CORPORATIONS—TAXATION—PENALTIES FOR NONPAYMENT OF TAXES.

Ky. St. 1903, § 3677, in relation to towns of the sixth class, authorizes the board of trustees to provide by ordinance a system for the assessment and collection of town taxes, and provides that all taxes, together with "any percentage imposed for delinquency," shall constitute a lien on property, and that any property sold for taxes shall be subject to redemption as provided by law for the redemption of property sold for state and county taxes. *Held*, that an ordinance imposing a penalty of 15 per cent. for delinquency was authorized, as the trustees were not restricted to the penalty of 6 per cent. provided for delinquent state taxes.

2. TAXATION—REMEDY FOR WRONGFUL ENFORCEMENT—INJUNCTION—PETITION—SUFFICIENCY.

In a suit by a tax payer to restrain the collection of a tax, it was incumbent on him to set out in his petition the facts entitling him to relief, and it was proper to ignore statements of an amended reply in so far as it referred to matters not complained of in the petition.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Suit by O. J. Carpenter and others against William Lambert, marshal of Central Covington, and others, to enjoin the collection of a penalty in addition to certain taxes. From a judgment dismissing the action, complainants appeal. Affirmed.

A. G. Simrall and R. S. Holmes, for appellants. Orlando P. Schmidt, for appellees.

HOBSON, C. J. The town of Central Covington levied certain taxes, the collection of which was enjoined by appellants. The circuit court, on final hearing, discharged the injunction, and on appeal to this court the judgment of the circuit court was affirmed. See *Carpenter v. Town of Central Covington*, 81 S. W. 919, 26 Ky. Law Rep. 430. After that litigation was ended, and the marshal was proceeding to collect the taxes, appellants brought this action to enjoin him from collecting a penalty of 15 per cent. in addition to the taxes. The circuit court, on final hearing, dismissed the action, and the taxpayers appeal. Central

Covington is a town of the sixth class. Section 3677, Ky. St. 1903, which is a part of the Act for the government of towns of the sixth class, is as follows: "The board of trustees shall have power, and it shall be their duty, to provide by ordinance a system for the assessment, levy, and collection of all town taxes, not inconsistent with the provisions of this chapter, which system shall conform, as nearly as the circumstances of the case may permit, to the provisions of the laws of this state in reference to the assessment, levy and collection of state and county taxes. All taxes assessed, together with any percentage imposed for delinquency, and the cost for collection, shall constitute liens on the property assessed, from and after the fifteenth day of September in each year, which liens may be enforced by a summary sale of such property, and the execution and delivery of all necessary certificates and deeds therefor, under such regulations as may be prescribed by ordinance or in the manner provided for the collection of state taxes, or by action in any court of competent jurisdiction to foreclose such liens: Provided, That any property sold for such taxes shall be subject to redemption within the time and in the manner provided by law for the redemption of property sold for state or county taxes. All deeds made upon any sale of property for taxes, or special assessments under the provisions of this chapter, shall have the same force and effect as is or may hereafter be provided by law for deeds of property sold for nonpayment of state or county taxes."

Pursuant to the authority conferred by the statute, the town adopted a general ordinance regulating the levy and collection of town taxes, section 21 of which is as follows: "The property tax herein mentioned shall be payable to the treasurer, at his office, from the first to the fifteenth day of June, both inclusive, in each year, and it is hereby made the duty of the treasurer to be present at his office on said days during ordinary business hours, to receive and receipt for such taxes. All taxes remaining unpaid on the fifteenth day of June in each year shall be marked 'delinquent' by the treasurer, and a penalty of fifteen per cent. shall be added to each delinquent individual list by the clerk and placed upon each of said bills." The taxes referred to were not paid on the 15th day of June, in the year in which they were due, and a penalty of 15 per cent. was added. This is the matter in controversy.

The ordinance is within the power conferred upon the trustees by the statute. They are not restricted to the penalty of 6 per cent. provided for state taxes which are delinquent. The statute expressly recognizes the trustees' power to levy a different penalty in the provision that all taxes assessed, together with any percentage imposed for delinquency, and the cost of collection, shall constitute liens upon the property

assessed. It will be observed that there is a proviso in the statute that property sold for such taxes shall be subject to redemption within the time, and in the manner provided by law for the redemption of property sold for state and county taxes, but there is nothing in the statute restricting the power of the trustees to the penalty described by law for delinquent state taxes. There is nothing in the record to show that the taxes were not duly levied, or that there was any infirmity in the ordinance levying the taxes. The ordinance referred to is a general ordinance. The annual levy ordinances are not assailed in the pleadings, or contained in the record. This is a suit by the tax payers to restrain the collection of taxes, and it was incumbent upon the plaintiffs to set out in their petition the facts entitling them to relief. The statements of the amended reply were properly ignored by the court in so far as the amended reply referred to matters not complained of in the petition. The plaintiffs, failing to state a cause of action in their petition, the demurrer thereto was properly sustained. It is unnecessary for us, therefore, to consider whether the relief sought in this action is barred by the proceedings in the former suit.

Judgment affirmed.

HEINDIRK v. LOUISVILLE ELEVATOR CO.

(Court of Appeals of Kentucky. April 24, 1906.)

NEGLIGENCE—DANGEROUS MACHINERY—LIABILITY OF MANUFACTURER.

A manufacturer, selling to an employer a machine not imminently dangerous to human life, is not liable for injuries to an employé operating the machine because of defects therein, where it is merely charged that the manufacturer knew, or could have known by the exercise of ordinary care, of the defects which rendered it dangerous.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 25, 27.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Ben Heindirk against the Louisville Elevator Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

Louis F. Steuerle, for appellant. Gibson, Marshall & Gibson, for appellee.

HOBSON, C. J. Appellant, Ben Heindirk, filed his petition in the circuit court to recover damages for personal injuries sustained by him. Appellee, the Louisville Elevator Company, filed a general demurrer to the petition, which was sustained by the circuit court, and, he failing to plead further, the action as to it was dismissed, and he appeals.

He alleged in his petition, in substance, that he was in the employment of the Howe Manufacturing Company; that in the course of his employment he was required to operate

a machine, consisting of a ball and socket joint, described as a large knob or ball of iron fitting or working in a socket of iron, and capable of revolving therein; that the machinery was extremely heavy, and was required to sustain in the operation of it great force and pressure; that it was manufactured by the Louisville Elevator Company, and sold by it to the Howe Manufacturing Company, which company furnished it to him to be used by him in the business of the Howe Manufacturing Company; that the machinery was manufactured by the Louisville Elevator Company in such a negligent and defective manner as to be inadequate for the purposes for which it was made by the Louisville Elevator Company; that in casting or molding the ball joint the elevator company left in it defects, the result of negligence in casting or molding it; that these defects in the machinery were known to the elevator company, or could have been known by the exercise of ordinary care; that the elevator company knew the use to which the machinery was to be put; that he did not know of the dangerous condition of the machinery, and could not have known of it by the exercise of ordinary care; that he did not have any opportunity or facility of knowing its dangerous condition, but that such opportunity and facility were possessed by the defendant; that while he was using the machinery for the purposes for which it had been manufactured and supplied to him, and while exercising reasonable care, the machine, by reason of its defective and dangerous condition, exploded, breaking his ankle and seriously and permanently injuring him. It is not charged that the elevator company knew of the defects in the machinery. The charge is that it knew, or could have known by the exercise of ordinary care and diligence, of the defects in the machinery, and that these defects rendered it dangerous and insufficient for the purposes for which it was intended.

As the pleading must be taken against the pleader, this is only an allegation that the defendant by ordinary care might have known the facts. In *King v. Creekmore*, 77 S. W. 689, 25 Ky. Law Rep. 1292, Creekmore owned a sawmill which he leased to Warren, and while Warren was operating it the boiler exploded, seriously injuring King, who was an employé of Warren. It was charged that the boiler was defective, and was known to be so by the defendant, or that he by ordinary care might have known of its dangerous and defective condition. It was held that Creekmore was not liable. This case was followed in *Simons v. Gregory*, 85 S. W. 751, 27 Ky. Law Rep. 500, where a passenger in an elevator sought to hold the maker of the elevator liable, when he was injured by the fall of the elevator after it had been run for months, and broke down by reason of its being operated by an inexperienced and unfit person. A number of authorities sustaining

the rule laid down are collected in these opinions. Summing up the authorities on this question in a note to *Woodward v. Miller*, 100 Am. St. Rep. 200, Judge Freeman says: "The manufacturer or vendor of a tool, machine, or appliance, which is not in its nature intrinsically dangerous, is not ordinarily liable for defects therein to one not in privity with him. This has been held to be the law in respect to a land roller, * * * a drop press, * * * a threshing machine cylinder, * * * a balance wheel, * * * a steam boiler, * * * a hoisting apparatus, * * * a gasoline pear burner, * * * a passenger elevator, * * * or a freight elevator."

There are some well recognized exceptions to the rule. One is where the thing is imminently dangerous to human life. Thus, where a druggist sold and labeled as "extract of dandelion," which is harmless, a jar of extract of belladonna, which is a deadly poison, he was held liable to a third person injured by it. *Thomas v. Winchester*, 6 N. Y. 97, 57 Am. Dec. 455. The same principle has been applied to a loaded gun, or a scaffold 90 feet high built for a painter to use in painting the steeple of a church (*Dixon v. Bell*, 5 Maule & S., 198; *Bishop v. Weber* [Mass.] 1 N. E. 154, 52 Am. Rep. 715; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Meers v. McDowell*, 110 Ky. 928, 62 S. W. 1013, 53 L. R. A. 789, 96 Am. St. Rep. 475), or where naphtha was sold for oil (*Wellington v. Downer Kerosene Oil Company*, 104 Mass. 64), or where poisonous ice cream was sold by a manufacturer as food at a ball (*Bishop v. Weber* [Mass.] 1 N. E. 154, 52 Am. Rep. 715). See, also, *McCaffrey v. Mossberg, etc., Manufacturing Company* (R. I.) 50 Atl. 651, 55 L. R. A. 822, 91 Am. St. Rep. 637; *Huset v. Case Threshing Machine Company*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 308, and cases cited. Another exception is made where the person whose negligence causes the injury invites or induces the plaintiff to use the defective appliance (*Coughtry v. Globe Woolen Company* [N. Y.] 15 Am. Rep. 387), or where a manufacturer makes fraudulent representations, or knows the defects or fraudulently paints them over, or so conceals them that they cannot be discovered (*Schubert v. Clark* [Minn.] 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559; *Woodward v. Miller* [Ga.] 46 S. E. 847, 64 L. R. A. 932, 100 Am. St. Rep. 188, and cases cited in note). The case before us does not fall within any of the exceptions laid down to the general rule, which seems to be supported by substantially the entire current of authority. It is not shown that the dangerous condition of the machinery was known to the elevator company, and it is not alleged that the machinery in its condition was imminently dangerous to human life, and there is nothing alleged to take the case out of the general rule.

Judgment affirmed.

SMITH v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 27, 1906.)

1. HOMICIDE—EVIDENCE—ADMISSIBILITY.

In a prosecution for homicide, where there was evidence of a difficulty between accused and deceased, and that children of the deceased had placed rocks in a road used by the accused, evidence that just previous to the homicide accused had threatened to shoot the children if they did not remove the rocks, and that he retained the pistol in his hand from the time he ordered them to remove the rocks until the fatal shot was fired, was admissible.

2. SAME—DECREE—INSTRUCTIONS.

In a prosecution for homicide, an instruction authorizing a conviction of voluntary manslaughter if the killing was "in sudden heat of passion and in sudden affray" was erroneous, since the homicide would have been reduced to manslaughter if it was committed either in sudden heat of passion or in sudden affray.

Appeal from Circuit Court, Perry County.

"Not to be officially reported."

Eli Smith was convicted of murder, and appeals. Reversed and remanded.

Hall & Baker, Morgan & Wooten, and L. D. Lewis, for appellant. N. B. Hays and Chas. H. Morris, for the Commonwealth.

PAYNTER, J. The appellant, Eli Smith, was indicted, tried, and convicted for the murder of Powell Logan. The appellant and deceased married sisters and lived in the same neighborhood, on Little Leatherwood creek. Their wives were daughters of a man by the name of Holcomb, who seemed to have owned considerable land. He sold appellant some timber, and gave him the right to haul it over a road which was also used by deceased for hauling corn and fodder from a nearby field, which he cultivated. As a result of the selling of the timber to Smith, and the hauling over the road, a bad feeling sprang up between the parties, and for a time it seemed to be principally upon the part of the deceased. The deceased had some small children. The oldest of them was about 16 years of age. These children, evidently at the instance of the deceased, placed a great many rocks in the road at different times. Some of the rocks were small and some quite large, and the removal of them was necessary for Smith to enjoy the use of the road over which to haul the timber. They continued to place rocks in the road until the day of the homicide. Smith was engaged at work in getting out the timber on the creek above where the deceased lived. He had to travel the road to reach his home for dinner, and in doing so found more rocks had been thrown in the road. This seems to have incensed him very much. When he left home after dinner he carried with him a pistol. He claims that he carried it because he had been told that the deceased had threatened his life, and that he heard him during the morning make a statement to his children that led him to believe that deceased might assassinate him. The deceased seems to have carried a gun with him wherever he

went. Smith claims that he went over to the road from where he was getting out the logs with the view of putting some sticks of timber across it to enable him to haul logs the next day, when he discovered Logan's children again throwing rocks into the road, and he gave them to understand that if they would remove the rocks he would not have them indicted. The children testified that they were not then putting rocks in the road, but were going to their field, when Smith appeared on the side of the road and told them that unless they removed the rocks from the road he would shoot their hearts out, and they proceeded to remove the rocks from the road while Smith remained there with the pistol in his hand. After they had removed the rocks from the road, the oldest boy, John, started rapidly towards the Logan house for his father. Smith remained there and talked with the other children, when in about five minutes John and his father were seen coming up the road and the father was carrying a gun. The testimony of Smith and the deceased's little girl was to the effect that Smith told her to go and tell her father not to come up there with a gun, and before she reached her father the appellant hollered to him to halt. From this point there is a slight conflict in the testimony of the appellant and the children of deceased. The children testified that almost immediately after the appellant gave the command to halt, he fired his pistol at deceased and missed him, and immediately the deceased fired at Smith with his gun (appellant says the bullet struck the rim of his hat). Thereupon Smith shot deceased, from the effects of which he soon thereafter died. The appellant testified that he commanded deceased to halt, but he did not do so, but advanced a few steps and placed his gun in a position which indicated that he was going to shoot him, but before he could do so he (appellant) fired the first shot at him. As to the other shots, his testimony is the same as that of the children.

The appellant seeks a reversal because of the admission of the evidence of the children that he had threatened to shoot them if they did not remove the rocks, and that he retained the pistol in his hand from the time he approached them and ordered the rocks removed from the road until the fatal shot was fired. It is urged that this evidence is incompetent because it tended to impeach the appellant's character for peace, etc. We are of the opinion that it was proper for the court to admit this evidence. It was part of the difficulty, or transaction, which culminated in the homicide. It tended to show malice and ill will towards the deceased and to show the purpose or motive which brought the appellant at the place in question. To have thus held the pistol in his hand might have authorized the jury to believe that he was remaining there with the intention of having a hostile meeting with the deceased.

Instruction No. 2 reads as follows: "Although the jury may believe from the evidence, beyond a reasonable doubt, that the defendant shot and killed the deceased, yet, if you believe from the evidence, beyond a reasonable doubt, that the defendant in the county of Perry, and before the finding of the indictment in this case, did unlawfully, willfully, feloniously, in sudden heat of passion, and in sudden affray, and not in his necessary, or apparent necessary, self-defense, shoot with a gun or pistol and killed Powell Logan, you should find the defendant guilty of voluntary manslaughter, and fix his punishment at confinement in the state Penitentiary for a term of not less than 2 years, nor more than 21 years, in your discretion." Under this instruction, before the jury could have found the defendant guilty of manslaughter, it was required to believe that the killing was done "in sudden heat of passion and in sudden affray." If the killing was done "in sudden heat of passion," it reduced the offense from murder to manslaughter. If it was done "in sudden affray," it would also have reduced the offense from murder to manslaughter. Under the instruction the jury was not authorized to find him guilty of manslaughter, unless he did the killing in sudden heat of passion and in sudden affray. The jury might have concluded from the evidence that the killing was in sudden affray, but they could not have found him guilty of manslaughter, unless they also believed that it was done in sudden heat of passion. There is evidence tending to show that the appellant had made threats against the deceased, and from the above testimony recited as to his conduct with the children the jury might have inferred that he had a predetermination to kill the deceased, and that he did so, in sudden heat of passion. The jury having reached this conclusion, it would not have found the appellant guilty of manslaughter, although it believed the homicide was the result of a sudden affray. The foregoing instruction was erroneous and prejudicial to the substantial rights of the appellant.

The judgment is reversed for proceedings consistent with this opinion.

MERRITT v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 24, 1906.)

INTOXICATING LIQUORS—UNLAWFUL SALES—SUFFICIENCY OF EVIDENCE.

Under Ky. St. 1903, § 2570, providing that no trick or pretense shall be allowed to evade the operation of the law against selling liquors without license, or in violation of any local option laws, evidence that defendant kept whisky for sale in a local option district, at his residence; that prosecuting witness went there to buy it, and announced his purpose, specifying the quantity of whisky desired; that defendant brought the whisky from his house, exhibited it to witness, and invited the latter

to go with him in his boat across the river, outside the local option district wherein defendant lived, to pay for the liquor; that, after crossing the river, witness received the whisky from defendant and paid the latter for it, whereupon they returned to defendant's house—showed a subterfuge within the section, justifying a conviction.

Appeal from Circuit Court, Clark County. "To be officially reported."

Henry Merritt was convicted of unlawfully selling intoxicating liquor, and appeals. Affirmed.

Pendleton, Bush & Bush, for appellant. N. B. Hays and C. H. Morris, for the Commonwealth.

SETTLE, J. The appellant, Henry Merritt, was indicted, tried, and convicted in the Clark circuit court for unlawfully selling by retail, spirituous liquor in magisterial district No. 5, in Clark county, a territory in which local option was then in force; his punishment being fixed at a fine of \$500. The lower court refused him a new trial and he insists that the judgment is erroneous and asks of this court its reversal upon the grounds: First, that the court erred in instructing the jury, and in refusing to peremptorily instruct them, to find appellant not guilty; second, that there was no evidence upon which to base the verdict of the jury.

The only witness introduced upon the trial was R. L. Epperson to whom appellant made the sale of whisky for which he was indicted, and this witness was introduced for the commonwealth. Epperson testified as follows: That he and appellant both live in Clark county, the latter in magisterial district No. 5; that he went to appellant's home at ice gathering time, one year prior to the finding of the indictment, and told appellant that he wanted to buy one-half pint of whisky from him; that appellant got the whisky from his house and took the witness in a boat across the river and then gave him the whisky, and witness paid him 20 cents for it; that he [witness] knew what the price of the whisky was before he went with appellant over the river, and upon his paying the latter the money and receiving of him the whisky, they immediately returned to magisterial district No. 5 in Clark county.

At the conclusion of the commonwealth's evidence, counsel for appellant asked of the court a peremptory instruction directing the jury to find him not guilty, which the court refused to give, but gave, over appellant's objection, instructions numbered 1 to 3 inclusive. No. 1 was predicated on the indictment and was written in the customary form. No. 3 was as to the reasonable doubt. But by instruction No. 2, to which appellant particularly objected, the jury were in substance told that if they believed from the evidence beyond a reasonable doubt that the witness Epperson, on the occasion testified to by him, applied to the defendant in magisterial

district No. 5, Clark county, for the purchase of a half a pint of whisky, and that the defendant in such district and in Clark county agreed to sell to the said witness the half pint of whisky, and that the whisky, if any, was sold to Epperson, was then in such district and county, and if they further believed from the evidence beyond a reasonable doubt that the act of the defendant and the witness in going across the river, and having the actual transfer of the whisky and the purchase money made in another county was a device or subterfuge resorted to by the defendant in order to evade the operation of, or defeat the policy of, the law against selling spirituous liquors in force in the fifth magisterial district in Clark county, then the sale in contemplation of law was made in such district and in Clark county.

It was admitted by appellant, upon the trial, that the local option law was in force in magisterial district No. 5, of Clark county at the time of the sale of the whisky in question, but it was then, and is now, contended by him that the sale of the whisky was wholly made and completed in another county than Clark, for which reason he was not guilty of the violation of the local option law in force in magisterial district No. 5 in Clark county. We are unwilling to accept this view of the matter. According to the evidence he kept for sale the whisky in the local option district of Clark county, at his residence; the purchaser went there to buy it and there announced the purpose of his visit, specifying the quantity of whisky he desired. He knew in advance the price to be paid for the whisky and carried the required amount with him. This of course was known to appellant, so he immediately brought forth from his house the half pint of whisky desired by the witness, exhibited it to him and invited him to go with him in his boat across the river to receive and pay for it. They went across the river and, after getting there, the witness received the whisky from appellant and paid him for it, following which they returned at once to appellant's house where they separated.

Upon receiving Epperson's avowal that he came to purchase whisky, and in letting him know he had it for sale, showing it to him and inviting him across the river to get it, appellant, even if no words were spoken, informed him as plainly as language could have done, that he could and would comply with his request upon the terms proposed, and by that means the minds of the parties came together as fully as if the whisky had been then and there delivered and paid for.

In other words, before leaving appellant's house to cross the river, the agreement as to the sale of the whisky was to all intents and purposes consummated. It only remained for appellant to deliver the whisky and receive of Epperson the money therefor, and these acts were therefore postponed until the river

was crossed. The only object in crossing the river for that purpose was to make it appear, in case the transaction should be discovered and an indictment follow, that the sale took place out of the local option district in which appellant lived. This was manifestly a pretense or subterfuge in the meaning of section 2570, Ky. St. 1903, which provides: "No trick, device, subterfuge, or pretense shall be allowed to evade the operation or defeat the policy of, the law against selling spirituous, vinous or malt liquors without license, or in violation or evasion of any local option laws prevailing in any county, town, city, precinct or municipality of this commonwealth."

If appellant, a resident of a local option district, is allowed to keep in such district whisky for sale, which is of itself a violation of another section of the local option statute, bargain in such district with purchasers for its sale, and be permitted to escape prosecution therefor by such a subterfuge as taking the purchaser across the river, that the whisky may be delivered and paid for in another county, merely to give the transaction the color and appearance of having occurred outside the local option district, he had as well be allowed to deliver as well as bargain for its sale within the local option district. The evil is the same in either case. As said by this court in *Commonwealth v. Adair*, 89 S. W. 1130, 28 Ky. Law Rep. 657: "The law is generally elastic enough to defeat tricks without enabling statutes for that purpose. Where an act is made up of a series of events, and is criminal in its result, all the occurrences leading up to the consequence need not be done, even within the jurisdiction where it is sought to be punished. It is enough if the result in that jurisdiction constitutes an offense. * * * Rules of law governing the construction of contracts have little place in prosecutions of penal actions, where a transaction in itself an offense is so shaped by the criminal actors as to make it conform in appearance to the letter of the law, but violates it in fact and spirit."

We are of opinion that the evidence authorized the giving of instruction No. 2, and that none of the rulings of the trial court complained of by appellant constituted error.

Wherefore the judgment is affirmed.

STINE v. GOODMAN et al.
(Court of Appeals of Kentucky. April 27, 1906.)

1. ESTOPPEL — INTEREST IN LAND — DISCLAIMER.

Where, in a proceeding for the sale of land of a deceased person, the husband of one of the heirs, who was entitled to a curtesy interest in the heir's share, was made a defendant and filed an answer disclaiming any interest in the land, he was estopped from thereafter setting up any claim as against the purchaser.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Estoppel, § 7.]

2. PARTITION—SALE OF PROPERTY—VESTED INTERESTS—LIFE ESTATES.

Testator devised his estate to his wife for life, remainder to their children, of whom there were then two. There were afterwards born four children, one of whom died, leaving a husband and one infant child. *Held*, that notwithstanding the child so dying was pretermitted, and therefore inherited direct from her father, as provided by Ky. St. 1903, § 4848, and on her death her share passed to her infant child, subject to her husband's right of curtesy, the joint property was subject to partition, sale under Civ. Code Prac. § 490, authorizing such sale if the estate be in possession and be incapable of division without impairing its value.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Proceeding for the sale of land of the estate of Alberto Baker, deceased, for partition among remaindermen. The property was sold to Amanda B. Stine, after which she filed exceptions to the sale and instituted a proceeding against Henry M. Goodman and others to be released from her purchase. From a decree denying such relief, she appeals. Affirmed.

John Stites and Wm. Marshall Bullitt, for appellant. C. B. Seymour, for appellees.

BARKER, J. This action involves the validity of a judicial sale had of real property situated in Louisville, Ky. The land in question was a part of the estate of Alberto Baker, who died testate, domiciled in Jefferson county, Ky. By his will he devised his estate to his wife for her life, with remainder to their children. At the time the will was made the testator had only two children; but afterwards there were four other children born to him, among whom was a daughter, Carrie Baker. At the testator's death he left a widow and six children surviving, and upon the death of the widow the remaindermen undertook to have the property sold at judicial sale, because of its indivisibility under the provisions of section 490, Civ. Code Prac. At the sale had the property was purchased by Amanda B. Stine, one of the daughters of the testator, who, deeming the sale invalid, filed exceptions to it, seeking to be released from her purchase. These were overruled by the court, of which judgment she is now complaining.

The appellant points out the following supposed defect in the title to the property pur-

chased by her: Her sister, Carrie Baker, was one of the children born after the date of the father's will. Subsequently she intermarried with Henry M. Goodman, by whom she had one child, the infant appellant, Carrie Irwin Goodman, and afterwards died; and it is urged that, inasmuch as Mrs. Goodman was born after the date of her father's will, she was a pretermitted child, and therefore inherited direct from her father under the provisions of section 4848, Ky. St. 1903; that this being true, her estate was one of possession, and not remainder, and her husband, Henry M. Goodman, at her death became a tenant by curtesy, and her infant child, Carrie Irwin Goodman, had a remainder interest subject to the life estate of her father, and therefore the estate as a whole was not one of possession, such as is authorized to be sold because of indivisibility by section 490, Civ. Code Prac. Henry M. Goodman was a defendant in the action, and filed an answer disclaiming any interest in the land. This clearly estops him from ever setting up any claim as against the purchaser. It results, therefore, that the land in question was owned by the infant, Carrie Irwin Goodman, and her five aunts as tenants in common, and the principle announced in *Dineen v. Hall*, 112 Ky. 273, 65 S. W. 445, 66 S. W. 392, has no application to the title under consideration.

But, even if this were not sound, from appellant's construction of the will of the testator, Alberto Baker, and the surrounding circumstances, it results that Henry M. Goodman was entitled to curtesy in one-sixth interest in the land as surviving husband of Carrie Goodman (née Baker), with remainder to his infant daughter, Carrie Irwin Goodman. Under the principle announced in *Dineen v. Hall*, supra, her objection would be well taken; but that case was expressly overruled by the case of *Atherton v. Warren*, etc., 85 S. W. 1100, 27 Ky. Law Rep. 632, in which the situation with reference to the title of the land there involved was precisely similar to the situation that would result in this case under appellant's construction of the will of Alberto Baker and section 4848 of the Kentucky Statutes of 1903 on the subject of pretermitted children, provided the tenant by curtesy had not disclaimed any interest, and therefore the merits of this appeal are even on this view concluded by the principle announced in the case last cited.

Judgment affirmed.

LEE et al. v. MISSOURI PAC. RY. CO.
(Supreme Court of Missouri, Division No. 1.
Feb. 28, 1906.)

1. STATUTES—LAWS OF ANOTHER STATE.

Where plaintiff relies for his cause of action on the law of another state, that law is to be pleaded and proven as a fact.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 380, 381, 390.]

2. PLEADING—PETITION—SUFFICIENCY—OBJECTION RAISED AT TRIAL.

Where an objection to a petition is made for the first time after trial has begun, it should be overruled, if the petition is susceptible of a construction that will constitute a cause of action.

3. DEATH—ACTION—PLEADING—PETITION—SUFFICIENCY.

In an action for negligence causing the death of a citizen of Kansas, in which plaintiff relied for recovery upon the statute of Kansas authorizing the widow of a person killed by the negligence of another to maintain an action as deceased might have done if the negligence had not resulted in death, the petition did not directly allege that the facts stated therein would have given rise to a cause of action in favor of plaintiff under the laws of Kansas, but did set out facts sufficient to constitute a cause of action under the laws of Missouri. *Held* that, under Rev. St. 1899, § 629, requiring pleadings to be construed liberally, etc., the petition was sufficient as against an objection made for the first time after trial had begun.

4. PLEADING—DEFECTIVE PETITION—AIDED BY ANSWER.

Where an action by a citizen of Kansas for negligence causing the death of a person also a citizen of that state, the petition contained no direct allegation that the facts stated would constitute a cause of action under the laws of Kansas, but the defendant joined issue upon allegations that the death was caused by defendant's negligence and affirmatively alleged that the facts stated constituted no cause of action under the laws of Kansas, which allegations were denied by plaintiff, the petition, if defective, was aided by the answer.

5. DEATH—CAUSE OF ACTION ARISING IN FOREIGN STATE.

In an action for death resulting from a negligent injury inflicted in the state of Kansas, plaintiff must rely upon the statute of that state both for the law governing the merits of the case, and for his legal capacity to sue.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 12.]

6. SAME—ACTION BY WIDOW—RIGHT TO SUE IN THIS STATE.

Rev. St. 1899, § 548, declares that when a cause of action accrues under the laws of another state, and the person entitled to the benefit of it is not authorized by the law of the foreign state to prosecute the action, the suit may be prosecuted in this state by a person to be appointed by the court here for that purpose. Gen. St. Kan. 1901, pp. 1002, 1003, provides that if a person killed by the negligence of another, is a resident of the state and no personal representative has been appointed, an action may be maintained by the widow. *Held*, that the widow of a resident of Kansas, killed in that state by the alleged negligence of another, may sue in this state for the negligent injury, and the fact that in such suit she was unnecessarily appointed trustee for her children, did not either take away or increase her right of action.

7. COURTS—RULES OF DECISION.

While, in an action for death caused by a negligent injury inflicted in another state,

the court must yield to the decisions of the highest court of that state as to the law of that state, it is at liberty to differ from the judgment of the foreign court as to the application of the law to the facts.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 322, 323.]

8. MASTER AND SERVANT—PERSONAL INJURIES—QUESTIONS FOR JURY—ASSUMPTION OF RISK.

In an action for the death of a switchman, alleged to have been caused by negligent failure of the railway company to block its tracks in a switchyard, evidence held sufficient under the laws of Kansas to require submission to the jury of the question whether deceased was aware of the danger arising from the absence of blocks.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1068-1088.]

9. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a switchman, alleged to have been caused by negligent failure of railway company to block its tracks in a switchyard, evidence held sufficient under the laws of Kansas to require submission to the jury of the question whether deceased was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

10. SAME—NEGLIGENCE OF MASTER.

In an action for the death of a switchman, alleged to have been caused by negligent failure of railway company to block its tracks in a switchyard, evidence held sufficient under the laws of Kansas to require submission to the jury of the question whether defendant was negligent.

11. SAME—EVIDENCE OF NEGLIGENCE—CUSTOMARY SAFEGUARDS.

In an action against a railway company for the death of a switchman, alleged to have been caused by negligence of defendant in failing to block its rails in a switchyard, evidence of general custom in well equipped yards to have tracks blocked, was admissible, but evidence that one or two other companies blocked their tracks, was not.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 925.]

12. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action against a railway company for the death of a servant alleged to have been killed because of defendant's negligent failure to block its tracks in a switchyard, in which it was undisputed that defendant had at one time blocked its tracks, the erroneous admission of evidence that certain other railways having switchyards in the town where the injury occurred had their tracks blocked, was harmless.

13. MASTER AND SERVANT—PERSONAL INJURIES—INSTRUCTIONS.

In an action for negligence causing death, an instruction that if the jury found certain facts plaintiff was entitled to recover, unless they also found that deceased had assumed the risk or was guilty of contributory negligence as defined in other instructions, was not erroneous because of the absence of other instructions specifically defining either assumption of risk or contributory negligence, where all the facts upon which defendant based its claim that deceased had assumed the risk or was guilty of contributory negligence, were set out in other instructions which stated that if the jury found that such facts existed, plaintiff could not recover.

14. APPEAL—HARMLESS ERROR—INSTRUCTIONS—MEASURE OF DAMAGES.

In an action for negligence causing death, in which damages were limited by statute to

\$10,000, an erroneous instruction impliedly authorizing the jury to fix the damages at such sum, not exceeding \$10,000, as deceased might probably have earned during his expectancy of life, was not cause for reversal, where the probable earnings would have been about \$35,000 and the jury awarded only \$8,000.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4228.]

15. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS—ASSUMPTION OF RISK.

In an action for negligence alleged to have caused the death of a servant, requested instructions that if deceased had means and opportunities of knowing of the danger which caused his death plaintiff could not recover, were properly refused because disregarding the question as to whether or not the danger was such that the servant might reasonably have hoped to avoid it by the use of ordinary care.

Marshall, Burgess, and Fox, JJ., dissenting.

Appeal from Circuit Court, Jackson County; Edward P. Gates, Judge.

Action by Susan A. Lee and others against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Elijah Robinson, for appellant. Frank P. Walsh, Rozzelle, Vineyard & Thatcher, and John G. Park, for respondents.

PER CURIAM. The following opinion by VALLIANT, J., in Division No. 1, is adopted as the opinion of the court in banc. BRACE, C. J., and GANTT, VALLIANT, and LAMM, JJ., concur. MARSHALL, J., dissents. BURGESS and FOX, JJ., dissent on the ground that in their opinion the deceased was guilty of contributory negligence.

VALLIANT, J. Plaintiff Susan A. Lee is the widow and the other plaintiffs are the minor children of Harvey A. Lee, deceased, who met his death in defendant's yards at Atchison, Kan., where he was in the service of defendant as a switchman. At the time of the accident deceased was one of a crew engaged in switching cars, he was walking or running between cars in a moving train in the act of drawing the coupling pin; his foot was caught and fastened in an unblocked space between a guard rail and a track rail, he was thrown down and run over and killed. The suit is founded on a statute of Kansas which is set out in the petition, the terms of which will be hereinafter stated. The negligence charged in the petition is that the blocking between the main rail and the guard rail had been allowed to become rotten, defective, worn out, and had disappeared; that defendant had neglected to block the interval and repair the defect, so that there was in fact no protection against entrapping the foot between the rails; the guard rail was defective and unsafe in that the ends thereof had not sufficient flare, the entrance to the same was short and narrow and calculated to seize and hold the foot of one walking over it; that defendant knew, or by the exercise of ordinary care would have known, the condition, yet failed to repair or remedy

the defect and deceased was ignorant of it. The answer admits the relationship of the parties, the occurrence of the accident, but denies the allegations of negligence, pleads contributory negligence, also that the deceased was an experienced switchman, knew the condition of the tracks, yards, etc., and that under the laws of Kansas he had no right to recover, and none under the laws of Missouri. Reply general denial.

The suit was originally instituted by Susan A. Lee as widow and the minor children by John McKinney their next friend, appointed by the court for that purpose, but after the institution of the suit the next friend died, and thereupon the court, on the petition of Susan A. Lee, appointed her trustee for the children to prosecute the suit, and an amended petition was filed in the name of Susan as widow, and also as trustee for the children as plaintiffs. The record shows that the deceased was a resident of Kansas and no personal representative has been appointed to administer on his estate in that state. At the opening of the trial defendant objected to any evidence on the part of the plaintiffs, on the ground that the petition does not state facts sufficient to constitute a cause of action, for the reason that it is not alleged in the petition that the plaintiff's husband, if death had not ensued, would have been entitled to maintain an action against defendant under the laws of Kansas, and for the further reason that there is a defect of parties plaintiff. The objection was overruled, and exception taken.

The evidence on the part of the plaintiff as to the accident tends to show as follows: On April 28, 1899, about 6:45 in the evening, Harvey A. Lee was at work with a switching crew in defendant's yard at Atchison, Kan.; his duty was to draw the coupling pin, connecting cars in the train; the train was moving at a rate variously stated by the witnesses as from four to six or eight miles an hour, he was walking or running (according as the speed of the train may have been) between the cars, one hand on the head of the coupling pin to draw it as soon as it was loosened, the other holding the handhold of the car; the pin was held fast because of a curve in the track, and he walked or ran in that way for a distance variously estimated by the witnesses at from 50 to 150 feet, when one of his feet got caught in the space between the rails, the cars coming against him threw him down, broke his hold on the handhold, and he was run over and killed. The intervals between the guard rails and the track rails had at one time, as early as 1893 or 1894, all been blocked, but the blocks had, to a great extent, been worn out or had rotted and disappeared, so that at this time about one-third of the spaces were blocked, and two-thirds were not blocked. There were at that time fewer spaces blocked than there had been the year before. There were some blocks, at the time of the accident, in the

immediate vicinity to the space in which this man's foot was caught, but none at that time in that space, but it had once been blocked, how long it had been unblocked was not shown, but one witness testified that he had observed it in that condition three weeks before the accident. Plaintiff was permitted, over the objection of defendant, to prove that the ground rails in the yards of the Santa Fé and of the Burlington at Atchison were blocked. Plaintiff introduced in evidence the following rule of the defendant company: "Rule 23. Great care must be used in coupling and uncoupling cars. Do not go between the cars unless they are moving at a slow and safe speed, or attempt to make any coupling unless the draw-bar and other coupling appliances are known to be in good order." On this point plaintiff's testimony tended to show that the rate of speed at which these cars were moving at the time was by railroad men considered slow, and that it was usual and customary for men to go between the cars moving in that way to uncouple them; that the foreman of the gang gave the signals to the engineer directing the moving of the train in switching. There were 50 or 60 guard rails in this yard. The foreman of the switch crew and one of the switchmen were examined as to their knowledge of the condition of the yard in respect of the blocking and they showed that they had not very distinct ideas of it—they had not paid very close attention to it. On cross-examination by defendant the foreman of the crew was asked: "Q. Now, if a man observes at all, it is easy enough for him to see the condition of the guard rails in a yard like that at Atchison, isn't it? A. I have been there five years and I never observed them. Q. I say if he observes at all? A. Yes, if he wants to look at it. Q. It is perfectly apparent, he can tell if he looks? A. Yes, he can if he looks at them, yes, sir. Q. If a man were undertaking to post himself, he could, within a few days after beginning to work, know whether the guard rails were blocked or not, couldn't he? A. Why, yes; if he would look at them and over-look his work in doing it, he might. Q. Now switching at the best is pretty dangerous work, isn't it? A. Very dangerous." The deceased was an intelligent experienced switchman. He had been working in this yard about nine months, but for the space of 21 days just prior to the accident he had been detained at home on account of a sick child and had been at work only three or four days when the accident occurred. The statute of Kansas, Gen. St. 1897, c. 95, art. 18, under which the suit is brought is as follows:

"Sec. 418. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years.

The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"Sec. 419. In all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 422 of the Civil Code of 1868 (the next preceding section), is or has been at the time of his death in any other state or territory, or when being a resident of this state no personal representative is or has been appointed, the action provided in said section may be brought by the widow or when there is no widow by the next of kin of such deceased."

At the close of the plaintiff's evidence the defendant asked an instruction to the effect that plaintiffs were not entitled to recover, which instruction the court refused and defendant excepted. Defendant offered no evidence. The cause was submitted to the jury under instructions which will be referred to later. There was a verdict for plaintiff for \$8,000 damages and judgment accordingly. The defendant has appealed.

1. The first assignment of error is the overruling of defendants' objection to any evidence in support of the petition, because it does not allege that the deceased, if death had not ensued, could have maintained an action under the laws of Kansas. The petition does not state in totidem verbis that if deceased had survived the injury he could have maintained a suit in Kansas, but it does state facts which would under the law of this state have entitled him, if he had survived, to recover damages of defendant for the injury and then it sets out the statute law of Kansas which gives the right of action for the benefit of the widow and children in the event of his death. When one relies on the law of a foreign country or of a sister state for his right of action he is required to state in his pleading what the law of the foreign jurisdiction is, such a law is to be pleaded and proven as a fact. By the strict rules of pleading therefore the plaintiffs in their petition should have stated the law of Kansas applicable to the facts to show that the deceased, if he had lived, could, under that law, have maintained an action for damages, and if timely objection to the petition had been made by demurrer or otherwise it would doubtless have been sustained with the result that the plaintiffs would have leave to amend. But this court has often said that where an objection to the petition is made for the first time when the trial has begun it will be overruled if the petition is susceptible of a construction that will constitute a cause of action.

Under the facts stated in the petition the deceased, if death had not ensued, could, under the laws of this state if the injury had occurred here have maintained an action for damages against the defendant, and in the absence of any showing to the contrary we

will presume that the law of Kansas is like the law of Missouri on that point and will construe the petition liberally. Section 629, Rev. St. 1899; *Flato v. Mulhall*, 72 Mo. 522; *Burdick v. Mo. Pacific Ry.*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528. The defendant, by its answer, accepted the issue of fact tendered in the petition in the form as tendered, that is, without express reference to the laws of Kansas, the petition stated that the accident was caused by the negligence of defendant, and the answer expressly denied that fact. By so joining issue the defendant united with the plaintiff in inviting judgment on the facts as pleaded. And in addition to that the defendant in a further paragraph of its answer itself tendered the issue of the law of Kansas which the plaintiffs accepted by a general denial. If therefore, as a matter of strict pleading, the petition was defective it was aided by the answer. The court committed no error in overruling the objection to the introduction of any evidence in support of the petition.

2. The next assignment concerns the legal capacity of the plaintiff to maintain a suit under the Kansas statute. The injury complained of occurred in Kansas and the right of action declared on is given by the statute of that state, the plaintiffs must therefore stand on the Kansas statute both for the law governing the merits of the case and their legal capacity to sue. This is not a new question in this state. In *Vawter v. Railway*, 84 Mo. 679, 54 Am. Rep. 105, an employé of the railroad company was killed in Kansas through, as was alleged, the negligence of the servants of the company; his widow qualified as administratrix of his estate in the probate court of Schuyler county, Mo., and as administratrix sued to recover the damages for which the company was made liable by the Kansas statute. At that time the statute of Kansas conferred the right of action on the personal representatives alone of the deceased. *Comp. Laws Kan.* 1885, p. 656. It was held by this court that no one but the executor or administrator in Kansas could sue, that our statute expressly denied to an administrator in this state the right to maintain such a suit (sections 96 and 97, Rev. St. 1899) and that a foreign statute could not confer on an administrator in Missouri a right which the statute of his own state expressly withheld. *Oates v. Railway*, 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348, was a case of like nature, except that the suit was brought by the widow, it was held that she could not sue because the Kansas statute limited the right to sue to the personal representatives of the deceased and did not extend it to the widow.

Since those cases arose, however, the Kansas statute in 1889 was amended, possibly with a view to meet those very decisions or decisions elsewhere like them, and it now provides that if the person killed is a non-

resident of Kansas or, being a resident, if no personal representative has been appointed, "the action provided in section 422 may be brought by the widow, or when there is no widow, by the next of kin of such deceased." In section 422 it is expressly provided that: "The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed," etc. Thus if the deceased resided in Kansas his administrator there could sue, and if there was no administrator his widow could sue, but, whichever sued, the damages recovered were for the exclusive benefit of the widow and children if any. *Gen. St. of Kan.* 1901, p. 1002-1003. Our statute (section 548, Rev. St. 1899) declares that when such cause of action accrues under the laws of another state, and the person entitled to the benefit of it is not authorized by the law of the foreign state to prosecute the action the suit may be brought and prosecuted in this state by a person to be appointed by the court here for that purpose. In *McGinnis v. Mo. Car & Foundry Co.*, 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553, the cause of action accrued in Illinois where there is a statute similar in character to the Kansas statute, in which, however, the right of action is conferred on the personal representatives only of the deceased. Since the Illinois administrator could not maintain the action here, the widow who was entitled to the benefit of the action, caused McGinnis to be appointed in the circuit court in St. Louis for the purpose of bringing the suit, and the suit was brought in his name for her benefit. But this court held that it was beyond the power of our Legislature to confer the power to sue on a cause of action created by the Illinois statute on a person on whom the Illinois statute had not conferred it. The court per Marshall, J., said, loc. cit. 232 of 174 Mo. and page 588 of 73 S. W. (97 Am. St. Rep. 553): "In such case the statute creating the liability must confer upon a specified person the right to enforce the liability. Unless it does so no one can enforce it, because no one has a right under the general common law to do so. When, therefore, a statute creates a liability and prescribes the person who shall have the right to enforce it; the two parts of the statute are component parts of the whole and it must be done exactly in the manner, and by the persons or agencies, that the statute prescribes. * * * In short, the whole matter depends upon the Illinois statute. That statute confers a right of action upon the administrator and not upon the widow or next of kin. It is for their benefit, but they cannot maintain an action therefor. Our statute attempts to enforce the liability created by the Illinois statute, not through the person who alone is given the right under the Illinois law to enforce it, but through a person who would have no right to enforce the liability in that state." So our statute (section

548) was condemned as invalid. *Jones v. Railway*, 178 Mo. 523, 77 S. W. 890, 101 Am. St. Rep. 434, arose under the Kansas statute. The suit was brought by the widow in her own right and as next friend for her infant child. It was objected to the petition in that case that there was a misjoinder of parties plaintiffs to wit, the infant was an unnecessary party, but the court held that inasmuch as the Kansas statute gave the widow the right to sue for the sole benefit of herself and her infant child she was the trustee of an express trust, and whilst it was unnecessary for her to have joined the infant it was immaterial that she did so. The court, referring to section 541, Rev. St. 1890, said: "But whilst the trustee of an express trust may sue in his own name without joining the person, for whose benefit the suit is prosecuted, he is not forbidden to join the beneficiary, and if he does so, the most that can be said in criticism of the act is that it was unnecessary." The reference to our statute in this connection was not for the purpose of basing it upon the right of the widow in that case to sue, because we there based her right to sue, as we must base the widow's right in this case, on the statute of Kansas, but it was to show that there was in our law nothing repugnant to her right to sue as agent of an express trust. The Kansas statute makes the widow, under the circumstances of this case, a trustee of an express trust, and expressly authorizes her, as such, to sue for the benefit of herself and her minor children. Reference in the *Jones Case* was made also to section 549, Rev. St. 1890, which is: "Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be brought in any of the courts of this state by the person or persons entitled to the proceeds of such cause of action: Provided such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued."

From the decisions in the foregoing cases, the following conclusions are drawn: (a) The right of action given by the foreign statute cannot be maintained in this state in a suit by a person on whom the foreign statute has not conferred the right to sue. (b) It cannot be maintained by a foreign administrator. (c) It can be maintained by one who has capacity otherwise to sue here and on whom the foreign statute has conferred the right. The Kansas statute confers the right on the widow to sue when no administrator has been appointed, which is the fact in this case, and our statute says that if the foreign statute confers the right on her to sue there she may sue in the courts of this state. She has brought this suit in her capacity of widow for the benefit of herself and her infant children, and although she has taken the unnecessary precaution to have herself appointed trustee for her children and adds that to her other capacity, that fact neither adds to nor mars

her right of action, we hold that she was entitled to sue as she has done. Since the decision in the *McGinnis Case* above referred to, our General Assembly, doubtless acting on the suggestion therein made, has repealed section 548 as it then was and has enacted a new section in place of it wherein authority to sue in such case in courts of this state is conferred on foreign administrators, guardians, etc. Acts 1905, p. 95. That, however, does not affect this case which was pending in this court when that act was passed.

3. Defendant insists that under the law of Kansas the deceased, if he had lived, could not have maintained an action against the defendant, and therefore the plaintiffs cannot maintain this action. The argument is that under the decisions of the Supreme Court of Kansas the deceased was guilty of such contributory negligence, in working in the yards in the unblocked condition, that the court should have so declared as a matter of law and have nonsuited the plaintiffs. The decision on which this argument is chiefly based is in *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582, decided in 1887. That was a case in which the plaintiff's intestate, a switchman, had come to his death by getting his foot caught in an unblocked track while attempting to pull a coupling pin and before he could extricate his foot the cars passed over him and killed him. That case was like in its facts to this except that the yard had never been blocked. The court said: "The railway was not out of repair, it was in just the same condition it was when it was originally constructed, and it was constructed in the yard where plaintiff's intestate worked, precisely as it was constructed in all the other yards belonging to the defendant, and in precisely the same manner as many other railways belonging to other companies were constructed. Again the court said: "It was not different from other guard rails in that yard, nor different from any of the other guard rails of the defendant's 5,000 miles of railway; nor different from the guard rails of many of the other railways in this country." The court held that the defect, if defect it was, was obvious and the danger was as apparent to the deceased as it was to the defendant. Other Kansas cases, which may be seen by reference to appellant's brief, are cited which in the main hold that if the danger is as obvious to the servant as it is to the master the court is justified in holding as a matter of law that the servant who continues in the service cannot recover if he is injured. In some of those cases the court designates it as assumption of risk and in others as contributory negligence. But in *Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232, that court lays down the law in regard to assumption of risk in effect the same as it has often been declared by this court. At page 71 of 66 Kan., page 234 of 71 Pac., per Green, J., it is said: "It is contended that the defendant assumed the risk of injury

for the falling of the pole, and, therefore cannot recover. While it is true the employé assumes the ordinary risks incident to his employment, the risks thus assumed by him, however, are those only which occur after the due performance by the master of those duties which the law imposes upon him." In that case the court refers with approval to *O'Neill v. Railroad*, 62 Neb. 358, 86 N. W. 1098, which was a case in its facts very much like the case at bar, wherein the Nebraska court at pages 360, 361 of 62 Neb., page 1099 of 86 N. W., said: "The defendant invokes the rule that a servant, by his contract of service, assumes the risks and dangers incident to his employment, and insists that such rule relieves it of liability for the injury sustained by the plaintiff. That the servant, by his contract of service, assumes certain risks, is true. Just what such risks are we are not required to determine in this case, because it is sufficient to say that the negligence of his employer is not one of the risks assumed. On the contrary, a servant has a right to assume that his employer has used ordinary care and prudence to insure his safety in the course of his employment."

We have gone through the Kansas cases cited by appellant, and also those cited by respondent, to discover what difference, if any, there is in the law of that state and our law in reference to the liability of the master to the servant in such case, and we discover no material difference. The Kansas court has not, in the cases that we have seen, emphasized the distinction between contributory negligence and assumption of risk as we have done, but in the main it has declared the law as we have declared it. We must yield to the decisions of the highest court of a sister state as to the law of that state, but we would be at liberty to differ from its judgment in the application of the law to the facts of a given case if we felt so constrained. The *Rush Case* was decided in 1887 when, according to the recitals in the opinion, the system of blocking the guard rails in a switch yard had not been adopted by this defendant, in any of its yards along its then 5,000 miles of tracks, and many other railroad companies had not adopted it. A switchman in the service of the defendant at that time had no right (the court thought) to expect the tracks to be safeguarded in this manner and in that view of the facts the court held that there was no cause of action. Since then 18 years have passed and railroad companies have gained by experience in many things. This company, as the evidence in the case at bar shows, had at the time of this accident adopted the blocking system, it had two yards in Atchison, one of which was fully blocked, and this one had been blocked, but in that respect it had been suffered to fall into decay and become out of repair, many of the blocks were worn out and rotten and had disappeared. The switchman of course could have seen this condition, and if one saw it and appreciated the

danger and continued to work over it and was injured, the question of contributory negligence would arise, a question to be decided as a matter of law by the court or as one of fact by the jury; if there could be no two opinions about it, it was a question for the court, if men might reasonably differ about it then it was for the jury. This man had been working in that yard several months, but there was evidence tending to show that for the period of 21 days just prior to the accident he had been detained at home with a sick child and had been at work only three or four days. The foreman of the crew and another switchman of the crew were unable to remember whether the rails in the immediate vicinity of the accident were blocked or not; they gave the impression that in the hurry of their work they had no time to look for the blocks. The foreman testified that one could post himself as to the blocks if he would take the time to do so, if he would look for them and slight his work. We think whether or not the deceased knew the danger he was incurring from the absence of the blocks was, under the evidence, a fair question for the jury.

It is argued that he was guilty of negligence in running between the moving cars. Going between the moving cars for that purpose was the usual practice and was recognized as proper by the defendant. Rule 23 in evidence was couched in the form of a caution, but at the same time it indicated to the servant what his master expected of him. He was warned not to go between moving cars to uncouple them unless they were moving at a slow and safe speed. The evidence was that these cars were moving at what men in that line of business called slow speed. Just how fast the train was going was not definitely ascertained, it was put at four, six, or eight miles an hour. Whether he was running or walking depends on the speed of the car, if it was four miles he was walking if it was eight miles he was running. And so too as to the distance he went, it was variously estimated at from 50 to 150 or 200 feet. The speed of the cars and the distance covered were facts to be found by the jury. The evidence on these points was not what might be called conflicting, but different, according to the estimates of the different witnesses, and the jury were to judge from the various positions from which the different witnesses saw the accident, their capacity for making the estimates, etc., which was most reliable. *Illinois Central Railroad v. Cozby*, 69 Ill. App. 256, was a case quite like the case at bar in its facts and the rule of the company in evidence was like this rule 23 except that in one sentence it forbade the switchman to attempt to uncouple moving cars and in another authorized him to do so if they were not moving at a dangerous rate of speed. The court said: "The evidence shows that it was the custom to couple and uncouple moving cars in the Cairo yards.

This practice was certainly known to the railroad authorities, and was not discouraged by them, except in this contradictory manner on paper. It is manifest that in extensive yards, where much switching is to be done, the business of a railroad company could not be transacted, if every train was brought to a dead halt in order that cars might be coupled or uncoupled. We cannot hold that Craiglow was necessarily guilty of negligence because he undertook to uncouple cars which were moving at the rate of two or three miles an hour." Under the evidence in this case the court would not have been justified in taking the case from the jury on the ground that the deceased was guilty of negligence. The evidence was also sufficient to justify the submission to the jury of the question of negligence on the part of the defendant in failing to furnish its servants a reasonably safe field in which to work. *Huhn v. Railway*, 92 Mo. 440, 4 S. W. 937.

4. Over the objection of defendant, evidence was admitted to show that other railroads had their yards at Atchison blocked. Evidence of a general custom in well equipped railroad yards would have been competent, but evidence as to the condition of the yards of one or two other companies was incompetent. But we do not think that evidence could have prejudiced the defendant. If it tended to prove anything it was that blocking the rails was an approved method of safeguarding the tracks. The evidence was undisputed that the defendant itself had adopted that method in its yards at Atchison and, in the absence of any evidence or suggestion to the contrary, it seems to be such a self-evident fact that proof on the point was unnecessary.

5. At the request of the plaintiffs the court gave the following instruction:

(1) "If you believe and find from the evidence that on April 26, 1899, Harvey A. Lee, was in the employ of defendant in its yard at Atchison, Kan., as switchman, and that the duties of said Lee required him to assist in the switching of cars therein, then it was defendant's duty to exercise ordinary care to provide him a reasonably safe place in which to work, and reasonably safe tracks and guard rails upon which to work. If, therefore, you believe and find from the evidence that on said day said Lee was, in pursuance to orders of defendant, engaged in uncoupling two moving freight cars on No. 4 track of defendant in Atchison, Kan.; that the right foot of said Lee, while he was performing said duty, slipped into the interval between the main rail and guard rail of said track; that thereby his foot was entrapped and he was unable to escape and the cars ran over him and killed him; that his death was caused by the blocking in said interval between said main rail and guard rail having disappeared therefrom, so that there was no protection against the entrapping of a foot in the space between the guard rail and the

main rail; that at said time defendant knew, or by the exercise of ordinary care might have known, that said blocking had disappeared and that there was, therefore, no protection against the entrapping of a foot therein, and negligently and wrongfully failed and omitted to repair the same, and that because thereof said rails and track were not reasonably safe for said Harvey A. Lee to work upon, then you will find a verdict in favor of plaintiffs, unless you further find and believe from the evidence that said Lee assumed the risk of said injury, or was guilty of negligence on his part contributing to produce his death as defined in other instructions given you." The criticism of this instruction is that it refers the jury to other instructions defining assumption of risk and contributory negligence and that there are no such other instructions.

There was an instruction defining ordinary care and negligence, and the following instructions given at the request of defendant. "(1) The court instructs the jury that if they believe from the evidence in the case that the deceased Harvey A. Lee was, at the time of the accident, running between two cars in motion and that he had been between said cars, while they were in motion for a distance of three or four car lengths before the accident occurred, then the plaintiffs are not entitled to recover and the verdict must be for defendant. (2) The court instructs the jury that if they believe from the evidence in the case that Harvey A. Lee was at and before the time of his death an experienced railroad switchman, of average intelligence and in full possession of his mental and physical faculties, and that he had been in the employ of the defendant as a switchman for several months next before the date of the accident which resulted in his death, and that during that time he had worked in what is known as defendant's lower yard at Atchison, Kan., and at the point where said accident occurred, and that prior to the date of the said accident he had ample means and opportunity of knowing the condition of the track where said accident occurred *and at the time said accident occurred* then the plaintiffs in this case are not entitled to recover, and the verdict must be for the defendant." The words in italics in No. 2 were inserted by the court and to that extent were a modification of the original No. 2 as asked by defendant.

There was no instruction expressly defining the terms "assumption of risk" and "contributory negligence," but instructions one and two for defendant embraced all the facts that defendant relied on to establish its defense on either of those grounds, and directed a verdict for the defendant if those facts were found. The defendant, in drafting those instructions, did not say if you find those facts then the deceased was guilty of contributory negligence or he assumed the risk and there-

fore you will find for the defendant, but only said if you find those facts you will find for the defendant. The instructions fully covered the defendant's theory, giving it the benefit of the facts on which it relied omitting only to say what those facts, if found, would be called in legal parlance. Instruction No. 1 for defendant was stronger in defendant's favor than the circumstances of the case justified, but that is now immaterial. The instructions taken as a whole presented the case at least as favorable to the jury as defendant could ask.

6. Instruction 3 for plaintiff on the measure of damages was as follows: "If you find a verdict in favor of the plaintiffs, you will assess the damages at such sum as you find from the evidence will reasonably compensate Susan A. Lee, the widow, and Edward R. Lee, Anne E. Lee, Helen B. Lee, and Rosa M. Lee, the children, for the injury, if any, necessarily resulting to them from the loss of the life of Harvey A. Lee, assessing such damages, with reference to the pecuniary loss, if any, sustained by said widow and children of deceased; first, by fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration his age, business capacity, experience, and the habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime if he had not been killed; second, by adding to this the value of his services in the superintendence, attention to the care of his family and education of his children, of which they have been deprived by his death, but your verdict must not be over \$10,000." That instruction is quite like that in *Jones v. Ry.*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434, which we condemned. But, as in that case, the jury in this case did not put the construction on the instruction that it was liable to have put upon it. Under the figures given in evidence, his wages \$75 to \$85 a month, his age 29 years, and expectancy of life 38 years, his prospective earnings would have been about \$35,000 and the limit placed on the amount that might be recovered by the Kansas statute is \$10,000. The jury fixed the award at \$8,000, showing that they did not understand the instruction to mean that they were to give the full amount of the possible earnings up to the limit fixed by the Kansas statute. Here was a widow and four young children the oldest 9 years old to be compensated for their loss by the death of their husband and father, the jury, though misdirected as to the measure of damages, said by their verdict that in their judgment \$8,000 was a reasonable amount. We have no reason to think that that was not a fair and conservative estimate, and we have no right to set it aside for a mere technical error which it is evident did not mislead the jury.

7. The court refused instructions 3, 4, and 5 asked by defendants. Three and four were

to the effect that if the jury should find that the deceased was an experienced switchman and had worked in this yard for several months, during which time a considerable portion of the guard rails there were unblocked and he had the means and opportunity of knowing that fact then the plaintiffs could not recover. That means that if a servant is aware of a defect in the appliance or field furnished by the master, or if he even has an opportunity of discovering it, he works at his own risk and cannot recover; it leaves out of view the question of whether or not the defect was such that the servant might reasonably hope to use it by exercising ordinary care. There was no error in refusing those instructions.

Instruction 5 was in effect that if the man was between the cars while they were going a distance of 150 or 200 feet the verdict should be for the defendant. Since the evidence showed that it was the usual custom of switchmen to go between moving trains to pull the coupling pin, and the printed rule of the company authorized them to do so when the train was moving at a slow rate, and that this train was moving at a rate railroad men called slow, the court had no right to say as a matter of law that it was negligence per se to remain between the moving cars for any specified distance, either 50 or 150 feet. The court had already gone too far in that direction by directing the jury to find for the defendant if the man remained between the cars while they were moving three or four car lengths. There was no error in refusing those instructions.

We find no reversible error in the record. The judgment is affirmed. All concur.

ROOT v. KANSAS CITY SOUTHERN RY. CO.

(Supreme Court of Missouri, Division No. 1.
March 30, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a brakeman riding on the engine saw that it could not be stopped before it reached the burning portion of a low trestle jumped when the engine was about two car lengths from the fire, he was not guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 789-794.]

2. SAME—ASSUMPTION OF RISK—KNOWLEDGE OF DANGER.

A freight brakeman, who had been employed but a few days and had passed over a certain trestle but six times, usually in the night, and who was not shown to have had any knowledge of the conditions about the trestle, did not assume the risk arising from a quantity of combustible material allowed to accumulate about the trestle, and which became ignited and set fire to the trestle.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600.]

3. SAME—CONCURRENT NEGLIGENCE OF MASTER AND FELLOW SERVANT—LIABILITY OF MASTER.

Where a servant is injured through the

combined negligence of the master and a fellow servant, he may recover from the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 515-534.]

4. SAME—ACTION FOR INJURIES—QUESTIONS FOR JURY.

In an action by a brakeman for injuries sustained by jumping from an engine through fear that it would go through a burning trestle, evidence held sufficient to justify submission to the jury of the question whether the fire was communicated to the trestle through combustible debris which it was alleged defendant railroad company negligently allowed to accumulate about the trestle.

5. SAME—NEGLIGENCE OF MASTER.

In an action by a railroad brakeman for injuries resulting from jumping from an engine, through fear that it would go through a burning trestle alleged to have been ignited because of the negligence of the railroad company in allowing combustible material to accumulate about it, evidence held sufficient under the law of Arkansas to justify submission to the jury of the question of defendant's negligence.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1001.]

6. SAME—EVIDENCE—DEFECTIVE CONDITION—REMOTENESS.

In an action by a railroad brakeman for injuries caused by jumping from an engine, through fear that it would go through a burning trestle claimed to have been ignited because of the negligence of the railroad company in allowing combustible material to accumulate about it, the admission of evidence that several months before the accident quantities of driftwood had floated down and lodged against the trestle was erroneous, in the absence of any evidence that the driftwood still remained there at the time of the accident.

7. TRIAL—OBJECTIONS TO EVIDENCE—NECESSITY OF RENEWING.

Where objection was made on the ground that certain evidence was too remote, and was overruled in view of a promise by counsel to show that the condition revealed by this evidence continued down to the time to which the issues related, the party objecting to the evidence was not required, after failure to introduce connecting evidence, to renew the objection by motion to strike out.

8. MASTER AND SERVANT—ACTION FOR INJURIES—PROOF AND VARIANCE.

Where, in an action by a railroad brakeman for injuries caused by jumping from a locomotive, through fear that it would go through a burning trestle the petition alleged that defendant negligently allowed driftwood, which was carried down the stream under the trestle at high water period, to remain lodged about the trestle, rendering it liable to take fire, evidence that at the time the right of way was originally cut through the timber logs were left lying on the right of way was outside the issues.

9. EVIDENCE—EXPERT WITNESSES—EXAMINATION—HYPOTHETICAL QUESTION.

A hypothetical question to an expert witness must be predicated on the testimony.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2369-2374.]

10. MASTER AND SERVANT—ACTION FOR INJURIES—INSTRUCTIONS.

In an action by a railroad brakeman for injuries caused by jumping from an engine because of fear that it would go through a burning trestle, alleged to have been ignited because of negligence of the railroad company in allowing combustible materials to accumulate about it, an instruction that it was the duty of defendant to use ordinary care to keep its right of way free from dry and combustible

matter which would be "liable" to take fire was erroneous, because of possibility of the word "liable" being construed to mean within the range of possibility.

11. SAME—NEGLIGENCE—QUESTION FOR JURY.

Leaving combustible material on the right of way is not necessarily negligence on the part of a railroad company, though the extent of such material and its proximity to the track may justify a jury in finding negligence.

Appeal from Circuit Court, Bates County; W. W. Graves, Judge.

Action by Eugene R. Root against the Kansas City Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

S. W. Moore, Cyrus Crane, and H. C. Clark, for appellant. Thos. J. Smith, W. O. Jackson, and Geo. W. Wright, for respondent.

LAMM, J. Root was head brakeman riding on the engine of one of defendant's freight trains of seven cars and a caboose, four cars laden with coal and three with hay. In running south at midnight on July 10, 1901, a mile or so south of a station named Poteau, in the Indian Territory, as the engine approached a long trestle spanning a depression, swamp or slough (called a creek by some witnesses) through which water flowed from the west to the east at flood times in Poteau river, a nearby stream, a fire was discovered in and toward the far end of the trestle, as near as we can determine from the evidence, about 1,000 feet away from the engine at the time. The engineer applied his emergency air, slowed up, but did not stop before the engine reached the fire. Facing this emergency, when the fact became apparent that the engine would not stop before reaching the burning part of the trestle, on the advice of the engineer and by common consent, all employees on the engine, to wit, the engineer, the fireman, and plaintiff, jumped from its steps to the ground, a distance of from 10 to 12 feet. By jumping plaintiff's right ankle was concededly injured, and it is claimed on one side and controverted on the other that by the jump and by being struck in the small of the back by a rail, which bulged out simultaneously with his jump, kidney and spinal troubles ensued, resulting in traumatic neurasthenia, paralysis, and a group of associated ills. Plaintiff had judgment below for \$8,000, from which defendant appealed.

The paper issues were as follows: The petition alleges in effect that the country in the vicinity of the trestle was timbered; that defendant negligently allowed quantities of timber, brush, leaves, driftwood, and other combustible matter, carried down at high water and lodged under said trestle, and upon the right of way adjacent thereto, to accumulate and remain thereunder and upon said right of way, particularly under the south end of said trestle, until the date of the accident; that the creek spanned by the trestle and the water supply thereof, licked up by a drought, dried away; that said matter,

so lodged and accumulated, became inflammable and susceptible to ignition from sparks and coals of fire from defendant's passing locomotives and from prairie and forest fires then raging in the region; that the drought had lasted for 30 days; that the trestle was constructed of wood and became dry and inflammable and in danger of catching fire from passing locomotives and from forest and prairie fires, all of which was known by defendant, or by the exercise of ordinary prudence could have been so known for more than 30 days prior to the injury of plaintiff; that defendant negligently failed to exercise care to remove said combustible matter from beneath said trestle and from its right of way, or to keep and maintain constantly a watchman, patrolman, or guard to watch and guard said wooden trestle after the passage of trains and for the purpose of discovering and extinguishing fire that might catch in said inflammable matter, or in said trestle, or upon its right of way adjacent thereto, from passing trains or said prairie or forest fires along defendant's right of way; that because of said negligence a fire caught in the dry bridge itself, or in the debris beneath it, from prairie or forest fires along defendant's right of way, or from engines passing over the trestle, which fire necessitated plaintiff's leap from the engine and which acts of negligence caused plaintiff's injury. The answer was a general denial, coupled with a plea that negligence on the part of plaintiff contributed to his injury; that the acts of his fellow servants caused it; the assumption of the risks of his employment was pleaded, and that the injury occurred in the Indian Territory; that in said Territory the common law upon the subject of master and servant and fellow servants was in force at the time, and according to said common law in said Territory the plaintiff was a fellow servant with the trainmen, including the engineer, conductor, and others, and a fellow servant with the section foreman and the sectionmen and inspectors of the track, and under said law defendant was not liable to plaintiff for any acts of said fellow servants. The reply was a general denial of the allegations of the answer, and, further, that if the common law was in force in the Indian Territory (which plaintiff denied) then, under such common law, plaintiff was not a fellow servant with those of defendant's employes whose duty it was to keep and maintain the track, right of way, and trestle of defendant in a reasonably safe condition.

At the close of plaintiff's case, a general demurrer was interposed and overruled, defendant excepting. A special demurrer was then interposed to the charge of negligence in the petition pertaining to the failure to have a watchman, patrolman, or other guard at the trestle. This was sustained. At the close of the whole case, the court instructed the jury, at the request of the defendant, that the charge of negligence in not keeping

a watchman, patrolman, or other guard at the trestle had been withdrawn and they could not find for plaintiff on that charge; that if fire was communicated to the trestle from passing engines, then their verdict should be for defendant, and that if it was communicated to the trestle from sparks from burning trees off the right of way blown over on the trestle, then their verdict should be for defendant, and also told the jury that if the fire was communicated to the trestle in any other manner than through inflammable matter on the right of way, they should find for the defendant. By still another of defendant's instructions the issues of fact submitted to the jury were restricted, thus: "Before plaintiff can recover he must prove by a preponderance of the evidence: First, that defendant was negligent in permitting inflammable matter to accumulate upon its right of way in proximity to fires outside of such right of way and in such quantities that such inflammable matter, if any, was likely to catch on fire; and second, that fire was communicated from the fires outside of the right of way to said inflammable matter and extended therefrom to said trestle and caused the burning of the same; third, that the presence of such inflammable material upon said right of way, if it so existed, directly caused the injuries, if any, to plaintiff." The learned trial court refused to adopt the views of appellant counsel evidenced in certain instructions offered, one of them a peremptory command to find for appellant, and exceptions were saved. So, too, that court modified certain of appellant's instructions and gave certain instructions for respondent, and exceptions were saved. The correctness of rulings nisi on certain evidence admitted for respondent was duly challenged below and is assigned for error here, as well as the rulings on instructions. The several assignments of error deemed material to be considered, together with those additional facts uncovered at the trial essential to an understanding and determination of the case, will be set forth in the course of this opinion.

1. It is contended by appellant there was no case to go to the jury under the issue as narrowly whittled down by the court. In other words, first, the ground of recovery left standing being the accumulation of inflammable debris negligently on the right of way, there was no evidence tending to show that this negligent accumulation caused the fire in the bridge, hence, respondent had no case; second, that if the fire in the bridge was communicated through a negligent accumulation of inflammable debris, then, the acts of the section men and section foreman in allowing such accumulation were the acts of fellow servants of the trainmen, and on that theory respondent must be cast; and, finally, that the negligence of the engineer, a fellow servant of respondent, was the proximate cause of the injury, and hence, no recovery would lie. Is there substance in either of

these contentions, or in the defenses of contributory negligence or assumption of risks? Let us see.

(1) There is no evidence worthy of the name tending to show that respondent himself was negligent. He was an experienced railroad man, it is true, but he was a brakeman, not charged with the duty of running the engine. He jumped when the engine was about two car lengths from the fire. It is not strongly contended by the learned counsel for appellants that respondent was not justified in jumping in the appalling emergency confronting him. True it is, the evidence shows the engine cleared the burning place in the trestle and stopped, and, if respondent had stayed where he was, no hurt would have come to him. His escape, however, was like that of a brand plucked from the burning, or with the smell of fire on his garments; for the four cars of coal next the engine either then, or presently, went through the trestle and one end of the tender went down. We may not be allowed to review this transaction from the standpoint of the way it looks to us, glancing back. We know; he did not know. It must be judged of by the way it would look to a reasonable man before the jump. Being suddenly called upon to consider a question of life and death in the face of a danger imperiously menacing him, he acted on appearances under a natural and allowable impulse of self-preservation and the law will not concern itself overclosely in scrutinizing and gauging his judgment, because men facing confusing perils sprung on them quickly are not called on to act with coolness and precision. The impelling question is whether appellant's own skirts are clear of blame for the fire, rather than whether respondent acted with good judgment in escaping its flames, and, in our view, the contributory negligence of respondent may be considered out of the case under the facts presented for adjudication.

(2) So, too, the assumption of risks plead in the answer may be eliminated; because, though it may be said generally a servant assumes the ordinary risks incident to a given employment, yet he does not assume the risk of supervening acts of negligence of the master and it is such alleged supervening acts of negligence that are to be dealt with in this case. It may be said, in passing, that Root was a new man on the road, had been in appellant's employ but a few days, passing over this trestle but six times, usually in the night, and he was not shown to have any knowledge of the conditions about the trestle or on the right of way, and, therefore, we may properly put away the defense of assumption of risks.

(3) But appellant says, the proximate cause of the injury was the negligence of the engineer in running his train too fast and approaching the bridge without caution. On this head it was shown in evidence he was running,

say, 23 miles an hour as he came around a curve in view of the trestle. It is shown that as the engine came around said curve, about 1,000 feet from the fire, on a slight down grade, the steam was cut off; and, when the fire was discovered, the emergency air was put on. It was furthermore shown that all the cars, as well as the engine, were equipped with air. A rule was in evidence requiring freight trains to be run at a rate not to exceed 18 miles an hour. On the 8th of July the trainmaster, having in charge the trainmen on that part of the road, issued the following order: "Office of Train Master, Pittsburg, July 8, 1901. Bulletin to Conductors and Engineers: Owing to extreme heat and drought there is a great liability of damage being done by fire. You will be very watchful and proceed cautiously in approaching bridges and obscure places. In case of fire being found on the right of way you will not hesitate to stop and do all in your power to extinguish such fires and use back fires whenever it seems practicable to do so. All fires found on our right of way should be reported to this office by wire from first telegraph station, and give mile post location, stating how far north or south of mile post. [Signed] Day Mills, Trainmaster." It was also in evidence, and uncontradicted, that a train equipped as this one, on that grade, at a going speed of 18 miles an hour, could be stopped in less than 400 feet, and going at 25 miles an hour, in 500 feet. The most that can be said of this proof is that it tended to show the engineer, a fellow servant of respondent, was running his train negligently. The court instructed the jury that if the negligence of the engineer was the sole cause of the injury, respondent could not recover; but the jury were further instructed that if the negligence of the fellow servant united with the negligence of appellant to produce the injury, then respondent could recover. If A. and B. contribute to the injury of C., and if A. is C.'s master and B. a fellow servant, C. may recover against A. *Browning v. Railroad*, 124 Mo. 55, 27 S. W. 644. This is also the law in *Arkansas. Neal v. Railroad*, 71 Ark., loc. cit. 450, 451, 78 S. W. 220.

(4) A general understanding of other facts uncovered at the trial is a necessary preliminary to the consideration of the principal propositions in hand, and those facts, avoiding detail, will now be given. The trestle ran north and south, and was a wooden structure made of bents, stringers, ties, and rails. Each bent was composed of a group of oak plies, 10 to 12 feet above ground, and a foot or more square. Said bents were about 14 feet apart, and the superstructure consisted of said stringers, ties, and rails. The testimony does not agree as to the exact length of this trestle, but it was several hundred feet long. The road at this place ran through a forest and the right of way was 100 feet wide with the roadbed in the

center. As said, there was a slough or cut-off, filled with running water in flood times; water that left Poteau river to the west and ran through this slough and back into Poteau river farther east. It was across this slough or draw, the trestle was built. A long-continued and searching drought in the summer of 1901 afflicted the region through which appellant's road ran. Fires were occurring and were naturally expected to occur along the line. Logs, dead trees, stumps, brush and even standing brambles and smaller growths had become somewhat combustible. In this prevailing condition of danger, appellant issued through its superintendent to its roadmasters, including P. Sloan, the roadmaster in charge of the track at the place in question, on the 7th day of July, 1901, the following circular order: "Dear Sirs: If you have not already done so, please proceed at once to remove all vegetable matter from under bridges, buildings, piles of material, etc., to prevent damage by fire. Also do everything you can consistently to prevent damage by fire to property adjoining right of way. Also report every case of fire being set along track by sparks dropping from ash pans of engines. Acknowledge receipt. Yours truly, [Signed] W. Coughlan, Superintendent." On the 8th day of July, 1901, Mr. Sloan issued the following circular order: "Spiro, 7-8 '01. Circular No. 26. All Foremen: You will at once remove all vegetable matter from under bridges, buildings, telegraph poles, piles of materials, etc., to prevent damage by fire, and do everything you can consistently to prevent damage by fire to property adjoining right of way. Also report any case of fire being set out along track by sparks dropping from ash pans of engines. Do not set fire to any old trees or timber of any kind during dry and hot weather. Acknowledge receipt. P. Sloan, Roadmaster."

One Parsons was the section foreman having in charge section 47, covering the trestle in question, and on a day not precisely located but shown by his weekly "force report" to be within a period covered by the 8th to the 13th of July, inclusive, he, with a force of 10 men, cleaned under that trestle and others and about telegraph poles, in obedience to the order of roadmaster Sloan. The plan adopted at the trestle in question was to clean out the stuff to a distance of three or four feet on each side of the trestle. Respondent called to the stand the section foreman, Parsons, and other employes engaged in this work. By Parsons, on cross-examination, it was shown there was no brush or rubbish or stuff to burn under the trestle before it was cleaned out; that there was nothing but small grass and a few weeds. By another witness, Thornton, who was then a sectionman and was engaged in farming at the time he testified, it was shown that they cleaned out under the trestle "mighty clean and nice." Then the following occur-

red: "Q. What did you do with the stuff that you cleaned out from under the bridge? A. Part of it we piled up. Piled part of it out where we got through, you know, and part of it we dragged out in a little branch that was there. Barrow pit; part of it was laying in there and part on the bank. Q. Now, about how far from this trestle was this stuff raked out? A. We was supposed to take it about six feet. Q. Not what you were supposed to, but how far did you take it? A. About three or three and a half feet from the trestle. Q. What was the nature of this stuff that you cleaned out from under this bridge? A. It was logs, stumps, and brush, and stuff that had been washed there from the overflows. Q. What was the nature of the stuff you cleaned out from under the trestle as to being wet or dry? A. Why, it was dry."

This witness also testified that there were two dry stumps left standing under the trestle, as we understand the evidence. Other evidence was introduced tending to show that there were dry (and presumably rotten) logs on the right of way, one of them, at least, coming as close as eight feet of the trestle and drift lying about. There was a so-called public road running adjacent to the right of way on the west, and at this immediate time a gang of men, not working for appellant, were cutting a public road to the east of the right of way and immediately adjacent thereto; the object being to drain it into the "barrow pit." It should be said, furthermore, that along the extreme verge of the right of way to the east, as likewise to the west, barrow (or borrow?) pits had been dug, out of which the material had been taken to make fills in the roadbed. We are not concerned about the barrow pit on the west, but the one on the east made a continuous ditch, useful for drainage, and this pit was dry except at the south end of the trestle, where there was a little water. The trestle fire burned to about 42 feet of its south end and seems to have been confined to the length of four cars, about 180 feet. Whether or not there was any water in the pit due east of this burnt part of the trestle is not clearly shown, but some of the testimony tended to show it was dry. We take it that the "branch" referred to by the witness Thornton, where some of the combustible rubbish was piled, was this dry barrow pit. The men engaged in cutting out this public road were using fire to burn the brush and whatever down, or cutdown, stuff would burn. During July 15th, and possibly before, a short distance east of the new public road, fires were in the timber among the dead trees. It was in evidence, and uncontradicted, that the men engaged in this road work "chunked up" their log or brush heaps about quitting time and that they were then afire. On July 15th, Parsons, with his gang of sectionmen, was about a mile and a half or two miles south of the trestle and these men

were in view of a smoke that was in the neighborhood of the trestle on the east. The wind during the afternoon sat in the northwest, but about sundown, or 7 o'clock, whipped around to the northeast and blew with vehemence for a short time, bringing in its train a slight fall of rain. Three witnesses, a farmer named Smith, and his wife and daughter, gave the most graphic description in the record of the prevailing condition of things at that time. They were returning home from labor in the field and were on the east of the trestle. The northeast wind in a gale was blowing a stream of live coals and rotten chunks ablaze from dead standing trees east of the right of way, and apparently alive with fire from top to bottom, on and across the right of way and over and on the trestle about where it was burnt. So strong was this storm of fire that Smith could not drive between the burning trees and the railroad and, accordingly, had to veer off. They noticed no fire on the right of way nor on the trestle. The last witness passing was a liveryman in a buggy with top up and side curtains down. This was about 9 o'clock p. m. He saw fires to the east, but none on the right of way and none on the trestle. At least two trains passed between 6 o'clock and 12, but there is no evidence indicating that any fire escaped from the ash-pans of either engine. In this condition of things about 12:05 o'clock on that night, after the engine of respondent's freight train, as said, came around a curve some distance north of the trestle, a fire was discovered blazing about a foot high above the trestle itself. At that time, or immediately before, respondent saw trees afire to the east of the trestle and possibly off the right of way. Respondent introduced witnesses in the employ of appellant company, who, on cross-examination, made it plain that they came on the scene, one, about two hours, and others, four and five hours after the fire, and some of these witnesses examined and then could discover no trace on the ground that the fire off the right of way to the east had spread continuously to the right of way and over the right of way to the trestle. Moreover there is testimony showing that the coal cars and coal went down and burnt and that this latter fire was somewhat wider than the trestle itself. There is other evidence tending to show that the right of way to the east of the burned place in the trestle had at that time been burnt over and that there were burning logs then on the right of way and, as we understand it, all the inflammable stuff on the right of way east of the burnt section of the trestle, save a log or so, had been consumed, or was burning. Appellant introduced evidence tending to show that there was no fire on the right of way east of the trestle at the time of the accident; at least, the witnesses didn't notice any.

We have thus condensed the facts of a long record relevant to the question now in

hand, to wit, whether the case was a proper one for the jury (barring for the present any consideration of the theory that the trackmen were fellow servants with the trainmen), and, considering those facts, we announce our conclusion to be that the court did not err in overruling the demurrer to respondent's evidence or in refusing appellant's peremptory instruction at the close of the case. Because: Appellant's contention is that the negligence, if any, in allowing the inflammable debris to accumulate on the right of way is not shown to be the proximate cause of the fire; i. e., that there is no substantial evidence showing the fire was communicated to the trestle through this debris. Appellant suggests that an engine may have dropped coals of fire from its ash pan on the trestle and that this view presents a reasonable cause of the fire's origin. If there were no facts pointing to a more reasonable theory of the fire, then the theory suggested by appellant would be well enough; but in the presence of the other facts pointing to a more reasonable theory of the fire, the engine theory, in our opinion, does not rise to the dignity of more than a conjecture—a possibility when compared with the theory that the fire was communicated through the debris. An engine has an ash pan containing, we will say, hot ashes and live coals. From it coals of fire might escape. The circular letters of Superintendent Coughlin and Roadmaster Sloan show they had in mind this very contingency. Based upon this possibility and upon the passage of two engines between dark and midnight, an alry and ingenious fabric of reasoning is built up that these engines caused this fire. No proof exists that the ash pans of these engines were out of repair or leaked fire; no proof is offered that a coal of fire escaped from such ash pans. One of these engines passed early in the evening. If, to use a homely simile, it had laid an egg in the shape of a live coal, hatching subsequently into a blaze, the presumption would, be the engineer or fireman on the second engine passing several hours later would have discovered it and reported it. No such discovery is indicated in the proof, hence, in appellant's hypothesis, the first engine should be eliminated. Its theory, then, must be held to stand or fall upon the passage of the second engine. The trial court permitted that theory to go to the jury, at appellant's request, as a question of fact and the jury weighed it in the balance and found it wanting in the presence of other facts pointing with more reasonable certainty to another origin of the fire. With their judgment we rest content.

But appellant says that there is evidence that at dusk of July 15th, fire was in the air blowing over the trestle and, what is more, over that part of the trestle burned. Appellant says the proof shows no fire ran along the ground from fires on the outside of the right of way and left trace on the ground of

a communication to the débris on the right of way and thence to the trestle, and that in the absence of such proof there is nothing to go to the jury. Of this contention it may be said that one theory advanced weakens another. For instance, one of appellant's notions is that fire was communicated to the trestle through the air by coals blown directly over the right of way and on the trestle, and hence it should escape liability on the theory of the court's instruction. But if coals of fire were blown through the air on the trestle and thereby, like a serpent on a rock or a bird in its flight, left no trace of passage, then, by the same token fire could have been blown through the air and have rained down on the right of way and on the débris in the windrow about three feet from the trestle, or on the rotten and dry logs on the right of way, or stumps, or on the rubbish stored in the branch or barrow pit, and this method of communicating a fire could not be shown by a trial on the ground connecting the fire raging to the east of the right of way up to and with the débris on the right of way. Now, the proof shows that coals of fire were raining down on the right of way and on the débris accumulated there, so that if we would allow appellant's contention that a lack of trace on the ground of communicated fire is fatal to a recovery, the same contention militates against its other theory of defense. The truth is the contention is unsound; for with fire raining from the air, why bother with traces on the ground? And while the communication of fire from this débris to the trestle is not proved by eyewitnesses or by direct proof, yet to our minds the transmission of fire in that way to a dry trestle lies above mere possibility and conjecture and comes within the realm of reasonable and natural inference; for, assuming the débris was there, assuming the fire at one time was outside the right of way, assuming the wind took up this fire and whirled it on the right of way in coals and burning chunks, assuming the fire on the trestle was seen some hours afterwards—we say, assuming all these things shown by the proof—then it seems reasonable to conclude, given some wind stirring afterwards, or none at all, that a live coal of this rained-down fire, falling on a rotten log or a mass of chunks or other débris, would naturally catch and smolder in ambush and presently break forth with such fury as to ignite a nearby dry structure, and that all this would be much more reasonable than to conclude that a live coal falling on top of the large, bare, sound timbers of a railroad bridge would smolder and lurk and some hours afterwards break out into a consuming blaze. The one theory furnishes a matrix and feed for the fire—the sustained application of igniting heat; and, since flames ascend, it dovetails into the proved fact that the fire was discovered in the top of the bridge. The other theory furnishes no matrix for the

fire except solid timber igniting from a live coal.

Speaking of the subject of liability for fires, it has been said (13 Am. & Eng. En. of Law [2d Ed.] p. 444): "It is not essential to a recovery that the plaintiff should introduce direct proof of the particular act of negligence which caused the damage complained of. Thus, where the proof did not show whether the fire was communicated first to the dry grass and combustibles on the right of way and thence to the plaintiff's premises, or directly to the latter without intervening medium, but it was clearly established that the fire originated in the one place or the other in the manner indicated, it was held that the jury were justified in returning a verdict for the plaintiff, without determining decisively where the fire first started." The general doctrine announced by this textwriter is sustained by the line of argumentation adopted by Henry, J., in *Kenney v. Railroad*, 70 Mo. 243; *Torpey v. Railway Co.*, 64 Mo. App. 382, and other cases that might be cited, though in those cases the question discussed pertained to engines setting out fires. Nevertheless, the reasoning employed fits a case where the issue is between two fires originating, possibly, in different ways. Many cases have been collated by the industrious counsel of appellant in their brief proper and reply, directed to the general proposition formulated by Marshall, J., in *Warner v. Railroad*, 178 Mo., loc. cit. 134, 77 S. W. 70, to the effect that "if the injury may have resulted from one of two causes, for one of which and not the other, the defendant is liable, the plaintiff must show with reasonable certainty that the cause for which the defendant is liable produced the result, and if the evidence leaves it to conjecture, the plaintiff must fail in his action." See, also, *Reiss v. Steam Co.*, 128 N. Y. 107, 28 N. E. 24; *Grant v. Railroad*, 133 N. Y. 658, 31 N. E. 220; *Railroad v. Victory* (Ky.) 47 S. W. 440; *Gas Co. v. Kaufman* (Ky.) 48 S. W. 434; *Hughes v. Railroad*, 91 Ky. 531, 16 S. W. 275; *Sash, etc., Co. v. Railroad*, 83 Minn. 370, 86 N. W. 451; *Hanrahan v. Brooklyn Elev. R. Co.* (Sup.) 45 N. Y. Supp. 477; *Railroad v. De Graff* (Colo. App.) 29 Pac. 664. But the propositions of law relied on and sustained by appellant's citations do not apply to the facts of the case at bar. Here, there are facts strongly sustaining the theory that the fire in the trestle was communicated through the accumulation of débris on the right of way. There were other facts rendering it possible that appellant might escape liability on the theory put to the jury that the fire was not communicated through such débris, but was carried from outside fires, directly to the trestle. As said by a very wise and a very just jurist, Caldwell, J. (though in a dissenting opinion)—*Myers v. Railroad*, 95 Fed., loc. cit. 414, 37 C. C. A. 145—"a jury is much more competent to determine these questions than

the judges of this court. * * * To the jury, then, the law leaves the matter, and in the presence of facts and inferences about which honest men might differ, the question does not resolve itself into one of law.

(5) The next serious contention of appellant is that the case should have been taken from the jury, because, conceding the negligent accumulation of rubbish on the right of way, and conceding, moreover, that the fire was communicated to the trestle through this debris, yet that appellant's skirts are clean because it issued orders to clean up the right of way in the presence of impending danger from fire, which orders issued from the superintendent to the roadmaster and by him were transmitted to the section foreman, and that the section foreman and his men in negligently carrying out these orders were fellow servants with respondent. To sustain this contention we are referred to the fact in proof that by an act of the federal Congress under date of May, 2, 1890 (26 Stat. 94, c. 182, § 81) certain laws of Arkansas were put in force in the Indian Territory and continued in force to the time of the injury. The specific statute referred to is one adopting the common law, reading thus: "Chapter 20. Common Statute Law of England. Sec. 566. The common law of England, so far as same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law made prior to the fourth year of James First (a) [that are applicable to our form of government] of a general nature and not local to that kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state, unless altered or repealed by the General Assembly of this state." Mansfield's Digest of Statutes, p. 262, c. 20. Appellant under this head introduced in evidence certain decisions of the Supreme Court of Arkansas construing the common law relating to the negligence of fellow servants. These cases were as follows: Railroad v. Shackelford, 42 Ark. 417; Railroad v. Gaines, 46 Ark. 555; Railroad v. Rice, 51 Ark. 467, 11 S. W. 699, 4 L. R. A. 173; Fordyce v. Briney, 58 Ark. 206, 24 S. W. 250; Railroad v. Henson, 61 Ark. 302, 32 S. W. 1079. And on the strength of the foregoing cases appellant contends, first, that on the date of the act of Congress putting in force in the Indian Territory the statutes of Arkansas, May 2, 1890, the common law had been construed by the courts of that state so that a section foreman or roadmaster was a fellow servant of a brakeman on a freight train, and that there must be read into the act of congress that construction of the common law; and, second, that such construction of the common law is binding upon this court in a suit here for injuries occurring in the Indian Territory.

Attending to these contentions, it may be said that if the action was based on a statute

of Arkansas, then, out of comity (barring mere rules of evidence) we should lean to the construction put on that statute by the courts of that state. And further, if the statute to be enforced were our own, but borrowed from Arkansas, our Legislature would be presumed to have borrowed the statute with the construction placed upon it by the courts of Arkansas. And, furthermore, it seems to be settled law that in a transitory common-law action, where a suit is brought in a state other than where the injury happened, the interpretation of the common law obtaining in the state where the cause of action accrued, the *lex loci*, will govern. *Fogarty v. Transfer Co.*, 180 Mo. 490, 79 S. W. 684; *Lee v. Railroad* (decided by this court in banc and not yet officially reported) 92 S. W. 614; *Sanger v. Flow*, 48 Fed. 152, 1 C. C. A. 56; *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Walsh v. Railroad*, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; *Brewster v. Railroad*, 114 Iowa, 144, 86 N. W. 221, 89 Am. St. Rep. 348; *Helton v. Railroad*, 97 Ala. 275, 12 South. 276; *Alexander v. Railroad*, 48 Ohio St. 623, 30 N. E. 69; *Turner v. St. Clair Tunnel Co.*, 111 Mich. 578, 70 N. W. 146, 36 L. R. A. 134, 66 Am. St. Rep. 397. In *Alexander v. Railroad*, supra, *Bradbury, J.*, speaking to the point, said: "If the facts of the parties impose no obligations on the one hand and confer no rights upon the other, where they occur, no good reason is apparent why they should spring into active existence the moment the parties pass into another jurisdiction, where, if they had occurred therein, such relative rights and obligations would have resulted. An act should be judged by the law of the jurisdiction where it was committed; the party acting or omitting to act must be presumed to have been guided by the law in force at the time and place, and to which he owed obedience; if his conduct according to that law violated no right of another, no cause of action arose, for actions at law are provided to redress violated rights. Nor is it material that the rules of Pennsylvania law that deny relief to plaintiff in error result from the adjudications of the courts of that state, instead of being legislative enactments, the rules of law established by judicial decisions, are as binding as legislative enactments, until modified, or overturned by other decisions or legislative enactments binding within that jurisdiction. In theory it may be true that there is no common law of Ohio, or of Pennsylvania; that the common law is one and the same in every state acknowledging its obligations, and that the decisions of one state are but evidence of it, not binding upon the courts of any other state; but, as a matter of fact, we know that in the application of the rules of the common law to the affairs of men, there is, unfortunately, in the several states a wide divergence; and that it necessarily follows that acts and transactions, sufficient in one state to create a cause of

action, will not produce that result in another, and in the administration of justice mere theory must be made to yield to the truth as established by facts and experience."

The gist of the matter is that if a litigant has no cause of action in the courts of the state in which he was injured, he has none elsewhere. As a matter of abstract reasoning, much might be said on the other side; because the force of the federal statute was spent in adopting an Arkansas statute, itself merely adopting the common law. The common law is a common heritage; i. e., it is our law, and why should we not adopt our own construction of our own law? The writer of this opinion sympathizes with that view; otherwise, in passing on the common law, we might speak with two voices and make "confusion worse confounded," for it is practically conceded by appellant that our own construction of the common law is to the effect that a section foreman or roadmaster, or even a sectionman, charged with the duty of providing a reasonably safe place for trainmen, a reasonably safe field of operations, to wit, safe bridges, rails, ties, and roadbed, are not fellow servants with trainmen whose duty it is to operate trains, but stand as vice principals to trainmen. It would serve no useful purpose to enter the maze of the labyrinth of judicial discussion and adjudication on this question (see *Grattis v. Railroad*, *infra*) but we think the proposition announced above is sustained by the following cases: *Parker v. Railroad*, 109 Mo. 362, 19 S. W. 1119, 18 L. R. A. 802; *Relyea v. Railway Co.*, 112 Mo. 86, 20 S. W. 480, 18 L. R. A. 817; *Schlereth v. Railway Co.*, 115 Mo. 87, 21 S. W. 1110; *Swadley v. Railway Co.*, 118 Mo. 268, 24 S. W. 140; *Burdick v. Railway Co.*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; *Grattis v. Railway Co.*, 153 Mo. 380, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721; *Jones v. Railway Co.*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434; 12 Am. & Eng. Ency. (2d Ed.) 1005, 1006, and notes.

Conceding, arguendo, that we should adopt the construction placed upon the common law by Arkansas courts in defining fellow servants, yet a close analysis of the Arkansas cases cited leads us to conclude that the Supreme Court of Arkansas never went so far as appellant contends. The very most that can be said was that that learned court was "heading" in that direction. But as seen by our own decisions, and pointed out in *Grattis v. Railway Co.*, *supra*, courts do not always go on the way they are headed, and it is not always safe to say that a court will reach a goal to which its face is turned and its steps directed. Indeed, we may allow to the Supreme Court of Arkansas the same right and disposition to establish a growth in the law or reconstruct its views that we arrogate to ourselves. Before that court reached the point appellant contends it had reached in principle, if it ever would have got there, the

Legislature of Arkansas in 1893 (Acts Ark. 1893, p. 68) passed a statute defining fellow servants, which, with variations, this state has adopted. Rev. St. 1899, § 2874 et seq. Let us examine the Arkansas cases relied on by appellant. In *Railroad v. Shackelford* it was held that a laborer on a construction train was a fellow servant with the engineer on the same train. In *Railroad v. Gaines* a brakeman and a car inspector were held to be fellow servants. In *Railroad v. Rice* it was held that a yard inspector and a yard foreman, both under control of a yardmaster, were fellow servants. In this case the distinction was drawn between "chief inspectors" and mere yard inspectors, and it was held that the company would be liable for the negligent default of its chief inspectors. But that court did not yield its assent to the doctrine "that every yard inspector on the line of a railroad is a vice principal." In *Fordyce v. Briney* it was held that a car inspector and a car repairer are fellow servants, where both are under the control and supervision of a foreman who had charge of the business of the company. In *Railroad v. Henson* it was held that a bridge foreman and locomotive engineer are fellow servants. But it must be said of that case that the facts in judgment showed the bridge foreman was hurt while moving with his men on the train run by the engineer. It seems that the bridge gang lived in boarding cars constantly on the move and being pulled over the road by engineers on the various trains. The case proceeded on the theory that the bridge foreman assumed the risk because he knew the manner and method of moving these trains. In that case the injury was caused by a collision.

Some of the foregoing cases would have probably been decided by this court precisely the same as they were by the Supreme Court of Arkansas—in fact, while the reasoning employed by the judges of this court on kindred questions may approach the subject-matter from a different standpoint and differ somewhat from reasons employed by our learned brothers of the Supreme Court of Arkansas, yet, it may be, all of the cases would have been decided the same way by this court at one time or another in its existence. At least, we are not willing to decide that the Supreme Court of Arkansas would have held, judged from its prior decisions, that the roadmaster, Sloan, would not represent appellant corporation when, as shown by the evidence, on the 18th of July he passed on a tour of inspection over the road, inspected the manner in which the debris had been handled about the trestle in question, from a moving train, presumably saw the condition of the right of way and stamped it with his approval. This court would have certainly held that Sloan's eyes, as well as the eyes of Parsons, the section foreman, were the eyes of the master and their judgment was the master's judgment, and it would be but a mere guess for us to say that

the Supreme Court of Arkansas would not have said the same thing; because in *Railroad v. Barry*, 58 Ark., loc. cit. 204, 23 S. W. 1007, 25 L. R. A. 386, the Supreme Court of that state used the following language and quoted approvingly the following authorities: "It seems impossible to formulate any general rule for all cases. Each case must, to some extent, be governed by the peculiar circumstances attending it. In *Baltimore & Ohio Railroad Co. v. McKenzie*, it was held that, under the circumstances of that case, a section boss and night watchman, represented the company, the court saying: 'Where the injuries are caused by the negligence of a servant, who is charged with the performance of duties which, by law, it is incumbent on the master to perform, such servant is regarded as the representative of the master; and in legal contemplation his negligence is the negligence of the master.' 81 Va. 71. Judge Cooley says: 'The master is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally, or in respect of the particular duty then resting upon the negligent employé, the latter so far occupied the position of his principal as to render the principal so far chargeable for his negligence as for personal fault.' Cooley, *Torts*, 564." In our opinion, the case at bar was entitled to go to the jury on any theory of the law.

2. Complaint is made of the introduction of incompetent testimony, and it is contended by appellant that the court below committed prejudicial error in that behalf.

(1) For instance, respondent, under an assurance of counsel, made *ore tenus*, that the same condition of things would be shown to continue down to the date of the injury, was permitted, over the objection of appellant that it was too remote, to show that in the April preceding large quantities of driftwood floated on to the right of way and lodged against the trestle. In making this assurance, counsel were betrayed by their zeal in the hot foot of the trial; because they either would not or could not fulfill it, inasmuch as no such testimony was forthcoming. Was the introduction of this testimony prejudicial error? We think so. Because: The amount of the inflammable debris on the right of way, and especially in the rows within three or four feet of the trestle, was a material element in determining the negligence of appellant and, what is more, in determining whether that negligence caused the fire in the trestle. The issue was the condition of the right of way at the time of the injury and the testimony should have been directed and confined to that issue. It is true that other testimony of respondent was directed to the issue and it may be the jury had evidence upon which, with nice circumspection, they could have determined whether the amount of inflammable stuff there on July

16th would likely have caused the trestle to catch fire, but how can we say they were not influenced by the remote unconnected testimony objected to? If the human mind were so automatically self-adjusting as to forget improper testimony and retain and apply only the proper proof, no injury might have resulted, but unfortunately it is not so. Here was a sharp issue on a vital question, with unfair testimony put in the balance, and who can say it had no effect in the result? In *Smith v. Sedalia*, 182 Mo., loc. cit. 9, 10, 81 S. W. 167, in an identical instance of a broken or forgotten promise, Vallant, J., said: "Upon that assurance [the assurance of counsel to connect the remote testimony] the objection to the evidence was overruled. But the promised evidence was not adduced. The learned trial judge was justified in admitting the evidence on the promise given, and he was also justified in sustaining the motion for a new trial on the ground that the defendant was unable to fulfill its promise. It is in the discretion of the trial court to allow counsel some choice as to the order in which they will introduce their evidence, but when counsel have been permitted to introduce evidence out of its usual order on their assurances that it will be connected and its relevancy shown later, if the promised evidence is not brought forward and if the irrelevant evidence is of a character likely to influence the jury and if the verdict is on that side, the trial court should set it aside and grant a new trial. The fact that the promise may have been made in good faith does not alter the effect of the illegal evidence." For other cases in point, see the brief of the learned counsel for appellant.

(2) In this case, the motion for a new trial was overruled and in our opinion the trial court erred in that ruling. And this is so in spite of the insistence of respondent that appellant should have renewed its attack by a motion to strike out. Appellant was not in fault, why should it ask a second time for what was denied it at first, because of a promise of respondent broken thereafter? It was respondent who did the mischief, who tolled the court into error, and it was he who thence onward carried the burden of undoing the wrong and who must bear the blame. Not only is the foregoing error in the case, but respondent was permitted to introduce testimony over the objection of appellant tending to show that when the right of way was originally cut through the timber, years before, the logs, etc., were thrown back and to some extent left on the right of way. This testimony tended to show a condition of things not even attempted to be connected on down with conditions prevailing at the time of the fire. In fact, the debris struck at by the petition was described therein as driftwood "carried down said creek at high-water periods," and the proof was outside the specifications in the petition, made with

unnecessary particularity, but nevertheless made and constituting the case appellant had to meet.

(3) In taking his depositions, respondent caused to be put to a medical witness this question: "Q. If the testimony in this case showed that on the 16th day of July, the plaintiff was in good health when serving in the capacity of head brakeman on a standard gauge freight train upon a dark night that he leaped from the locomotive engine, when upon a trestle, the distance of from 10 to 25 feet, into the bottom of a dry creek, and that as he made the leap he was struck across the back in the vicinity of the lumbar region by some timber, scantling, or other railroad iron, whether in your opinion, such a strike and such a fall would be sufficient to produce the injured condition in which you found Mr. Root to be?" The question was objected to at the trial because it did not correctly state the facts in evidence from respondent and his witnesses, and the objection being overruled, appellant excepted, and the question was answered in the affirmative. The objection should have been sustained. A hypothetical question should be predicated on the testimony and this one was not. *Russ v. Railroad*, 112 Mo., loc. cit. 48, 20 S. W. 472, 18 L. R. A. 823 and cases cited.

3. Appellant complains of the ruling of the court on instructions and this complaint has substance in our opinion. Appellant challenges the correctness of respondent's instruction No. 7 as a rule of law. That instruction reads: "You are instructed that it was the duty of the defendant to exercise ordinary care to keep its right of way free from dry and combustible matter which would be liable to take fire and communicate to the trestle, and this duty is a personal duty of the defendant, is absolute in its nature, and cannot be delegated or entrusted to any of its agents, employes or servants so as to release itself from liability to the plaintiff for injuries sustained by him in consequence of the failure of any such agent, servant, or employe to perform such duty, but upon the other hand when the authority is delegated or entrusted by the defendant to any such agent, servant, or employe, the negligent acts or omissions of such agent, servant, or employe becomes the negligence or omission of the defendant itself." One criticism hinges on the phrase "liable to take fire," and it is insisted the word "liable" is a word of such wide play in meaning as to admit of a gloss rendering its meaning as "within the range of possibility," and so this court held in *Beasley v. Linehan Tr. Co.*, 148 Mo., loc. cit. 421, 50 S. W. 87, in speaking of it when used in a petition. Substituting that meaning, we have an instruction telling the jury that the law imposed upon appellant the duty of keeping its entire right of way free from dry and combustible matter which, within the range of possibility, would take fire and communicate to the trestle, etc., and, so read, its er-

ror is so imprinted on its face that one who runs may read it there. This instruction should have told the jury that it was the duty of appellant to use ordinary care to keep its right of way free from such accumulations of combustible matter in such proximity to its trestle as would be subject to, or would probably, or would likely communicate fire thereto. Conceding the word "liable" may shade off in some of its uses into probably or likely, yet other meanings are also attached to it, and its use was unfortunate, for no man can say what meaning was given to it by the jury. A. walks in the field in a rain. He is liable to be struck by lightning. B. rides in a boat. He is liable to be drowned. C. eats fish. He is liable to have a bone stick in his throat. All these are allowable expressions, and yet neither A., B., nor C. is necessarily negligent in walking in the field, rowing on the river, or in eating fish.

The duty of the master is performed in supplying a reasonably safe field of operations, a reasonably safe place. *Jones v. Railroad*, 178 Mo., loc. cit. 544, 77 S. W. 890, 101 Am. St. Rep. 434. Accumulations of inflammable matter on its right of way so close to a dry trestle and in such amounts as to endanger it by fire igniting the matter and thereby burning the trestle is negligence, and the court should have so directed the jury in substance. Instead of so doing the instruction in hand went beyond the rule regulating the duty of the master. Leaving combustible material on the right of way is not negligence per se. Its extent and its proximity to the track may be such as to justly subject appellant to the imputation of negligence and of this the jury are the judges, and not the court. *Railroad Co. v. Dennis*, 38 Kan., loc. cit. 426, 17 Pac. 153; *White v. Railroad Co.*, 31 Kan., loc. cit. 280, 1 Pac. 611, and cases cited; *Taylor v. Railroad (Pa.)* 34 Atl. 457; *Railway v. Bailey (Ind. App.)* 46 N. E. 689; *Railway Co. v. Sparks (Tex. Civ. App.)* 35 S. W. 745.

Other assignments of error in refusing and modifying instructions seem to us without merit as applied to the facts in judgment. Otherwise than as stated, the cause was well tried.

The judgment is reversed, and the cause remanded to be proceeded with in accordance with this opinion.

BRACE, P. J., and VALLIANT, J., concur. MARSHALL, J., concurs in the result.

STATE v. GROVES.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. CRIMINAL LAW—TRIAL—DIRECTION OF ACQUITTAL.

Where, in a prosecution for assault with a deadly weapon, the evidence as to who was the assailant, and as to whether L. or any other

person was throwing stones at defendant before he fired the shot that struck prosecutor, was conflicting, it was not error to decline to direct an acquittal.

2. HOMICIDE—DEGREES OF OFFENSE—ASSAULT.

Rev. St. 1899, § 2369, provides that, on an indictment for any defense consisting of different degrees, the jury may convict of the offense charged, or of any degree of such offense inferior to that charged. Section 2370 declares that, on an indictment for an assault with intent to commit a felony, or for a felonious assault, the defendant may be convicted of a less offense. Section 1847 provides that an assault on purpose and of malice aforethought, with intent to kill, maim, or disfigure, is punishable by imprisonment not exceeding 10 years, whereas, a felonious wounding is punishable by section 1849 by imprisonment not exceeding five years, or by a fine of \$100. *Held* that, where defendant was charged with shooting a pistol with intent to kill prosecutor, but the evidence showed that the pistol was shot in a public street while defendant was pursuing another, it was proper to charge on and authorize a conviction as for a felonious wounding.

3. CRIMINAL LAW—INSTRUCTIONS—REQUESTS.

In a prosecution for assault, it was not error to omit to charge on its own motion defendant's right to pursue one who had possession of his cap; no instruction being requested, and the court's attention not being called to its omission.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

David Groves was convicted of feloniously wounding, and he appeals. Affirmed.

Morton Jourdan, for appellant. The Attorney General and N. T. Gentry, for the State.

GANTT, J. This prosecution was commenced in the circuit court of the city of St. Louis, at the February term, 1904, by information filed by the assistant circuit attorney, charging the defendant with having on the 1st of July, 1903 willfully, on purpose, and of his malice aforethought made an assault in and upon one Abraham Peters, in the city of St. Louis, and then and there shooting off a certain pistol loaded with gunpowder and leaden balls, at, against, and upon the said Peters, and giving unto him (said Peters) one wound, with intent then and there upon him the said Peters to kill, against the peace and dignity of the state. The defendant was convicted of felonious wounding, and his punishment assessed at a fine of \$100. In due form he appealed to this court.

The evidence on the part of the state tended to prove that the defendant is a conductor on a street car in St. Louis, and the prosecuting witness is a negro man. On July 17, 1903, between 6 and 7 o'clock in the evening, defendant was in charge of an electric car going along Gratiot street near Seventeenth, when he got into a misunderstanding with one James Ladell, on the rear platform of his car. In the scuffle the defendant's cap was knocked off and fell to the ground, and Ladell jumped off of the car. Ladell ran towards the cap and picked it up to get the number. The defendant got a pistol from another passenger on the car and followed Ladell and

fired four shots at him. Ladell testified he dropped defendant's cap at the first shot, and that the defendant fired at him three times after that as he ran down the street. All of the shots missed Ladell, but one of them took effect in the body of Peters, the prosecuting witness herein. The bullet pierced the right breast and was taken out of the back of the shoulder. At the time of the shooting, Peters was standing near the curbstone, and had gone out of his boarding house on to the street in order to hear the trouble that was then in progress between defendant and Ladell, when a large number of negroes were drawn to the street by reason of the firing of the pistol.

The defendant's evidence tended to show that Ladell was guilty of misconduct on the street car, and that the conductor undertook to eject him, and got into a fight with him. Sheriff Hoog of Butler county, Mo., was a passenger on the car, and was standing on the rear platform. He saw Ladell get on the platform, and his attention was first attracted by the conductor attempting to put Ladell off of the car. Before Ladell was put off he knocked off the conductor's cap, and it fell in the street. After he was put off he picked up a rock and attempted to throw it at the conductor, the defendant. The conductor asked witness for his gun in order to go and get his cap. The sheriff at first refused to let him have his pistol, but defendant said he wanted to protect himself, and thereupon he loaned him his pistol. His cap was about a half block back from the car. After getting the revolver the defendant started after his cap. Ladell started down the street in a run and took up defendant's cap. Sheriff Hoog saw the defendant shoot at Ladell. They then ran down a side street, and he did not know what occurred after that; said the street was pretty well filled up for a block with a crowd of negroes. The sheriff testified that there were rocks thrown at the car before defendant shot at Ladell. Other witnesses testify that rocks were thrown from the crowd of negroes before any shots were fired. One rock struck the back end of the car. A passenger by the name of McKenna was struck by one of the rocks thrown by one of the negroes after the shot. McKenna testified that he saw Ladell beating the conductor with his fists on the rear platform, and saw him run and pick up the defendant's cap. He saw defendant pursue Ladell down the road, shooting at him. There was no evidence tending to show that Peters himself took any part in the assault on the defendant or had anything to do with throwing the rocks at the defendant or at the car.

The court instructed on assault to kill with malice aforethought, and defined the terms "willfully," "on purpose," and "malice aforethought." It also instructed on assault with intent to kill without malice aforethought, and then gave the following instruction: "If from the evidence, and under these instruc-

tions, you find that at the city of St. Louis, Mo., on or about the 1st day of July, 1908, defendant shot, struck, and wounded one Abraham Peters with a bullet fired and discharged by said defendant out of and from a pistol loaded with gunpowder and leaden bullets, and you further find that such striking and wounding of said Abraham Peters was not intentionally done by defendant, but was done while he was shooting at some other person than said Abraham Peters, and that such striking and wounding of said Peters was the direct result of defendant's gross and culpable negligence and of his then and there acting in a careless and reckless manner incompatible with a proper regard for human life, then you should convict defendant of felonious wounding, and assess his punishment at imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the city jail for not less than six months, or by both a fine of not less than \$100 and imprisonment in the city jail of not less than three months, or by a fine of not less than \$100." The court also instructed on self-defense, the presumption of innocence, reasonable doubt, and the credibility of the witnesses.

1. To reverse the judgment the defendant assigns three grounds of error. It is first insisted that the court should have directed a verdict of acquittal under the evidence. The basis of this contention is that the negro Ladell brought on the difficulty and assaulted the conductor, who was in the discharge of his duty, and, when the defendant had ejected Ladell from the car and the latter began to throw rocks at the conductor, the conductor had the right to take the pistol from Sheriff Hoog and pursue Ladell to recover defendant's cap, and to shoot at Ladell or at any other person who was engaged in throwing stones at him. As to who was the assailant, and as to whether Ladell or any other person was throwing stones at the defendant before he fired the shot which struck Peters, the testimony is hopelessly conflicting. If that on behalf of the state was believed, no stones were thrown at the conductor before he shot at Ladell. In this state of the evidence it would have been manifestly improper for the court to have taken the case from the jury and directed an acquittal.

2. It is urged that the court committed error in giving the instruction to the jury upon felonious wounding, as set forth in the foregoing statement. It is insisted that, if the state's witnesses are to be believed, the defendant was guilty of a felonious assault with intent to kill, and, if the testimony of the defendant's witnesses is true, the defendant was entirely justified, and therefore there was no testimony upon which to predicate an instruction for felonious wounding. On the other hand, the position of the state is that, if the jury believed the state's evidence, the defendant was clearly guilty of discharging a loaded pistol into an unoffending crowd of

people on the street, and recklessly wounding Peters, who was a mere looker-on; that, even though the defendant was guilty of an assault with intent to kill, he is in no position to complain of the instruction and verdict for felonious wounding. Section 2369, Rev. St. 1899, provides: "Upon indictment for any offense, consisting of different degrees as prescribed by this law, the jury may find the accused not guilty of the offense charged in the indictment, and may find him guilty of any degree of such offense inferior to that charged in the indictment, or of an attempt to commit such an offense or any degree thereof; and any person found guilty of murder in the second degree, or of any degree of manslaughter shall be punished according to the verdict of the jury although the evidence in the case shows him to be guilty of a higher degree of homicide." And section 2370 provides: "Upon an indictment for an assault with intent to commit a felony or for a felonious assault, the defendant may be convicted of a less offense." That there was sufficient evidence to justify a conviction for felonious wounding by the culpable negligence of the defendant in recklessly firing a loaded revolver in a public street, in which a large number of persons had congregated, there can be no doubt whatever, and the indictment in the case not only alleges an assault, but it alleges the wounding of Abraham Peters with a leaden ball out of the pistol so shot off as aforesaid by the defendant; that the offense of maiming, wounding, or disfiguring another by the culpable negligence of a defendant is a less offense than an assault on purpose and of malice aforethought with intent to kill, maim, or disfigure such person, which is a greater offense than defined in section 1849, there can be no doubt. An assault on purpose and of malice aforethought, with intent to kill, maim, or disfigure, under section 1847, is punishable by imprisonment not exceeding 10 years, whereas, felonious wounding under section 1849, is punishable by imprisonment in the penitentiary not exceeding five years, and may be scaled down to a fine of \$100, as in this case. We think the court properly instructed on felonious wounding under the indictment and the evidence in the case, and that the defendant has no cause to complain because the evidence in fact tended to show he was guilty of a larger offense than of an assault with intent to kill under section 1847.

3. There was no error in failing to instruct the jury, by the court of its own motion, of the right of the defendant to pursue one who had the possession of his cap. No such instruction was requested of the court, nor was the court's attention called to the failure to instruct specially on said subject. Moreover, the defendant did not testify that he believed that Ladell was trying to steal his cap, or that it was his reason for shooting at him, and such an instruction would have been

wholly foreign to the defendant's own evidence.

We discover no reversible error in the record, and the judgment of the circuit court must be and is affirmed.

BURGESS, P. J., and FOX, J., concur.

MATTHEWS v. FRENCH.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. PRINCIPAL AND AGENT — AUTHORITY OF AGENT—RATIFICATION.

Where the husband of an owner of land made an agreement with an adjoining owner as to the boundary and the wife occupied the land and claimed to the agreed division line, this constituted a ratification of the agreement, so that it was immaterial whether he had any express authority from her to make the agreement.

2. QUIETING TITLE—CLAIMS OF THIRD PERSONS.

Where two persons, claiming to be adjoining owners of accretions, agreed on a boundary between their property, in an action between their successors in interest to determine their rights, the claims to a third person not a party to the action to a portion of the accretions between those which belonged to the parties was immaterial, since the judgment could not affect his right.

3. APPEAL—REVIEW—FINDINGS.

Findings of the trial court on questions of fact supported by substantial evidence will not be disturbed by the appellate court.

Appeal from Circuit Court, Mississippi County; H. C. Riley, Judge.

Action by Charles D. Matthews against Silas French. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This cause is here upon appeal by plaintiff from a judgment in the Mississippi county circuit court in favor of defendant. This proceeding is predicated upon the provisions of section 650, Rev. St. 1899, to ascertain and define title to real estate.

The petition thus states the cause of action: "Plaintiff states that he is the owner in fee simple of the following described real estate in Mississippi county, Missouri, viz.: A tract of land bounded as follows: Beginning at a point on the original bank of the Mississippi river one hundred and twenty-five feet south of the north line of section 22, township 27, range 17, running thence sixteen degrees and fifty-three minutes east 3,000 feet to the Mississippi river; thence down the river to a point due east of the point of beginning; thence due west to the point of beginning. Plaintiff further states that the defendant claims to have title to or an interest in the said described land or real estate, which claim is adverse and hostile to plaintiff's right. Wherefore, the plaintiff prays the court to ascertain and determine the estate, title, and interest to the said parties, respectively, in the real estate, and to define and adjudge by its judgment and decree the title, estate, and interest of the parties, severally, in and to

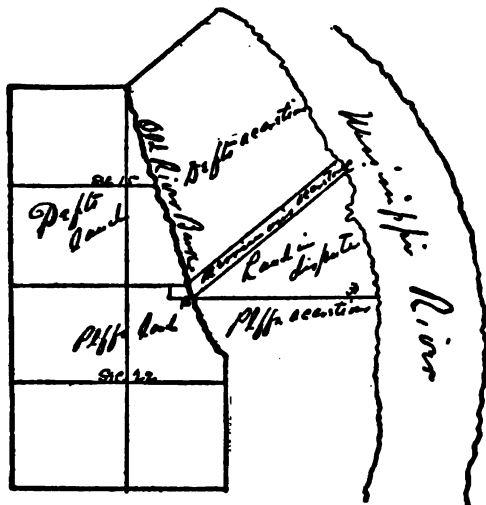
said lands, and plaintiff asks for all other proper relief and for costs."

To this petition defendant filed the following answer: "The defendant for answer to the plaintiff's petition denies generally each and every allegation therein contained and prays for judgment. And for a further answer to said petition the defendant says: That the real estate sued for herein is part of an accretion or made land, which accretion is five or six miles in length formed in front of sections 23, 22, 14, 15, and others. That said land against which and to which said accretion is formed and attached in 1889 belonged to Stephen Bird, Althea Keyser, wife of Capt. Wm. Keyser; Merriman, Sickman, and others. That said accretion has never been divided and partitioned by deed or decree between the several parties entitled to an interest therein. That the lands of Stephen Bird under whom Matthews the plaintiff in this cause, claims title, lies immediately south and adjoining to the lands of Althea Keyser in section 14, now owned by the defendant. That on, to wit, the 25th March, 1889, said division line being a subject of controversy, and to settle same between Stephen Bird, acting in his own behalf, and Mrs. Althea Keyser, represented by her husband and agent, William Keyser, did voluntarily agree upon and fix the division line on said accretion, whereby they and each, Bird and Keyser, then knew and was informed that the line agreed upon was not the true line or where the same would be if the said accretion was equitably divided between all the parties interested therein, and they with such knowledge did cause the county surveyor, Jno. C. O'Bryan, to run and establish a point up the river 14.89 chains from the intersection of the ancient meander line, and then commencing at the corner of fraction section 14 and 23, township 27, range 17, and run a line to the point established in the river, bearing of line being north 52 degrees and 30 seconds east, length of line 7.68 chains, which the said Bird and Keyser then and there with the information that said line was not the true line, yet, nevertheless, then and there agreed upon, and caused said surveyor to make a record thereof as an agreed division line, and that all accreted lands north of said line was to be Keyser's, and that south Bird's. And ever since then Keyser and French, his grantees have held and used said land, being the same in actual, and continued, and adverse possession, that the land sued for in plaintiff's petition are lying north of said agreed line and under said agreement are the property of the said defendant and by reason of the said agreement plaintiff, a grantee under Bird, is estopped to now claim the land sued for or dispute the division line agreed upon."

The replication of plaintiff was a general denial of the new matter alleged in the answer. The cause was tried by the court without the aid of a jury.

Upon the trial the following agreement as to facts was submitted to the court as part of the evidence in this cause: "Counsel agree that the plat marked 'Exhibit A' is a correct plat showing the land in controversy, and it is admitted further that the land between lines marked 'B' and 'C' and the line marked 'F' and the river, and the section line on the south is the land in dispute. And it is admitted also that this land in controversy being an accretion of the Mississippi river is the property of the plaintiff, unless there has been an agreed line between the parties on the line designated 'F' on the plat and it is admitted that if it is established by the proof that the line marked 'F' has been made the agreed line between the parties, then the title to the property would rest in the defendant. And it is agreed that the lines 'B' and 'C' on the south end extend one one hundred and twenty five feet south of the section line."

The plat referred to in the agreement was as follows:



Under the agreement submitted in evidence there was only one question in dispute between the parties to this suit, and that was as to whether there was an agreed line as designated on the plat with the letter "F" between parties then claiming to own the land as to the accretions which had formed in front of their respective claims. It is unnecessary to set out the testimony in detail upon this sharply contested question as to an agreed line between parties, who were then claiming to be the owners of certain accretions which had formed in front of the lands claimed by the parties, whom it is said agreed upon a division line. This court would not undertake to settle the conflict in the testimony upon that subject; hence it is sufficient to enable us to determine the legal propositions involved in this case to say that there was testimony both for the plaintiff and defendant tending to prove the

assertions made by each of them in respect to this agreed line. Witnesses Bird and Keyser, whom it is charged made the agreement as to the division line, both deny that any such line was agreed upon. On the other hand, John C. O'Bryan, who was the county surveyor for about 10 years, testified most positively that Stephen Bird, who is plaintiff's grantor, and William Keyser, the husband of Mrs. Keyser, authorized him to run the line designated by "F" in the plat and that they agreed at the time that such line should be the division line between their lands; and to emphasize his testimony, that such line was agreed upon, they requested him to make a record of it, which he did, and such record was introduced in evidence. In addition to this witness Sickman testifies that O'Bryan surveyed the division line, and that it was surveyed to divide the lands of Bird and Keyser. He says that Bird and Keyser had O'Bryan run that line and mark it off, and they agreed that north of the line should be Keyser's and south of the line should be Bird's, and that after the line was established they fenced it, and Mrs. Keyser and French have occupied down to the line since that time. French, the defendant, testified that after he bought the land from Mrs. Keyser that he did not know there was an agreed line on the premises between Keyser and Bird, but that Bird told him, and pointed out the agreed line, and he thinks Bird told him that the accretions south of the line were his, and those north were Mrs. Keyser's. The land in dispute is north of the agreed line. Defendant states that he fenced and took possession of this land in 1894, and has been in possession ever since, and that Bird took possession of the land south of the agreed line, and fenced it up to the agreed line, and made no claim to any part of the land in dispute until there was a new survey made of the accretions in 1896. In addition to this the testimony of Bird and other witnesses tends to show that J. E. Merriman was the owner of a few acres of land in section 22, and that if accretions formed to this land so as to make Merriman the owner of such accretions, then such accretions so formed to the Merriman land would make a small strip of land between the Bird and Keyser land, which would prevent them from being adjoining proprietors. This is a sufficient indication of the testimony to show the basis upon which the trial court rests its judgment for defendant.

At the close of the evidence the plaintiff requested the court to declare the law as follows: "No. 1. The court declares the law to be that even if there was a division line agreed upon between Stephen Bird and William Keyser the husband of Althea Keyser, who was the owner of the land, such an agreed line would not be binding in this case, as the proof falls to show that the said William Keyser had any authority to bind his wife, and was therefore not binding

upon the said Bird, because the same was not mutual. No. 2. The court declares the law to be that even if Stephen Bird and William Keyser undertook to establish a division line across the accretions in front of the lands of the said Bird and Althea Keyser, still such an agreement was of no effect, unless the lands of the said parties were adjoining, and if the court believes from the evidence that one Merriman owned a strip of land between the land of the said Bird and Althea Keyser, then no such agreement undertaking to establish such a division line could be valid or binding, and, in such case, the finding should be for the plaintiff. No. 3. The court declares the law to be that if at the time the accretions now in controversy began to form and did form against the river bank, one J. E. Merriman or those under whom he holds owned a lot that extended to the river bank, then the said Merriman is entitled to accretions forming in front of his lot in the same proportion to the amount of his river front as other landowners adjoining him."

Upon the cause being submitted to the court, a finding was made in favor of the defendant, and decree and judgment entered in accordance with such finding. Plaintiff timely filed motion for new trial, which was by the court overruled, and from the judgment rendered in this cause, his appeal was in due time and form prosecuted to this court. The record is now before us for review.

Russell & Deal, for appellant. H. C. O'Bryan, for respondent.

FOX, J. (after stating the facts). It is manifest from this record that the main dispute between the parties to this action is as to the agreed or division line between them, as contended for by the respondent. Upon this question the trial court heard the testimony, had the witnesses before it, and we shall not undertake to retry, upon the disclosures of the record, that question, which is purely one of fact. This leads us to the consideration of the only legal proposition presented by this record, which is embraced in the contention of appellant that the court committed error in refusing the declarations of law requested by appellant.

Instruction No. 1, it will be observed, requested the court to substantially declare the law that the division line, even though agreed upon between Stephen Bird and William Keyser, would not be binding in this court on account of the failure of the testimony to show that William Keyser had any authority from his wife, Althea Keyser, who was the owner of the land, to make such agreement as to the division line. This instruction was properly refused for the reason that it ignores the testimony which tends to show a ratification by Mrs. Keyser of such agreement. William Sickman testifies that after this agreed line was run, Mrs. Keyser

and French occupied the land in accordance with such agreement. The respondent testifies that the Keyzers had fenced this land in accordance with the division line, prior to it being claimed by him. Upon this state of facts, even though Mrs. Keyser did not expressly authorize her husband to make the agreement to the division line between his land and that of Bird, yet, after the agreement was made, and the division line agreed upon, Mrs. Keyser and her husband acted upon it, took charge of the property in accordance with it, must be treated as a ratification of the agreement as well as an approval of the results of it, and was just as effective in making it a binding agreement upon a division line as though she had expressly given the authority to her husband to make such agreement prior to its being made.

We will treat together instructions Nos. 2 and 3 refused by the court. They treat of land claimed by Mr. Merriman, by reason of being accretions attached to his land on the bank of the river, and they declare the law to be that if these accretions formed a strip of land between the lands owned by Stephen Bird and the Keyzers; in that event Bird and Keyser were not adjoining proprietors, and such agreement establishing a division line between them was invalid. The fundamental error of those instructions is that they undertake in this proceeding between plaintiff and defendant to litigate the title and right of possession of J. E. Merriman to certain lands in possession of the defendant, when Merriman is not a party to the action. It is made manifest from the testimony in this cause that at the time the division line was established, that the Keyzers and Bird were claiming all these accretions, and sought to establish a division line as adjoining proprietors. In fact, Mr. Merriman testifies that respondent now has possession of that strip of land claimed by him. The judgment in this cause can in no way affect the claim or legal rights of Merriman to the strip of land claimed by him, for the reason that he is no party to this proceeding. This controversy is between the parties to this action, and the question is as to their rights to the property in dispute. If they were claiming these accretions as adjoining proprietors, and made and established a division line that both parties acted upon, as between them, that settled that question, and Mr. Merriman's rights to the land claimed by him can only be determined in an action where he is made a party, and the issues as to such rights are presented for determination. Merriman's claim to the strip of land designated in the instructions or its place of location, as between the parties to this action and upon the issues presented in the pleadings, had no place in this controversy and the court properly refused the instructions upon that subject.

As to the establishment of the division line

between Bird and Keyser, the conclusions of the court have ample testimony upon which to rest their correctness, and under the well settled and uniform rulings of this court the finding of the trial court upon the pure question of fact, that is supported by at least substantial evidence, should not be disturbed by the appellate court.

Finding no reversible error in the record before us, the judgment should be affirmed, and it is so ordered. All concur.

O'DAY v. MEADOWS et al.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. HUSBAND AND WIFE — CONTRACTS — VALIDITY.

A contract between a husband and wife, whereby he agrees to convey to her certain property in full satisfaction of all claims for dower, alimony, or maintenance, is valid.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 232, 235.]

2. WILLS—DISTINGUISHED FROM DEEDS.

Deeds, whereby a husband conveys land to his wife through a third person, reciting that the grantors remise, sell, and quitclaim an estate to commence at the death of the husband, to continue during the life of the wife, were not testamentary in character, but conveyed a vested interest in the estate described.

3. LIFE ESTATES—COMMENCEMENT IN FUTURE—PARTICULAR ESTATE—NECESSITY.

Under Rev. St. 1899, § 900, providing that conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey it or by his agent or attorney, and acknowledged and recorded as therein provided, without any other act or ceremony, and section 4506, providing that an estate of freehold or of inheritance may be made to commence in future by deed in like manner as by will, a husband may convey to his wife, through a third person, an estate to commence at his death and to continue during her life, without creating any particular estate.

4. HUSBAND AND WIFE—CONTRACTS—RESCISSION.

Where a husband and wife entered into a contract whereby he agreed to convey certain property to her in satisfaction of all claims for dower, alimony, or maintenance, the commencement by her of a suit for divorce and alimony, in which he made no defense, and judgment granting her alimony other than that provided for in the contract, did not amount to a rescission of the contract.

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by Clymena Alice O'Day against B. F. Meadows and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

This cause is now in this court upon an appeal from a judgment in an action in ejectment begun in the circuit court of Greene county, Mo., against B. F. Meadows, the tenant in possession. Sue I. B. O'Day, claiming to be the owner, was made party defendant on her own motion. The judgment in the Greene county circuit court was for the defendants. The petition in which the cause of action is stated is in the usual

and ordinary form of petition in actions of ejectment, and the land sought to be recovered is the S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, all in section 27, of township 29, range 22; said premises being also known as blocks 2 and 3, in Oklahoma addition to the city of Springfield, Mo. The answer of Meadows is in the ordinary form, admitting possession, but denying each and every other allegation.

To fully appreciate the questions in controversy in this proceeding, and in order to fully comprehend the basis of the relief granted the defendant, Sue I. B. O'Day, by the decree and judgment in this cause, it is necessary to reproduce her answer, which is as follows:

"Now comes defendant Sue I. B. O'Day, and for answer to plaintiff's petition admits that she is in possession by tenant of the land described therein, but denies each and every other allegation in said petition contained. Wherefore she prays for judgment. And further answering, and for a separate, distinct, and equitable defense, defendant Sue I. B. O'Day says: That on the 5th day of March, 1900, the plaintiff and one John O'Day were husband and wife, and had sustained said relation for a long time prior thereto. That on said day the said plaintiff and her said husband agreed in writing upon a marriage settlement of all property rights, by the terms of which, in consideration of the conveyance of certain properties therein described, including the land described in petition, and in further consideration of other things of value to said plaintiff paid, she agreed to relinquish all her marital rights in estate of the said John O'Day, and in furtherance of said agreement the said plaintiff and her said husband executed the following instrument: 'This agreement, made and entered into this 5th day of March, 1900, by and between John O'Day, of the city of Springfield, Mo., party of the first part, and Clymena Alice O'Day, his wife, party of the second part, witnesseth: That said parties, for the purpose of adjusting and settling all questions as to rights of property between them arising out of every matter whatsoever, agree as follows: First. The party of the first part agrees to assign and deliver to said party of the second part certificates for the full paid capital stock of the Oriel Realty & Construction Company, the owner of the Oriel Building, on the corner of Sixth and Locust streets, St. Louis, Mo., amounting to two hundred thousand dollars. Also to convey, or cause to be conveyed, by proper deed or deeds the absolute and fee simple title to the south half of a tract of land in Greene county, Mo., adjoining the town of Springfield, Mo., known as Park Place, and being in sections 26 and 27, township 29, range 22, and the entire tract being composed of the following described parcels of land, to wit: The Hugh Schultz

land, the land formerly of Maggie C. Baker and husband, the Graham Young tract, the H. C. Young tract, the Jarboe tract, and the M. C. Vinton tract, said south half of said tract of land to be conveyed free and clear of incumbrance. Also to convey by proper instrument in writing a life estate to said party of the second part in the north half of said tract of land above described, known as Park Place, so long as said party of the second part shall live: Provided that the party of the first part shall die before the party of the second part the fee simple estate in said north half of aforesaid tract of land to remain in any event in the party of the first part. The said party of the first part further agrees and obligates himself to erect or cause to be erected on said south half of said Park Place, above described, a homestead which shall cost not less than twelve thousand dollars nor more than fifteen thousand dollars; the said home building to be commenced at once, and the construction thereof to be completed as rapidly as practicable. The party of the second part hereto, in consideration of the covenants and agreements herein contained to be kept and performed by the party of the first part, accepts the property herein provided to be transferred and conveyed to her in full satisfaction of all claims of any kind, whether for dower interest, alimony, or maintenance, which she may have against the party of the first part, and waives any claim whatever to any share or interest in any other property, real or personal, which now belongs to the party of the first part or in which he has any interest, as well as to any property or interest in property hereafter acquired by him. It is agreed and understood that proper deeds and instruments carrying out this agreement are to be executed and delivered between the parties hereto. Witness the hands and seals of said parties of the first part and second part this 5th day of March, 1900. John O'Day. [Seal.] Clymena Alice O'Day. [Seal.]

"That in execution of said agreement, and for no other purpose and no other consideration, the said John O'Day, plaintiff herein, assigned said stock in the Oriel Realty & Construction Company to said plaintiff, and in execution of said agreement, and for no other purpose and no other consideration, the said John O'Day on March 6, 1900, executed and delivered to his son, A. C. O'Day, his certain instrument in writing, in which plaintiff herein joined, which instrument is in words and figures as follows: 'Know all men by these presents, that we, John O'Day and Clymena Alice O'Day, his wife, of the city of Springfield, in the county of Greene and state of Missouri, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey unto the said A. C. O'Day the following described tracts and parcels of land,

situate in said county of Greene and state of Missouri, that is to say, to wit: All of the south half and 20 acres along the south end of the north half of a body of land situate in sections 26 and 27, township 29, range 22 of said Greene county, Mo., known as Park Place, and which Park Place or body of land is made up of several tracts or parcels of land acquired by said John O'Day by the following deeds, to wit: Deed from Hugh G. Schultz and Emily V. Schultz, his wife, dated March 13, 1891, recorded in book 104, at page 167; deed from William G. Goodwin, dated April 27, 1896, recorded in book 150, at page 401; deed from Maggie C. Baker and James Baker, her husband, dated January 11, 1898, recorded in book 153, at page 215; deed from Charles Graham Young, dated August 5, 1890, recorded in book 99, at page 82 (all of said books being of record in the office of the recorder of deed's office of Greene county, Mo.); deed from G. R. Young, dated September 25, 1890, recorded March 10, 1891. Also the tract of land conveyed to said John O'Day by deed from Henry C. Young, being the south half of the south half of the southwest quarter of the northwest quarter of the southwest quarter, except 8 acres off of the northwest quarter of the same section, township, and range, and which body of land above described constitutes what is designated by me as Park Place, and which contains between three and four hundred acres; to have and to hold the same, with all the rights, privileges, and appurtenances thereto belonging, or in any wise appertaining unto the said A. C. O'Day, his heirs and assigns forever. And said John O'Day and Clymena Alice O'Day, his wife, in consideration of the sum of one dollar to them paid by said A. C. O'Day, hereby remise, sell, and quitclaim to said A. C. O'Day an estate in all the north half of said body of land hereinbefore described (except the twenty acres on the south end thereof hereinbefore conveyed), and also in that certain tract or parcel of land acquired by said John O'Day from M. C. Vinton by deed dated February 7, 1898, which deed is recorded in book 165, at page 434, of the office of the recorder of deeds of Springfield, Greene county, Mo., commencing upon the death of the said John O'Day and continuing so long as said Clymena Alice O'Day shall live. To have and to hold the said last-created estate to the said A. C. O'Day and to his assigns, heirs, executors, and administrators during such period hereinbefore fixed. In witness whereof the said John O'Day and Clymena Alice O'Day have hereunto set their hands and seals this 6th day of March, 1900. John O'Day. [Seal.] Clymena Alice O'Day. [Seal.]—which instrument was duly acknowledged before a notary public on said 6th day of March, 1900, and delivered to said A. C. O'Day, and the same was on said day duly filed for record and is recorded in book 179, at page 416, in the

office of the recorder of deeds of Greene county, Mo.

"That on the same day, and in further execution of said written agreement between said John O'Day and his said wife, plaintiff herein, and for no other purpose than to effectuate said agreement, and upon no other consideration, the said A. C. O'Day executed and delivered to said plaintiff herein, who received and accepted the same at the time as a compliance with said agreement, the following described instrument in writing: 'Know all men by these presents, that I, A. C. O'Day, a single man, of the city of Springfield, in the county of Greene and state of Missouri, for and in consideration of the sum of ten thousand dollars, to me in hand paid by Clymena Alice O'Day, of the same place, the receipt of which is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, sell, and convey unto the said Clymena Alice O'Day the following described tracts or parcels of land situate in said county of Greene and state of Missouri, that is to say: All the south half and 20 acres along the south end of the north half of a body of land situate in sections 28 and 27 of township 29, range 22 of said Greene County, Mo., known as Park Place, and which Park Place or body of land is made up of several tracts of parcels of land acquired by said John O'Day by the following deeds, to wit: Deed from Hugh G. Schultz and Emily Schultz, his wife, dated March 13, 1891, recorded in book 104, at page 167; deed from Wm. G. Goodlin, dated April 27, 1896, recorded in book 150, at page 401; deed from Maggie C. Baker and James Baker, her husband, dated January 11, 1896, recorded in book 153, at page 215; deed from Charles Graham Young, dated August 5, 1890, recorded in book 99, at page 82 (all of said books being books of record in the office of the recorder of deeds' office of Greene county, Mo.); deed from G. R. Young, dated September 25, 1890, recorded March 10, 1891. Also the tract of land conveyed to said John O'Day by deed from Henry C. Young, being the south half of the south half of the southwest quarter of the northwest quarter of the southwest quarter, except 8 acres off the northwest quarter of the same section, township, and range, and which body of land above described constitutes what is designated by me as Park Place, and which contains between three and four hundred acres. To have and to hold the same by Clymena Alice O'Day, her heirs and assigns forever, with all the right, privileges, and appurtenances thereto belonging or in any wise appertaining unto the said Clymena Alice O'Day, her heirs and assigns forever. And the said A. C. O'Day, in consideration of one dollar to him in hand paid by said Clymena Alice O'Day, the receipt of which is hereby acknowledged, hereby remise, release, and quitclaim unto the said Clymena Alice O'Day an estate in all the north half of said

body of land hereinbefore described (except the 20 acres on the south end thereof hereinbefore conveyed), and also in that certain tract or parcel of land acquired by said John O'Day from M. C. Vinton by deed dated February 7, 1898, which deed is recorded in book 165, at page 434, of the office of the recorder of deeds of Springfield, Greene county, Mo., commencing upon the death of the said John O'Day and continuing so long as said Clymena Alice O'Day shall live. To have and to hold said last-created estate to the said Clymena Alice O'Day for and during her natural life after the death of said John O'Day. In witness hereof said A. C. O'Day has hereto set his hand and seal this 6th day of March, 1900. A. C. O'Day. [Seal.]"—which instrument was duly acknowledged on said day before a notary public and delivered to plaintiff, who accepted the same, and the same was on said day filed for record in book 179, at page — and the same was on said day filed for record and recorded in book —, — county, Mo.

"Defendants say that whatever title or estate plaintiff acquired of, in, and to the land described in her said petition was acquired under and by virtue of the said agreement between her and her said husband and two instruments hereinbefore described, made in execution of said agreement, and that she (plaintiff) has no other right, title, interest, or estate or color thereof in any other manner or by any other means, and defendants say that the land described in plaintiff's petition is the same land known as the M. C. Vinton land, and is described in the said deeds from M. C. Vinton to John O'Day by the description set forth in the petition herein. Defendants state that said agreement and the instruments herein described, made and delivered in furtherance of said agreement and to effectuate the same, were not binding in law or equity on the said Clymena Alice O'Day on account of the marital relation then subsisting between her and said O'Day, and by reason of the premises she had the right to rescind and repudiate the same. And the defendants say that on the 31st day of August, 1900, she did repudiate said agreement and instruments made in execution of said agreement, by then and therein express contravention of the terms of said agreement, that she would accept the same in full satisfaction of all claims of any kind, whether for dower interest, alimony, or maintenance, file a bill for divorce in the circuit court of Greene county, Mo., praying a divorce for certain causes therein alleged, and in said bill claimed alimony out of the estate of said John O'Day, as appears from the following allegation in said petition contained, to wit: 'Plaintiff further states that the defendant is seised and possessed of real and personal estate and money of great value, but the exact value is to plaintiff unknown. Wherefore plaintiff prays to be divorced from the bonds of matrimony, contracted as aforesaid with

defendant; that the court will adjudge to her support and maintenance out of the property of said defendant as the nature of the cause and the circumstances of the parties may require; and that the court will make such further orders and judgments from time to time touching the premises as may be meet and proper.'

"Defendants further say that on the trial of said cause judgment was rendered for said plaintiff, and other and different property than that described in said article of settlement and said instruments made to effectuate the same, and by different limitations were set aside, assigned, transferred, conveyed, and ordered to be so set aside, assigned, transferred, and conveyed to this plaintiff; but the property described in plaintiff's petition was not set aside to or ordered to be conveyed to said plaintiff, but was expressly excepted and reserved from the said decree, all of which is in words as follows: 'And it is further ordered, adjudged, and decreed by the court that the defendant pay to the plaintiff by way of alimony the sum of twenty four thousand dollars (\$24,000). Also that he transfer and deliver to her certificates for the full paid capital stock of the Oriel Realty & Construction Company, being the owner of the Oriel Building on the southeast corner of Sixth and Locust streets, in the city of St. Louis and state of Missouri, amounting to two hundred thousand dollars (\$200,000). Also that he convey or cause to be conveyed by proper deed or deeds to her absolutely, and in fee simple title to the following described real estate lying and being situated in the county of Greene, state of Missouri, free and clear from any and all liens or incumbrances of any kind whatsoever, save and except the taxes now due or to become due on said property for the year A. D. 1900 and thereafter, to wit: The south half of the southeast quarter of the northeast quarter of section 27, except 3 acres in the northwest corner thereof heretofore sold to one Clark; also 25 acres off the south end of the west half of the northwest quarter of section 26; also the east half of the southeast quarter of section 27; also the west half of the southwest quarter of section 26, all the above described real estate lying and being situate in township 29, range 22, and containing all of the tract known as Park Place, save and except blocks two and three of Oklahoma addition. Also that defendant assign, transfer, and deliver to the plaintiff all of the live stock, tools, implements, farm machinery, carriages, bugles, harness, and all other vehicles now belonging to him, and also all the household and kitchen furniture, bric-a-brac, tableware, ornaments, library, and other goods and personal property now on or about the aforesaid Park Place, as well as all household goods now in storage in the city of Springfield, or elsewhere and now or formerly used by said parties; said real and personal property, when so delivered and conveyed to plain-

tiff by defendant, to be in lieu of her right of dower in the defendant's real estate wherever situate and all personal property said defendant now possesses or may hereafter possess.'

"And defendants say that said decree and the orders of the court so made were fully complied with by said John O'Day, and the property therein described in satisfaction of said decree was at and before the filing of this suit duly assigned, transferred, set over, and conveyed to plaintiff herein. And defendants say that the land above excepted from the terms and force of said decree, to wit, blocks 2 and 3 of Oklahoma addition to Springfield, Mo., is the land described in plaintiff's petition herein and is otherwise known as the M. C. Vinton tract, and is known as the southeast quarter of the northwest quarter of section 27, township 29, range 22. Defendants say that by reason of the premises the interest, if any was acquired by said plaintiff in the land in petition described, became in equity and good conscience invested in the said John O'Day, and that said suit for divorce and said decree for alimony in equity avoided and was a rescission of said agreement and instruments, had no force or effect in law or equity to bind the plaintiff herein on account of her relationship to said O'Day, and because the filing of said divorce suit and the decree made therein was on the part of said plaintiff a rescission of said agreement and instruments. And defendants further say that under said agreement and said instruments no legal or equitable estate passed to plaintiff herein, but had the effect only to cloud the title of said John O'Day.

"Defendant further states that said John O'Day departed this life on the ——— day of ———, 1901, and by reason of the premises died equitably and legally seised of the fee in said land. And defendants state that by his last will and testament, duly subscribed and witnessed as required by law, and duly proven and admitted to probate by and in the probate court of Greene county, Mo., he, the said John O'Day, devised the said land in plaintiff's petition described to this defendant, Sue I. B. O'Day, who is his widow, and she is now legally and equitably seised of the fee in said land, and is now in possession thereof, and has been in possession thereof continuously since the date of entry mentioned in plaintiff's petition, and admits that the reasonable rental value of said land is two hundred and fifty dollars. Defendant Sue I. B. O'Day says that by reason of the premises the said agreement between plaintiff herein and said John O'Day, and the instruments herein described from John O'Day and Clymena Alice O'Day to A. C. O'Day, and from A. C. O'Day to plaintiff herein, are clouds upon the title of said defendant, Sue I. B. O'Day, who in law and in equity and good conscience is the absolute owner in ree of said land. But defendant states that she is remediless at law. Wherefore she prays

that said agreement be canceled, set aside, and for naught held, and that said instrument from said plaintiff and John O'Day to said A. C. O'Day, and said instrument from said A. C. O'Day to plaintiff herein, be set aside, canceled, and for naught held, and that all rights, if any, acquired by said plaintiff thereunder, whether held by this court to be legal, equitable, or colorable, be divested, and that the same be vested in this defendant Sue I. B. O'Day. And she further prays for such other and further relief as to this court may seem proper, and for her costs herein expended."

To this answer plaintiff filed the following replication: "Comes now the plaintiff, and for reply to the separate equitable defense of the defendant, Sue I. B. O'Day, herein, denies each and every allegation in said answer and defense contained, except such allegations as are hereinafter expressly admitted to be true. Admits that on the 6th of March, 1900, John O'Day, deceased, and the plaintiff, executed to the son of said John O'Day the instrument set out in said answer, and that said deed so set forth is a true and correct copy of said deed from John O'Day and plaintiff to said A. C. O'Day. Admits that on the same day the said A. C. O'Day executed to the plaintiff the deed set forth in said answer from said A. C. O'Day to plaintiff, and that both of said deeds were duly executed, delivered, and recorded as set forth in said answer. Admits that defendants have been continuously in possession of the premises sued for since the date of the entry alleged in plaintiff's petition, and that the value of the rents and profits of said premises is two hundred and fifty dollars per annum, or twenty and ten-twelfths dollars per month. Admits that the premises sued for are the premises described in the Vinton deed referred to in the above-mentioned deeds, and are also described as blocks 2 and 3, Oklahoma addition to the city of Springfield, Mo. Admits that after the execution of said deeds the plaintiff instituted a suit for divorce against the said John O'Day, and in said suit that she was awarded a decree of divorce from the defendant therein, and awarded alimony by the terms of said decree. Plaintiff states further that prior to said decree of divorce and award of alimony therein the plaintiff herein made claim to all the property which was awarded to her by said decree, and that her said claim was confirmed by said decree of alimony, and that, by the said decree and the awards therein contained, all equities or alleged equities sought to be invoked by the defendants herein were adjudicated in favor of the plaintiff, and all property rights that were in issue or that could have been in issue were forever settled and determined. Wherefore the plaintiff prays that defendants be denied all equitable relief herein, and that she have and recover judgment as hereinbefore prayed."

The cause was tried by the court without the aid of a jury, and the evidence was substantially as follows: It is admitted that John O'Day is the common source of title; that O'Day departed this life prior to August 9, 1901, the alleged date of dissection. The plaintiff read in evidence the deed from John O'Day and Clymena Alice O'Day, his wife, to A. C. O'Day, dated March 6, 1900, which is fully set forth in the answer of Sue I. B. O'Day. Plaintiffs then offered in evidence a deed from A. C. O'Day to Clymena Alice O'Day (plaintiff herein) dated the same day, March 6, 1900, conveying the same land, and the deed contained the same language as contained in deed to A. C. O'Day defining the estate conveyed. It was admitted that the premises described in the said two deeds and known as the Vinton tract and which passed by deed from M. C. Vinton to John O'Day, dated February 7, 1898, and recorded in book 165, at page 434, are the same premises that are sued for herein, and that said premises are also described as blocks 2 and 3 of Oklahoma addition to Springfield, Mo. It was also admitted that the defendants are in the possession of the premises sued for, and that they have been in the possession of the same since August 9, 1901. And it was further admitted that the rental value of the rents and profits of said premises is \$250 per annum. The plaintiff here rested her case.

The defendants then, to sustain the issues on their behalf, introduced evidence as follows: It is admitted that the defendant Sue I. B. O'Day is the widow of John O'Day, deceased, who is admitted to be the common source of title. The defendants then offered in evidence the last will of John O'Day, deceased, which was admitted to have been duly executed and properly probated, and which will, amongst other devises, purports to devise to the defendant Sue I. B. O'Day, in fee simple, the property in controversy; objection being made to the competency, relevancy, materiality of said testimony, the exception being saved to the action of the court in overruling said objection. Defendant then offered in evidence an agreement between John O'Day and Clymena Alice O'Day, dated March 5, 1900, which agreement is set out in the answer of defendants. The agreement as pleaded differs from the agreement read in evidence in this: That the agreement contains the following, which was not set forth in the agreement pleaded: "The party of the first part further agrees to and does hereby sell, assign, and transfer to the party of the second part the horses now on said Park Place, known as Elite, Echo, Juno, Ben, Lalah, Rook, and Zephyr, which together with their produce shall belong absolutely to the party of the second part; also one-half of all the cows, sheep and hogs on said Park Place. It is further agreed and understood that all the carriages, buggies, and other vehicles belonging

to the party of the first part, and also all the household and kitchen furniture, bric-a-brac, tableware, ornaments, library, and other goods and personal property in and about said Park Place or which was heretofore used therein and thereupon shall be used and belong jointly to the parties of the first and second part so long as they both shall live, and on the death of either the survivor shall have the absolute title to the same." Defendants then offered in evidence a decree of divorce rendered on the 10th day of September, 1900, in favor of the plaintiff herein, Clymena Alice O'Day, against John O'Day, the substance of which decree is set out in the answer of defendant Sue I. B. O'Day. The defendants then offered in evidence, first, a deed from John O'Day to E. W. Banister, dated August 25, 1900, and, second, a deed from E. W. Banister to the plaintiff, Clymena Alice O'Day, dated September 15, 1900, both of which deeds were duly acknowledged and recorded. It is unnecessary to reproduce the contents of them here, but it will suffice to say that they were deeds transferring the property in compliance with an order of the court as set forth in the decree for divorce. Defendants then offered in evidence the petition in the action for divorce wherein Clymena Alice O'Day was plaintiff and John O'Day was defendant. There is no necessity for reproducing the contents of that petition.

The cause being submitted upon the evidence as here indicated, the court rendered and entered of record the following judgment and decree: "Now at this day comes on this cause to be heard, both parties appearing in person and by attorney, and the court doth proceed by consent and agreement of the parties to a trial of this cause, and all and singular the premises being seen, heard, and fully understood, the court doth find that the plaintiff and John O'Day were on the 6th day of March, 1900, husband and wife and had sustained such relation for a long time prior thereto. That on said day the plaintiff and the said husband entered into an agreement in writing by the terms of which said husband, John O'Day, agreed to convey unto said plaintiff certain real estate therein mentioned, and including an agreement to convey to plaintiff the land in petition described, during the natural life of said plaintiff; that pursuant to said agreement the said plaintiff and her said husband conveyed the land described in plaintiff's petition to one A. C. O'Day, to have and to hold to the said A. C. O'Day an estate therein commencing upon the death of the said John O'Day, and to continue during the life of said plaintiff; and that in further execution of said agreement, and on the said day, the said A. C. O'Day by his deed, duly acknowledged and delivered, conveyed all the real estate in said last deed described, including the land described in plaintiff's petition, to this plaintiff, and conveyed said land plaintiff's petition

described to the plaintiff herein, to have and to hold an estate therein commencing upon the death of the said John O'Day and continuing so long as plaintiff herein shall live. The court doth further find that plaintiff herein accepted and received said deed and conveyance at the time as a full execution of and compliance with said agreement, and accepted and received the same in full of all marital rights and claims in the estate of the said John O'Day, real and personal, including dower interest, alimony, and maintenance, as in said agreement it was agreed she would. The court further finds that afterwards, in direct contravention of the terms of said agreement, and of the deeds executed pursuant thereto, she (the plaintiff) filed in the circuit court of Greene county, Mo., her petition for divorce from the bonds of matrimony subsisting between plaintiff herein and said John O'Day, and in said petition, in contravention of the terms of her said agreement, prayed the court to award her alimony in the estate of the said John O'Day. The court doth further find that upon the trial of said cause judgment was rendered for said plaintiff therein, and other and different property than in said deeds to plaintiff contained and described in said agreement (as well as some of the same property therein described), and by different limitations, was awarded to plaintiff herein as alimony and in full satisfaction of her marital rights in the estate of the said John O'Day. The court further finds that the property in plaintiff's petition described was by express terms excepted from said decree. And the court doth find that the bringing of said divorce suit, and the judgment and decree therein rendered, is an express repudiation and rescission on the part of the plaintiff herein of the said agreement and the deeds made pursuant thereto and in execution thereof. And the court doth further find that John O'Day in all matters complied with the conditions of said decree, and assigned and transferred to plaintiff herein all the property and money in said decree specified, and conveyed by proper deeds to said plaintiff all of the real estate described in said decree, excepting, however, the land described in plaintiff's petition. The court doth further find that the only interest claimed by said plaintiff in said lands is based upon said agreement and deeds made in execution thereof. And the court doth further find that John O'Day by his last will devised the land described in plaintiff's petition to the defendant, Sue I. B. O'Day. Wherefore, all and singular premises being seen, heard, and fully understood, the court doth order, decree, and adjudge that the said agreement so made and entered into by and between plaintiff herein and her then husband, John O'Day, be canceled, set aside, and for naught held; that the deed of Clymena Alice O'Day and her then husband, John O'Day, conveying the land described in plaintiff's petition to A. C.

O'Day (which deed is recorded in the office of the recorder of deeds for Greene county, Mo., in book 179, at page 416), be canceled, set aside, and for naught held; and that the deed of said A. C. O'Day, conveying the land described in plaintiff's petition to plaintiff herein, Clymena Alice O'Day (which deed is recorded in the office of the recorder of deeds for Greene county, Mo., in book 179, at page 418), be canceled, set aside, and for naught held, and that all the right, title, interest, and estate and color of title claimed or owned by the said Clymena Alice O'Day of, in, and to the following land, to wit, the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 27, township 29, range 22, in Greene county, Mo., also known and described as blocks 2 and 3 of Oklahoma addition to Springfield, Mo., be and the same is hereby divested from and out of the said Clymena Alice O'Day, and that the full legal and equitable title thereto be, and the same is hereby, vested in fee in the defendant, Sue I. B. O'Day, and that defendants recover their costs herein from plaintiff, for which execution may issue."

Motions for new trial and in arrest of judgment were timely filed and by the court overruled. From this judgment plaintiff in proper time and form prosecuted her appeal to this court, and the record is now before us for consideration.

T. A. Sherwood and Henry C. Young, for appellant. Delaney & Delaney, for respondents.

FOX, J. (after stating the facts). The record before us fully discloses the propositions upon which it is sought to maintain the judgment and decree rendered in this cause by the trial court: (1) It is insisted by respondent that the agreement between John O'Day and his wife, the plaintiff in this cause, was invalid and not binding on the wife according to the rules of the common law; and, in fact, that it was not a contract at all, as it lacked mutuality. It is also insisted that this contract was voidable at the election of the plaintiff, Clymena Alice O'Day, and some act on her part or acquiescence on her part after she become discover was necessary before the agreement could be dignified as a contract. (2) It is insisted by respondents that the conveyance from John O'Day and wife to A. C. O'Day, being the deed upon which this plaintiff must base her right to recover, does not pass a legal title sufficient to maintain ejectment: First. Because the paper is testamentary in its nature. Second. It attempts by deed to create a freehold estate in futuro; that is, a contingent estate *pur autre vie* without creating at the same time and by the same deed or instrument a particular estate to support it. (3) It is earnestly contended that the action of plaintiff for divorce, in which she made claim to alimony, was a direct repudiation of the agreement be-

tween John O'Day and the plaintiff, and of the deeds made pursuant thereto, and that such conduct on her part operated as a rescission and cancellation of the deeds conveying the property in dispute to plaintiff. We will treat the propositions in the order as above designated.

1. Upon the first proposition, as to the validity of the contract between John O'Day and this plaintiff during coverture, it is sufficient to say that, in view of the conclusions reached in the recent case of Rice, Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 398, that is no longer an open question in this state. That case was decided by court in banc, and the conclusions reached upon the question involved in the first proposition were fully concurred in by the entire court. The question as to the validity of contracts between husband and wife is fully covered in that case. All of the authorities in this state, as well as those treating of the subject in other jurisdictions, were discussed and fully reviewed, and the conclusions of the court upon the subject in hand were thus announced: "After a careful consideration, we are of the opinion that the intention of our Legislature was to remove the disabilities under which a married woman labored at common law, so as to permit her to contract and be contracted with, sue or be sued, and that the language used, being entirely without exception, is broad enough to permit her to contract with her husband, and that her contract with him will be enforced at law, just as if she had contracted with third persons; and this we think is the weight of judicial opinion in other states where statutes no broader than ours have been construed." Rice, Stix & Co. v. Sally, 176 Mo. 107, 75 S. W. 398; Bank v. Hagelucken, 165 Mo. 443, 65 S. W. 728, 88 Am. St. Rep. 434. Following the doctrine as announced in that case, it must be held that John O'Day and the plaintiff in this case, during coverture as husband and wife, had the full power and authority under the statute, as to their property rights, to contract with each other, and such contract will be enforced at law just as if she had contracted with third persons.

2. This brings us to the consideration of the second proposition, which in our opinion is the most serious question involved in this record. Upon this proposition it is urged by counsel for respondent that the deed from John O'Day and wife to A. C. O'Day, upon which plaintiff's right of recovery must be predicated, is testamentary in its nature and therefore insufficient to pass the legal title to the premises therein conveyed. The terms of the deed to which this challenge of sufficiency to pass the title is directed are as follows: "And said John O'Day and Clymena Alice O'Day, his wife, in consideration of the sum of one dollar to them in hand paid by said A. C. O'Day, hereby remise, sell and quitclaim

to said A. C. O'Day an estate in all the north half of said body of land hereinbefore described (except the 20 acres thereof on the south end thereof hereinbefore conveyed), and also in that certain tract or parcel of land acquired by said John O'Day from M. C. Vinton by deed dated February 7, 1898, and which deed is recorded in book 165, at page 434, in the office of the recorder of deeds, Springfield, Greene county, Mo., commencing upon the death of the said John O'Day and continuing so long as the said Clymena Alice O'Day shall live. To have and to hold said last-created estate to the said A. C. O'Day and to his assigns, heirs, executors, and administrators during said period hereinbefore fixed. In witness whereof the said John O'Day and Clymena Alice O'Day have hereunto set their hands and seals this 6th day of March, 1900." The record discloses that this deed was executed by John O'Day and this plaintiff, who was at that time his wife, duly acknowledged and delivered to the grantee in that deed, A. C. O'Day, who caused the same to be placed of record, and that subsequently A. C. O'Day, in substantially the same terms, conveyed the property in dispute to this plaintiff, which deed was duly and properly acknowledged before a notary public and duly recorded in the recorder's office of Greene county, Mo. It is apparent from the terms of this deed that John O'Day intended and undertook to carve out of the land embraced in that deed a life estate; that is, an estate to continue so long as his wife, this plaintiff, should live, which in our opinion, under the laws of this state, he had the right to do.

It is ably argued by counsel for respondents that this instrument was simply testamentary in its nature and was not in fact a deed, and that no rights vested in plaintiff until after the death of John O'Day; hence the instrument amounted to nothing more than a will and was insufficient to pass such legal title as would maintain ejectment. The grantor and grantee in this deed were capable of contracting, and the terms used were those usually employed in a quitclaim deed, stating that "in consideration * * * we hereby remise, sell and quitclaim to said A. C. O'Day an estate in the land in controversy," coupled with the designation of the time when the possession and enjoyment of such estate should commence, which was "upon the death of the said John O'Day and continuing so long as the said Clymena Alice O'Day shall live." Then follows the concluding clause of that instrument, which fully recognizes that the deed was operative and effective upon its execution and delivery, then and there fixing the rights of the grantee in respect to such property, and that an estate had been created by the terms of the instrument, which says: "To have and to hold said last-created estate to the said A. C. O'Day and to his assigns, heirs, executors,

and administrators during said period hereinbefore fixed." The insistence of counsel for respondents that this deed was testamentary in its nature leads us to the inquiry as to what are the essential characteristics of such instruments. The marks of an instrument testamentary in its character are nowhere more clearly stated than in *Nichols v. Emery*, 109 Cal., loc. cit. 329, 41 Pac. 1091, 50 Am. St. Rep. 43, where it was said: "The essential characteristic of an instrument testamentary in its nature is that it operates only upon, and by reason of, the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory. It acquires a fixed status and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status." In that same case it was expressly pointed out that it was important to note the distinction between the interest transferred and the enjoyment of that interest. As in the case at bar, the distinction must be kept in mind between the creation and conveyance of the estate and the commencement of the possession and enjoyment of that estate. Another mark of distinction between wills and instruments testamentary in their character, and deeds formally executed, is that in the former the grantor may at any time prior to his death revoke the provisions of his will or an instrument conveying property, which is testamentary in its character. In the latter, where the deed is formally executed and delivered by parties capable of contracting, and a present fixed right of future enjoyment is created, there is no power in the grantor prior to his death to revoke such deed. Take the deeds in this case from John O'Day and wife to A. C. O'Day and from A. C. O'Day to the plaintiff, it certainly will not be seriously contended that, after the execution and delivery of those deeds, John O'Day had the power, prior to his death, to revoke or in any way lessen the force, vitality, intent, and purpose of the provisions of such deeds. They became effective upon their execution and delivery, and the rights of the grantees in such deeds were fixed at that time. The tendency of modern decisions is to uphold conveyances, when not clearly repugnant to some well-defined rules of law. *Devlin on Deeds*, vol. 2, § 855. These deeds now in judgment before us vested an estate in the grantees at the time of their execution and delivery; and, as was said in *Tindall v. Tindall*, 167 Mo., loc. cit. 225, 66 S. W. 1094: "The law favors vested estates, and the rule is that estates shall be held to vest at the earliest possible period, unless a contrary intention is clearly

manifested in the grant." *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *Amos v. Amos*, 117 Ind. 19; 19 N. E. 539. The law is nowhere more clearly stated as to when an estate is vested than by Chancellor Kent. Kent's Com. vol. 4, § 2, t. p. 202. It is thus announced: "An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment."

It is clear by the execution and delivery of the deeds now in hand, in which it is recited by the grantors that "we hereby remise, sell and quitclaim an estate in the premises described," a life estate was created, and the possession and enjoyment of that estate, by the other terms in the deeds, were simply postponed until the death of John O'Day. A present fixed right of future enjoyment of that estate was, beyond dispute, created by the terms of the deed in controversy. In *Abbott v. Holway*, 72 Me., loc. cit. 304, it was contended that the instrument in judgment in that case was not a conveyance, because it was contrary to public policy and an attempt to evade the statute regulating the making and execution of wills. Barrows, J., responding to that contention, said: "But the instrument was duly executed by the defendant's testator, a man capable of contracting, and having an absolute power of disposition over his homestead farm, subject only to the rights of his existing creditors. It was duly recorded so that all the world might know what disposition he had made of a certain interest in it, and what was left in himself. If operative at all, it operated differently from a will. A will is ambulatory, revocable. Whatever passed to the wife by this instrument became irrevocably hers."

The mere fact that provisions in a deed may postpone the enjoyment of the estate created should not be made the basis of a rule of construction that such instruments are testamentary in their character. Upon this subject the remarks of Chief Justice Stone, in *Sharp v. Hall*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28, are very appropriate. He said: "There are few, if any, questions less clearly defined in the lawbooks, than an intelligible uniform test by which to determine when a given paper is a deed, and when it is a will. Deeds, once executed, are irrevocable, unless such power is reserved in the instrument. Wills are always revocable, so long as the testator lives and retains testamentary capacity. Deeds take effect by delivery, and are operative and binding during the life of the grantor. Wills are ambulatory during the life of the testator, and have no effect until his death. Out of this has grown one of the tests of testamentary purpose, namely, that its operation shall be posthumous. If this distinction were carried into uniform, complete effect, and if it were invariably ruled that instruments which confer no actual use, possession,

enjoyment, or usufruct, on the donee or grantee, during the life of the maker, are always wills, and never deeds, this would seem to be simple rule, and easy application. The corollary would also appear to result naturally and necessarily that, if the instrument, during the lifetime of the maker, secured to the grantee any actual use, possession, enjoyment, or usufruct of the property, this would stamp it irrefutably as a deed. The authorities, however, will not permit us to declare such inflexible rule." The distinction between wills and instruments testamentary in their character and deeds is very clearly drawn in *McDaniel v. Johns et ux.*, 45 Miss., loc. cit. 641, 642. It was there said that "a will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristics of wills; for, though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature of the instrument."

We have critically analyzed the provisions of the deeds involved in this controversy, and we are unable to discover any design or purpose on the part of the grantors to make them testamentary in their character; but, on the other hand, the terms employed in those deeds evince in the clearest and most explicit manner known to the forms of conveyancing an intention to convey and not to devise. As was said by Broom, in his *Maxims*, star page 540, in translating a fundamental maxim of the law: "A liberal construction should be placed upon written instruments so as to uphold them, if possible, and carry into effect the intention of the parties." The terms of the deeds relied upon by plaintiff to support her title in this proceeding are very unlike the instrument under consideration in *Murphy v. Gabbert*, 166 Mo. 601, 66 S. W. 536, 89 Am. St. Rep. 733, to which our attention has been specially directed. It is manifest from the terms of that instrument that it was testamentary in its character and was properly so held. It was expressly provided by that instrument that "the intention of this instrument of writing is such that, if Mrs. Ann Ellison relinquishes her entire right at her death, then this deed is to immediately come into effect, but not until then." It is clear that the instrument involved in that case, by its own terms, was not to take effect or become operative until the death of the grantor, unlike the deeds involved in this controversy, which clearly, by the terms employed in them, fixed the rights of the grantees in respect to the property conveyed, upon the execution and delivery of them. Upon this proposition it must be held that these deeds were not instruments

testamentary in their character, but were operative and effective in conveying an interest in real estate.

The second subdivision of respondent's contention upon this proposition is that it attempts by deed to create a freehold estate in futuro; that is, a contingent estate *pur autre vie* without creating at the same time and by the same deed or instrument a particular estate to support it. Upon this proposition, we confess that, if the rules of law which are applicable to ancient feudal tenures, and all the restrictive effects of such laws upon alienations of real property, were in force and applicable to the conveyancing of real estate under the statutes of this state, the contention of respondents could well be maintained. This insistence on the part of the respondents involves for the first time a construction of the last subdivision or sentence of section 4596, Rev. St. 1890. This section provides: "When an estate hath been or shall be, by any conveyance, limited in remainder to the son or daughter, or to the use of the son or daughter of any person to be begotten, such son or daughter born after the decease of his or her father shall take the estate in the same manner as if he or she had been born in the lifetime of the father, although no estate shall have been conveyed to support the contingent remainder after his death. And hereafter an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will." While the last subdivision or sentence of that section, "and hereafter an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will," is in the same section making provisions in respect to posthumous children, yet it is apparent that it has no application to the first subdivision of the section which treats and fully disposes of the subject of posthumous children. The last sentence of that section of the statute is useless and meaningless, unless it be construed as changing the rules applicable to conveyances at common law, and, in our opinion, the intention of the Legislature, by the insertion of that independent provision, providing that "an estate of freehold or of inheritance may be made to commence in future by deed, in like manner as by will," was for the specific purpose, as had been done in other states, notably Virginia and Indiana, to change the common-law rules applicable to conveyances. Dr. Minor, in his *Institutes* (volume 2, p. 270), in treating of this subject, said: "At common law, a freehold estate in lands to commence in futuro cannot be created, because, as we have seen, it cannot arise without livery of seisin, which must in its nature take effect immediately, or not at all; and, if it should take effect so far as to pass the freehold out of the grantor, the same would be vested in nobody, but would be in abeyance, contrary to the established policy of the law. 3 Th. Co. Lit. 102, n [G]; 2 Bl. Com. 165, 166. But

in conveyances operating under the statutes above named (*supra*, l. e.), which pass the freehold without livery of seisin, this reason does not apply. The freehold remains in the grantor or in the devisors's heirs, until the time appointed for it to take effect, and then passes to the grantee or devisee, by the force and effect of the several statutes. The future limitation may be either appointed to arise upon a contingency (e. g., a devise to the heirs of A., who is yet living, or to the unborn son of A.), or at a period certain (e. g., a grant to A. for life, or in fee, to commence five years from the date); but in either case, in order to constitute an executory limitation, there must be no preceding particular estate to give it effect as a remainder, for the rule admits of no exception, being indeed, as we have seen, of the essence of the definition that no estate can be construed to be an executory limitation which is capable of taking effect as a remainder. *Fearne's Rem.* 395 et seq., and note "d"; *Id.*, 382, and note "a"; *Id.*, 394 et seq.; 1 Th. Co. Lit. 648, note "c." In Virginia it is further provided by statute that any estate may be made to commence in futuro by deed, in like manner as by will, which either is without meaning, or applies to conveyances at common law, as feoffment, and the like, and in the latter aspect makes very radical innovations upon the common-law doctrine of conveyances. Va. Code 1873, c. 112, § 5. In devises, such limitations are not otherwise known than as executory devises; but, when they occur in conveyances operating under the statute of uses, they are called springing uses. No name has yet been bestowed on them under the statute of grants (8 & 9 Vict.), but they might very well be denominated springing grants, and such limitations in general might be called springing limitations." Section 900, Rev. St. 1890, upon the subject of conveyances, provides that "conveyances of lands, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, or by his agent or attorney, and acknowledged and recorded as herein directed, without any other act or ceremony whatever."

Under a similar statute in respect to conveying real estate, the Supreme Court of Maine, in *Abbott v. Holway*, *supra*, held that, even in the absence of a statute with provisions similar to section 4596, a conveyance purporting to convey a freehold estate to commence at a future date should be upheld. The decision in that case is such a practical and common-sense application of the rule which should govern the conveying of real estate, under our system of government and method of conveyancing, that we will be pardoned for reproducing the full discussion applicable to the subject. In treating of the question involved in that case, which is similar to the one in the case at bar, *Barrows, J.*, speaking for that court, thus discussed the

question and announced the conclusions of that court: "Our statutes (Rev. St. c. 73, § 1) provide that 'a person owning real estate and having a right of entry into it, whether seised of it or not, may convey it, or all of his interest in it, by a deed to be acknowledged and recorded as hereinafter provided.' Detailed regulations as to the mode of execution, and as to the force and effect of conveyances thus made and recorded, follow this general provision in some 30 sections, more or less. Can it be doubted that, under such statutes, the owner of real estate can convey, in the manner prescribed, such part or portion of his estate as he and his grantee may agree, subject only to those restrictions which the law imposes as required by public policy, but relieved from the technical doctrine which arose out of ancient feudal tenures, and all the restrictive effect which they had upon alienations? Why prevent the owner in fee simple from agreeing with his grantee (and setting forth that agreement in his conveyance) as to the time when, and the conditions upon which, the instrument shall be operative to transfer the estate from one to the other? In substance, our law now says to a party having such an interest in real estate as is mentioned in Rev. St. c. 73: 'You may convey that interest or any part thereof in the manner herein prescribed, with such limitations as you see fit, provided you violate no rule of public policy, and place what you do on record, so that you may see how the ownership stands.' In the discussion of the effect of the statute of uses and of our own statutes regulating conveyances of real estate, in *Wyman v. Brown*, 50 Me. 139 (a leading case upon the validity of conveyances under which the grantee's right of possession was to accrue, not upon delivery of the deed, but at some future day), Walton, J., remarks: 'We are also of the opinion that effect may be given to such deeds by force of our own statutes, independently of the statute of uses. Our deeds are not framed to convey a use merely, relying upon the statute to annex the legal title to the use. They purport to convey the land itself, and, being duly acknowledged and recorded, as our statutes require, operate more like feoffments than like conveyances under the statute of uses.' In this connection he quotes Oliver's *Conveyancing*, touching the operation and properties of our common warranty deed to the effect that, in the transfer authorized by the statute in this mode: 'The land itself is conveyed as in a feoffment, except that livery of seisin is dispensed with upon complying with the requisitions of the statute, acknowledging and recording, substituted instead of it.' And he concludes that deeds executed in accordance with the provisions of our statutes, and deriving their validity therefrom, may be upheld thereby, as well as under the statute of uses, notwithstanding they purport to convey freeholds to commence at a future day. In other words,

the mere technicalities of ancient law are dispensed with upon compliance with statute requirements. The acknowledgment and recording are accepted in place of livery of seisin, and it is competent to fix such time in the future as the parties may agree upon as the time when the estate of the grantee shall commence. No more necessity for limiting one estate upon another, or for having an estate (of some sort) pass immediately to the grantee in opposition to the expressed intention of the parties. The feoffment is to be regarded as taking place, and the livery of seisin as occurring, at the time fixed in the instrument, and the acknowledgment and recording are to be considered as giving the necessary publicity which was sought in the ancient ceremony."

Under the provisions of section 900, Rev. St. 1899, in respect to conveyancing of real estate, supplemented by the provisions of section 4506, *supra*, we are of the opinion that the deeds involved in this controversy conveying the property in dispute, were valid and conveyed a sufficient legal title upon which to predicate an action in ejectment.

3. This leads us to the final contention of the respondents; that is, that the bringing of the action for divorce claiming alimony therein and obtaining a judgment for such alimony was a direct repudiation of the original agreement between John O'Day and this plaintiff, and operated as a rescission and cancellation of the deeds by John O'Day and wife to A. C. O'Day, and by A. C. O'Day to this plaintiff, made in pursuance of such original agreement. To this insistence of respondents we are unable to give our assent. The deeds which resulted in the conveyance of a life estate to this plaintiff, at the time of the institution of the divorce suit, were fully executed, acknowledged, and delivered, and the original agreement between John O'Day and the plaintiff, who was then his wife, did not, by the terms of said agreement, make the force and validity of such conveyances dependent upon her subsequent action in bringing a suit for divorce and claiming alimony. It may be conceded, for the purposes of this case, that, having accepted the conveyances made in pursuance of the original agreement in lieu of dower, alimony, etc., the claim for alimony in her divorce suit, and the obtaining of judgment therefor, was a wrongful act; yet we are unable to conceive upon what principle of law the mere commission of that wrongful act is to operate as a rescission or cancellation of solemn conveyances fully executed and delivered. To illustrate: If A. should execute and deliver a deed to B. in which certain land was conveyed, and an independent agreement should have been previously made, the terms of which would recite that this conveyance was made in lieu of 10 head of horses, which were to be delivered by A. to B., and subsequent to the execution and delivery of the deed B. should bring suit against A. to re-

cover the horses, would it be seriously contended that the bringing of that suit, and even the recovery of the horses, would operate as a rescission or cancellation of the deed executed to B.? Certainly not; for A., in that instance, had his day in court in the suit to recover the horses, where he could make his defense that there was no right of recovery, for the reason that this deed which had been executed and delivered under a solemn agreement was in lieu of those horses, and therefore there could be no right of recovery. If he should fail to make that defense, the loss is his, and the responsibility for such loss must be attributable to his failure to make his defense at the proper time. So it is in the case at bar. Mr. O'Day fully executed and delivered the deed to A. C. O'Day, and, concede for the purposes of this case that it was made in pursuance of an original agreement between him and his wife, and in lieu of alimony, yet, when the plaintiff in this case brought suit for divorce, claiming alimony, Mr. O'Day was served with a copy of the petition. He knew what her claim was; he had his day in court; and, if he had previous to that time satisfied her by conveyances, then beyond any sort of question it was his plain duty to make it known to the court in that proceeding, and thereby prevent a recovery of judgment for such alimony.

The record discloses that to the action for divorce he made no defense whatever to her claim for alimony. He simply filed a general denial (except as to the marriage), and that general denial, of course, went only to the causes alleged in the petition as ground for divorce and the amount of property that it was alleged of which he was seised. He made no objections to the decree of divorce or to the judgment for alimony, allowing it to stand unappealed from. Even in the action for divorce, the defense that the mere bringing of an action claiming alimony, in violation of an original agreement, could not have been made the basis of a cancellation of rescission of a fully executed contract. While the court having jurisdiction of the parties could have proceeded to have adjusted their property rights, yet it by no means would have undertaken to have settled by a decree that a fully executed conveyance should be canceled or rescinded upon the basis that the plaintiff had wrongfully claimed alimony. However, it is unnecessary to pursue this subject further. He made no such defense, after being fully notified as to the nature of the cause of action. He was fully cognizant of the original agreement, must have known that he was the grantor in a deed of conveyance that had been fully executed and delivered, and, if there were to be any steps taken in the direction of rescinding or canceling his conveyances, that was a matter to which he should have called the attention of the court by an appropriate pleading,

and, having had his day in court and failing to do so, it is now too late for those succeeding to his rights to ask the court to rescind or cancel such conveyances.

A great deal is said in the briefs of both counsel for appellant and respondents upon the subject of *res adjudicata*. We are of the opinion that the doctrine of *res adjudicata* has very little to do with this case. It is contended by respondents that plaintiff in her reply failed to properly plead *res adjudicata*. Under the pleadings in this case there was no necessity for any such pleading. The answer of Sue I. B. O'Day simply charged that the institution of the action for divorce and the recovery of judgment for alimony was a repudiation of the original agreement, and operated as a rescission or cancellation of the deeds of conveyances. The reply of plaintiff denied this allegation, and that denial put in issue the allegations of the answer. As to whether or not the institution of the divorce suit was a repudiation of the original contract and a rescission or cancellation of the deeds of conveyance were not, as a matter of fact, adjudicated in the divorce proceeding. However, it is clear that was the place for the settlement of that question, and the failure of the defendant John O'Day, in that proceeding, to avail himself of all defenses that he was called upon by the nature of the proceeding to make, must be treated under the law as equally effective in settling that question adversely to him as though the same result had been reached after making a complete defense and a thorough adjudication of the subject.

The answer of the defendant Sue I. B. O'Day in this cause does not proceed upon the theory that these conveyances vesting this life estate should be rescinded or canceled by reason of any fraud or mistake, or that they had been rescinded or canceled by any affirmative action of any court of competent jurisdiction, and it nowhere appears that the parties to these conveyances were consenting to any cancellation or rescission of such instruments. If there is any presumption to be indulged from the divorce proceeding and the judgment rendered therein, and the conduct and action of all parties surrounding that transaction, it is that the validity of the conveyances assailed in this proceeding were fully recognized in the divorce proceeding. Not an utterance by either of the parties, nor an allegation in either petition of the plaintiff or the answer of the defendant in that proceeding, in any way indicating that there was a contest as to the validity of the deeds which had been fully executed and delivered by the grantors prior to the action for divorce; but, on the contrary, as before stated, the validity of such instruments was fully recognized. The deeds offered in evidence by plaintiff conveyed to her a life estate and were sufficient to authorize a recovery

of such estate in an action of ejectment. She was entitled to the possession of the land in controversy upon the death of John O'Day.

We have thus indicated our views upon the propositions involved in the record before us, and nothing remains to be done except to announce our conclusion, which is that the decree and judgment as rendered in this cause by the trial court was erroneous. There should have been a judgment for the plaintiff.

It is therefore ordered that the judgment in this cause be reversed, and the cause remanded, with direction to the trial court to ascertain the amount of damages sustained by plaintiff by reason of the withholding of the premises and the monthly value of the rents and profits, and render judgment for the plaintiff for the recovery of the possession of the premises, as well as the damages, rents, and profits ascertained. All concur.

STATE v. RICHARDSON.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. CRIMINAL LAW—APPEAL—CONTINUANCE—DISCRETION.

Granting or denying an application for continuance is a matter resting largely in the discretion of the trial court, and it is only where it is manifest that such discretion has been abused that the Supreme Court will interfere with the action of the trial court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1311; vol. 15, Cent. Dig. Criminal Law, §§ 3045-3049.]

2. SAME—CONTINUANCE—DILIGENCE.

It was proper to refuse a continuance on the ground of absence of witnesses, where the subpoena was not issued for the witnesses until two days before the day set for trial, and one of the intervening days was Sunday.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1337.]

3. SAME—APPLICATION—REQUISITES.

An application for continuance on the ground of the absence of witnesses must state that the facts expected to be proved by such absent witnesses are true.

4. SAME—APPEAL—MOTION FOR NEW TRIAL—NECESSITY.

The denial of a motion to quash the panel of jurors will not be reviewed on appeal, where such ground of complaint was not called to the attention of the trial court in the motion for a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3084.]

5. SAME—CHANGE OF VENUE—AFFIDAVITS.

Under Rev. St. 1899, § 2576, requiring that the petition of the applicant for change of venue shall be supported by the affidavit of the petitioner and the affidavit of at least two credible disinterested citizens of the county, the failure to furnish the affidavits of the disinterested citizens was fatal to the application.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 251.]

6. SAME—NEW TRIAL—MISCONDUCT OF JURORS.

There was no error in overruling a motion for a new trial on the ground of misconduct

of a juror in receiving two letters during the trial, where such alleged misconduct was simply called to the attention of the trial court in the motion for new trial, and such motion was neither accompanied by the affidavit of defendant nor of his attorney, and it nowhere appeared at what time the alleged misconduct came to the knowledge of defendant or his counsel.

7. SAME—EVIDENCE—SILENT ADMISSIONS.

Statements made by one of joint defendants in the presence of the other, while they were both in jail, were not admissible on the ground of a silent admission, where the witness who detailed the conversation stated that defendant on hearing the statements said that the same were not right and he wanted to state it himself, whereupon the officer in charge refused to permit him to do so.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 898.]

8. WITNESSES—STATEMENTS OF DEFENDANT'S WIFE.

Where the wife is incompetent to testify against her husband, the testimony of the third person as to her declarations in the presence of her husband is not admissible against him.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 133.]

9. CRIMINAL LAW—DECLARATIONS OF CODEFENDANTS.

Where a husband and wife were jointly indicted, statements made by the wife, not in the presence of her husband, were inadmissible as against him.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1004.]

10. SAME—INSTRUCTIONS—PROVINCE OF JURY.

Where the testimony of a witness for the state as to declarations made in the presence of defendant showed that defendant said, in the presence of the witness who testified, that the statement was not right, and that he wanted to correct it, but was refused permission by the officer in charge, it was error for the court in instructing the jury to leave it to them to determine whether defendant assented or not.

11. HOMICIDE—CHARACTER OF ACCUSED—EVIDENCE.

In a prosecution for murder, it is error to permit the state to show that defendant has the reputation of being quarrelsome, and has shot at other persons, until defendant has first attempted to show his good reputation for peace and quiet.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 810.]

12. SAME—APPEAL—OBJECTIONS IN LOWER COURT—EVIDENCE.

In a prosecution for murder, the admission of incompetent testimony showing that defendant had shot at other persons affords no ground of reversal, where no objection was made to it in the lower court.

13. WITNESSES—CREDIBILITY—GENERAL REPUTATION.

The general reputation of defendant, in a criminal prosecution, who testifies as a witness, as being quarrelsome and violent, is not admissible for the purpose of affecting his credibility.

14. HOMICIDE—INSTRUCTIONS—GRADE OF CRIME.

In a prosecution for murder, whatever grades of the crime defendant's testimony may tend to prove should be covered by appropriate instructions, although his evidence may not be true.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 638-667.]

Appeal from Circuit Court, Cape Girardeau County; Henry C. Riley, Judge.

James Richardson was convicted of mur-

der in the first degree, and appeals. Reversed.

This cause is here upon appeal by the defendant from a judgment of the circuit court of Cape Girardeau county, Mo., convicting him of murder of the first degree. The indictment upon which defendant was tried was returned by the grand jury on January 2, 1905, charging James Richardson and Phoebe Richardson, his wife, with murder in the first degree. Omitting formal parts, the offense was thus charged: "The grand jurors of the state of Missouri, duly impaneled, sworn, and charged to inquire within and for the county of Cape Girardeau, state aforesaid, on their oaths present and charge that James Richardson at the said county and state, on or about the 22d day of August, A. D. 1904, in and upon one Wm. Bleckwendt, then and there being willfully, feloniously, on purpose, deliberately, premeditatedly, and of his malice aforethought, did make an assault, and with a dangerous and deadly weapon, to wit, a shotgun, then and there charged and loaded with gunpowder and lead shot, which he, the said James Richardson, in his hands then and there, had and held, then and there willfully, deliberately, on purpose, premeditatedly, and of his malice aforethought, feloniously, did discharge, and shoot off at, to, and against the body of him, the said Wm. Bleckwendt, and with the shotgun aforesaid, and the leaden shot aforesaid, then and there feloniously, and on purpose, and of his malice aforethought, willfully, deliberately, and premeditatedly, did shoot, strike, penetrate, and wound him, the said Wm. Bleckwendt, in and upon the back and body of him, the said Wm. Bleckwendt, giving him, the said William Bleckwendt, then and there with the dangerous and deadly weapon, the shotgun aforesaid, and the gunpowder and the leaden balls aforesaid, so as aforesaid shot out of the shotgun aforesaid, by the force of the gunpowder aforesaid, in and upon the back and body of him, the said William Bleckwendt, divers wounds and one mortal wound of the breadth of one quarter of an inch, and the depth of three inches, of which said mortal wound, the said William Bleckwendt then and there did die. And the grand jurors aforesaid, upon their oath aforesaid, do further find, present, and charge that Phoebe Richardson, before the said felony and murder was committed in the manner and form aforesaid, and by the means aforesaid, at the time and place aforesaid, and also at the time, did then and there willfully, deliberately, premeditatedly, and of her malice aforethought, feloniously, incite, move, procure, and aid with said shotgun and with a deadly weapon, to wit, a large club, and counsel, hire, and command him, the said James Richardson, to do and commit the said murder aforesaid, in the manner and form aforesaid, and by the means aforesaid

at the time and place aforesaid, to do and commit, and so the grand jurors, aforesaid, upon their oaths aforesaid, do say that James Richardson and Phoebe Richardson, him, the said William Bleckwendt, at the time and place aforesaid, in the manner and by the means aforesaid, feloniously, on purpose, willfully, deliberately, premeditatedly, and of their malice aforethought, did kill and murder, contrary to law and against the peace and dignity of the state."

At the May term, 1905, of the circuit court of said county the defendant, James Richardson, and his wife, Phoebe Richardson, were jointly tried for the commission of the offense charged in the indictment. Defendant's wife, Phoebe Richardson, was acquitted, and he was convicted. Upon the trial of this cause the evidence introduced by the state tended to prove: That the defendants, James Richardson and Phoebe Richardson, were husband and wife, and lived in a house about 150 yards from the place of the fatal difficulty. That Seehausen, Mortensen, May, and Meyestedt visited the home of Mary Le Grand on August 21, 1904, and took some beer with them. This home was a houseboat, situated on a slough of Sloan's creek in a meadow in Dannybrook, a suburb of the city of Cape Girardeau, and was about 100 yards from the public road. It was practically admitted that Mary Le Grand was a woman of bad repute; she having been married, but living apart from her husband, and that she kept a bawdy house, and that deceased was a frequent visitor at the house. After remaining at this shanty boat for some time, variously estimated at from half an hour to two hours, the deceased came, and the other men left; three of them going in the direction of a spring wagon. After reaching this wagon, the three drove to a gate, which opened into a public road, a gravel road. This was about midnight. This road ran north and south, and separated the land of defendant from that owned by Mrs. Sullivan; defendant's being on the west and Mrs. Sullivan's on the east of said road. This houseboat was situated on the bank of the creek on Mrs. Sullivan's land. The deceased and the Le Grand woman walked along with the men in the wagon for the purpose of opening and shutting the gate. As the three men drove off in the spring wagon, they met a man and woman on the road, coming from the direction of the defendant's house, and going towards this gate. It was a bright moonlight night, and all the witnesses seem to have had no trouble in recognizing persons, even at some distance. After driving up the road a little way, these three men heard the report of a gun, and one of them returned and found deceased suffering from the effects of a number of wounds in the back. The only eye-witnesses to the shooting were the Le Grand woman and both of the defendants. After

the three men drove off in the spring wagon, the Le Grand woman testified she and the deceased heard some one coming down the road, looked up, and recognised the defendant walking rapidly towards them. As defendant neared the gate, he called out: "Hi, you God damn sons of bitches, you want to leave our cows alone." Mrs. Richardson, who was then by the side of her husband, came up to the gate and said: "O, you God damn old whore, we are going to kill you!" Mrs. Richardson then began striking deceased on the arm with a board, and saying to her husband: "Shoot them, shoot them, sons of bitches." At the time deceased and the Le Grand woman were inside the gate on the Sullivan ground, deceased near the gate, and the Le Grand woman some 18 feet away. Deceased and the Le Grand woman turned and started to walk off and leave the Richardsons, deceased saying, "They would not hurt us." A shot was then fired by defendant, James Richardson, and deceased instantly cried out, "O, my God! I am shot." The Le Grand woman helped deceased walk to the boathouse, when he sank down. Some of the neighbors came in, and Mr. Taylor and the Le Grand woman ran for a physician. One of the neighbors, Mrs. Eva Doll, who lived near by, testified that she heard Mrs. Richardson say: "O, God damn your dirty souls, I have got you now and I am going to murder you." Then she heard one shot, and deceased cried out: "O, my God! I am shot. I am dying." Deputy Sheriff Grieb, who was also chief of police of Cape Girardeau, on learning that a man had been shot, started in a hack in company with Dr. Patton. On the way they met the Le Grand woman, who wanted them to hurry, as the man was about to die. Dr. Patton testified that he examined the deceased shortly after the shooting and found him suffering from a gun shot wound in the back, and that the whole of his back was perforated with small buck shot; that the deceased was carried out of the boat towards the back, but that he died in 30 minutes; that the wounds were mortal. This physician and the undertaker testified that all of the buck shot took effect in the back of the deceased, and entered at points ranging from the back of the neck down to the waist line. They also testified to the bruises on the arm of deceased, which bruises were inflicted before his death, in their judgment. After the shooting Officer Grieb and Policeman Blank went to defendant's home, reaching there about half past 1 o'clock. James Richardson was in bed, and Mrs. Richardson came to the front door. She told the officers that defendant was sick in bed, and could not see them, and insisted on them not coming in. In fact, she stood in the door and said that no one could come in without a row. After considerable trouble and some threats the officers succeeded in passing by Mrs. Richardson and arrested

her husband. They asked for the gun, but Mrs. Richardson said that there was no gun in the house. The next morning the officers returned and found the gun in the house, in a corner behind the safe or wardrobe. The gun was a double-barreled one, and the right barrel showed that it had recently been discharged, but had been reloaded. After the gun was found in her house Mrs. Richardson stated to the officers that her husband had killed a milk thief, and now they had taken him to jail. Afterwards, during the day, Mrs. Richardson said to some persons near the place of the shooting: "God damn him, that is what he gets for fooling with other people's cows." After she was placed in jail Mrs. Richardson stated to Albert Sheute, in the presence of her husband, that her husband went down to the gate to shoot deceased, and she begged him not to shoot him.

Mrs. Richardson did not testify; but defendant, James Richardson, did. In behalf of said defendant, the evidence tended to show: That he had a little place in the suburbs of Cape Girardeau, owned a few cows, and sold milk. That there was an unfriendly feeling existing between him and the Le Grand woman; he having made complaint charging her with running a bawdy house, to which she entered a plea of guilty. That defendant had some trouble with some people bothering his stock and milking his cows. That Mary Le Grand frequently visited his place at night and milked his cows. That on the night of this difficulty defendant's dog awakened him by barking and chasing some one out of the milk lot. When he got up, he saw the Le Grand woman and some one else milking defendant's Jersey cow. That these persons soon got up and left the milk lot, and defendant dressed himself and went down the road, and his wife followed him. On approaching the Le Grand woman and the deceased, defendant said: "You want to go away and leave my dog and cows alone." Defendant admitted that he and his wife were in the road, and deceased and the Le Grand woman were not in the road, but were inside of the Sullivan inclosure. That, when his (defendant's) wife got up to the gate, deceased tried to grab a board, but defendant's wife grabbed it. That deceased reached down and struck at them with a razor and tried to cut defendant's wife. That defendant then raised his gun, and the gun went off. Defendant admitted that he saw deceased and the Le Grand woman before he left his house, and also that he loaded his double-barreled shotgun and went after them. He further testified that the Le Grand woman stood a short distance away with a revolver in one hand and a tin bucket in the other, and that the bucket had about one gallon of milk in it. Defendant denied that any one used a board that night, but said that they tried to use it. Defendant offered, and the trial court admitted, in evidence the record

of the police court of Cape Girardeau, showing the conviction of the Le Grand woman on a charge of running a bawdy house. In rebuttal, the state proved by Meyestedt and others that they had only driven a very short distance from deceased and the Le Grand woman before they heard the gun fire; that in their opinion only about 30 seconds had elapsed.

At the conclusion of the evidence, the court instructed the jury upon murder in the first and second degree, self-defense, reasonable doubt, etc. The cause was submitted to the jury upon the evidence and instructions of the court, and they returned a verdict finding the defendant guilty of murder of the first degree as charged in the indictment, also a verdict finding the defendant, Phoebe Richardson, wife of the defendant, not guilty. The instructions of the court will be given due consideration in the course of the opinion. Motions for new trial and in arrest of judgment were filed and by the court overruled, and judgment and sentence was rendered against the defendant in accordance with the verdict returned by the jury. From this judgment the cause is brought here by appeal and the record is now before us for consideration.

Orren Wilson, for appellant. The Attorney General and N. T. Gentry, for the State.

FOX, J. (after stating the facts). The record in this cause discloses many complaints by appellant at the action of the trial court as a basis for the reversal of this judgment. At the very inception of the consideration of this very important cause, it is not inappropriate to say that many of the assignments of error are absolutely without merit, and many others are assigned which are not properly preserved by the record as to render them subject to review upon this appeal. The serious results flowing from the enforcement of this judgment, should it be affirmed, have lead us to carefully scrutinize every detail of this record, and we will give the questions presented in it such attention and consideration as their importance require and merit.

1. The indictment in this cause properly charged the offense in such terms as have repeatedly met the approval of this court, and there was no error in the action of the court overruling defendant's motion to quash such indictment.

2. There was no error committed by the court in overruling defendant's application for a continuance. The granting or denying of an application for a continuance, as has often been ruled by this court, is a matter resting largely in the discretion of the trial court, and it is only where it is manifest that such discretion has been abused, and not rightfully or judicially exercised, that this court will interfere with the action of the trial court upon that subject. It is apparent from the disclosures of the record, as

to the grounds alleged for such continuance, that there was in noway any abuse of a proper judicial discretion. The record discloses that the subpoena was not issued for the witnesses claimed to be absent until two days before the day set for the trial, and one of the intervening days was Sunday. Emphasizing the correctness of the action of the trial court in denying the application for a continuance, it may be further stated that the affiant did not conform to the essential requisites of the statute, in this: That he failed to state that the facts he expected to prove by such absent witnesses were true. *State v. Alfred*, 115 Mo. 471, 22 S. W. 362; *State v. Cummings* (Mo. Sup.) 88 S. W. 706; Rev. St. 1899, § 2600.

3. Defendant filed a motion to quash the panel of jurors returned by the sheriff to try his cause, assigning as reasons for such motion that the jurors were not selected from the entire county. This motion was by the court overruled, and it is upon this action of the court that appellant insists there was reversible error committed in the trial of this cause. It is sufficient to say of this ground of complaint that it is nowhere called to the attention of the trial court in the motion for new trial, and therefore must be treated as having been waived, and is not subject to review by this court.

4. Appellant complains at the action of the court in denying his application for a change of venue. It is only necessary to say upon this proposition that the record discloses an entire failure to conform to the requirements of the statute in respect to such applications. Section 2576, Rev. St. 1899, requires that the petition of the applicant shall be supported by the affidavit of the petitioner and the affidavit of at least two credible disinterested citizens of the county wherein such cause is pending. While the petition in this cause indicates that the applicants supported the petition by their affidavits, yet the record discloses an entire absence of any supporting affidavit by other witnesses as is required by the statute. This was fatal to the application. *State v. Turlington*, 102 Mo., loc. cit. 653, 15 S. W. 141; *State v. Brownfield*, 83 Mo. 448.

5. Complaint is urged upon the ground of the misconduct of juror Hinton, one of the panel who was selected to try this cause. The evidence upon the subject of his misconduct shows that he was a merchant, and that his clerk brought him two letters and gave them to him in the presence of the sheriff, and that one of these letters contained a check or draft from a bank and the other letter was from the Elks' lodge, and simply had reference to some new members that were to be initiated. This alleged misconduct was simply called to the attention of the trial court in the motion for a new trial, and such motion was neither accompanied by the affidavit of defendant nor of defendant's attorney. It is nowhere made to appear at

what time this alleged misconduct of the juror came to the knowledge of the defendant or his counsel. It was expressly ruled in *State v. Robinson*, 117 Mo. 666, 23 S. W. 1066, that, where misbehavior of a juror is charged as having occurred during the trial, it must affirmatively appear that the party complaining thereof did not know of the fact before the jury retired to consider of their verdict, and it was said in that case that this material fact not being disclosed in the affidavit filed that the statement of it in the motion for new trial is no evidence of its existence. If the complaining party knew during the trial of such misbehavior, it was his duty to call the immediate attention of the court to it and not take his chances on a reversal based on such ground. *State v. Robinson*, 117 Mo., loc. cit. 666, 23 S. W. 1066; *Ency. Plead. & Prac.* vol. 12, p. 558; *State v. Barrington*, not yet officially reported, 93 S. W. —. It was said in discussing a complaint similar to this one, as to the misconduct of a juror, in *State v. Hunt*, 141 Mo., loc. cit. 637, 43 S. W. 392, that, "moreover, also, the motion for a new trial upon the ground suggested in the proposed amendment, and in the supplemental motion, was not supported by the affidavit of the defendant, which was absolutely essential. It must have been supported by both the affidavit of the defendant and his counsel. Nothing less will answer the behests of the law." *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. Burns*, 85 Mo. 47. With the disclosures of the record as our guide, there was no error in overruling the motion for new trial on this ground.

6. This leads us to the consideration of the most serious ground for a reversal of this judgment and sentence disclosed by the record; that is, the admission of incompetent and improper testimony against the defendant. The record discloses that Albert Sheute was introduced by the state, and he testified that he and his wife were in the town of Jackson, where the defendant, James Richardson and his wife, Pheobe Richardson, were confined in jail, and this witness testified that he and his wife wanted to see them. They went over to the jail, and this witness states, in answer to a question, that "Mrs. Richardson said she saw them coming towards the gate out there, and her husband went there. As they got there, they got in a quarrel, and said her husband said he wanted to shoot. She said she didn't want him to shoot. She begged him not to shoot, and Mr. Richardson said, 'That's not right,' and Schade said, 'Could not talk more in jail.' Nothing more was said." The following further inquiry was made of this witness by the state as to what Mrs. Richardson said: "Q. You speak in such a undertone I do not understand you, and I do not think the jury do. What did she say—that who wanted to shoot? A. Mr. Richardson wanted to shoot. She said not to shoot. Q. Shoot who? A. Well, that fellow Will Bleckwendt. Q. Now

let me see if I understand you right. Mrs. Richardson said that her husband wanted to shoot Bleckwendt, and she did not want him to do it? A. Yes, sir. (Court: Let the witness state. Mr. Daues: If I cannot hear, I want to know what he says. Court: I think the jury heard it. It is not necessary to repeat it.) Q. What did Mr. Richardson say? A. He says let him tell it. It was not right, and Mr. Schade said could not have more talk in jail, not to say any more; and that was all said." We are unable to conceive upon what theory this testimony was admissible. It was not admissible on the ground of a silent admission by reason of the statement of Mrs. Richardson in his presence, for the reason that the witness who detailed the conversation says that this defendant said that the statement was not right, and wanted to make it himself, and Mr. Schade, who evidently was the officer in charge, would not permit any more talking between them. It was not admissible simply as an admission against Mrs. Richardson, for the statement was in her favor. She expressly said that she did not want him to shoot, and it will further be observed that the court, in admitting this testimony, did not, either by suggestion or otherwise, limit its application to her. That this testimony was damaging and injurious to only one of these defendants, and that was the defendant who was convicted, is too clear for discussion. This testimony was directed solely against the defendant, James Richardson, and no one else, and was inadmissible for two reasons: First, because the defendant said at the time that the statement was not right, and therefore could be no acquiescence or assent to it; secondly, Mrs. Richardson, who was making the statement against this defendant, was his wife. She was incompetent as a witness to testify to such statement so made, and it necessarily follows that, if she could not make the statement as a witness, she could not make it to a third party, and have him repeat it and thereby violate one of the fundamental rules of evidence applicable to the competency of witnesses; that is, that it is incompetent for the wife to give evidence against the husband, except in the case where she is the immediate prosecutrix for some injury threatened or done to her person. In *State v. Arnold*, 55 Mo., loc. cit. 91, Wagner, J., speaking for this court, thus clearly announced the rule. He said: "Nothing is clearer than that it is incompetent for the wife to give evidence against the husband except in the case where she is the immediate prosecutrix for some injury threatened or done to her person. If she herself is not a competent witness, it follows, that her declarations as to what her husband said must also be inadmissible." To this testimony the record discloses a timely objection and exception. We can see no difference in the admission of this testimony in the form of statements made by Mrs. Richardson to witness Sheute and in introducing

Mrs. Richardson herself as a witness to testify against the defendant, which must be conceded would have been manifestly improper and erroneous. It is clear that the jury could have only considered this testimony as against the defendant, James Richardson, for it had no application to any one else. It will be observed from the record in this cause that the court very properly excluded as against this defendant, James Richardson, all statements made by his wife not in his presence, and the record discloses that this is the only statement made by Mrs. Richardson in the presence of the defendant.

Emphasizing the error in admitting this statement, the court, by instruction No. 7, practically left it to the jury to determine whether or not this statement was assented to or acquiesced in by the defendant. The jury are told in that instruction that what Mrs. Richardson said cannot be used against the other defendant, James Richardson, unless assented to or acquiesced in by him. That amounted to nothing more nor less (notwithstanding this defendant, James Richardson, said in the presence of the witness, who testified to the statement of Mrs. Richardson, that her statement was not right) than saying to the jury: "You must determine from the surrounding circumstances whether he assented to or acquiesced in such statement." It is a very questionable legal proposition, even if the defendant at the time this statement was made had remained silent, as to whether or not it was admissible against him, for the reason that he was then in the custody of the sheriff and jailer, and was not in a position to speak. It was ruled in the case of *State v. Young*, 99 Mo., loc. cit. 674, 12 S. W. 879, that a defendant who was under arrest was in no position to make any denial as to what might be said by others in his presence, and that his silence under such circumstances would not warrant any inference against him. *Wharton's Crim. Ev.* § 680; *Com. v. Walker*, 13 Allen, 570; *U. S. v. Brown*, 4 Cranch (C. C.) 508, Fed. Cas. No. 14,680; *Com. v. Kenney*, 12 Metc. 235, 46 Am. Dec. 672; *Rex v. Appleby*, 3 Stark, 33; *Bob v. State*, 32 Ala. 560. To the same effect is case of *State v. Foley*, 144 Mo., loc. cit. 618, 46 S. W. 733, where this court approved the ruling in the *Young Case*, and in discussing this proposition said: "Of course, there are cases in which silence of a party suspected of crime is evidence against him, but to give such silence the effect of an admission the party must be in a position to explain, and it is the settled law of this state that a defendant's silence when charges are judicially made against him or he is under arrest cannot be shown against him." In view of the well-settled law upon this subject, we see no escape from the conclusion that the admission of Mrs. Richardson's statement at the jail to witness Shente, which amounted to nothing more nor less than permitting her to testify against her husband, must be held error for

which the judgment must be reversed and cause remanded.

As this cause must be retried, we deem it not inappropriate to suggest another error committed in the trial of it, which, if it had been duly preserved by timely objections and exceptions, would be sufficient to reverse the judgment. That was this: Before the defendant attempted to offer any testimony as to his good reputation for peace and quiet the court permitted counsel for the state to inquire of the witness Fred Kraft if he knew of James Richardson, the defendant, having shot at any other person there in Cape Girardeau. Upon the witness answering, "No, sir; none that I know of," the additional inquiry was permitted: "Did you ever hear of it?" and the witness answered, "Well, yes, sir; I have heard them talking about it." This testimony was clearly incompetent, and upon timely objections doubtless would have been excluded, but as there were no objections made to it we cannot base our action in the reversal of this judgment upon that ground. The additional inquiry was made of this witness as to whether or not he knew the general reputation among the neighbors and friends of the defendant for being a violent, quarrelsome, and turbulent man. The answer was in the affirmative, stating that, "It seems like he was quarrelsome, and could not get along with anybody." Then followed the additional question as to his being a dangerous man. This was answered by relating a conversation between the witness and Mr. Blank about hauling through a pasture, and finally a threat by the defendant against Blank. This testimony was not admissible. The defendant had not put in issue his reputation for peace and quiet, and while the defendant had testified as a witness his general reputation as a dangerous and turbulent man is not admissible for the purpose of affecting his credibility.

It will be noted that the law as applicable to the general reputation of a defendant or a witness affecting their credibility makes a distinction between general moral character and general reputation for being a quarrelsome and dangerous man. The former may affect his credibility as a witness. The latter does not. In other words, general moral depravity has a tendency to affect the credibility of a witness; but, on the other hand, a man may have the reputation of being quarrelsome and dangerous and still be a truthful man. The law as now settled may thus be briefly stated as applicable to the subject in hand. If the defendant offers himself as a witness the state, for the purpose of affecting his credibility, even though he has offered no testimony upon his general reputation, he may offer in evidence testimony showing his general reputation, either for truth and veracity, or for general immorality. But, if the defendant does not first put his general reputation for peace and quiet in issue, by offering some testimony on that subject, the

state is not permitted to offer testimony of his general reputation as being a turbulent, quarrelsome, or dangerous man, for the purpose of affecting his credibility. But, on the other hand, if the defendant puts his reputation for peace and quiet in issue, by offering testimony along that line, then, of course, the state has the right to rebut such showing by offering testimony showing his general reputation as a turbulent, quarrelsome, and dangerous man. In *State v. Nelson*, 101 Mo. 464, 14 S. W. 712, a witness by the name of Ferrill had testified for the state and the defendant offered testimony tending to show that he had the reputation of being a rash, dangerous, and turbulent man when in liquor. This testimony was excluded by the trial court, and on this point Judge Black, speaking for the whole court, said: "Nor was there any error in excluding evidence offered by the defendant to show that Ferrill, one of the state's witnesses, had the reputation of being a rash, dangerous, and turbulent man when in liquor. We do not see for what purpose this evidence was offered, unless it was to discredit the evidence given by Ferrill, and it was certainly not competent for that purpose."

At the present sitting of this court, in case of *State v. Charles Beckner*, 91 S. W. 892, this question is fully and most thoroughly treated in an opinion by Judge Gantt. All of the authorities in this state, as well as in other jurisdictions, are fully reviewed, and the conclusion is finally announced that the general reputation of a defendant or a witness for being a violent, turbulent, and dangerous man does not in any way cast any light on or affect his credibility, and it was ruled in that case that, the defendant not having offered any testimony as to his reputation for peace and quiet, that it was reversible error for the state to introduce testimony as to his reputation of being a violent, dangerous, and turbulent man. However, it is unnecessary to pursue this subject further. It is merely a suggestion which may be observed in the retrial of this cause. There was no objection or exception to the introduction of this testimony. Therefore it is not subject to review by this court for the purpose of basing any affirmative action upon it, and we do not wish appellant's counsel to understand that we are treating of this error, even though no objections or exceptions are preserved in the record, for it is certain that if the fate of this defendant rested upon these suggestions of errors, without any objections or exceptions having been preserved, they would be of no avail.

Upon the subject of instructions, it is sufficient to suggest that upon the retrial of this cause that, whatever grades of the crime the defendant's testimony may tend to prove, they should be covered by appropriate instructions based upon his testimony. It may be that his testimony, in view of the testimony on the part of the state, may not be true.

However, he is entitled to instructions presenting the grades of crime to which his testimony is applicable. We, of course, cannot foreshadow what the testimony will be in the retrial of this cause. However, we take it that in the event that the defendant testifies that there was a personal encounter between the deceased and the defendant's wife, and further testifies that he simply started to raise the gun with a view of checking such violence to his wife, and that the gun fired before he got it to his shoulder, and that he did not intend to fire the shot, notwithstanding, in view of the other testimony in the cause, the statements may seem unreasonable and inconsistent, yet the court will instruct upon that grade of manslaughter to which such testimony is applicable.

We have thus given expression to our views upon the questions presented by the record. The penalty of this judgment can only be justified and enforced by a trial that is absolutely free from any substantial error. We have indicated the errors during the progress of the trial, for which the judgment in this cause should be reversed. Nothing remains to be said except to announce the conclusion that, for the error herein pointed out, the judgment should be reversed, and the cause remanded for a new trial, and it is so ordered. All concur.

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BORING v. METROPOLITAN ST. RY. CO.
(Supreme Court of Missouri, Division No. 2.
March 6, 1908.)

1. STREET RAILROADS—INJURY TO PEDESTRIAN
—CONTRIBUTORY NEGLIGENCE—CONCURRING
NEGLECTANCE.

In an action for injuries to plaintiff while attempting to walk across a street railway track, it was not contended that plaintiff was not guilty of negligence in attempting to cross the track without looking to see if a car was approaching, but that defendant was guilty of negligence concurrently with plaintiff, and that the gripman of the car knew, or by the exercise of diligence might have known or observed that it was plaintiff's purpose to cross the track in front of the car, and could have stopped the car in time to have avoided the injury. Plaintiff testified that he did not slacken his pace or look to see if a car was approaching from the time he left the sidewalk until the moment the car struck him. The distance between the point where he turned to cross the street and the point where he attempted to cross the track was but a few feet, and there was no evidence that the gripman could by the exercise of due care and diligence have stopped the car in time to prevent the accident. *Held*, that plaintiff's contributory negligence defeated his right to recover.

2. EVIDENCE—OPINIONS—QUALIFICATION OF
WITNESS.

It was proper to exclude testimony of a witness as to whether he knew within what distance one of defendant's cable cars when running at its usual rate of speed could be stopped, and, if so, to state within what distance it could be stopped without injury to the passengers, no showing having been made that witness was qualified to express an opinion thereon.

Appeal from Circuit Court, Jackson County; Shannon C. Douglass, Judge.

Action by G. W. Boring against the Metropolitan Street Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

McCluer & Bowling, for appellant. John H. Lucas and Chas. A. Loomis, for respondent.

BURGESS, P. J. This is an action for damages alleged to have been sustained by plaintiff by being run against by one of defendant's cars on or about the 12th day of November, 1900, in Kansas City, Mo.

The petition alleges the incorporation of defendant, and that it was operating a cable street railway on East Fifteenth street, in said city, and that plaintiff, while attempting to walk across said Fifteenth street, at the junction of Fifteenth and Cherry streets, was run against by one of the street cars operated by the defendant on its Fifteenth street line, and was knocked down, bruised, injured, and damaged to the extent of \$10,000; the precise injuries to plaintiff being set forth. The petition further sets forth that when the plaintiff started to cross the said street, he looked for cars on said railway, and saw one going east, nearly opposite to where he was attempting to cross, but did not see a car coming from the east, and that believing he could cross the said railway in safety, in front of the east-bound car, with his face to the west watching the east-bound car, proceeded to walk across said Fifteenth street from a northwest to a southeast direction, and while so walking across said Fifteenth street with his head so turned to the west, a train from the east on the defendant's railway came along said Fifteenth street, a short distance to the east of where this plaintiff was so crossing said street, without ringing the bell, or making any effort to notify this plaintiff of the approach of said train, and while this plaintiff was so walking across said street, in full view of the gripman operating the car coming from the east, and while the gripman on the said train could plainly see and did see, or by the exercise of ordinary care should have seen, in time to have sounded an alarm and notified this plaintiff, and in time to have avoided accident by stopping his car; that while the plaintiff had his head turned away from said west-bound car, and was unmindful of the same or of its approach, said gripman drove said car along said track at full speed and into and against plaintiff, when said gripman well knew that plaintiff was looking at and watching the east-bound car and was unaware of the approach of said west-bound car; that, by the exercise of ordinary care, said gripman could have stopped said west-bound car and avoided the injury to plaintiff. That plaintiff had no knowledge of the approach of said west-bound train until so short a time before it struck him that it was impossible for him to get out of the way of same, and that the collision occurred at or near the

center of the crossing of said Fifteenth street at Cherry street, and that if the defendant had rung the bell or sounded the alarm as said train approached said crossing at Cherry street, the plaintiff's attention would have been attracted to the approaching of said train in time for him to have gotten off said track before he was struck; that said accident was caused by the carelessness and negligence of defendant's servants and employes in failing and neglecting to ring the bell or sound an alarm as they approached said crossing, and carelessly and negligently failing to ring a bell or sound an alarm after said servants and employes saw, or by the exercise of ordinary care should have seen, the plaintiff was going onto said track ahead of said train unaware of its approach, and was, without knowing it, placing himself in a dangerous position, and carelessly and negligently failing and refusing to stop or slow up said car after the said servants saw or by the exercise of ordinary care should have seen that plaintiff, unaware of the approach of said train, was approaching the track, and placing himself in a dangerous position, and in carelessly and negligently failing and refusing to stop or slow up said car in time to prevent injuring plaintiff. The defenses were a general denial and a plea of contributory negligence.

The salient facts are about as follows: The defendant was operating a double-track street railway on East Fifteenth street in Kansas City. The cars going east used the south track, and those going west, the north track. The different lines were operated over this street by defendant—one known as the "Fifteenth Street Line," using yellow cars, and running east and west on said street; the other, known as the "Holmes Street Line," using red cars, and running east on said street to Holmes street, and then turning south on Holmes—both lines using the same tracks as far east as Holmes street. The evidence tends to show that the injury of which plaintiff complains took place on November 24, 1900, where Cherry street, the first street west of Holmes, crossed Fifteenth; that Fifteenth street, from Holmes west to Cherry, is almost level, but at Cherry it ascends quite a little to the next street, Locust; that at a point about half way between Cherry and Locust, and about 150 feet west of Cherry, the east-bound cars would stop to drop the rope, and would then, before starting, ring a bell to attract the attention of a flagman stationed at Holmes street, who would signal when to start; that Cherry street was about 30 or 35 feet wide between the curbing; that Fifteenth street, at that place, was about 50 feet wide from the curbing, and about 10 feet from the curbing on either side to the building line; that the tracks of the railway were in the center of the street, the outside rails on each side of each track being about 15 to 18 feet from the curbing; that there were two gas street lights at this crossing at

Cherry street, one at the southeast and the other at the southwest corner, making the light such that a man could be seen for a block or more. The above, in relation to the place where the injury happened, is shown by the evidence of Andrew Stone. This witness owned and operated a barber shop at the southeast corner of that crossing, and it was to his shop, a little before 8 o'clock in the evening, that the plaintiff was going when injured. The evidence of the plaintiff showed that he was the janitor of flats at Fourteenth and Holmes streets, and went that evening from the flats to a little bakery on Fifteenth street near Locust, and from there started east, on the north side of Fifteenth street, to go to Stone's barber shop, and proceeded as far as the sidewalk on the west side of Cherry. Just as he got there, an east-bound car, which had stopped to let go the rope and wait for signals, rang its bell and attracted his attention. He looked and saw that car, and then, to use his own language, "I turned and looked the other way, and there was no car coming, and I just came right across there, east on Fifteenth, and on to the curb; I did not go to the curb. I then turned, quartering, you might say, a little east of south, and started to the barber shop. I was watching this car—the east-bound car. I had my head turned to the southwest." When on the north track a west-bound car struck him, and the blow rendered him unconscious.

Plaintiff testified that he never saw the car that injured him until just as he was struck; that the gripman on that car did not ring the bell, and that if it had been rung he would have heard it. He fully described his injuries, which he said were permanent and that one arm was rendered useless for life. Thomas Hanway testified that he passed over this line at about the time of evening that this injury occurred, and under similar lights and conditions; that one could see a party approaching the car tracks at this crossing, and see the way his head was turned and the way he was looking, at a distance of more than 60 feet. Mat C. Stone, a witness, testified that when plaintiff was walking south, just before the injury, he was watching the Holmes street car; that plaintiff was within three or four feet of witness when he turned to cross Fifteenth street, and that the west-bound car struck him just after he stepped on the track; that he (witness) did not hear the bell ring before the accident. At the conclusion of plaintiff's evidence the court, over the objection and exception of plaintiff, instructed the jury that, under the pleadings and evidence, their verdict must be for the defendant. Plaintiff insists that the gripman on said west-bound car saw, or could have seen him before the car approached within 60 feet of the crossing, and that he saw, or could have seen, that plaintiff was placing himself un-

knowingly in a dangerous position, and should have taken measures to avoid injuring him; that the car was going at full speed and gave no warning of its approach; and that, as the gripman failed to give such warning, as was his duty to do, the company is liable.

The evidence shows that the east-bound car, when it first attracted plaintiff's attention was standing still at a distance of about half a block west of him, between Cherry and Locust streets, and was ringing for a signal from a flagman stationed at the intersection of Fifteenth and Holmes streets in order to proceed, and that the distance between said car and the place where plaintiff was injured by the west-bound car was about 190 feet. Plaintiff testified that he heard the bell ringing, and knew that the car, before moving, would have to receive a signal from the said flagman, and that the west-bound cars would also have to pass the flagman; that before he left the sidewalk at the corner of Fifteenth and Cherry streets he looked east to see if a car was coming, but saw none, and that he did not look any further for a car coming from that direction; that he then walked across Cherry street to within a distance of a few feet from the opposite or northeast corner, when he turned south in order to cross Fifteenth street and reach a barber shop on the southeast corner of Fifteenth and Cherry streets; that in the meantime the east-bound car had started down the grade between Cherry and Locust streets, and again attracted his attention, and as he was in the act of crossing the other track, or the one nearest him, on the north side of Fifteenth street, he was struck by the west-bound car. It is not contended that plaintiff was not guilty of negligence in attempting to cross the track, without looking east to see if a car was approaching on that track, but that defendant was guilty of negligence concurrently with plaintiff, and that the gripman of the car knew, or by the exercise of proper diligence might have known and observed, that it was plaintiff's purpose to cross the track in front of the car, and could have stopped the car in time to have avoided the injury. Plaintiff testified that he did not slacken his pace, or look to see if a car was approaching from the east, from the time he left the sidewalk at the northeast corner of Cherry and Fifteenth streets until the moment the car struck him. The distance between the point where he made the turn, at the northeast corner of said streets, and the point where he attempted to cross the track was but comparatively a few feet, and there is no evidence tending to show that the gripman could by the exercise of due care and diligence, have stopped the car in time to have prevented the accident. The evidence shows that the plaintiff was unobservant, careless of his safety, and walk-

ed into danger. There is nothing disclosed by the record which would justify the submission of the cause to the jury.

In a somewhat similar case to this (*Boyd v. Wabash Western Ry. Co.*, 105 Mo. 371, 16 S. W. 909), *Brace, J.*, in speaking for the court, said: "But it is contended that as the walk on which the deceased was pursuing his way to the depot was in plain view of defendant's engineer on the locomotive, and the deceased could have been seen upon it, in haste making his way towards the depot, the engineer ought to have commenced checking the speed of his train in time to have permitted the deceased to cross before it in safety. To this petition the instructions given in this case furnish a full and complete answer in declarations of law supported by all the authorities, 'that it was the duty of deceased to look and listen if he could see or hear the train, for the purpose of avoiding injury by it, and, if at any time he might have stopped his progress and avoided injury, then he was guilty of contributory negligence;' and, 'if the servants of defendant in charge of its train saw the deceased approaching the track then they had the right to presume that he would not attempt to cross the track immediately in front of the train, and to proceed without abating the speed of the train.' If the instructions had stopped here, the law of the case would have been properly declared on the evidence, which is equivalent to saying there was no evidence to take the case to the jury, and this must be so; for assuming that the engineer saw the deceased from the moment he left the hotel until he arrived within 20 or 25 feet of the track, when it was beyond the power of the engineer to control the speed of the train so as to avoid the collision, what could he have seen? Simply a man of mature age, of quick and active movements, in haste making his way to the depot, on the walk to the crossing, possibly in the rain, wearing a slouch hat, who could stop at any moment; who could see and hear the train; who apparently, and in fact, was in possession of all his mental faculties, and perfect master of his movements; what could the engineer presume, but that such a man, like all other men, having due regard for their own safety, and governed by the ordinary instincts of human nature, would stop before he reached the point of peril patent before him? Into his mind he could not look and see what was passing there." But not until he actually entered upon the track and attempted to cross before the moving train, and when it was too late for the engineer to do anything to save him, was there anything disclosed in his manner or movement to lead to the conclusion that he would not act intelligently and rationally, and while yet a safe distance from the approaching train would not stop and permit the train to pass by before attempting to cross, if he found that he could

not with safety do so before it. Unless the doctrine of contributory negligence is to be entirely discarded, and engineers required to be such expert psychologists as to be able to read the minds of men, and know beforehand when a man in the possession of all his mental faculties is going to act in a way other than could be expected of an ordinarily prudent man, there was no evidence to take this case to the jury."

In the case of *Van Bach v. Mo. Pac. Ry. Co.*, 171 Mo. 338, 71 S. W. 358, *Valliant, J.*, speaking for the court, says: "But, in this case, what reason had the defendant's servants to suppose that this man would act as he did? Could they infer that he did not see what was going on before his eyes? Every one else who was there, including the plaintiff's witnesses, saw what was being done. Not one of them was in a better position to observe the movements of the train and the cars than the deceased. Conceding that the flagman ought to have signaled him to stop before he crossed the Wabash tracks, and failed to do so, or conceding that there was no watchman there at all, still if the deceased had used his eyes he could have seen all that the watchman could have called to his attention. It required no expert to understand the situation; it was a matter within common every day experience in city life. If the employees of defendant saw the deceased approaching the crossing in a slow trot, in full view of the moving cars, had they not every reason to suppose that he would stop when he had driven as close to the crossing as was prudent, and wait until the car had passed? That is what the plaintiff's witness who was going the same direction did, and that is what any reasonable man looking on would suppose any other reasonable man would do. We are referred to *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195. But the case at bar is not that of a man walking along the track with his back to the coming train apparently oblivious to the danger. If this train crew saw the deceased coming, and saw that he was in a position where he could not fail to see the car approaching the crossing if he used his sense of seeing, they were not negligent if they assumed that he would act as any reasonable man would for his own protection under like circumstances, and regulated their own actions accordingly." *Guyer v. Mo. Pac. Ry. Co.*, 174 Mo. 344, 73 S. W. 584; *Moore v. Lindell Ry. Co.*, 176 Mo. 538, 75 S. W. 672.

In *Roensfeldt v. St. L. & Sub. Ry.*, 180 Mo. 554, 79 S. W. 708, *Valliant, J.*, said: "But the theory of the plaintiff's case, as shown by his petition, his evidence and the argument in his brief, is that, admitting that the plaintiff through his own negligence put himself in a position of peril, yet the case falls within the exception to the rule that one cannot recover for injuries received in consequence of his own contributory negligence.

The exception to the rule is that when the defendant sees [or in some cases when by the exercise of ordinary care he might see] the plaintiff in a position of peril, and, with the means then at hand, is able by the exercise of ordinary care to avert the injury, but neglects to do so, he is liable. Under those circumstances the defendant is adjudged guilty of such reckless or wanton disregard of human life or limb that he is not exonerated by showing that the plaintiff was also negligent. Is there anything in the evidence in this case to show such a reckless or wanton disregard of duty on the part of the defendant's servants in charge of this car? Is there any evidence tending to show that after the motorman or motormen saw the plaintiff in peril they could have stopped the car in time to avert the catastrophe?

* * * Plaintiff was guilty of negligence which contributed to his injury, and there is nothing in evidence tending to show that the motorman could have stopped the car in time to have prevented the collision after the plaintiff put himself in the position of peril." See, also, *Reno v. St. L. & Sub. Ry.*, 180 Mo. 469, 79 S. W. 464; *Giardina v. Railroad*, 185 Mo., loc. cit. 835, 85 S. W. 928; *Markowitz v. Met. St. Ry. Co.*, 186 Mo. loc. cit. 350, 85 S. W. 351, 69 L. R. A. 889.

It is also insisted that the court committed error in refusing to allow one Hanway, a witness for plaintiff, to testify as to whether he knew within what distance one of defendant's cable cars, when running at its usual rate of speed, could be stopped, and, if so, to state within what distance it could be stopped without injury to the passengers. The court refused to allow the witness to answer the questions upon the ground that it had not been shown that witness was qualified to express an opinion upon the matter. We think the court properly refused to allow the witness to answer, for the reason that it had not been shown that he had, by practical tests and observation, qualified himself to express an opinion as to the distance within which one of the said cars could be stopped under the conditions stated. From our view of the case, whatever might have been elicited from the witness, if allowed to answer the questions, it would not have changed or affected the result.

The facts clearly show that plaintiff's injury resulted from his own negligence solely, for which the defendant should not be held liable.

The judgment is affirmed. All concur.

STATE v. WALKER.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. LARCENY—EVIDENCE—SUFFICIENCY.

Evidence in a prosecution for stealing a cow examined, and held sufficient to support a conviction.

2. CRIMINAL LAW—EVIDENCE—IDENTIFICATION.

In a prosecution for stealing a cow, which defendant sold to a commission company, it was proper to admit for the purpose of identification evidence that a day or two before defendant had sold to such company another cow not shown to have been stolen.

3. SAME—APPEAL—EXCEPTIONS—NECESSITY.

The propriety of striking out certain evidence is not before the court for review where no exception thereto was saved.

4. SAME—ERROR IN INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

Failure of the court to include in an instruction enumerating the evidence rebutting the presumption of guilt from the recent possession of stolen property the evidence tending to prove an alibi was cured by subsequently instructing an alibi.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1993.]

5. SAME—APPEAL—EXCEPTIONS—NECESSITY.

A ruling as to improper remarks of the prosecuting attorney is not before the court for review where no exception was saved.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2863.]

Appeal from Circuit Court, Jackson County; John W. Wofford, Judge.

Charles Walker was convicted of larceny, and appeals. Affirmed.

Philip D. Clear, for appellant. The Attorney General and John Kennish, for the State.

GANTT, J. This prosecution was commenced by the prosecuting attorney of Jackson county, filing an information in the criminal court of Jackson county, at the January term, 1905, wherein he charged that Charles Walker, alias E. Johnson, whose Christian name in full is unknown to said prosecuting attorney, late of the county aforesaid, on the 23d day of December, 1904, one red milk cow of the goods and chattels of William A. Gosnell and James C. Gosnell, then and there being, did then and there unlawfully and feloniously steal, take and carry away, against the peace and dignity of the state. The information was verified. The defendant was arrested and arraigned upon said charge and entered his plea of not guilty, and at the April term, 1905, of said court, was tried, convicted, and his punishment assessed at four years' imprisonment in the penitentiary. Motion for new trial was filed in due time, heard, and overruled, exceptions saved, and an appeal taken to this court.

The evidence on the part of the state tended to prove the following facts: James C. Gosnell, on the 22d of December, 1904, resided at Thirty-Fifth and Agnes streets in Kansas City, Jackson county, Mo. He had in his possession a milk cow, belonging to himself and his father, William A. Gosnell. This cow was kept in a barnyard on his premises, which yard was surrounded by a wire fence and two gates. About dark on the night of December 22, 1904, the cow was seen in the lot by James C. Gosnell and his employé, Thomas Jones. The latter fastened

the gates, tying one, and the other was closed with a latch. The next morning the fence was broken and the cow gone. Not far from the lot Gosnell found a cow track corresponding to the track of his cow, and near the cow's tracks, and leading in the same direction, the tracks of a man wearing large overshoes. The tracks were leading away from Gosnell's premises. That same day the cow was found in the Kansas City Stockyards, in the possession of the Campbell & Rosson Live Stock Commission Company. On the morning of the 21st of December, 1904, a man giving his name as J. Smith, sold a cow to the said commission company, and received therefor a ticket showing the weight, charges, price, etc.; and a check for the purchase money. The same man appeared again with another cow, to wit, the cow belonging to the Gosnells, on the morning of December 23, 1904, and sold her to the same company under the name of Johnson, and received a ticket and check as before. This last cow sold by the man giving his name as Johnson, was fully identified as the cow stolen from Gosnell, and was returned to him by the commission company. A description of the man who sold the cow, was given to Gosnell, and thereupon he gave the commission company the address of a man living about two miles from his place of residence. Lee Glascock, an employé of the commission company and a deputy marshal, was sent to the residence of this man, and Glascock identified this man, the defendant herein, as the one who sold the company said cow, and thereupon defendant was arrested at his home by the deputy marshal, about 4 o'clock in the afternoon. When arrested, the defendant answered to the name of Walker. The testimony on the part of the state positively identified the defendant as the man who had sold the cow two days before under the name of Smith, and who had sold Gosnell's cow under the name of Johnson. When arrested, the defendant was searched, and a \$5 gold piece was found in one of his boots, and three silver dollars in the other. In the fob pocket of his pants was found the sale ticket of the cow sold the commission company on the 21st, under the name of Smith. This ticket was offered in evidence, and the defendant was asked about it, but said he did not know anything about it. The defendant offered evidence tending to show that he was at his home all night during the night of December 22, 1904, and until 7 or 8 o'clock on the morning of the 23d; he also offered evidence of good character in the neighborhood in which he resided. The state, in rebuttal, offered evidence tending to impeach his good character for honesty and integrity. The cause was submitted to the jury under instructions defining larceny; on the presumption arising from the recent possession of stolen property, and on the defense of alibi and reasonable doubt. Other facts will be noted as occasion may require in the

examination of the errors alleged to have been committed by the criminal court.

1. Counsel for the defendant insists that at the close of the state's case, if only proper and legitimate evidence had been admitted the court should have directed a verdict for the defendant. Under this head, the counsel for the defendant argues at great length, the insufficiency of the evidence tending to identify the defendant as the man Johnson, who sold the cow to the commission company at the stockyards on the morning of the 23d of December. Much stress is laid upon the fact that at the preliminary trial before the justice of the peace, several of the witnesses, Glascock and McReynolds among others, only identified the defendant as Johnson, from the fact that he wore felt boots, and that Gosnell was actuated by unfriendly feelings to the defendant. But on the other hand, the witnesses on behalf of the state made out the following case: Mr. Gosnell testified to the ownership and possession of the cow, and that she was at his home on the night of the 22d of December, 1904, in an inclosed lot; that next morning about 7 or 7:30 o'clock, his cow was missing, and he found the tracks leading towards the stockyards; that he went to the stockyards, and found her there in the possession of the Campbell & Rosson Live Stock Commission Company. He testified that the tracks of the man which accompanied the cow tracks from his place appeared to have been made by large felt boots, or overshoes; that the overshoes appeared to have been of new rubber; that the impression of the rubber was plain. Indeed the evidence left no doubt whatever, that the cow found by Gosnell in the stockyards, belonged to him. His evidence was fully corroborated by that of Jones, who lived with Gosnell, and closed the lot gates on the night the cow was stolen.

Mr. Hieronymus testified that he had lived in Kansas City for 20 years, and his business was that of selling hogs at the stockyards. He identified the defendant as the man who, on the 21st of December, came to the stockyards at the Twelfth street gate, and gave him the name of J. Smith. He had a cow to sell. Witness asked the defendant, "Who sells your cow?" and he says, "You folks." Witness then asked him his name and he said, "J. A. Smith." Thereupon the witness says, "I took his cow up to block 25, and turned her over to the cattle salesman," and said to the defendant, "I do not know how long it will be before your cow will be sold," and defendant says: "I am going out the Twelfth street gate. I have a horse and wagon out there." Witness testified that he was in the employment of the Campbell & Rosson Company on the 21st of December; that he had good opportunity to observe the defendant as he talked with him and walked with him; that the defendant had on a cap and felt boots with rubbers over them, had a short beard on his

face at that time, and thinks he had on a duck coat. He testified that he had no doubt whatever of the defendant being the man who brought the cow to the stockyards on the 21st of December; that he made a memorandum in his book at the time. W. H. Gott testified that he was in the employment of the stockyards company at the Twelfth street gate, on the morning of December 21st, asked if he knew the defendant, he answered, "I have seen him before," and that the defendant had given him his name as J. Smith; that he brought a cow there on the morning; that he made a memorandum at the time of the transaction which showed J. Smith, C. B. R., which stood for Campbell & Rosson, one cattle; that he noticed that the defendant had on a pair of rubber boots, otherwise he would not attempt to describe his dress; that it was bright day light, and he had no difficulty in observing the defendant; that he noticed particularly some spots on the defendant's face; that at first he thought it was small-pox marks, that was the first thing that directed his attention when he saw the defendant at the trial in the criminal court and identified him as the same man. Joe Hielman testified that he was a buyer at the stockyards, and saw the defendant there on the morning of the 21st of December, and recognized him as the man who came there with a cow to sell, and gave the name of Smith, and his recollection was that he had on felt boots that morning; he did not pay much attention to his other clothing. He noticed that defendant had a freckled face, and that attracted his attention. Mr. W. H. Thompson testified that he was the cashier and bookkeeper for the Campbell Bros. & Rosson Commission Company. He recognized the defendant. The first name he knew him under was Smith, he identified a duplicate scale ticket issued by the stockyards company of the weight of the cow that was sold by his firm on the account of J. Smith. When the cow was sold on the 21st of December, witness figured up the ticket and determined the net proceeds and gave defendant a check for the same. He delivered this check to the prisoner under the name of J. Smith that morning in the company's office, and it was paid and came back with the return vouchers from the bank. On the 23d of December, this same man, under the name of Johnson, brought another cow to the stockyards, and his firm sold the cow for him, and he again made out a ticket for the cow, and gave the defendant under the name of Johnson, a check for her; that the defendant came up to the desk and inquired if we had a ticket there for his cow. At that time we did not have it, I asked him to have a seat, and "the boys would probably send it in from the yard." The defendant sat down in a chair, he then got up and went out of the office, and before his return they sent the ticket in from the

yards, and when he came back and asked for it again, witness figured it up and wrote a check and gave it to him. The defendant was around the office probably for a half or three-quarters of an hour. Asked if he observed the defendant's face, he answered "Yes." Asked if he noticed anything peculiar on his face, he answered he did, "I noticed he was a large man, at that time, and had kind of reddish whiskers, and probably a week's growth of whiskers on his face, and was freckled." Q. "You understood he was a colored man?" Ans. "Yes, sir, there was no question about that in my mind." Asked if defendant was that man whom he knew as Johnson, he answered, "Yes, sir, unquestionably." On cross-examination, he was asked why it was he received the cow from the defendant, and bought it from him, and issued a check to him for the money under the name of Johnson, he answered, "I remembered the man's face when he came in, and knew he had been there; at that time under the pressure of business, I did not associate the man's face with the name of Smith, when he had been there before, I did that afterwards when this thing came up, I went to investigating my records and found out that he was the same man that gave the name of Smith." He testified also, that the defendant had on felt boots, and said that he positively identified the defendant in the justice's court. Lee Glascock testified that he was at the office of Campbell Bros. & Rosson on the morning of the 23d of December, when the defendant came in and said he had a cow for Campbell Bros. & Rosson, and the defendant gave the name of Johnson. The cow was sold to Swift & Co., but Mr. Gosnell came in that day and identified the cow, and witness sent over and got the latter from Swift & Co. and got the cow out of their pens and turned her over to Mr. Gosnell. Witness testified that he next saw the defendant at his home out south of the city, that afternoon. He identified the defendant Walker as the man he talked with that morning at the stockyards under the name of Johnson. McReynolds also testified that he was working at the stockyards on the 23d of December, 1904, and the defendant came there and gave his name as Johnson, and said he had a cow to yard for Campbell Bros. & Rosson. He had the cow tied behind a one-horse wagon, a milk cow, and he put her in the yards, and gave him an order to the commission firm to let them know that the cow was there. The marshal testified that, when he arrested the defendant that afternoon, he had on a pair of felt boots with big rubber overshoes over them; that he searched him after he brought him to jail, and found a \$5 gold piece in one of his boots, \$3 in silver in the other, in the fob pocket of the first pair of pants he found a scale ticket of the weight of a cow—this was the scale ticket identified by the witnesses, of the sale of the cow by

defendant under the name of J. Smith on the 21st of December. He was asked where he got that, and he said, "I do not know anything about that." I said, "This is a different cow and different weight from the one we are looking for." The state also proved that the cow would be cheap at \$30. In the light of all this evidence, it is plain that the court committed no error in refusing to discharge the prisoner at the close of the state's case.

2. But it is earnestly insisted by the defendant, that the court erred in permitting the state to show the defendant under the name of J. Smith, sold another cow on the 21st of December, 1904, to the commission company; that this permitted the state to prove another and separate crime than the one with which the defendant was charged, and that under the decisions of this court in *State v. Goetz*, 34 Mo. 85, and *State v. Spray*, 174 Mo. 569, 74 S. W. 846, it was error to admit such proof. This, however, is a misapplication of the doctrine announced in those two cases, and many others to the same effect in this state. In the first place there was no evidence offered tending to prove that the cow he first sold had been stolen. The purpose of the evidence offered as to the first cow and the ticket of the said sale, was to identify the defendant as the same person who had in his possession, on the 23d of December, 1904, the cow stolen from the prosecuting witness, Gosnell. For the purpose of identification it is permissible to prove every fact connecting the defendant with the crime charged. *State v. Bailey* (Mo. Sup.) 88 S. W. 733; *Underhill on Criminal Ev.* § 91; 1 *Bishop's New Criminal Proc.* 1129; 1 *Wigmore on Evidence*, § 414; *State v. Folwell*, 14 Kan. 105; *Yarborough v. State*, 41 Ala. 406. It was entirely competent for the witnesses who were the employés of the Campbell & Roeson Commission Company, to state when, and where, and under what circumstances they had seen the defendant prior to the time they were testifying in this case, and identifying him as the man from whom they had received Gosnell's cow, and for whom they had sold it to Swift & Co. This is elemental and requires no citation of the law of evidence to sustain it. The ruling of the learned criminal court is in no manner in conflict with the decision in *State v. Spray*, 174 Mo. 569, 74 S. W. 846.

3. It is next urged that the court erred in refusing to admit more evidence to establish an alibi, and in striking out the evidence of David Ingle for the defendant. There is nothing to show that any other witnesses were offered in addition to those who did testify for the defendant to establish his alibi, and no exception whatever was saved to the striking out of the evidence of

David Ingle, hence there is nothing for us to review on that point.

4. It is insisted that the court erred in its fourth instruction to the jury on the question of the presumption arising from the recent possession of stolen property. The basis of this assignment is that the court in this instruction did not include in its enumeration of the evidence which the jury should consider as rebutting the presumption of guilt from the recent possession of stolen property, the evidence tending to prove an alibi. While the counsel for the defendant has not called our attention to this specific objection to this instruction, it is to be noted that the instruction in and of itself is not comprehensive enough under the decisions of this court in *State v. Kelly*, 73 Mo. 608; *State v. Sidney*, 74 Mo. 890; *State v. North*, 95 Mo. 615, 8 S. W. 799, and if the instruction stood alone and had not been supplemented by instruction No. 6, which fully covered the defense of alibi, it could hardly stand the test of the foregoing cases, but as we have often said, the instructions of the court must all be read and considered together. In *State v. Riney*, 137 Mo., loc. cit. 105, 38 S. W. 719, it was said: "The state having shown defendant in the exclusive possession of a pair of shoes stolen from the burglarized car so recently after the goods were stolen, it was entirely proper to instruct the jury on the presumption arising from such possession, and as the court also instructed fully upon the defense of alibi, no error resulted from not qualifying the instruction on recent possession, as to the rebuttal of the presumption of guilt from recent possession by proof of an alibi, as the two instructions necessarily had that effect and must be read together." Upon the authority of that case it must be held that the court by its instruction on alibi cured the oversight in not qualifying the instruction No. 4 as to the effect of an alibi rebutting the presumption of guilt. We will say, however, that we think it would be much preferable for the trial court to make the instruction on recent possession broad enough to cover all the matters which the jury should consider in rebuttal of the presumption of guilt from recent possession of stolen property.

5. In his motion for new trial, counsel assigned as error certain remarks of the prosecuting attorney in his address to the jury; but as no exception was saved to the ruling of the court, that matter is not before us for review. Under the evidence and the presumptions of law, the defendant has no ground to complain of the verdict of the jury, and the judgment of the court.

The judgment is affirmed.

BURGESS, P. J., and FOX, J., concur.

STATE v. FEELEY.

(Supreme Court of Missouri, Division No. 2.
Jan. 31, 1906. On Rehearing,
March 6, 1906.)

1. HOMICIDE—MALICE—ADMISSIBILITY OF EVIDENCE.

In a prosecution for murder, evidence of a statement by the defendant before he met deceased that he was "a straight shot and he was a game man," and witness would find it out, though not a part of the res geste, was admissible to show general malice, and a disposition on the part of the defendant to do a criminal act.

2. CRIMINAL LAW—APPEAL—RECORD.

Questions as to misconduct of counsel not shown by the bill of exceptions cannot be considered on appeal, since matters of exceptions which occur in the presence of the court cannot be shown by affidavits unless the court refuses to sign the bill when presented to him on the ground that the matters stated are not true.

3. SAME—HARMLESS ERROR—CROSS-EXAMINATION OF DEFENDANT.

Though Rev. St. 1899, § 2637, prohibits by implication the cross-examination of a defendant in a criminal case touching matters not testified to by him in his examination in chief, it was not ground for reversal in a prosecution for murder to require the defendant to testify on cross-examination whether certain persons were present at the place where he testified on direct examination that the difficulty between him and deceased had taken place, since such cross-examination was immaterial.

4. HOMICIDE — EVIDENCE — REPUTATION OF DECEASED.

Where the defendant in a prosecution for homicide introduced evidence that the deceased was a quarrelsome and dangerous man when drinking, the state could show in rebuttal his general reputation for peace, quiet, and good citizenship where he resided.

5. SAME.

In a prosecution for murder, where defendant testified that he shot deceased because he was afraid deceased was going to kill him, evidence of the character of deceased for being quarrelsome and dangerous when drinking was properly admitted.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 391-397.]

6. SAME—INSTRUCTIONS—MOTIVE OF DEFENDANT.

Where the defendant in a prosecution for murder testified that he shot deceased to defend himself, the failure of the court to instruct on the question of the defendant's motive was not error.

7. SAME—PROVOKING DIFFICULTY

In a prosecution for murder, evidence tending to show that defendant was anxious to get into a difficulty with some one, particularly the deceased; that he made frequent aggravating remarks in the presence of deceased to provoke the difficulty; and that he shot deceased while unarmed and even after he was down—was sufficient to justify an instruction as to defendant's right to defend himself where he voluntarily entered into the difficulty.

8. SAME.

One who voluntarily entered into a difficulty for an unlawful purpose, such as gratifying malice, is not justified in killing the other in self-defense.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 145-150.]

9. CRIMINAL LAW — INSTRUCTIONS — IMPEACHING WITNESSES.

In a prosecution for homicide, an instruction that if any witness had been impeached the

jury were not bound to disregard his testimony but were at liberty to disregard the whole or any part of it, or believe or disbelieve him, as they might believe that he had testified truthfully or falsely, was not erroneous as bringing into prominence the evidence of the single witness who had been impeached.

10. INDICTMENT — OFFENSE INCLUDED IN CHARGE—LESSER DEGREE OF HOMICIDE.

Under Rev. St. 1899, § 2369, providing that any person found guilty of murder in the second degree or of any degree of manslaughter shall be punished according to the verdict of the jury, though the evidence in the case shows him to be guilty of a higher degree of homicide, the state on indictment of a person for murder in the first degree may elect to prosecute him for murder in the second degree, and the defendant will have no right to complain of this course.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 426, 593.]

11. SAME—APPEAL—RECORD—CORRECTION.

No record, after being lodged with the clerk of the Supreme Court, can be changed without the permission of the court, duly entered of record.

Appeal from Circuit Court, Bates County; Argus Cox, Special Judge.

Robert Feeley was convicted of murder in the second degree, and appeals; Affirmed.

Scott & Bowker, Francisco & Clark, and W. W. Graves, for appellant. The Attorney General and N. T. Gentry, for the State.

BURGESS, P. J. At the October term, 1903, of the circuit court of Bates county the grand jury of said county preferred an indictment against the defendant, Robert Feeley, charging him with murder in the first degree, in having, on the 8th day of September, 1903, at said county, shot and killed, with a pistol, one Martin Hoots. There were two mistrials. Thereafter, at the May term, 1905, of said court, the defendant was again put upon trial on the charge of murder in the second degree, convicted, and his punishment assessed at 10 years' imprisonment in the penitentiary. He filed motions for new trial and in arrest of judgment, which being overruled, he saved his exceptions, and appeals to this court.

The evidence tends to show that the defendant was born and raised in Bates county, near a small town called Burdette. The defendant, some 12 years before the trial of this cause moved to Nevada, in this state, where he has resided ever since. On the 8th day of September, 1903, defendant left his home in Nevada for the purpose of visiting his father at his home near Burdette. He went by train to a little place called Archie, where he hired one Frank Calhoun to take him in a buggy to Burdette. While on the road to said town the defendant pulled a pistol out of his pocket and remarked to Calhoun that he was a straight shot and a game man, and that he, Calhoun, would find it out before he got back. When Burdette was reached they saw Martin Hoots, the deceased, with a gun on his shoulder, walking along in front of a store owned by a

man named Buel Mudd. There was evidence tending to show that defendant said, "There goes a dirty coward," and that deceased, who appeared to have heard the remark, replied, "If he calls me a dirty coward, I will take it up." Deceased went into the store to buy some shotgun shells, but was told that there was none in stock. Deceased then set his gun down in the store, and a friend picked it up and carried it away to the residence of Dr. Cash. David Roach was sitting on the porch of the store when defendant got out of his buggy. As deceased came out of the store, and was passing by Mr. Roach, he greeted the latter with, "Hello, Dave." defendant, who was near by, said, "Who in the hell are you?" Deceased replied, "I don't know as it's any of your business." Defendant then said, "You are not so game but what I am just as game as you are." To which deceased replied, "If you are looking for trouble, you are up against it." Then defendant said, "You run on home," and deceased rejoined, "You had better make me run on home." Mr. Roach then walked away with deceased about a distance of 60 feet, and deceased asked who that was, at the same time saying he thought it was Bob Feeley, and that he loved every man named Feeley. He also told Mr. Roach that he had had some trouble with Jim Fenton, and had shot at the latter to scare him, but that the next time he shot he would shoot to kill Fenton. Prof. Maxey, who was near by, saw defendant on the porch of Roach's store take a pistol out of his pocket, wave it around his head, and then walk off the porch. Defendant followed after deceased, but Mr. Roach took hold of him and led him back to the store, when defendant said, "Who is that son of a bitch?" Being told deceased's name, defendant said: "He is looking for trouble. I will fix him if he bothers me." Defendant then took his pistol out of his pocket and exhibited it to Roach and others. He appeared to be intoxicated, and he and deceased, who was drinking, had several disputes during the afternoon.

Deceased and one Jim Fenton, who lived near the edge of the town, had had some trouble in the forenoon of the day of the homicide, and deceased had been up to Fenton's a time or two to see him. After he returned from Fenton's house, the last time he was there, and about half an hour before the shooting, one Wilkerson introduced deceased to the defendant. The two men shook hands, the deceased remarking: "Give me your hand, Bob. I understand you are a brother of Crit and Frank Feeley." Both men appeared to be friendly, and a short time afterwards they were seen by several persons standing near the hitch rack, drinking whisky. Calhoun, seeing the defendant's condition, tried to get him away, and did succeed in getting him into the buggy. Just then the deceased passed by, on his way to the store, and said to the men standing there,

"The coward would not come out." About this time some man came out of the blacksmith shop and told defendant that deceased was talking about him, and defendant at once got out of the buggy and told Calhoun to go on home. Cothrien, a witness, told defendant to get back in the buggy, and assured him that deceased was talking about Jim Fenton, with whom he had had trouble. Defendant then said he was going to see Fenton, and started towards Fenton's residence, and while on the way he met Mrs. Fenton and had a talk with her, after which he was seen at the back of said blacksmith shop, where he again met deceased. A witness saw deceased take a drink out of defendant's bottle and then throw the bottle down. The two men stood talking for a few minutes, when defendant fired a shot, and deceased fell. Defendant then fired four more shots in rapid succession, which took effect upon deceased, and he also struck deceased on the back of the head with his pistol. He then threw his pistol and hat on the ground and walked towards an iron bridge, a short distance off. While on the bridge defendant waved his hands over his head several times, and then returned to where the dead body lay. In the meantime several persons appeared on the scene and saw that Hoots was dead, and that defendant's hat, a whisky bottle and a .38-caliber pistol were lying on the ground near by. One of the shots entered deceased's body about 1½ inches to the left of the median line and came out at about the same distance to the right of said line. Another bullet entered just under the left eye and came out above the right ear, passing through the brain. Three bullets entered in the back. Defendant asked the people who had gathered near the body who the deceased was, and when some one remarked that the man was dead, defendant said, "He is not dead to me." About this time a rainstorm was brewing, and the persons present moved the dead body to the store, and gathered up some rocks and marked therewith the place where the body lay. There was evidence to show that there were no rocks nearer than 20 feet to the body at the time, but upon this question the evidence was conflicting. The deceased had no weapons on his person at the time of the shooting. That night defendant was heard say: "I am the worst son of a bitch in town. He has been running over me all day, and now I have shot it into the back of his neck; shot it in right." He used similar expressions in the hearing of others.

The evidence upon the part of the defendant tended to show that there were rocks at the place where the deceased fell when shot. Defendant also showed by a number of witnesses that his reputation for peace and good order at Nevada, where he lived, was good. He also testified in his own behalf substantially as follows: "Q. You may state your name to the jury? A. Robert Feeley. Q.

You are the defendant in this case, are you, Mr. Feeley? A. Yes, sir. Q. How old are you, Mr. Feeley? A. Forty years old. Q. Are you a married man? A. Yes, sir. Q. Son of Uncle Norris Feeley, of this county? A. Yes, sir. Q. Where were you born? A. Out west of Burdette. Q. West of Burdette. Mr. Feeley, when did you leave Bates county and Cass county and go south? A. About 18 years ago. Q. How much of that time, where did you live? A. Nevada. Q. How much of the time have you lived in Nevada? A. About 12 years. Q. What is your business? A. Barber. Q. On the 8th day of September, 1903, where did you start? A. Started to my father's. Q. Your father's. State to the jury, Mr. Feeley, what time you got to Burdette, about. A. Why, I guess about 4 or 5 o'clock, about. Q. 4 or 5 o'clock. A. Yes, sir. Q. Well, just state to the jury when you got to Burdette and what you did. A. I got out of the buggy and stepped upon the porch and met Mr. Roach. Met Mr. Roach there and was talking to him. Q. Where was it you got out? A. Mr. Mudd's store. Q. Mr. Buell Mudd's store? Q. Mr. Feeley, when and where was the first time you saw the deceased, Martin Hoots? A. I was standing on the store porch and he came up. Q. Had you ever met or heard of Martin Hoots prior to that time? A. No, sir. Q. What was he doing when you first saw him? A. He was going south. Q. State to the jury, what if anything, he had. A. He had a shot gun. Q. State to the jury what conversation, if any, you had with the deceased, or in his presence. A. Well he came up, and I asked Mr. Roach who he was. He says, 'He is Martin Hoots,' and he said; 'It's none of your business.' Q. Who said that? A. Mr. Hoots did. Q. Mr. Hoots said, 'It's none of your business.' * * * Q. Mr. Feeley, what further conversation, if any, did you have there with Mr. Hoots? A. Why, Mr. Roach says, 'That is Uncle Norris Feeley's son,' and he said he had an order on Crit, my brother, for some money, and I told him I guess Crit would pay it, and he talked a few minutes, and he walked on away. Q. When he left you, where did he go? A. He went south. Q. Which way? A. Towards the old blacksmith shop. * * * Yes, sir. Q. Where did you go? When the deceased started toward the old blacksmith shop, where did you go? A. I went out south of the store to get in and go home. Q. Who did you see, if any one, while you was at the buggy? A. Uncle Dan Cothrien. Q. When did you next see the deceased, Martin Hoots, Mr. Feeley? A. He came up to the buggy. Q. Coming which way? A. From the west. Q. What did he have with him, if anything? A. He had a shotgun. Q. State to the jury what, if anything, Martin Hoots said when he addressed you. A. Well, he said: 'The God damned son of a bitch was a coward. He wouldn't come out,' Q. What did you do then? A. I stepped out of

the buggy. Q. Was anything further said there at that time between you and Mr. Hoots? A. No, sir. Q. What became of Hoots? A. He went on north toward the store. Q. Where did you go? A. I went over behind the store to the old schoolhouse. Q. Back of the old schoolhouse? A. Yes, sir. Q. How did you happen to go over there? A. Well, Mrs. Fenton was over there, and she called me to come over. Q. Did you have any conversation with Mrs. Fenton? A. Yes, sir. Q. What was it? A. Back of the schoolhouse. Q. Was it, or was it in the schoolhouse yard? A. It was in the schoolhouse yard. Q. State what conversation, if any, you had with Mrs. Fenton in regard to the deceased, Martin Hoots. A. Well, I was talking with her, and going to go up home with her, and she said for me not to go with her; that her son Jim had been having trouble with Hoots, and for me not to go; that he was a dangerous man to go about; and I didn't go. Q. Where did you next see the deceased, Martin Hoots? A. In behind the blacksmith shop. Q. What, if anything, was said by you, or Hoots? A. Why, he called for me to come over where he was? Q. Where was you when he called you? A. I was in the schoolhouse yard. Q. Where was Hoots? A. He was back of the blacksmith shop. Q. Did you go to the back end of the blacksmith shop where Hoots was? A. Yes, sir. Q. What was said by you or Hoots when you got over there, if anything? A. Well, he wanted to know what God damned old woman that was I was talking to. I told him it was old Grandma Fenton. He says: 'God damn it. I have been up to Fenton's two or three times after Jim.' And he said, 'The coward won't come out. He says, 'I have had trouble with him.' He says, 'I made him and Sheriff Mudd leave town,' and this town belonged to him. And he asked me if I had any whisky, and I told him, 'Yes,' and he wanted a drink, and I pulled out my bottle and handed it to him, and he says, 'No, you take a drink.' I took a drink, and then he drank and threw it down. He says, 'This whisky is no account, bad stuff,' and he says, 'Just like you.' He says, 'I am going to make you go home.' I told him if he would wait a few minutes I would go home without making. He says, 'No, you ain't; I am going to make you go now.' He stepped towards me, and I stepped back, and pulled my gun, and told him to stand back; I didn't want any trouble. He reached back to pick up a rock, and then I commenced shooting. Q. Now, Mr. Feeley, just stand up here and show the jury the position Hoots was in when you commenced firing the pistol. Just come down here, I guess you had better. Which way first was Mr. Hoots standing from you when you had this conversation with him? A. He was standing about like that (indicating). Q. Where was he with reference to where I would be. Say I am Hoots, which way was

he, what direction? A. I was west of Hoots, about where you are standing. Q. Now, just show the jury what position Hoots was in when you fired the first shot. A. Something like this (stooping down). Q. Where was you standing if you was Hoots? A. About where I was. Q. Now, Mr. Feeley, how many shots did you fire, do you know? A. No; I emptied my gun. Q. Mr. Feeley, what was the position of Hoots when you fired the last shot? A. Well it was about straight. Q. You may state to the jury why you shot Martin Hoots? A. Well, sir, I did it because I—(Mr. Jackson [interrupting]: I object to that. Court: Overruled.) A. I done it because I was afraid he was going to kill me. Q. Was going to kill you? A. Yes, sir."

Over the objection and exception of defendant, the court gave 14 instructions covering murder in the second degree, self-defense, and reasonable doubt, only 2 of which, the eleventh and fourteenth instructions, are criticised. The grounds of objection and criticism will be reviewed later in this opinion.

It is contended by defendant that the court committed error in admitting in evidence, over the objection of defendant, the testimony of witness Calhoun, which was to the effect that while on the way from Archie, in Burdette, defendant said to him: "He was a straight shot and he was a game man, and I would find it out before I got back." The contention is that, while admitted as a threat, it is too vague and indefinite to be called such, and that, even if it could be so called, it was inadmissible. That defendant did not know the deceased at the time is clearly shown by the evidence, and the threat could not, therefore, have been made against him in particular. In *State v. Crabtree*, 111 Mo. 136, 20 S. W. 7, it was held that general threats made by the defendant before the homicide, and having no reference to the deceased, were not admissible in evidence against him. But in that case the evidence showed that the threats applied to the members of defendant's own family, if to any in particular, and had no reference whatever to the deceased. In *Godwin v. State*, 38 Tex. Cr. R. 466, 43 S. W. 336, that case was cited with approval. In the last case cited, which was a prosecution for murder, it was held that testimony of threats made by the defendant, on the day preceding the homicide, to kill somebody, but not directed in any way towards the deceased, were inadmissible. Practically the same rule is announced in the case of *Strange v. State*, 38 Tex. Cr. R. 280, 42 S. W. 551.

Counsel for defendant also cite *Whitaker v Commonwealth* (Ky.) 17 S. W. 358, as sustaining the contention of the defendant, but it does not do so. On the contrary, it was ruled that general threats, while not competent as part of the *res gestæ*, part

of the bloody transaction, they were competent as showing general malice, and a purpose to injure or kill some one, and the deceased became the victim. In the recent case of *State v. Brown*, 188 Mo. 451, 87 S. W. 519, Fox, J., in speaking for the court, held such threats to be admissible in evidence, "as indicating the existence of a frame of mind or disposition from which criminal actions proceed, and the action of the court in overruling the objections of defendant to the introduction of those statements is fully supported by the rule as announced upon this subject in *State v. Grant*, 79 Mo., loc. cit. 137, 49 Am. Rep. 218; *State v. Guy*, 69 Mo. 430; *State v. Hamilton*, 170 Mo. 377, 70 S. W. 876." In *Hopkins v. Com.*, 50 Pa. 9, 88 Am. Dec. 518, the rule is stated in the following language: "Nor was it necessary that the premeditated malice should have selected its victim. If the jury believe that the defendant had formed the deliberate design to kill somebody, and in pursuance of that purpose, within an hour after declaring it, did kill *McMarey*, the commonwealth has a right to insist upon his conviction of murder in the first degree, and that they might thus insist they had a right to prove his declaration an hour before the deed." In *Brooks v. Com.*, 100 Ky. 194, 37 S. W. 1043, it is held that general threats by the accused to kill some one, made shortly before the homicide, were admissible to show malice, without proving that such threats were directed toward any particular individual. The court said: "According to the weight of authority, the testimony of the other witnesses of general threats by the accused or of his purpose to do an act which would be criminal, the like of which followed, was admissible in order to establish 'general malice and purpose to injure or kill some one,' of which the deceased became the victim."

We do not think the threat proven in the case at bar was admissible in evidence as part of the *res gestæ*, because it had no immediate connection with the homicide, which occurred several hours afterwards, but we do think, according to the weight of authority and the rule announced in our own decisions, it was admissible to show general malice and a disposition on the part of the defendant to do an act which was criminal, such threat to be given such weight by the jury as they, under all the circumstances, thought it entitled to.

The point is made by defendant that the court erred in permitting W. O. Jackson, counsel for the state, in the course of his argument to take a pistol, and have Mr. Ludwick, the prosecuting attorney, assume different attitudes in front of the pistol in order to demonstrate what could or could not have been the range of the shots. But no such occurrence is shown by the bill of exceptions, and cannot, therefore, be con-

sidered by this court. Matters of exception which occur in the presence of the court cannot be shown by affidavits, unless the court refuses to sign the bill when presented to him upon the ground that the matters therein stated, or some of them, are not true. *State v. McAfee*, 148 Mo. 370, 50 S. W. 82; *State v. Grant*, 144 Mo., loc. cit. 66, 45 S. W. 1102; *State v. Lamb*, 141 Mo. 298, 42 S. W. 827; *State v. Reed*, 154 Mo., loc. cit. 126, 55 S. W. 278.

Defendant testified in his direct examination to going to the schoolhouse yard and talking to Mrs. Fenton, and to returning to a point behind the blacksmith shop, and there seeing and talking with deceased; and, over the objection of defendant, the prosecuting attorney, in the cross-examination of defendant, was permitted to ask him about the presence of Rich Haley, Toney Rhodes, Willie Nelson, and Sol Wilkerson there at the same place and time, although he had not testified to the presence of either of them in his examination in chief. Defendant contends that this was error. Section 2637, Rev. St. 1899, by implication, prohibits the cross-examination of a defendant in a criminal case, who testifies in his own behalf, touching matters not testified to by him in his examination in chief, if timely objection be interposed to such cross-examination; and it has been held that the defendant can only be cross-examined as to matters referred to by him in his examination in chief. *State v. Chamberlain*, 89 Mo. 129, 1 S. W. 145; *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374, and authorities cited. But we do not think that such a cross-examination, regardless of the fact that it may not be prejudicial to the defendant or work him any harm, should, ipso facto, be ground for the reversal of a judgment of conviction; otherwise the most immaterial matter elicited from a defendant on cross-examination, and not testified to in chief, would authorize the reversal of a judgment of conviction. We cannot believe that such was the intention of the Legislature in passing the law. Whether the persons named, or either of them, were present at the time and place indicated was entirely immaterial for the purpose of this inquiry, and we are unable to see in what way the mere fact that defendant was improperly cross-examined as to their presence could prejudice his case. Moreover none of these persons was introduced as a witness by the state for the purpose of contradicting the defendant with regard to the fact of his or their presence at the time and place indicated. In an exhaustive review of the authorities upon this question, at the present term of the court, in the case of *State v. Barrington*, (not yet officially reported) 93 S. W. —, Fox, J., in speaking for the court, held that the cross-examination of a defendant upon immaterial matters not testified to by him upon his examination in chief, will not, when no evi-

dence is offered by the state to contradict him, justify a reversal of a judgment of conviction.

It is said for defendant that the court erred in permitting the state to show the general reputation of deceased when not drinking, when the defendant had only introduced evidence tending to show that deceased was a quarrelsome and dangerous man when drinking. The argument is that such evidence upon the part of the state was improper, not rebuttal, and brought forward an issue not raised by the defendant. The record shows that, in rebuttal to testimony offered by defendant tending to show that deceased was a quarrelsome and dangerous man when drinking, the state introduced evidence tending to prove that the general reputation of deceased in the neighborhood in which he lived, for peace and quiet and good citizenship, was good. In support of the contention of defendant, *Keener v. State*, 18 Ga. 184, 63 Am. Dec. 269, is chiefly relied upon. In that case the deceased, who was a railroad conductor, was killed by Keener in a brothel. Upon his trial for murder the defendant purposes to prove the general character of deceased for violence in the particular place where the difficulty occurred, to which the state objected and the evidence was excluded. The case went to the Supreme Court of that state, and the judgment of conviction was reversed upon the ground of the exclusion of said evidence, the court expressly repudiating the general doctrine that a person can have but one general reputation, and that in the neighborhood only in which he lives, and holding that "a man may have different general characters, adapted to different circumstances and localities; that is a character for rail cars and a character for the brothel; a character for the church and one for the street; a character when drunk and a character when sober." *Wigmore on Evidence*, vol. 2, § 1618, is another authority relied upon by defendant as sustaining his contention. The doctrine announced in the *Keener Case* forms the basis of the text in that work upon this subject. These authorities, with perhaps one exception, namely, *Atlantic & B. R. R. Co. v. Reynolds*, 117 Ga. 47, 43 S. E. 456, are the only ones to which our attention has been directed, or that we have been able to find after diligent search, which announce this doctrine. But even these do not sustain defendant's contention, because it is not pretended in this case that deceased had acquired any kind of reputation at any place other than in the neighborhood in which he resided, while the question decided in *Keener's Case*, upon which the other authority cited by defendant is based, was that a man may acquire and have, at the same time, different general reputations in different places or localities. While it would have been proper for the defendant to show by testimony the general reputation of deceased in the neighborhood in which he lived for vio-

lence and quarrelsomeness when drunk, yet, under the circumstances hereinafter to be noted, that was only one trait or quality of his disposition which went to make up his general reputation, and not separable from it, and the state should not, therefore, be deprived of the right to show, in rebuttal, his general reputation for peace, quiet, and good citizenship, in the neighborhood in which he resided. In the case of *Hussey v. State*, 87 Ala. 121, 6 South. 420, it was said: "There was no error in allowing the state to prove the good character of the deceased for peace and quiet. The ground of objection to this evidence seems to be that the general reputation of the deceased had not been put in issue, but only the particular traits of his character as a quick-tempered, violent man, easily provoked and likely to provoke a difficulty. If these traits of disposition are provable at all—which we do not decide—they are not separable from the question of character. It is plain that the state could rebut this evidence by proof of defendant's [sic] reputation for peace and quiet, the whole question of character often going to the intent with which an alleged crime was committed, 'the prevailing character of the party's mind, as evinced by the previous habits of his life, being a material element in discovering that intent in the instance in question.' 1 Greenl. Ev. § 54, note 3."

Whether or not, in a trial for murder, where it is doubtful whether the homicide was committed with malice or from a well-grounded apprehension of danger, the defendant has the right to show the quarrelsome and dangerous reputation of the deceased, as tending to show that the killing was not in malice, regardless of the fact that he may not know it at the time of the killing, as well also as to whether the defendant has the right to show such reputation under any circumstances, the authorities are much in conflict. In *State v. Hicks*, 27 Mo. 588, the rule that defendant must at the time of the killing, have knowledge of the reputation of deceased for being a quarrelsome and dangerous man, was expressly recognized by an instruction asked by defendant himself, which was refused by the trial court, and which this court ruled should have been given. While that case was followed in some respects in *State v. Keene*, 50 Mo. 357, the rule was not followed respecting the necessity of knowledge on the part of defendant of the general reputation of the deceased in order to entitle him to introduce evidence tending to show that deceased's general reputation was that of a quarrelsome and dangerous man. The court said: "When the homicide is committed under such circumstances that it is doubtful whether the act was committed maliciously, or from a well-grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent, and desperate, in determining whether the accused had rea-

sonable cause to apprehend great personal injury to himself." The same rule is announced in *State v. Bryant*, 55 Mo. 75. The same question was before this court again in *State v. Downs*, 91 Mo. 19, 3 S. W. 219, in which it is said: "When the killing has been done under such circumstances that there is doubt as to whether the act was done from malice, or from a sense of real danger, testimony of the turbulent character of the deceased may be received, and should be admitted, as tending to show and explain the motive that prompted the act"—citing *State v. Hicks*, supra; *State v. Elkins*, 68 Mo. 159; *State v. Keene*, 50 Mo. 360; *State v. Bryant*, 55 Mo. 77. In the more recent case, however, of *State v. Kennade*, 121 Mo. 406, 26 S. W. 347, it was held that evidence as to the reputation of deceased for quarrelsomeness was properly rejected, it not having been shown that defendant knew it. The court said: "Even if deceased had a reputation for being quarrelsome and dangerous, evidence of it could not have been received unless it had been previously shown that defendant knew it, and therefore might more reasonably apprehend danger in certain circumstances than if that reputation had been different. As this knowledge of defendant of the reputation of deceased is affirmatively shown by his testimony not to have existed, an answer to the question asked the officers was correctly denied"—citing *State v. Hicks*, 27 Mo. 590. That case is clearly in conflict on this point with the previous decisions of this court which we have cited, and should not longer be followed. In the case at bar, defendant testified that he shot deceased because he was afraid deceased was going to kill him, and under such circumstances evidence of the character of the deceased for being quarrelsome and dangerous when drinking was properly admitted.

A point is made upon the failure of the court to instruct the jury upon the question of motive when requested by defendant to instruct upon all the law of the case. No instruction upon this particular feature of the case was necessary for, according to the defendant's own testimony, he shot deceased because he was afraid he was going to kill him. In other words, his motive in shooting deceased, if his testimony be true, was to defend himself against the apprehended assault which was then about to be made upon him by deceased; and in the instruction on the right of self-defense given in the case defendant was given the full benefit of such motive. Moreover, there was no error for failure to instruct upon motive, "because a man is not to be acquitted of crime simply because his motive for perpetrating it cannot be discovered." *State v. Brown*, 168 Mo. 449, 68 S. W. 568; *State v. David*, 131 Mo. 397, 33 S. W. 28.

Instruction number 11 is claimed to be erroneous upon the ground of absence of evidence tending to show that defendant

voluntarily entered into the difficulty. This contention is groundless. The evidence tended strongly to show that defendant was rather anxious to get into a difficulty with some one, particularly the deceased; certainly he did not try to avoid it. His frequent aggravating remarks in the presence of and directed toward the deceased for the evident purpose of provoking him into a difficulty, his shooting him while unarmed and even after he was down, and all the circumstances connected with the killing, show that defendant not only voluntarily entered into the difficulty for the purpose of wreaking his malice upon deceased, but that he sought and provoked it, for such purpose. But, says defendant, even if there was evidence authorizing the instruction, the form and wording in which it is couched is erroneous. In support of this position defendant relies upon *State v. Rapp*, 142 Mo. 443, 44 S. W. 270. Instructions numbers 1 and 2, commented on in that case, deprived the defendants therein of the right of self-defense if they voluntarily entered into the difficulty, whatever their motive, even though it might have been for the sole and only purpose of defending themselves against the assault of their adversary, while under the law it is only where the difficulty is entered into for some unlawful purpose, such as taking the life of the adversary or to do him some great bodily harm, as provided in the instructions in this case, that the defendant is deprived of the right of self-defense. "Self-defense is an affirmative, positive, intentional act," and it logically follows that such act is voluntary. *State v. Gilmore*, 95 Mo. 554, 8 S. W. 359, 912. In speaking for the court in the case of *State v. Gordon*, (not yet officially reported) 89 S. W. 1025, Gantt, J., said: "It has been ruled in various cases by this court that self-defense is an affirmative, intentional act, and in that sense is voluntary, and while, perhaps, it was too strongly put in *State v. Rapp*, 142 Mo., loc. cit. 443, 44 S. W. 270, to say that 'voluntarily entering into a difficulty is not an ingredient of any homicidal crime,' as was said in that case, still we think that it is clear that when one is assaulted by another, and he neither brought on or voluntarily entered into such difficulty with a view to take advantage of a quarrel begun between him and his opponent, he does not forfeit his right of self-defense by voluntarily resisting the assault made upon him, and if the circumstances are such that when thus assaulted he has reasonable cause to believe and does believe that his opponent then and there entertains a design to kill him or do him some great bodily harm, and there is imminent danger of the accomplishment of such design, then he may resist the accomplishment of such a purpose by killing his adversary to prevent the accomplishment of such a purpose." But, as we have said, when the difficulty is entered into for some

unlawful purpose, such as wreaking or gratifying malice, then there can be no self-defense in the case. The position taken by defendant with reference to this instruction is, we think, clearly untenable.

In the brief of counsel for defendant it is insisted that instruction 14 is erroneous in that it is a direct comment upon the evidence of W. T. Simpson, who was a witness for the state. The position is that no other witness was impeached in the way indicated by the instruction, and that the effect of it was to bolster up his testimony. The case of *State v. Rutherford*, 152 Mo. 124, 53 S. W. 417, is relied on by defendant to sustain his contention, but the reason the instruction in that case was condemned was because it singled out certain evidence which was before the jury and gave it marked prominence, when the weight of all the evidence was for the consideration of the jury. The instruction in this case in no way intimated to the jury the weight to be given to the testimony of any particular witness, but told them, as it should, that if any witness had been impeached, they were not for that reason bound to disregard his testimony, but were at liberty to disregard the whole or any part of the testimony of such witness, or believe or disbelieve him, as they might believe that he had testified truthfully or falsely in the case. That the instruction may not have applied to any other witness than Simpson makes it no more objectionable than an instruction which tells the jury that if they believe that any witness has willfully and falsely sworn to any material fact, they might disregard all or any part of the testimony of such witness as might seem to them proper, which has so often been approved by this court that it seems unnecessary to cite the decisions upon the subject.

A further contention is that the court should have instructed the jury to acquit the defendant of murder in the second degree. The argument is that the evidence of Simpson, a witness for the state, and the only person who saw the killing, makes it murder in the first degree, and that defendant was not tried for that crime; that all the evidence showed it to be murder in the first degree or nothing. When a person is indicted for murder in the first degree, as in this case, the state, with the permission of the court, may elect to prosecute him for murder in the second degree, and the defendant will have no right to complain of the course of the state in electing to prosecute him for a less than the highest grade of homicide. *Rev. St. 1899, § 2369*; *State v. Talmage*, 107 Mo. 543, 17 S. W. 990; *State v. Lowe*, 93 Mo. 547, 5 S. W. 889; *State v. Keeland*, 90 Mo. 337, 2 S. W. 442; *State v. Nelson*, 88 Mo. 126, *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131; *State v. Burk*, 89 Mo. 635, 2 S. W. 10; *State v. Moxley*, 115 Mo. 644, 22 S. W. 575. While the case of *State v. Talmage*, supra, has been expressly overruled as

to what it takes to constitute manslaughter in the third degree (*State v. Pettit*, 119 Mo. 410, 24 S. W. 1014; *State v. Barutlo*, 148 Mo. 249, 49 S. W. 1004), its correctness in all other respects has never been questioned by this court. In a homicidal case, it is only when there is no evidence to authorize an instruction upon the particular grade of the offense upon which an instruction has been given that it will be held to be erroneous. Here there was sufficient evidence to authorize instructions upon both degrees of murder; hence, there was no error in instructing upon the lower grade of the offense, or in refusing to instruct the jury to acquit defendant of that offense. As was said by Gantt, P. J., in speaking for the court in *State v. Silk*, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959: "It is urged that the offense was murder in the first degree or nothing, that the court ought not to have instructed for murder in the second degree. We think the evidence shows an intentional killing with a deadly weapon, which alone raises the presumption of murder in the second degree."

The issues in this case were submitted to the jury upon instructions which covered every feature of the case and which were very fair to the defendant. They were fully justified by the facts disclosed by the record. According to the testimony of defendant himself, and all the facts connected with the homicide adduced in evidence, defendant was guilty of murder in the first or second degree, or else the killing was in self-defense. The jury found him guilty of the offense for which he was put upon trial, and we think the verdict was fully warranted by the evidence.

The judgment should be affirmed. It is so ordered. All concur.

On Rehearing.

An opinion was delivered in this case on the 31st day of January last, affirming the judgment of the trial court, in which we declined to pass upon said instructions numbered 11 and 14 for the reason that neither the record filed in this court nor the original bill of exceptions filed with the clerk of the circuit court, showed that any complaint was made of the action of the court in giving said instructions. In the motion for a rehearing, however, filed February 6th, inst., our attention is called to the fact that by stipulation between counsel for the defendant and the state, filed with the clerk of this court on January 3, 1906, the motion for new trial is correctly set out in appellant's brief at pages 5 to 8, inclusive, which shows that the point upon the action of the court in giving all instructions in behalf of the state was duly raised by the motion. On January 4, 1906, another stipulation entered into by the same counsel, correcting the record in other respects, was also filed with the clerk of this court. The records of this court fail to show the filing of either of these stipulations, and

when we come to the investigation of the case we found but one, that being the stipulation filed January 4, 1906, which referred in no way to the instruction, and it being so unusual for two different stipulations to be filed for the correction of the record in the same case, and especially without asking or obtaining the permission of the court, that we overlooked the stipulation filed January 3d. It may not be out of place to say here that no record, after being lodged with the clerk of this court, can be changed without the permission of the court, duly entered of record at the time. But owing to the importance of this case we have duly considered the questions raised by counsel for defendant upon the instructions, and have modified the opinion in this respect.

The motion for rehearing is overruled. All concur.

STATE v. KING.

(Supreme Court of Missouri, Division No. 2
March 6, 1906.)

1. CRIMINAL LAW — APPEAL — OBJECTIONS — EXCEPTIONS.

Where the appeal record showed that there were no refused instructions, and that no exceptions were taken by accused to the court's failure to instruct on all the law applicable to the case, accused could not object that the court failed to give "cautionary instructions," the nature of which were not disclosed.

2. SAME — NEW TRIAL — ASSIGNMENTS.

Where a motion for a new trial in a criminal case did not challenge the correctness of any instructions given by the trial court, and merely alleged that the court erred in not instructing the jury on all points of the case under the evidence, such objection was insufficient to require the Supreme Court to pass on the sufficiency of the instructions given.

3. SAME — EXCEPTIONS.

In the absence of an exception to the failure of the court to charge on all the points in the case, an assignment that the court erred in failing to instruct the jury on all points was unavailable on appeal.

4. SAME — NEW TRIAL — NEWLY DISCOVERED EVIDENCE — CUMULATIVE EVIDENCE.

Where, in a prosecution for homicide, W. testified on defendant's behalf that he was in the saloon where the shooting occurred when it began, which was denied by certain witnesses for the state, other newly discovered evidence that W. was present in the saloon was merely cumulative and insufficient to authorize a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2329.]

5. SAME — DILIGENCE.

Where one of the affidavits filed in support of an application for a new trial for alleged newly discovered evidence was sworn to in C. county, where defendant was tried on the same day he was convicted, and affiant was present at the trial, but did not testify, and the failure of another affiant to testify to the alleged newly discovered facts was owing entirely to the neglect of defendant's counsel to examine him concerning such subject when he was a witness, defendant's proof of diligence was insufficient.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2318, 2319.]

6. SAME—AFFIDAVIT OF ACCUSED.

A motion for a new trial for newly discovered evidence cannot be granted in the absence of an affidavit by accused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2397.]

7. SAME—VERDICT—REVIEW—EXCEPTIONS.

A verdict convicting accused of an offense, being a part of the record proper, is before the Supreme Court for review on appeal, without an exception taken thereto in the circuit court.

8. SAME—ERROR IN VERDICT—PREJUDICE.

Rev. St. 1899, § 2649, provides that where a verdict of guilty is found and the jury fail to agree on the punishment, or do not declare such punishment by their verdict, or assess a punishment not authorized by law, the court shall assess and define the punishment and render judgment accordingly. *Held* that, where the jury found defendant guilty of murder in the second degree and assessed his punishment at "teen years (10)," the verdict at least constituted a conviction of murder in the second degree, on which the court had power to sentence defendant to 10 years' imprisonment, and hence, even if the verdict was erroneous for misspelling the word "ten" and failure to add "in the penitentiary," the error was not prejudicial.

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Lee King was convicted of murder in the second degree, and he appeals. *Affirmed*.

Troy Pace and E. G. Mitchell, for appellant. The Attorney General and N. T. Gentry, for the State.

GANTT, J. On December 23, 1903, the prosecuting attorney of Taney county filed an information, duly verified, charging the defendant and West Hudson, Bill, alias "Red," Barker, and Clyde, alias "Curley," Elliott, with murder in the first degree. The date of the commission of the alleged crime was the 15th day of December, 1903, and the name of the deceased was Henry Barchman. Defendant applied for and was granted a change of venue on account of the prejudice of the inhabitants of Taney county. The cause was accordingly sent to Christian county. In the latter named county defendant entered a plea of not guilty, was granted a severance, and convicted of murder in the second degree at the December term, 1904. The punishment assessed was 10 years in the penitentiary. After the usual unsuccessful motions for new trial and in arrest of judgment, defendant appealed.

The state's evidence tended to show that for some time prior to December 15, 1903, Oliver & Thompson conducted a saloon in Taney county, a short distance from the line between Missouri and Arkansas. It was known as the "State Line Saloon," and the deceased and John Hart were the bartenders. Thompson also conducted a saloon at Branson, in Taney county, and the defendant had been his bartender, but quit on account of trouble with Thompson a few days before the homicide. Omaha, Ark., was a small village, a few miles from the state line, and a number of men were engaged in a railroad camp near there; among them being Hudson,

Elliott, and Barker, who are jointly charged with defendant. The day before the shooting Elliott, Barker, and defendant had some trouble with Oliver, one of the proprietors of the State Line Saloon. On said day defendant and the others went to said saloon, taking a girl with them from Omaha. They soon got into a fight with some Irishmen, and Oliver told them to get out. Turning to defendant, Oliver said: "You fellows can close Charley Thompson's doors, and go over to Forsythe and have a big time, but no one can close mine. If they do, they can close over the best son of a bitch they ever saw." After returning to Omaha, Barker was heard to say that Oliver had run him out of his saloon, and that he was going back to settle with him. He further said. "I am going back to kill Jess Oliver." Hudson and defendant were present in this room and took part with Barker in the conversation. The evidence showed that Barker, Hudson, and Elliott were disorderly and dangerous men, and Thompson had requested defendant to get them away from his saloon at Branson, as they were causing him trouble and people were complaining about them. For some days prior to the final difficulty there seemed to be an intimacy existing between defendant and these three. In fact, they seemed to be together continually. On December 15, 1903, defendant and the same three men again hired a hack and were driven from Omaha to the State Line Saloon, reaching there between 1 and 2 o'clock. All of them at once entered the saloon, and remained in there most of the time, drinking and talking until the shooting occurred. These men got into trouble with an Irishman in the saloon, made him treat the crowd, and then they retired for a few minutes. After talking together on the outside, they came back into the saloon and partook of another round of drinks. In another tussle with the Irishman, the men got him on the floor and were handling him pretty rough, when one of the bartenders, John Hart, asked defendant not to do that. The four men then left the saloon, and in a few minutes all came back and ordered another round of drinks. Hudson drew his pistol, and without any apparent reason, fired it three times. Upon a protest from the bartender, and an appeal to defendant to stop it, defendant said "all right." Defendant then ordered drinks for all and called on all to partake of same. Accordingly, every one in the room lined up to the bar. Bartender Hart stooped down to get whiskey from a demijohn for some of them, and deceased began to pull corks from bottles for those that had ordered beer. While thus engaged, Hudson rushed towards deceased, saying, "I will kill that three fingered son of a bitch," referring to deceased, who had only three fingers on one hand. At the time defendant and Barker had each a pistol in his hand defendant's pistol was pointed towards bartender Hart. Some one called out, "Hands

off!" At once a shot was fired, and deceased exclaimed: "Don't shoot any more. You have killed me now." Hudson, Barker, and a number of others ran out the front door of the saloon; but defendant and Elliott remained. Defendant continued to hold his pistol on Hart, and told Hart to give him \$5 or \$10. Hart gave him the only bill he had in the cash drawer, but did not notice what denomination it was. While defendant was getting this money from Hart, Mr. Powers came into the saloon to see what was the trouble, and saw Elliott sitting straddle of deceased. As Mr. Powers entered the door, Elliott drew his pistol and commanded him to go back, which he did. In a little while Elliott and defendant came out, and Elliott told Mr. Powers he could now come in if he wanted to. Some one asked who did that shooting, and Hudson said: "I shot the son of a bitch." Deceased was picked up and carried to a room over Powers' restaurant, where he lingered until 11 o'clock the next night, when he died. An examination showed that the deceased received a gun shot wound on the left side of the abdomen, four inches to the left of the navel, and that bullet passed through his body and out the back. Deceased, seemed to think his condition serious, as he stated to Mrs. Powers, while being taken to her room, that there would soon be one man less. At one time he had hope of recovery; but his suffering was so great that in less than five minutes he changed his mind. The physician told deceased that he could not recover, that he was bound to die, and deceased agreed with him. Deceased then made a statement, in which he said that West Hudson shot him, and that he (deceased) was doing nothing at the time, and that he did not have any pistol. About two minutes after the shooting defendant, Hudson, Elliott, and Barker, each one still carrying a pistol, met a short distance away from the State Line Saloon, ordered their hack, and drove to Omaha. James Langwell testified: That he drove the hack, and that Elliott sat on the front seat with him, and that the other three sat on the back seat of the hack. That during the ride to Omaha one of the men on the back seat shot a hole through Hudson's hat. That the men had him stop the hack, and all of them got out and went behind the hack, when one of them fired a shot. After reaching Omaha, defendant told several persons that there had been a shooting over at the State Line Saloon. That Hudson had shot the bartender. That the bartender had shot several times at Hudson and defendant. That several shots passed through defendant's clothes. That defendant and Hudson had shot several times at the bartender, and that Hudson hit him first. Defendant showed a hole in his shirt and one in his coat and collar, which he claimed were made by bullets from deceased's pistol. At that time Hudson exhibited his hat, which had a hole in it, and which they claimed had been made

by one of deceased's bullets. Mrs. Middleton, who had charge of the hotel at Omaha, heard defendant say, after his return from the State Line Saloon, "We had to kill a man." In response to a question from David Eoff as to how it happened that he did such a cobbled-up job as that, Hudson replied: "I don't know, Uncle David, how it happened. I only wish I had done a better job." Defendant then said: "Well, we had to shoot him. If he hadn't of shot him, I would." In showing Constable Davis some holes in his coat and vest, which he claimed deceased had shot in there, defendant said: "If Wes Hudson hadn't of done it, I would have had to have done it." In the presence of defendant, Hudson said that he (Hudson) "shot the fellow just to see him buck himself to death." After these various statements defendant telephoned to the sheriff and told him to come to Omaha, as a man had been killed.

The defendant's evidence tended to show: That prior to this trouble defendant enjoyed a good reputation as a law-abiding man. That while the defendant went to the State Line Saloon both days in company with Hudson, Elliott, and Barker, and was present when Hudson shot deceased, yet defendant had nothing to do with said shooting, and did not aid, assist, nor counsel it. Defendant admitted having a pistol at said saloon, and admitted having a little trouble with one of the proprietors of said saloon, but denied making the statements which the state's witnesses attributed to him in reference to the killing; but admitted shooting a hole in Hudson's hat, and that Barker shot holes in his (defendant's) coat and vest. Defendant claimed that he was on friendly terms with deceased, and that on both occasions he (defendant) was trying to keep the other men quiet. That the reason he went with Barker, Elliott, and Hudson was that Mr. Thompson was afraid of them, and asked defendant to take them away to some place where they would not bother him. Defendant also testified that deceased threw some beer bottles at Hudson just before the last shot was fired, and that he (defendant) was in the act of picking up his change from the bar when he heard said shot. In all that defendant testified to in reference to his presence and conduct in the saloon on the day of the difficulty he was fully corroborated by one Thomas Williams, a witness, who testified that he was a farmer of 50 year's experience, a justice of the peace of 16 years' standing, and had been commander of the G. A. R. post. Mr. Williams, who claimed to have been present from the beginning to the end of the difficulty in the saloon, even made a stronger case for defendant than was made by defendant himself. Although Mr. Williams lived in Boone county, Ark., he did not appear as a witness at the trial, but his deposition was taken at Omaha and read by defendant. In rebuttal, the state proved by several witnesses that Mr. Williams was not in the saloon at the

time of the difficulty, but was some 200 yards away, and asked what was the matter when he heard the shooting and saw a boy running away.

1. The information was sufficient. It followed a number of approved precedents in this state. Indeed, counsel for the defendant do not challenge it in their brief.

2. The only error assigned by the learned counsel for the defendant in their brief is the incorrectness of one of the instructions. In his motion for new trial the defendant nowhere assigns any objections or errors to the instructions given by the court; and the record shows that none of defendant's instructions were refused. It is true that one of the counsel for the defendant in one of the affidavits filed in support for motion for new trial does state: "The defendant asked the court to give cautionary instructions and the court agreed to give said instructions, but forgot it, and failed to do so." What the nature of the said cautionary instructions were, and on what subject counsel desired the jury to be cautioned, the affidavit does not state, but the record does show that there were no refused instructions, and shows no exceptions on the part of the defendant to the failure of the court to instruct on all of the law applicable to the case. It would seem too clear in the light of the uniform practice of this court, at least since the case of *State v. Cantlin*, 118 Mo. 111, 23 S. W. 1091, that the instructions of the court are not before us for review, because the motion for a new trial does not allege any error in those given by the court of its own motion, and there was no exception to the failure of the court to declare all the law of the case, and the attention of the court to its failure to instruct upon any proposition of law was not at that time called to its attention. But it is now insisted by counsel in their brief that the fourth assignment in their motion for new trial, to wit, "That the court erred in not instructing the jury on all points in the case under the evidence," is sufficiently broad to require this court to pass upon any error or inaccuracy in the instructions given by the court. We think it is too plain for discussion that a motion for new trial which nowhere challenges the correctness of instructions given by a trial court, and merely assigns as error the failure to instruct on all the points in the case, is not sufficient to require this court to pass upon the sufficiency of the instructions that were really given upon the points which the court deemed necessary. It would be manifest injustice to the circuit court. If counsel deemed that the circuit court had erred in giving away instruction, it was their duty to call the circuit court's attention to any error therein, and afford that court an opportunity to correct its own errors, and thus save the unnecessary delay and cost of an appeal in an important criminal prosecution. In this case, however, it is equally clear that, inasmuch as counsel saved

no exceptions to the failure of the court to instruct upon all the points in the case, this assignment itself is not sufficient to permit or require an examination by this court of any alleged errors in the instructions. *State v. Whitesell*, 142 Mo. 474, 44 S. W. 332; *State v. Headrick*, 149 Mo. 396, 51 S. W. 99.

3. In his motion for new trial the defendant alleges that he had discovered new and material evidence, and the affidavits of Taylor, Langwell, and Pace were filed in support of this ground for a new trial. The main point sought to be established by these affidavits seems to have been that Justice Williams, who testified in behalf of the defendant was in the saloon at the time of the homicide, or had been just immediately before the shooting began. Williams testified that he was in the saloon at the time of the homicide, and the defendant testified, also, that Williams was present. On the contrary, the witnesses Ramsey and Powers both testified that Williams had left the saloon, and did not know of the shooting of deceased by defendant until Ramsey met him as he was on his way to get a horse and send for a physician, after the deceased had been removed from the saloon and taken to the restaurant, and therefore it would have been a physical impossibility for Williams to have witnessed the facts to which he testified in his examination. That the evidence of Taylor that Williams was present was entirely cumulative is perfectly obvious. Moreover, this affidavit discloses no diligence whatever on the part of the defendant and his counsel to procure Taylor's evidence at the trial. It is significant that the defendant was convicted on the 5th of December, 1904, and on this same day this affidavit of Taylor's was made and sworn to before the clerk of the circuit court of Christian county. How Taylor happened to leave Taney county and attend this trial in Christian county, and not testify for the defendant on the trial, and yet be ready and willing to make this affidavit on the day the verdict was rendered, is not explained by the defendant or the witness who made the affidavit. Langwell, one of the other affiants, was a witness, and testified at the trial. He testified that Williams was in the saloon less than 20 minutes before the shooting. As to this proposition there was absolutely no conflict. Indeed the state's own testimony tended to show that Williams was in the saloon a short time before the killing, but had left and gone down the road, where he was met by the witness Ramsey, and was told about the killing for the first time, some 10 or 15 minutes, at least, after it had occurred. The failure, however, to prove this fact by Langwell, was owing entirely to neglect of defendant's counsel to ask him about it when he was on the stand. But, over and beyond all of this, the defendant himself filed no affidavit in support of his motion for new trial on the ground of newly discovered evidence, and it is too well settled to admit of

question that such an affidavit by the defendant is necessary. *State v. Campbell*, 115 Mo., loc. cit. 393, 22 S. W. 367; *State v. McLaughlin*, 27 Mo., loc. cit. 111; *State v. Gordon*, 153 Mo. 576, 55 S. W. 76; *State v. Lucas*, 147 Mo., loc. cit. 72, 47 S. W. 1067. And what has already been said applies with equal force to the affidavit of Mr. Pace, one of the defendant's attorneys in the case. No error was committed in refusing a new trial on the ground of newly discovered evidence.

4. The verdict of the jury was in this form: "We, the jury, find the defendant guilty of murder in the second degree, and assess his punishment at teen years (10)." No point is made by counsel as to the insufficiency of this verdict, but the verdict is a part of the record proper, and is before us for review without exception taken to it in the circuit court. Even if the misspelling of the word "ten" should be held erroneous, and the failure to add the words "in the penitentiary," we are of the opinion that the error is not a reversible one. The jury distinctly found the defendant guilty of murder in the second degree, and, if we are to regard it as if no punishment had been assessed by the jury, then the court by a plain statutory provision had power, and, indeed, it was its duty, to have fixed the defendant's punishment for the offense of which he was found guilty. Section 2649, Rev. St. 1899, provides: "Where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, or assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment and render judgment accordingly." And this the court did in this case, and sentenced the defendant to be confined in the penitentiary of the state of Missouri for a period of 10 years, from the 5th day of December, 1904, or until otherwise discharged in due course of law. *State v. Gordon*, 153 Mo. 576, 55 S. W. 76; *State v. Thornhill*, 174 Mo. 364, 74 S. W. 832; *State v. Hamey*, 168 Mo. 167, 67 S. W. 620, 57 L. R. A. 846. As the court sentenced the defendant to the least punishment affixed by the statute for murder in the second degree, it is obvious that he had no cause of complaint on this score. After a review of all the evidence and the record in this cause, we are of the opinion that no error was committed in the proceedings and trial of the defendant which would justify a reversal by this court.

The judgment must be, and is, affirmed.

BURGESS, P. J., and FOX, J., concur.

STATE v. TODD.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. CRIMINAL LAW — TRIAL — REMARKS OF COUNSEL.

In a prosecution for murder, where the attorney representing the state was allowed,

over the objection of defendant, to state that the testimony would show that defendant assaulted a third person, and this difficulty had no connection with the homicide in question, and the court instructed that the statements should not be considered, and that evidence introduced in support of it would not be admitted, the remarks did not constitute ground for reversal, though the court did not rebuke the attorney.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1693.]

2. SAME—WAIVER OF OBJECTIONS.

In a prosecution for murder, after counsel for defendant objected to remarks of the attorney representing the state with reference to an assault by the accused on a third person, and after the remarks were excluded by the court from the consideration of the jury, where defendant's counsel repeatedly referred to the same affair, notwithstanding objection of counsel for the state, he waived any objection to the remarks of the attorney for the state.

3. HOMICIDE—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for murder, any error in the admission of testimony that the witness heard defendant cursing deceased and calling him vile names, when witness told deceased he had better come into the store, and deceased replied that he would have no trouble with defendant, was not prejudicial to the defendant.

4. SAME—TRIAL—INSTRUCTIONS.

In a prosecution for murder, evidence that deceased, as he rode past defendant's office, straightened up in his saddle and gave defendant a very angry look, and that defendant did not shoot him until he had proceeded some 15 feet, checked up his horse, and made a motion with his hand toward his hip pocket, when defendant drew his pistol and began shooting, and continued to shoot until deceased fell from his horse, was sufficient to support an instruction that, if the killing were done willfully, premeditatedly, and of malice aforethought, but without deliberation, the defendant was guilty of murder in the second degree.

5. SAME—APPEAL—HARMLESS ERROR.

Under Rev. St. 1899, § 2369, providing that any person found guilty of murder in the second degree shall be punished according to the verdict of the jury, though the evidence shows him guilty of a higher homicide, and section 2535, providing that no judgment shall be affected for any error committed at the instance of or in favor of the defendant, nor because the evidence shows him guilty of a higher degree than that of which he is convicted, any error in an instruction in a prosecution for murder in the first degree, in authorizing a conviction of murder in the second degree, was not ground for reversal, where the evidence would have warranted a verdict in either degree.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 717-720.]

6. SAME—INSTRUCTIONS — DEGREES OF HOMICIDE.

In a prosecution for murder, an instruction authorizing a conviction of murder in the second degree, if the killing were done willfully, premeditatedly, and of malice aforethought, but without deliberation, these terms being defined in another instruction, sufficiently indicated to the jury what facts were necessary to authorize a conviction of murder in the second degree.

7. SAME—MANSLAUGHTER.

In a prosecution for murder, where there was no evidence that deceased made any remarks to or in the presence of defendant, or that he made any assault on him at the time of the homicide, there was nothing on which to base an instruction on manslaughter in the fourth degree.

Appeal from Circuit Court, Vernon County; H. C. Timmonds, Judge.

Joseph B. Todd was convicted of murder in the second degree, and appeals. Affirmed.

A. J. King, C. G. Burton, and W. M. Williams, for appellant. Herbert S. Hadley, Atty. Gen., John Kennish, Scott & Bowker, and M. T. January, for the State.

BURGESS, P. J. On an information filed in the circuit court of Vernon county by the prosecuting attorney of said county, in which the defendant, Todd, is charged with murder in the first degree, for shooting and killing one Robert T. Wall at said county, defendant was convicted of murder in the second degree, and his punishment assessed at imprisonment in the penitentiary for a term of 12 years. In due time, after said conviction, defendant filed motions for new trial and in arrest, which were overruled, to which rulings of the court defendant duly excepted, and brings the case to this court by appeal for review.

The homicide occurred at Richards, a village of some 200 or 300 inhabitants, in said county, on the 20th day of May, 1904. There had been bad feeling of long standing between the parties, which seemed to increase as time passed, until an intense hatred grew up between them. They had one or two personal encounters as well as frequent quarrels, many threats were exchanged, and they frequently went armed, as if each was apprehensive of an assault upon him by the other. Defendant was especially vindictive, and at various times, in the presence of others, charged deceased with being dishonest, a scoundrel, and a tax dodger. Charges of a similar character were also made by deceased against the defendant. Several months before the killing, Wall acquired by purchase from one Claypool a tract of land about one mile north from Richards, through which defendant had been accustomed to travel in order to get to another tract owned by him and adjoining the Claypool tract. After Wall bought this land from Claypool he fenced it in; but, regardless of this fact, and against the protests of deceased, defendant and son threw down the fence and passed through the land as usual. A few days thereafter, when defendant and his son appeared at the fence for the purpose of tearing it down and passing through Wall's land, they were intercepted by Wall, who, with a double-barrel shotgun in his hands, warned them not to do so, when they left. There was evidence tending to show a preconcerted plan upon the part of Wall to destroy defendant's practice as a physician and compel him to leave the town, and to that end he induced another physician to locate there, agreeing to defray his expenses until he became established in his practice at that place. The defendant and Wall were both residents of Richards. The main business street of the town is 80 feet wide, running north and south. Defendant's office

was located on the west side of this street, and deceased conducted a store also on the west side of said street and about half a block south of defendant's office. South of Wall's store, in the same block and on the same side of the street, was located Dr. Adams' drug store, and just across the street, east of the drug store, was a lumber yard.

Some time prior to the homicide defendant was sued by one Kauffman for damages alleged to have been sustained by him by fire which had been set out on defendant's land and which, through defendant's negligence, spread to Kauffman's land, and defendant made statements to the effect that the suit would not have been pressed but for Wall. Between 7 and 8 o'clock on the morning of the homicide, and about two hours before it occurred, the defendant, in a conversation had in his office with Mrs. Claypool, said that Wall was to blame for the suit brought against him by Kauffman. Immediately after this conversation the defendant had a quarrel with and assaulted Mrs. Claypool's husband. He then looked south and saw the deceased, some 400 feet distant, crossing the street from the lumber yard to Adams' drug store. Defendant started south towards Wall's store. He was then without coat or hat, in an excited condition, and had a pistol in his hand, but which he put in his pocket. Wall crossed the street and went to the drug store, and from there to a position in front of his own building, where he and the defendant met. Defendant began immediately to abuse and curse the deceased, but friends interfered and kept the men apart. Cox, a witness for the state, over the objection of defendant, was permitted to testify that, as Wall came to the drug store he (Wall) said to witness: "My stars, I will have no trouble with him"—meaning defendant. Shortly after this difficulty between defendant and deceased, the latter rode out to his farm on horseback. Returning from his farm, he rode by defendant's office. Defendant at the time was sitting in a chair in front of his office. Wall was riding very near the center of the street, with the bridle reins and his riding whip in his left hand, and his right hand hanging down by his side. As he rode by he straightened up in the saddle, and looked at defendant, and continued to look until there was some little distance between them. As to what then occurred the evidence is conflicting. The state's evidence tended to show that about this time Wall took his eyes off defendant and faced south, the direction in which he was riding, while the evidence upon the part of the defendant tends to show that when deceased had ridden about 10 feet past the defendant he checked his horse almost to a standstill, the horse facing southwest or west, and Wall looking at the defendant; that defendant then arose from his chair and walked to the edge of the sidewalk, and that Wall loosened his reins and the horse started south; that defendant stepped out in the

street and fired four shots at Wall, two of which took effect and were mortal. One of the shots entered the head, near the temple, about 2½ inches above the right eye; the bullet ranging downward and slightly back, in the direction of the left ear. The other wound was in the back, about 2½ or 3 inches to the left of the spinal column, between the hip and short ribs. Another of the bullets struck the horse in the left jaw, entering from the rear and coming out at the mouth. As a result of the shooting Wall fell from his horse about 44 feet south of where defendant had been sitting on the chair, and when picked up, immediately afterwards, he was found unconscious. He died 12 minutes after 12 o'clock on the day of the shooting. When Wall was picked up he was carried to the office of Dr. Adams and placed upon a surgeon's chair. An examination was then made of his pockets by three persons, but no pistol was found upon his person. Subsequently, however, when the body was being prepared for burial, a loaded pistol was found in his right-hand coat pocket. In the meantime, after Wall's death and while he was lying upon the surgeon's chair, Dr. Tommy Todd, a son of the defendant, came in and felt the wounded man's pulse with one hand and ran his other hand down upon or into Wall's coat pocket on the right side. Dr. Tommy Todd, however, testified that he did not put his hand in Wall's pocket, and that he had no pistol or anything else in his hands or pocket; that he did not put a pistol in Wall's pocket; and did not know whose pistol was found there. The defendant testified that when deceased appeared in front of his office, just before the shooting, he occupied a natural position in the saddle, but that deceased at once straightened himself up and fixed his eyes upon defendant, and gave defendant a very angry, vicious, and terrifying look which scared him greatly; that he (defendant) continued to sit upon his chair until deceased, who still kept his eyes upon defendant, had ridden south 15 feet or more, when deceased checked and drew his horse a little to the right, the animal's head being turned a little to the south; that he (defendant) then rose from his chair, and deceased went to his pocket, as defendant supposed, for a pistol, and that defendant then stepped out in the street a few feet, pulled out his pistol, and fired; that he hesitated, after firing the first shot, to see whether he would be compelled to further defend himself, but that deceased turned his horse's head toward defendant and continued his efforts, as defendant thought, to get a pistol out of his pocket; whereupon defendant, fearing that deceased was going to shoot him, raised his pistol again and fired three times as rapidly as he could.

Over the objections and exceptions of defendant, the court instructed the jury as follows: "(2) The defendant is presumed to be innocent. Before you can convict him, the state must overcome that presumption by

proving him guilty beyond a reasonable doubt. If you have a reasonable doubt as to his guilt, you should acquit him. But a doubt, to authorize an acquittal, should be a substantial doubt, founded on the evidence, and not a mere possibility of innocence. (3) You are the sole judges of the credibility of the witnesses and of the weight and value to be given to their testimony. In determining such credibility, weight, and value, you should take into consideration the character of the respective witnesses, their manner on the stand, their interest, if any, in the result of this trial, their relations to and feelings for or against the deceased and the defendant, the probability or improbability of their statements, their opportunities for seeing, knowing, and understanding the facts about which they have testified, as well as all other facts and circumstances appearing in evidence. And if you shall believe that any witness has knowingly and intentionally sworn falsely as to any material fact in this case, then you are at liberty to disregard the whole or any part of the testimony of such witness. (4) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, in the month of May, 1904, at Vernon county, Mo., with a pistol, shot and killed Robert T. Wall, and that such shooting and killing were done willfully, deliberately, premeditatedly, and of malice aforethought, you should find the defendant guilty of murder in the first degree. Unless you do so believe, you should not find him guilty of murder in the first degree. (5) If you shall believe from the evidence, beyond a reasonable doubt, that the defendant, in the month of May, 1904, at Vernon county, Mo., with a pistol, shot and killed Robert T. Wall, and that such shooting and killing were done willfully, premeditatedly, and of malice aforethought, but without deliberation, you should find the defendant guilty of murder in the second degree. Unless you do so believe, you should not find him guilty of murder in the second degree. (6) As used in these instructions, the expressions 'willfully, deliberately, premeditatedly, and of malice aforethought' have the following meanings. 'Willfully' means intentionally, not accidentally. 'Deliberately' means in a cool state of the blood. It does not mean brooded over or reflected upon for a week, or a day or an hour; but it means an intent to kill, executed in a cool state of the blood, in furtherance of a formed desire to gratify a feeling of revenge, or to accomplish some other unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some persons. 'Premeditatedly' means thought of beforehand, for any length of time, however short. 'Malice' does not mean mere spite, ill will, or hatred, as it is ordinarily understood; but it means that condition of the mind which prompts one to take the life of another without just cause or justification, and it signifies a state of disposition which

shows a heart regardless of social duty and fatally bent on mischief. 'Malice aforethought' means with malice and premeditation. (7) If you shall believe from the evidence that, prior to the time of the shooting, the deceased had made threats against the defendant, or that defendant had made threats against the deceased, or that each had made threats against the other, you should take such threats into consideration, together with all the other facts and circumstances appearing in evidence, in determining who was the aggressor in this case. (8) Although you may believe from the evidence that the defendant did shoot and kill Robert T. Wall, yet, if you shall further believe from the evidence that he did so in self-defense, as hereinafter explained, you should acquit him. On the question of self-defense the court further instructs you as follows: If you shall believe from the evidence that, at the time of the shooting, the defendant had reasonable cause to apprehend, and did apprehend, a design on the part of Mr. Wall to take his life or to do him some great personal injury, and that there was reasonable cause for him to apprehend, and he did apprehend, immediate danger of such design being accomplished, and that he shot to avert such apprehended danger, and that, at the time of the shooting, he had reasonable cause to believe, and did believe, it was necessary for him to do so to protect himself from such apprehended danger, then he had a right to do such shooting; and you should acquit him on the ground of self-defense. It is not necessary that the defendant should have been in actual or real danger, nor that the danger, if any, should have been impending and about to fall. If he had reasonable cause to believe, and did believe, he was in immediate danger of being killed or receiving some great personal injury, he had a right to act upon such belief. Whether or not he did have reasonable cause to so believe, and whether or not he did so believe, are for you to determine from all the facts and circumstances appearing in evidence. If you find the defendant guilty of murder in the first degree, you should simply so state, without assessing any punishment therefor. If you find him guilty of murder in the second degree, you should assess his punishment therefor at imprisonment in the penitentiary for a term of not less than 10 years. If you find him not guilty, you will simply so state."

The court, at the request of the defendant, gave instructions numbered 1, 9, 10, and 11, which are as follows:

"(1) The court instructs the jury that the information filed in this case is a mere formal accusation, and raises no presumption against the defendant, and the jury should not permit themselves to be influenced thereby against the defendant on account of said information. * * * (9) The court instructs the jury that if you shall believe from the evidence that at the time defendant shot and

killed Robert T. Wall he (the defendant) had reasonable cause to believe, and did believe, from the acts and conduct of Wall, that Wall was attempting to draw a pistol and shoot defendant, and that defendant had reasonable cause to believe, and did believe, that there was imminent danger of Wall so doing, then you must acquit the defendant on the ground of self-defense, even though the jury may further believe that Wall was unarmed, and that there was no real danger. (10) The court instructs the jury that if they find from the evidence that the defendant had reasonable cause to believe, and did believe, that the deceased was about to draw a pistol at the time and place of the shooting, to shoot him, then he was not bound to flee, but had the right to defend himself from such threatened attack. (11) The court further instructs the jury that, although you may believe from the evidence that defendant entertained ill will towards the deceased and had abused and threatened him, still the defendant was not thereby deprived of the right to defend himself against any attack upon him by the deceased. And if you shall find from the evidence that defendant shot and killed the deceased in self-defense, as defined in other instructions, then you must acquit him, notwithstanding such ill will, abuse, and threats."

The first assignment of error is upon the ground that the attorney representing the state was allowed, over the objection and exception of defendant, to state to the jury in his opening statement that the testimony would show that about 8 o'clock on the morning of the homicide the defendant assaulted a man Claypool and struck him over the head with a pistol. This difficulty between defendant and Claypool had no connection or anything whatever to do with the shooting of Wall by defendant, and the statement made by the attorney representing the state, to the effect that defendant assaulted Claypool with a pistol some two hours before the killing of Wall, shed no light on the homicide, and should not have been made or admitted. But this statement as to what the testimony would show was admitted by the court, over the objection of defendant, upon the theory, evidently, that the attorney making it would thereafter be able to show some connection between the alleged assault on Claypool and the homicide; but, the attorney having failed to do this, the court, at the conclusion of his statement, excluded from the consideration of the jury that part of it which related to the assault upon Claypool. The court said: "Gentlemen, Counsel for the Defendant, and the Jury: The court desires to make this statement and this ruling: Mr. Scott's statement of what the state expected to prove, the court thinks that, the defendant objecting to the details of the difficulty which is alleged to have taken place between this defendant and a man by the name of Claypool, that that statement

ought not to be taken into consideration; nothing to show that that had any connection with this difficulty. And therefore the defendant objected to Mr. Scott's statement as to what took place between this defendant and Claypool. That will be excluded and struck out now, and if there should be any testimony of that kind offered it will be excluded. There is nothing in Mr. Scott's statement connecting it with Mr. Wall at all. It is immaterial whether Mr. Todd or Claypool was to blame in that trouble, and does not seem to connect Mr. Wall with it in any way, and therefore it is not competent or admissible, and the jurors will not allow it to have any lodgment in your minds, if you can help it." What more could the court do than it did? The statement complained of had been made with its permission, and the court could not therefore rebuke the attorney. But the court's direction to the jury to disregard the statements of the attorney relating to the assault upon Claypool, and that any testimony which might be offered in regard thereto would be excluded, served as an antidote to any prejudicial effect that such statement might have had upon the minds of the jury. No evidence regarding the Claypool affair was offered by the state, and, as it was expressly announced by the court from the bench that should any such evidence be offered it would be excluded, no prejudice could possibly have resulted to the defendant by reason of such statement. While it was held, in *State v. Stubblefield*, 157 Mo. 360, 58 S. W. 337, that the court erred in not rebuking the prosecuting attorney for statements made by him in his opening statement, connecting the defendant upon trial with crimes other than that for which he was then being tried, that case differs from the one at bar in that the statements in that case were not made with the permission of the court. Nor is the case in hand to be included in that class of cases where the prosecuting attorney, in addressing the jury, speaks of matters dehors the record prejudicial to the defendant, and where, upon objections made by the defendant, it becomes the duty of the court to reprimand the attorney for thus transgressing, and to direct the jury to disregard such remarks, as held in the case of *State v. Kring*, 64 Mo. 591, and *State v. Lee*, 66 Mo. 165, and in this way obviate any resulting prejudice to the defendant. The statement complained of was in no sense evidence, and could not have an effect such as evidence relating to the said assault might have upon the minds of the jury, and the court's direction that it be excluded from their consideration entirely eliminated it from the case. Had evidence in support of the statement been permitted to go to the jury, it would have been prejudicial to the rights of defendant, and the wrong could not have been righted by the mere oral direction of the court from the bench to disregard it. But even after the objectionable statement had

been made, and after the court directed the jury to exclude it from their consideration, the attorney for defendant, who made the statement of defendant's case, insisted upon laying the Claypool affair before the jury, and did state some of the details thereof; nor did he desist until the court, upon objections made by the state, had several times ruled that he could not be permitted to inject the Claypool matter into the case unless by consent of the adverse counsel, which consent counsel for the state refused to give unless allowed the same privilege. We think, by this course, the defendant waived any objection he might have had, in the first instance, to the statement in question.

Over the objection and exception of defendant, Hugh Cox, a clerk in the drug store of Dr. Adams and a witness for the state, was permitted to testify that, on the morning of the difficulty between defendant and deceased, which occurred some hours prior to the homicide, he saw deceased coming across the street from the lumber yard towards the drug store, and also saw defendant coming south towards the drug store, and heard defendant cursing deceased and calling him vile names, when witness, addressing deceased said, "Uncle Bob, you had better come in the store," and that deceased replied, "My stars, I will have no trouble with him." The contention is that this testimony was mere hearsay, and was improperly admitted. While we agree to this, it seems clear to us that the error was nonprejudicial, and that the judgment should not be reversed on that ground.

Instruction numbered 5 is claimed to be erroneous upon the ground that there was no testimony upon which to base it. "Where there is a willful killing, with malice aforethought—that is, with malice and premeditation, but not with deliberation, or in a cool state of the blood—the offense is murder in the second degree." *State v. Curtis*, 70 Mo. 594; *State v. Robinson*, 73 Mo. 306. While there was evidence tending to show that the shooting and killing was done deliberately, premeditatedly, and with malice, the defendant's own testimony, if true, showed that it was not done with deliberation. He stated that, as deceased rode past his office, he (deceased) straightened himself up in the saddle and gave defendant a very angry look, and that he did not shoot at deceased until he had proceeded some 15 feet, checked up his horse and made a motion with his hand toward his hip pocket; that he (defendant) then stepped out in the street, drew his pistol, and began shooting, and continued to shoot until deceased fell from his horse, which tended to show that the shooting was not done deliberately, but willfully, premeditatedly, and of malice aforethought, rendering the homicide murder in the second degree. But, even if the testimony did not warrant this instruction, the defendant is in no position to complain, for,

if the court erred in instructing for a lesser degree of murder than that with which the defendant is charged, it was an error in defendant's favor of which he has no cause to complain. Section 2309, Rev. St. 1899, provides: "Any person found guilty of murder in the second degree, or of any degree of manslaughter, shall be punished according to the verdict of the jury, although the evidence in the case shows him to be guilty of a higher homicide." Section 2535, Rev. St. 1899, provides that no judgment shall be affected "for any error committed at the instance or in favor of the defendant; nor because the evidence shows or tends to show him to be guilty of a higher degree of the offense than that of which he is convicted." We think it clear from the evidence that the jury might have found the defendant guilty of murder in either degree, and under such circumstances said instruction was proper. *State v. McMullin*, 170 Mo. 608, 71 S. W. 221; *State v. Frazier*, 137 Mo. 317, 38 S. W. 913.

Another objection urged against said instruction No. 5 is that it does not indicate to the jury what facts were necessary for it to find in order to authorize a conviction of murder in the second degree. The instruction told the jury that, before they could find the defendant guilty of murder in the second degree, they must believe from the evidence, beyond a reasonable doubt, that defendant, with a pistol, shot and killed Robert T. Wall, and that such shooting and killing were done willfully, premeditatedly, and of malice aforethought, but without deliberation (these terms being defined in another instruction), and thus presented to the jury all the questions necessary for them to pass upon in order to a determination of the guilt or innocence of defendant of murder in the second degree. In speaking of a similar instruction in *State v. Bauerle*, 145 Mo. 1, 46 S. W. 609, *Gantt, J.*, said: "The court gave the following instruction: 'The court instructs the jury that if you believe and find from the evidence in this cause, beyond a reasonable doubt, that the defendant, at the county of Lafayette and state of Missouri, on or about the 26th day of April, 1896, willfully, premeditatedly, and of his malice aforethought, shot and killed one Amella Bauerle, but without deliberation, you will find the defendant guilty of murder in the second degree, and will assess his punishment at imprisonment in the penitentiary for a term of not less than 10 years.' It had already defined the meaning of deliberation, premeditation, and malice aforethought. Defendant insists that this instruction is misleading and should not have been given. It is sufficient to say that this instruction has been approved a score of times by this court, and is the settled law of this state. *State v. Moxley*, 115 Mo. 644, 22 S. W. 575, same as 102 Mo. 874, 14 S. W. 999, 15 S. W. 556."

The defendant contends that the court should have given an instruction on manslaughter in the fourth degree. To authorize such an instruction there must have been evidence tending to show that the defendant, in the heat of passion induced by reasonable provocation, without malice and without premeditation, shot and killed the deceased, which the evidence in this case does not show; "and the passion which will reduce homicide to the grade of manslaughter is an excited state of mind produced by some lawful provocation, such as a blow or an assault of any kind upon the person." *State v. Ellis*, 74 Mo. 207. In *State v. McKenzie*, 177 Mo. 699, 76 S. W. 1015, it is said: "Manslaughter in the fourth degree, under the statutes of this state, is the intentional killing of a human being in a heat of passion on a reasonable provocation, without malice and without premeditation, and under circumstances which will not render the killing justifiable or excusable homicide; and as a general rule it takes an assault, with personal violence, to constitute such provocation." The same rule is announced in *State v. Sumpter*, 153 Mo. 436, 55 S. W. 76; *State v. Meadows*, 156 Mo. 110, 56 S. W. 878; *State v. Brown*, 64 Mo. 367; *State v. Diller*, 170 Mo. 1, 70 S. W. 139; *State v. Ashcraft*, 170 Mo. 409, 70 S. W. 898; *State v. Kindred*, 148 Mo. 270, 49 S. W. 845; *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045. None of the authorities cited by defendant are to the contrary. There was no evidence that deceased made any remarks whatever to or in the presence of defendant, or that he made any assault upon him at the time of the homicide, and there was therefore nothing upon which to base an instruction for manslaughter.

The instructions were such as have been frequently approved by this court. They covered every phase of the case, and were very fair to the defendant, especially upon the question of self-defense. There was ample evidence to authorize and sustain the verdict.

Our conclusion is that the judgment should be affirmed. It is so ordered. All concur.

STATE v. JAMES.

(Supreme Court of Missouri. Division No. 2.
March 6, 1906.)

1. BURGLARY—INFORMATION—ALLEGATION OF OWNERSHIP OF BUILDING.

An information for burglary, which fails to allege the ownership of the building burglarized, is fatally defective.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, § 56.]

2. CRIMINAL LAW — REVIEW — FAILURE TO CALL ATTENTION TO DEFECTS IN INFORMATION—EFFECT.

Though defendant, appealing from a conviction for a felony, fails to call the court's attention to a defect in the information, it is the duty of the court to review the record and adjudge the information defective, if it is so.

3. LARCENY—EVIDENCE—IDENTITY OF GOODS—QUESTION FOR JURY.

On a trial for larceny, the prosecutor identified the goods in the possession of defendant as the goods stolen. There was no testimony contradicting the identification. *Held*, that the question of the identity of the goods was for the jury.

[Ed. Note.—For cases in point, see vol. 82, Cent. Dig. Larceny, § 180.]

4. CRIMINAL LAW — OPINION EVIDENCE — IDENTITY OF PROPERTY.

The opinion of a witness as to identity of things is competent when resting on facts within the knowledge of the witness.

5. BURGLARY—POSSESSION OF STOLEN PROPERTY—PRESUMPTIONS.

Where property had been stolen by means of a burglary, and recently thereafter the property is found in the possession of another, the latter is presumed to be the thief and to have used all means necessary to have secured access to and possession of such property, and, if he fails to account for his possession in a manner consistent with his innocence, or to overcome the presumption by direct or circumstantial evidence, a verdict of guilty of larceny and burglary is authorized.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Burglary, §§ 104-107.]

6. SAME—INSTRUCTIONS.

Where, on a trial for burglary and larceny, the evidence showed that accused had in his possession a part of the stolen goods, that he admitted having given to another a part of the property to sell at a pawnshop, that in the pawnshop such property was found, and that accused made contradictory statements as to how he obtained the goods, a charge on the presumption arising from possession of the stolen property was authorized.

7. CRIMINAL LAW — IMPROPER REMARKS OF PROSECUTING ATTORNEY—REVIEW—EXCEPTIONS—PRESERVATION IN BILL OF EXCEPTIONS—NECESSITY.

Improper remarks of the prosecuting attorney in his argument to the jury are not reviewable, unless preserved in the bill of exceptions, though they are assigned as a ground in the motion for a new trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2929.]

8. SAME—APPEAL—HARMLESS ERROR.

Where defendant testified and admitted that he had been in the penitentiary, the error in permitting the state to prove, before defendant testified, that he had been a convict, was not prejudicial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3138, 3139.]

Appeal from Circuit Court, Jackson County; Jno. W. Wofford, Judge.

George James was convicted of burglary and larceny, and he appeals. Affirmed in part, reversed in part.

This cause comes here upon appeal by the defendant from a judgment of conviction in the criminal court of Jackson county, for burglary and larceny. The information upon which this judgment is predicated, omitting formal parts, was as follows: "Now comes Roland Hughes, prosecuting attorney for the state of Missouri in and for the body of the county of Jackson, and upon the affidavit of Jacob Louis, herewith attached and filed, informs the court that George James and John Richards, whose Christian names in full are unknown to said prosecuting attorney,

late of the county aforesaid, on the 25th day of March, 1904, at the county of Jackson, state of aforesaid, did unlawfully, feloniously, and burglariously break into and enter a certain building, No. 806 Independence avenue there situate, the same being a building in which divers goods, wares, merchandise and valuable things were then and there kept for sale and deposited, with the felonious intent the said goods, wares, merchandise and valuable things in the said building then and there being, then and there unlawfully, feloniously, and burglariously to steal, take and carry away; and 16 pairs of shoes of the value of thirty-four dollars, 30 undershirts of the value of nine dollars, 6 drawers of the value of three dollars, 6 drawers, elastic sides, of the value of three dollars, two dozen pairs of socks of the value of three dollars, three dozen handkerchiefs of the value of three dollars and sixty cents, two striped shirts of the value of one dollar, one grip of the value of one dollar, three hats of the value of six dollars, all in the aggregate of the value of sixty-three and ⁴⁰/₁₀₀ dollars, of the goods and property of Jacob Louis in said building then and there being found, did then and there unlawfully, feloniously and burglariously steal, take and carry away against the peace and dignity of the state."

On May 25, 1904, a severance was granted defendant and he was put upon trial for the offense charged. We have examined the disclosures of the record and find that the testimony tended to prove substantially the following state of facts: That on the 25th of March, 1904, the defendant, who is a negro, resided with his mother in Kansas City. That the prosecuting witness, Jacob Louis, was the owner and proprietor of a clothing store, situated at No. 806 Independence avenue, in said city, and that in said store various articles of merchandise were stored and kept for sale. That Mr. Louis remained at his store on the evening of the 25th of March till about 11 or 12 o'clock, when he locked the front and back doors and went to his bedroom, which was over his store. The next morning Mr. Louis discovered that some one had cut a hole in the panel of the back door, and then removed the wooden bar which fastened the door. There were two back doors to said store, and in front of this one there were some valises sitting on the floor. These valises had been pushed back, and the door was wide open. On examining his stock, Mr. Louis discovered that 16 pairs of shoes, 24 blue undershirts, 12 pink undershirts, 6 pairs of cream-colored drawers, 36 handkerchiefs, a suit case, 4 hats, some socks, and some striped shirts had been stolen. The aggregate value of said property was about \$63.40. The defendant had often been around Mr. Louis' place of business. Mr. Louis at once reported the facts to the police authorities. Officer Phelan, having been detailed to investigate the burglary,

arrested the defendant and John Richards the next day at Sandy Edwards' saloon. A new suit of underwear was found on defendant, and a new suit of underwear was found on John Richards, both of which were identified by Mr. Louis as having been stolen the night before—the undershirt was too small for defendant. All of the balance of the stolen property was found at the home of defendant's mother that day, except the 16 pairs of shoes. To this police officer defendant admitted that he had given one pair of shoes to a man named Bishop to sell to Levy's pawnshop. In this pawnshop one pair of shoes was found, which was identified by Mr. Louis. Defendant told this officer that he got these various articles from John Richards, and afterwards said that he bought them from a white man. He also stated that he might just as well have gotten a wagon load. The defendant's mother testified that she bought the clothing from a white man, and gave him \$1 and something to eat. That she then gave some of the clothes to defendant, and the rest remained at her house till the police searched the house. Defendant's sister testified that she saw a white man leaving home just as she was returning, and that her mother then told her that she had purchased a lot of clothing from that man, and had paid him \$1. In his own behalf defendant testified that he was in St. Joseph at the time of the commission of the alleged crime, returning to Kansas City the morning after its commission, and got the clothing from his mother; that he did not steal any of said property, knew nothing of who stole it, and was not even acquainted with John Richards. He also testified that Police Officer Phelan mistreated him and threatened him, forcing him to make the alleged statements testified to by said officer. The officer denied the statements of defendant as to such mistreatment.

At the close of the evidence the court instructed the jury, and the cause was submitted to them, and they returned the following verdict: "We, the jury, find the defendant, George James, guilty of burglary, as charged in the information, and assess his punishment at five years in the state penitentiary. We, the jury, also find the defendant guilty of larceny, as charged in the information, and assess his punishment therefor, in addition to the punishment assessed for burglary, at three years in the state penitentiary. Edwin E. Richter, Foreman." The instructions complained of will be given due consideration during the course of the opinion. Motions for new trial and in arrest of judgment were timely filed and by the court taken up and overruled. Judgment and sentence was duly entered of record, and from this judgment defendant in due time and form prosecuted his appeal to this court, and the record is now before us for consideration.

Phillip D. Clear and W. F. Riggs, for appellant. The Attorney General and N. T. Gentry, for the State.

FOX, J. (after stating the facts). At the very inception of the consideration of the record in this cause we find that the information upon which this judgment is predicated fails to properly charge the offense of burglary in the second degree. We have reproduced such information, and it is apparent that there is an entire absence of any charge or allegation of ownership of the building, in which it is charged the burglary was committed. The charge is that the defendant did unlawfully, feloniously, and burglariously break into and enter a certain building No. 806 Independence avenue, there situate; but there is no allegation as to the ownership of the building, not even an intimation as to who was in possession of it. The ownership of the building is an essential allegation in charging the offense of burglary. The general rule as to the necessity of this allegation is well stated in 6 Cyc. p. 209, § 11. It is there said: "Except in so far as the rule may be changed by statute, an indictment for burglary, whether at common law or under a statute, must allege the ownership of the dwelling house or other building broken and entered, if it is known, or it will be fatally defective, and it must do so accurately, so that there will be no variance between the allegation and the proof. If the ownership is not known, it need not be stated, but in such a case that it is not known must be alleged." This rule, as stated in the text of Law and Procedure, is fully supported by the appellate courts of many states—Alabama, California, Connecticut, Florida, Iowa, Kansas, Mississippi, New York, and many other states. As to whether or not the ownership of the building is an essential allegation, in an information or indictment charging the offense of burglary in the second degree, is no longer an open question in this state. In *State v. Jones*, 168 Mo. 398, 68 S. W. 566, the prosecuting attorney of Stoddard county undertook to charge the offense of burglary under the same section upon which the information in the case at bar is based. In the information in that case it was charged that the defendant did break and enter the store of the Drysdale-Ulen Hardware Company, there situate; the same being a building in which divers goods, merchandise, etc., were then and there kept for sale and deposited. The information in that case was held fatally defective for the reason that the ownership of the building was not sufficiently alleged. Gantt, J., speaking for the court, in discussing the proposition, said: "It has always been necessary to allege and prove the ownership of the house charged to have been burglarized and

the ownership of the chattels alleged to have been stolen. 2 East P. C. 650. Where ownership is laid in a corporation, the fact of the incorporation should be alleged, and this is not affected by the fact that the proof of the existence of the corporation de facto will sustain the charge. As nothing is to be left to intentment, the defendant is entitled to know whether the state intends to show ownership in a firm composed of individuals or in a corporation. In this case he raised the objection in his motion in arrest, but it has often been ruled that he may take advantage of the defect in the indictment in this court for the first time. *State v. Patterson*, 159 Mo. 98, 59 S. W. 1104; *Wharton's Crim. Law*, §§ 1828, 1833; 2 *Russell on Crimes*, p. 100; *Wallace v. People*, 63 Ill. 451; 1 *Bishop's Crim. Prac.* (3d Ed.) § 682; *State v. Mead*, 27 Vt. 722; *Cohen v. People*, 5 Parker, Cr. R. 330; 2 *Archbald's Crim. Pl.* 359; *White v. State*, 24 Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879; *Thurmond v. State*, 30 Tex. App. 539, 17 S. W. 1098; *McCowan v. State*, 58 Ark. 17, 22 S. W. 955. There are cases to the contrary in other states, but in the absence of a statute we are relegated to the common law, and we hold the information bad, in substance, in failing to allege the names of the copartners, if the *Drysdale-Ulen Hardware Company* was a firm, and, if a corporation, in not alleging it was a corporation." The rule announced in the case last cited was expressly approved and followed in *State v. Horned*, 178 Mo. 59, 76 S. W. 953. While this defect in the information, applicable alone to the charge of burglary, was not called to our attention by counsel for appellant, yet it is the duty of the court to review the record and, if the judgment is erroneous, to so state. It follows from what has been heretofore stated, based upon the authorities cited, that the information, in so far as it applies to the charge of burglary, is fatally defective and will not support the judgment inflicting the punishment upon defendant for the commission of that offense. In this cause, however, there is embraced a proper charge of the commission of the offense by the defendant of grand larceny, hence we are led to the consideration of the complaints of appellant occurring upon the trial.

It is insisted by appellant that there was no proper or sufficient identification of the goods in the possession of the defendant as being the goods which were stolen from *Jacob Louis*. It is sufficient to say, upon this proposition, that the prosecuting witness, *Jacob Louis*, identified the goods which were found in the possession of the defendant as his property. There is no testimony contradicting his identification. He was fully cross-examined upon the question of the identity of the goods, and in whatever particular his examination in chief is weakened by the cross-examination was entirely a matter for the jury, and the testimony upon the question of identity of the goods in the pos-

session of the defendant was ample to authorize the court to submit that question to the jury. The opinion or belief of witnesses as to identity of persons or things, when such opinion or belief rests upon facts within the witness' own knowledge, is competent evidence, although the witness will not testify positively to such identity, and testimony of this character is, at least, a sufficient foundation for the submission of the question to the jury and allow them to finally determine the ultimate fact as to whether or not the goods found in the possession of the defendant were in fact the goods stolen from the prosecuting witness. *State v. Cuchenberry*, 157 Mo. 168, 56 S. W. 737; *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. Hopkirk*, 84 Mo. 278; *State v. Babb*, 76 Mo. 501. While the testimony of the prosecuting witness identifying the goods was sufficient to authorize the submission of the question to the jury as to whether or not the goods referred to by him were in fact the goods stolen from him, it by no means follows that the jury must accept his testimony as to identification as conclusive evidence that they were the goods stolen from the prosecuting witness, but they simply hear the testimony and then, upon their final consideration, determine for themselves as to whether the testimony upon the identification of the goods was sufficient to authorize them to find the ultimate fact that the goods found in the possession of the defendant were in fact the goods stolen from the prosecuting witness, *Jacob Louis*.

2. It is insisted that the court committed error in giving instruction No. 3, which was as follows: "Where property has been stolen, by means of a burglary, proven beyond a reasonable doubt, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person, in whose possession the same is found, is presumed to be the thief who stole the same, and is also presumed to have used all means necessary to have secured access to and possession of such property, and if he fails to account for his possession of such property in a manner consistent with his innocence, or unless such presumption be overcome by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, then this presumption that the person in whose possession such property is found is the thief, and used all means necessary to secure such property, becomes evidence against him, so that unless such possession be explained or the presumption arising therefrom be overcome by evidence as aforesaid, to your satisfaction, then from such possession of property recently stolen you are authorized to presume such person guilty of both the larceny and the burglary." Instructions embracing the same principle, and substantially in form with the one here complained of, have frequently met the ap-

proval of this court (*State v. Owens*, 79 Mo. 619; *State v. Barker*, 64 Mo. 282; *State v. Sidney*, 74 Mo. 391), while in the cases of *State v. Drew*, 179 Mo. 315, 78 S. W. 594, and *State v. Belcher*, 136 Mo. 135, 37 S. W. 800, this court held that an instruction similar to the one in the case at bar should not have been given. However, it will be observed that such ruling was based upon the reason that the testimony was insufficient upon which to predicate it. The rule of law, respecting presumption arising from recent possession of stolen property, was fully recognized in those cases. Hence we take it that appellant's complaint as to this instruction is not directed to the form of the instruction, but rather to the fact, as contended by him, that there was not sufficient testimony upon which to predicate it. We have carefully considered the disclosures of the record, and have reached the conclusion: First, that the instruction was a proper one; secondly, that there was ample testimony upon which to base it. In determining the propriety of this instruction we are not confined to the mere fact that defendant had in his possession a new suit of underwear, which was only a part of the goods identified, which were stolen from the prosecuting witness; but it was clearly proper and highly important to take into consideration such possession in connection with any other circumstances which tended to show the unlawful possession, and that the defendant had wrongfully obtained such goods. In *State v. Barker*, 64 Mo. 282, it was said by this court: "The possession of a part of the stolen goods of the smallest value, in connection with other circumstances, might clearly fix the guilt of stealing all the goods upon the defendant." To the same effect is *State v. Davis*, 73 Mo. 133, where it was said that "only a portion of the goods stolen was found in the possession of the defendant; but this fact, in connection with other concurring circumstances, was sufficient to warrant the jury in finding him guilty of stealing them all." We have in this case, in addition to the possession of a part of the stolen goods, the admissions of the defendant to the police officer that he had given one pair of shoes to a man named Bishop to sell to Levy's pawnshop, and the truth of the admission is emphasized by the fact that in this pawnshop one pair of shoes was found, which was identified by the prosecuting witness, Mr. Louis. In addition to this the defendant made contradictory statements in respect to the manner of obtaining the goods and from whom they were obtained. He first stated that he had gotten them from John Richards, and afterwards said he bought them from a white man, and finally stated, in the conversation with the police officer, that he might just as well have gotten a wagon load. Confronted with this state of facts, it is too clear for discussion that the testimony was amply sufficient

upon which to predicate instruction No. 3, and the court committed no error in giving that instruction. The cases to which our attention is specially directed by counsel for appellant (*State v. Warford*, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322; *State v. Belcher*, 136 Mo. 135, 37 S. W. 800; and *State v. Drew*, 179 Mo. 315, 78 S. W. 594, 101 Am. St. Rep. 474) are not parallel cases, and a careful analysis of them demonstrates that they afford no support to the contention upon this proposition urged by counsel for appellant.

3. Complaint is made to the remarks of the prosecuting attorney to the jury in the discussion of this cause. It will suffice to say to this assignment of error that the alleged improper remarks of the prosecuting attorney during his argument to the jury are not preserved in the bill of exceptions, hence are not subject to review by this court. The mere assignment of such remarks as one of the grounds in the motion for new trial is not sufficient to preserve such matter for review. *State v. Latimer*, 116 Mo. 524, 22 S. W. 804; *State v. Welsor*, 117 Mo. 583, 21 S. W. 443; *State v. Steen*, 115 Mo. 474, 22 S. W. 461.

4. Finally, it is contended by appellant that the unfair and improper question propounded to Mrs. James as to whether or not the defendant had been in the penitentiary, before the defendant had testified in the cause, constitutes error on the part of the trial court. It cannot be denied that, until the defendant testified as a witness, this was an improper question, and the prosecuting attorney should not have propounded it. However, as the defendant subsequently testified and admitted that he had been in the penitentiary, we are unable to conceive how the mere asking of that improper question could have possibly done him any injury in the trial of this cause.

The judgment in this cause is an entirety, and consists of a sentence by the court of the defendant to imprisonment in the penitentiary for the term fixed by the jury for both burglary and larceny. As before stated, this judgment is erroneous. The conviction of the defendant for grand larceny, which was embraced in the information, was proper, and the judgment should have been only a sentence for three years in the penitentiary, as assessed by the jury for that offense. It is manifest that the error in this judgment is as to the length of time defendant was sentenced to the penitentiary. Hence this judgment should not be set aside or reversed for such error.

It is expressly provided by section 2720, Rev. St. 1899, that a judgment should not be reversed or set aside by the Supreme Court, for the reason that the judgment by virtue of which such person is convicted or from which he has prosecuted an appeal or writ of error was erroneous as to the time or place of imprisonment; but in such case it

shall be the duty of the court or officer hearing such to sentence such person to the proper place of confinement, and for the correct length of time from and after the date of the original sentence. Proceeding to perform this duty as required by section 2720, supra, it is ordered and adjudged by the court that the defendant, George James, be confined in the penitentiary of this state for a term of three years, and that the sheriff of Jackson county, Mo., or other officer having such prisoner legally in charge, shall, with all convenient speed, convey such defendant to the state penitentiary of the state of Missouri and deliver him to the warden thereof, there to be imprisoned for the period of three years. All concur.

STATE v. MCCARVER.

(Supreme Court of Missouri, Division No. 2
March 6, 1906.)

1. CRIMINAL LAW—APPEAL—TRIAL COURT'S DISCRETION—CHANGE OF VENUE.

Where the evidence on an application for a change of venue is conflicting, the action of the trial court will not be disturbed on appeal, in the absence of some fact indicating an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3044.]

2. JUDGES—QUALIFICATION—STATUTES.

Rev. St. 1899, § 2597, provides that if, in any criminal case, the judge be incompetent to sit, he shall request the judge of some other circuit court to try the cause and it shall be the duty of the latter judge to appear, etc. *Held*, that a judge called in to try a criminal case was not disqualified to sit merely because he had no authority to try criminal cases in the circuit court in which he presided.

3. JURY—SELECTION OF JURORS—OBJECTION TO JUROR.

Challenges to jurors for cause must be specifically stated.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 559.]

4. SAME—COMPETENCY OF JUROR.

Where a juror's opinion of the case had been formed from newspaper reports, but he stated that he could try the case fairly, he was qualified.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 461-479.]

5. INDICTMENT—LOSS—SUPPLYING LOST INDICTMENT.

A court in which an indictment has been found, when the indictment has been lost or destroyed, may allow a paper proved to be a copy to be filed as the indictment, provided it appears from the record or from testimony that the indictment was returned into court and filed.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 78.]

6. CRIMINAL LAW—APPEAL—REVIEW—BILL OF EXCEPTIONS.

Argument of counsel cannot be reviewed, where not preserved in the bill of exceptions.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2929.]

7. SAME—INSTRUCTIONS—FAILURE TO OBJECT.

The failure of the trial court to instruct on all the law in the case is no ground for reversal, unless appellant objected at the time the instructions were given, pointing out the

alleged deficiency, and unless he excepted on refusal to instruct.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2646, 2668.]

8. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

On a prosecution for murder, it appeared that deceased, at the time of the killing, was accompanied by his uncle, and there was evidence tending to show a conversation between them before the killing showing a design against defendant. The court instructed that defendant, if he had reasonable cause to apprehend a design on the part of deceased to take his life, and that to avert such danger he shot, he should be acquitted on the ground of self-defense, and in another instruction stated that any threats made by either the deceased or his uncle against defendant should be considered in arriving at a verdict. *Held*, that the instructions were not erroneous on the theory that they did not embrace the right of defendant to defend against both deceased and his uncle.

9. SAME—MURDER IN THE FIRST DEGREE.

On a prosecution for murder, the court instructed that if defendant shot deceased, and at the time or before the shot was fired defendant had formed the willful, premeditated, and deliberate design or purpose to take the life of deceased, and that the shot was fired in furtherance of the purpose and without any justifiable cause or legal excuse, defendant should be found guilty of murder in the first degree. *Held*, that the instruction properly presented the law.

Appeal from Circuit Court, St. Francois County; Samuel Davis, Special Judge.

O. P. McCarver was convicted of murder in the first degree, and he appeals. *Affirmed*.

W. S. Anthony, J. A. Abernathy, and Jasper N. Burks, for appellant. The Attorney General and N. T. Gentry, for the State.

BURGESS, P. J. On November 16, 1903, O. P. McCarver was indicted by the grand jury of St. Francois county for murder in the first degree for having, at said county, on the 14th day of November, 1903, shot and killed with a pistol, one Harry Lett. Thereafter, at the August term, 1904, of said court, defendant was put upon his trial before the court and jury, found guilty of the offense charged, and his punishment assessed at death. Defendant's motions for new trial and in arrest having been overruled, he appeals.

After defendant's arraignment and his plea of not guilty were entered of record, he made application for a change of venue of said cause on account of the prejudice of the judge of the St. Francois county circuit court against him. The application was sustained, and Hon. Samuel Davis, judge of the Fifteenth circuit, was called in by the judge of the St. Francois circuit court to try the case. After a panel of 40 men had been qualified to sit as jurors upon the trial of the cause, the court discharged them all on account of alleged misconduct of which he became satisfied. At the same term, however, another panel of 40 qualified jurors were summoned, from which 12 were selected to act as jurors upon the trial of the case, which was then entered upon. The result was a mistrial. Defendant was again put upon his trial at

the August term, 1904, of said court and, as before stated, found guilty of murder in the first degree as charged in the indictment. The homicide was committed at Farmington, in a saloon of which Bentley & Ryan were proprietors, about 10 o'clock on Saturday evening, November 14, 1908. Until a short time prior to the shooting, deceased had been employed in said saloon. Defendant, at the time of the difficulty, was the proprietor of another saloon in said town. A few minutes before the shooting occurred, deceased came into the saloon with a pitcher of water which he set down behind the bar. The saloon faced south, and the bar, which was 20 feet long, was on the east side. At the end of the bar was an ice chest, and behind that was the side or east door. After the deceased had put the pitcher of water behind the bar, he walked around the bar and out the front door. After he went out defendant said, "Harry (meaning deceased) is a good boy, but he has a brother that is a God damn son of a bitch." After walking a short distance on the street deceased met his uncle Leo Lett, and invited him to go and take a cigar with him. Deceased and his uncle then turned and walked back to the Bentley & Ryan saloon, deceased having been absent about 10 minutes. Leo Lett and deceased walked in the front door, passed by defendant and his friends, and on to the extreme other end of the bar, and deceased called for and purchased a cigar for himself and one for his uncle. Defendant then invited all present to take a drink with him; some did so, but deceased and his uncle declined with thanks the uncle saying that he had just had a cigar with Harry. Defendant said, "You think you are too damn good to drink with me." Defendant made the remark again, and added thereto, "Harry, you are a God damn son of a bitch." Deceased replied, "I am no more of a son of a bitch than you are." Defendant then applied a vile epithet to deceased which is too vulgar to be reproduced. To which deceased retorted, "Same to you." At the time of using these words defendant stepped up towards deceased, drew his pistol, and shot deceased in the neck. Deceased had turned and was then facing defendant, with a lighted cigar in his hand, and his left elbow leaning on the bar. The state's evidence differed as to the position of his right hand, some of the witnesses saying that the cigar was in his right hand, and others saying that his right hand was hanging down by his side. Deceased and defendant were 10 or 12 feet apart, and facing each other. Just prior to the firing of the pistol, deceased's uncle (Leo Lett) stepped up and said to deceased, "Harry, let's go home, don't have any trouble." Some of the witnesses testified that after the shooting, defendant walked out the front door and said, "I don't allow no man to call me a * * * (repeating the same epithet applied by him to deceased) without I kill him." As soon as the shot was fired, deces-

ed fell to the floor, and the bartender and Duke Powell took off his coat and overcoat, and placed him on a cot. While examining these coats, and while taking off his pants, no weapons of any kind were found on deceased. A physician, Dr. Fleming, was called who, after making an examination of deceased's wound in the saloon, had him taken to the Baptist Sanitarium, where he died the next day (Sunday) at five p. m. as a result of this gunshot wound.

The defendant's evidence tended to prove that defendant and deceased were both drinking at Bentley & Ryan's saloon, and that deceased left the saloon after bringing a pitcher of water, and was gone perhaps half an hour. That George Gordon heard deceased and Leo Lett talking out in front of the saloon, at which time deceased asked Leo if he got it, and Leo replied, "Yes, and a damn good one too." Deceased then asked his uncle to stand behind him, and they would go in, and he would do the rest. That deceased pointed out defendant through the glass window and said, "He is in there, setting them up." That at that time defendant and several others were standing at the bar near the front end of the saloon. Another witness, Jesse Biggs, who claimed to hear this conversation, said that deceased asked Leo if he got that pistol, to which Leo replied, "Yes, and a damn good one too." Deceased then said "There he is in the saloon; he is pretty drunk now, and now will be our time to get him." That deceased and his uncle walked by the other persons standing at the bar, called for, and lighted their cigars. Defendant then told the bartender to give them a drink, but the bartender shook his head. That defendant again invited them to drink, but Leo Lett declined, saying, "I have just had a cigar with Harry." That deceased said, "No, God damn you, I am not going to drink with you, you have been acting a God damn fool around here all night." That Leo Lett tried to slip a pistol into the right hand of deceased at that time, and Arthur Bodell called out, "Look, Pink (defendant), Lett has got a gun." Defendant fired one shot, and Leo Lett ran behind the ice chest with a pistol in his right hand. That at the time of the shooting, deceased was standing with a cigar in his left hand, his left arm resting on the bar, and his right arm in his front pants pocket. Defendant's evidence further showed that prior to this night, deceased and defendant had some trouble over a horse and also over a woman. A number of witnesses testified to threats made by deceased against the life of defendant; and some of the threats were communicated to defendant, and others were not. Defendant admitted the shooting, but claimed that he did it in self-defense. He also admitted that just prior to the shooting he used all of the rough language towards deceased, as detailed by the state's witnesses. Defendant testified that he saw the pistol, which Leo Lett tried to hand to deceased,

and that he then thought he did hand it to deceased. That after the shooting he saw Leo Lett with the pistol in his hand, as Lett walked away behind the ice chest. Defendant further testified that he heard many of the threats which deceased made against him, which were communicated to him prior to the final difficulty.

In rebuttal, the state's evidence tended to show that one of defendant's main witnesses, George Gordon, was not in Farmington on that night, but that he attended a shooting contest at the home of James Field, some 20 miles away, and remained at Mr. Field's all that afternoon and until the next (Sunday) morning. The state's evidence further tended to show that it was impossible for defendant's witnesses, Jesse Biggs, George Gordon, and others to have seen what occurred in the saloon, as said witnesses were outside on the sidewalk, and the window curtains were raised, the curtains working from below. The defendant read to the jury the deposition of one Arthur Bodell, which corroborated defendant in many particulars; but Bodell was contradicted by his testimony before the coroner. Defendant then offered some witnesses who testified that the curtains were raised that night, but not raised till after the shooting, and that the witness Gordon was in Farmington that night. Then the state introduced a number of witnesses who testified to the bad character and reputation of defendant's witnesses, who had testified to seeing George Gordon in Farmington the night of the shooting. Lydia Jacobs and Linnie Moore, two of defendant's witnesses, were shown to be of bad moral character.

The court, over the objection and exception of defendant, instructed the jury as follows:

"(1) The court instructs the jury that if you believe from the evidence in this case that the defendant O. P. McCarver, at the county of St. Francois, state of Missouri, at any time prior to the 16th day of November, 1903, willfully, deliberately, premeditatedly, and with malice aforethought, shot with a pistol and by such shooting wounded Harry Lett, and that within a year and a day thereafter and before the 16th day of November, 1903, said Harry Lett, at the county of St. Francois aforesaid, died in consequence of such shooting and wounding, you will find the defendant guilty of murder in the first degree.

"(2) If you believe from the evidence that the defendant, O. P. McCarver, in the county of St. Francois, state of Missouri, at any time prior to the 16th day of November, 1903, willfully, premeditatedly, and of his malice aforethought, but not deliberately, shot and wounded Harry Lett, and that within a year and a day thereafter and before the 16th day of November, 1903, the said Harry Lett, at the county of St. Francois, aforesaid, died in consequence of said shooting and wounding, then it will be your duty to find the defendant guilty of murder in the second degree.

"(3) The court instructs the jury that, as

used in these instructions, the term 'willfully' means intentionally; that is, not accidentally. 'Deliberately' means in a cool state of the blood, it does not mean, brooded over or reflected upon for a week or a day or an hour; but it means a conscious purpose to kill, formed in a cool state of the blood, and not under a violent passion, suddenly aroused by some real or supposed grievance. 'Premeditatedly' means thought of beforehand for any length of time, however short. 'Malice,' in its legal sense, does not mean mere spite or ill will, as ordinarily understood, but means the intentional doing of a wrongful act, that condition of mind which prompts one person to take the life of another without just cause or justification; and it signifies a state of disposition which shows a heart regardless of social duty and fatally bent on mischief. 'Malice aforethought' means with malice and premeditation.

"(4) You are further instructed that he who willfully, that is, intentionally, uses upon another at some vital point a deadly weapon, must, in the absence of qualifying facts, be presumed to know that the effect is likely to produce death, and knowing this, must be presumed to intend death, which is the probable consequence of such an act, and if such deadly weapon is used without just cause or provocation he must be presumed to do it wickedly and from a bad heart, and if the jury believes from the evidence that the defendant, O. P. McCarver shot and killed Harry Lett, as charged, and that at the time or before the shot was fired, the defendant had formed in his mind the willful, premeditated, and deliberate design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose and without any justifiable cause or legal excuse therefor as explained in these instructions, then the jury should find the defendant guilty of murder in the first degree.

"(5) Upon the question of self-defense the court instructs the jury that if at the time defendant shot Harry Lett, he, the defendant, had reasonable cause to apprehend a design on the part of Harry Lett to take his life, or to do him some great personal injury, and that there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and that to avert such apprehended danger he shot, and that, at the time he shot, he had reasonable cause to believe and did believe that it was necessary for him to shoot and kill to protect himself from such apprehended danger, you will acquit the defendant on the ground of self-defense. It is not necessary that the danger should have been actual or real, or that the danger should have been impending and about to fall. All that is necessary is that defendant had cause to believe and did believe this fact. On the other hand, it is not enough that he should have so believed, but he must have had reasonable cause to so believe. Whether or not he had reasonable cause is

for you to determine under all the facts and circumstances given in evidence. If you shall believe from the evidence that defendant did not have reasonable cause to so believe, you cannot acquit him on the ground of self-defense, although you may believe from the evidence that the defendant really thought he was in danger.

"(6) The court further instructs the jury that when a person has reasonable grounds to apprehend that some one is about to do him great bodily harm, and there are reasonable grounds for believing the danger imminent that such design will be accomplished, he may safely act upon appearances, and kill the assailant if that be necessary to avoid the apprehended danger, and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and that there was in fact no design, to do him serious injury nor danger that it would be done, and in passing upon the question whether the defendant had reasonable ground for believing that there was imminent danger that the deceased was about to kill him or do him some great bodily harm, the jury should determine the question from the standpoint of the defendant at the time he acted, and under his surroundings at that particular instant of time, and the jury must also, in passing upon that question, take into consideration the threats, if any, made by the deceased against the defendant.

"(7) The court instructs the jury that they should take into consideration the threats, if any, made by deceased against the defendant. If you believe from the evidence that any threats made by deceased were communicated to defendant prior to the killing, then such threat, or threats, if any, so communicated may be considered by you as explaining the conduct and apprehensions of defendant at the time of the shooting. You may also consider any threats you may believe from the evidence were made by Harry Lett and not communicated to the defendant prior to the killing, for the purpose of explaining the conduct and demeanor of deceased at the time of the shooting. If the jury believe from the evidence that prior to the shooting said Harry Lett had made threats against the defendant, yet this fact alone did not justify or excuse defendant for shooting deceased, if he did shoot him, and although such threats were communicated to defendant, before he shot said Lett, yet, if, at the time of the fatal shot, the said Lett made no threats against defendant, and made no assault upon defendant, and was making no effort or attempt to carry out such threats, then the same did not justify defendant in shooting deceased, if he did shoot him.

"(8) The court instructs the jury that the defendant is presumed to be innocent, and this presumption attends and protects him at every stage of the case until it is overcome by testimony which proves his guilt beyond

a reasonable doubt; and it is not enough in a criminal case to justify a verdict of guilty that there may be strong suspicion or even strong probabilities of the guilt of the defendant, but the law requires proof so clear and satisfactory as to leave no reasonable doubt of defendant's guilt.

"(9) The jury are instructed that the indictment in this case is of itself a mere formal accusation or charge against the defendant, and is not of itself any evidence of the guilt of the defendant, and no juror should permit himself to be to any extent influenced against the defendant because or on account of the indictment in this case.

"(10) Before defendant can be convicted of any offense under the indictment the jury must believe from the evidence that the defendant is guilty beyond a reasonable doubt. A reasonable doubt, however, must be a substantial doubt, arising out of a due consideration of all the testimony, and not a mere possibility of defendant's innocence.

"(11) The defendant is a competent witness in his own behalf, and his testimony is to be weighed by the same rules that govern the testimony of other witnesses; but in weighing his testimony the jury may take into consideration the fact that he is the defendant in the case, and his interest in the result of the trial.

"(12) The jury are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony; and you should take into consideration the character of the witnesses, their conduct and appearance on the stand, their interest, if any, in the result of the suit, the motive actuating them in testifying, the witness' relation to or feeling for or against the defendant, or the deceased, the probability or improbability of the witness' statements, the opportunity the witness had to observe or be informed as to matters respecting which such witness gives testimony, and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness, together with all the other facts and circumstances given in evidence. If, upon a consideration of all the evidence, you conclude that any witness has willfully sworn falsely as to any material fact involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony. By 'material fact' is meant any fact which tends to prove or disprove the defendant's guilt or innocence."

Then follows another instruction, No. 18, as to the form of the verdict, which is unnecessary to reproduce.

After the arguments of counsel on both sides to the jury, the court withdrew instruction No. 7 from the jury and gave in lieu thereof another instruction, No. 7a, which reads as follows:

"(7a) All threats which you believe from the evidence were made by either the deceased, Harry Lett, or by Leo Lett against

the defendant should be considered by you in arriving at a verdict. Any threats which were communicated to defendant should be considered as explaining the conduct and apprehensions of defendant at the time of the shooting, and all threats whether communicated to the defendant or not, should be considered in passing upon the evidence as to the conduct and demeanor of deceased and Leo Lett at the time of the shooting. Although you may believe from the evidence that prior to the shooting deceased, Harry Lett and Leo Lett made threats against the defendant, yet such threats alone did not justify defendant for shooting Harry Lett, and although such threats were communicated to defendant before the shooting, yet, if, at the time defendant fired the fatal shot, neither Harry nor Leo Lett made any threat or threats against defendant, and made no assault upon defendant, and were making no effort to carry out such threats, then the same did not justify defendant in shooting Harry Lett."

The defendant again renewed his objection to the instructions as a whole, because they did not properly declare all the law in writing to the jury necessary for their deliberations, which objection was by the court overruled, and defendant excepted. Thereupon, on the 1st day of September, 1904, the jury returned into the court their verdict and finding, the same having been written on the body on said instruction No. 13, as to the form of the verdict, as follows: "We, the jury, find the defendant, O. P. McCarver, guilty of murder in the first degree. J. D. Webb, Foreman." The court thereupon orally informed the jury that the verdict so returned by them was not in due form, and that they should return to their room and correct the same, or return another verdict written on another sheet of paper. Said jury again returned to their room, and within a few minutes returned into court the following verdict: "We, the jury, find the defendant, O. P. McCarver, guilty of murder in the first degree. J. D. Webb, foreman." To the action of the court, and to the returning of said verdict, the defendant objected and excepted at the time.

While it was the absolute right of defendant to be tried in the county where the offense is charged to have been committed, such right extended no further; but if it was made to appear to the court in the manner pointed out by the statute (section 2576, Rev. St. 1899), that the minds of the inhabitants of that county were so prejudiced against the defendant that a fair trial could not be had therein, then said case might be removed by the order of the court to the circuit court of another county in the same circuit. Section 2572, Rev. St. 1899. The right to a change of venue by defendant being purely statutory, it devolved upon him, in order to avail himself of that right, to bring his case within the provisions of the statute. That the evidence

upon the applications was conflicting is indisputable, and under such circumstances, in the absence of proof of some fact indicating an abuse of its discretion, this court will defer to the ruling of the trial court. As was said by Sherwood, J., in speaking for the court in the case of *State v. Albright*, 144 Mo. 638, 46 S. W. 620: "The evidence in favor of and against the application was heard by the trial court, and having been determined adversely to granting the change, such ruling will not be disturbed by this court, and should not be unless there had been circumstances of such a nature as indicated an abuse of the discretion lodged in the trial court, something which is not to be found in the present record." The same rule is announced in *State v. Dyer*, 139 Mo. 199, 40 S. W. 768; *State v. Tatlow*, 136 Mo. 678, 38 S. W. 552; *State v. Clevenger*, 156 Mo. 190, 56 S. W. 1078; *State v. Burgess*, 78 Mo. 234.

When Judge Davis took the bench, in pursuance of the call of Judge Anthony, to try this case, the defendant, by his counsel, filed a motion or plea to the jurisdiction based on the ground that Judge Davis did not have jurisdiction in any criminal case in the Fifteenth judicial circuit of Missouri, over which he presided, there being a criminal court in said Fifteenth judicial circuit having exclusive jurisdiction in all criminal cases originating in said circuit, or which go there for trial upon change of venue. The contention is that section 2597, Rev. St. 1899, only conferred upon Judge Anthony, who was disqualified to try the cause, the power to call in, to try the cause, the judge of some other circuit who possessed all the qualifications of a circuit judge under the law, and that as Judge Davis had no authority under the law to try criminal cases in the circuit in which he presides, he possessed no such authority elsewhere, and, therefore, was without authority to try this case. That Judge Davis has no authority to try criminal cases in the circuit in which he presides will be conceded, because by section 4, p. 2564, Rev. St. 1899, jurisdiction is expressly conferred upon the criminal court of that circuit to try all cases that originate therein, and by section 7, p. 2564, of the same act it is provided that all criminal cases removed from any county to any of the counties composing said criminal judicial circuit shall be certified to, tried and determined by said criminal court in the county in which the same may be sent. But it does not necessarily follow that Judge Davis was without authority to try this case. The application for the change of venue under consideration was based upon the ground that the Hon. R. A. Anthony, judge of the circuit court of St. Francois county was biased and prejudiced against the defendant, and would not afford him a fair trial, and said application conformed to the provisions of section 2594, Rev. St. 1899. The record discloses that the application was sustained, and an order entered of record, which recites that

"the said defendant and prosecuting attorney have failed to agree in writing to elect some attorney at law, who possesses all the qualifications of a judge of the circuit court, as special judge in said cause, this cause is set down for trial" on Tuesday, the 2d day of February, 1904, and Hon. Samuel Davis, judge of the Fifteenth judicial circuit of Missouri, is requested to be present and preside in this court at the trial of said defendant. Section 2597, Rev. St. 1899. This section of the statute, under the circumstances stated, makes it the duty of the court granting the change to set the case for trial on some day of the term, or on some day as early as practicable in vacation, and to notify or request the judge of some other circuit to try the cause; and the statute also makes it the duty of the judge so requested to appear and hold the court at the time fixed, and vests him with full power and authority during the trial of said cause to perform all the duties of a circuit judge at a regular term of such court. The statute authorizing the calling of a judge of another circuit to preside at the trial of a certain criminal cause pending in another circuit, under the circumstances and conditions therein provided, makes no exception against any judge who may not have jurisdiction of criminal cases in the circuit court in which he presides, because such jurisdiction is conferred upon a criminal court in that circuit; nor can any such exception be inferred from or read into the statute. Its terms apply to all circuit judges in this state, and the fact that Judge Davis did not have jurisdiction to hear and try criminal cases in the Fifteenth judicial circuit in no way disqualified him from hearing and trying such in another circuit, when requested to do so by the judge presiding therein under the conditions provided by the statute. Suppose that in one county only of the Fifteenth circuit there was a criminal court having exclusive jurisdiction of criminal cases, would it be contended from that fact that Judge Davis would be disqualified from hearing and trying a criminal case in any other circuit, when properly requested so to do by the judge of that circuit? Or, suppose Judge Anthony, under the provisions of section 1678, Rev. St. 1899, had requested Judge Davis to hold the term or part of the term of the St. Francois circuit court, and Judge Davis had presided at the trial of defendant, could it be claimed that he was without authority to try the case because he had no authority to hear and try criminal cases in his own circuit? We think not. There is no difference in principle between the two propositions. Judge Samuel Davis has on several occasions in response to requests made by the judge of the criminal court of Jackson county, presided at trial of cases in that court. At one of such trials (*State v. Taylor*, 171 Mo. 485, 71 S. W. 1005) the defendant was convicted of murder in the first degree, and upon appeal to this court the judgment was affirmed, with directions that

the sentence of the law be executed. In addition to *Taylor's Case* may be mentioned *State v. Hudspeth*, 159 Mo. 178, 60 S. W. 136; *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027; *State v. Nelson*, 181 Mo. 340, 80 S. W. 947, 108 Am. St. Rep. 602; *State v. Nelson*, 166 Mo. 191, 65 S. W. 749, 89 Am. St. Rep. 681, and in none of them was it ever intimated or suggested, so far as the records therein disclose, that he had no jurisdiction; nor do we think there can be any question as to his jurisdiction to try the case at bar.

It is claimed by defendant that Martin Westover, Abe Elser, N. A. Kinkead, and James F. Sigman, who were selected as qualified jurors on the panel of 40, from which 12 were selected to sit as jurors upon the trial of the cause, were not qualified to sit as such jurors, and that the court erred in allowing them to remain on the panel of 40. The objection against Westover was general, no reason for the objection having been given, and it has been ruled by this court that the objection must be specific. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Evans*, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669; *State v. McGinnis*, 158 Mo. 105, 59 S. W. 83. The same may be said with respect to the objection to jurors Sigman and Elser. Besides, their examination touching their qualifications as jurors showed them to be clearly qualified, as it appeared that the opinion which each had formed was based upon newspaper reports of the homicide, and both stated that they could try the case fairly. Such opinions did not, under the circumstances, disqualify them as jurors. *State v. Duffy*, 124 Mo. 1, 27 S. W. 358; *State v. Hunt*, 141 Mo. 626, 43 S. W. 389. In *State v. Duffy*, supra, it is said: "Persons who have formed opinion of the guilt or innocence of one accused of crime, from rumor or newspaper reports, are not for that reason rendered incompetent to sit as jurors on the trial of the case where they answer upon their voir dire that they can give the defendant a fair and impartial trial." Nor is a person who states that he has "formed an impression or opinion as to the guilt or innocence of the accused, and that such opinion has been formed either from rumor or newspaper reports, or both, which it would require evidence to remove, is not an incompetent juror, provided it further appears to the satisfaction of the court that such opinion will readily yield to the evidence in the case, and that such juror, notwithstanding such opinion, will determine the issue upon the evidence adduced on the trial, free from prejudice or bias." *State v. Walton*, 74 Mo. 270; *State v. Cunningham*, 100 Mo. 382, 12 S. W. 376. Or that he can, under such circumstances, give the defendant a fair and impartial trial. *State v. Hunt*, 141 Mo. 626, 43 S. W. 389. In *State v. Brennan*, 164 Mo. 487, 65 S. W. 325, a juror stated in his voir dire that he had formed an opinion of the guilt or innocence of the defendant from news-

paper reports only, and that the burden would be on the defendant to change this opinion, but further stated that all he knew of the case was what he had gleaned from the newspapers; that he was entirely free to be governed by the evidence and could render a fair and impartial verdict. The juror was held to be competent. So in *State v. Reed*, 137 Mo. 125, 38 S. W. 574, a juror was held to be competent who stated that he had formed an opinion, from rumor and newspaper accounts, as to the guilt or innocence of the accused, which would require evidence to remove, and that if such rumor was not contradicted by evidence his opinion, thus formed, would be bound to have some influence upon him in arriving at a verdict; but that he could give the defendant a fair and impartial trial, and acquit him, unless the evidence warranted a different verdict. The challenges to these jurors were only general, nothing more than saying, "We object to Sigman and Elser," and simply amounted to the statement of a legal conclusion. It is well settled that challenges for cause must be specifically stated. *State v. Taylor*, 184 Mo. 109, 35 S. W. 92; *People v. Reynolds*, 16 Cal. 128; *Mann v. Glover*, 14 N. J. Law, 195; *Powers v. Presgroves*, 38 Miss. 227; *Drake v. State* (N. J. Sup.) 20 Atl. 747; 2 Elliott's Gen. Prac. § 530. "Fairness to the court and to adverse counsel alike demands the grounds of the challenge for cause to be particularly set forth." *State v. Taylor*, supra.

About the time the jury was selected to try the case, it was discovered that the indictment upon which the defendant was then on trial was lost. It was then shown by the records of said court that an indictment had theretofore been found by a grand jury of St. Francois county, returned into court and filed in the office of the clerk of the circuit court of said county, charging the defendant with murder in the first degree, in having killed and murdered, at said county, one Harry Lett with a pistol, a certified copy of which said indictment had been furnished by the clerk of said court to the prosecuting attorney of said county and was then in evidence before the court. The trial court then, by an entry of record, after hearing evidence, that satisfied the court that the original indictment had been lost or destroyed and that the copy was a true copy of the original indictment, adopted this certified copy of the indictment as the indictment in the case, and then proceeded with the trial. Defendant claims this was error; that the loss of the indictment could not be supplied in that way, and that supplying the record is not finding the indictment. It was held in *State v. Simpson*, 67 Mo. 647, that while no power is conferred by statute to supply a lost indictment, such power exists independent of any statute and authorizes a court in which an indictment has been found by

a grand jury of the county, when such indictment has been lost or destroyed, to allow a paper, proved to be a copy, to be filed as for the indictment, provided it appears, either from the record or from the testimony of witnesses, that the indictment was returned into court and filed. The same question was before this court in *State v. Burks*, 132 Mo. 868, 34 S. W. 48, wherein Gantt, P. J., in speaking for the court, said "A lost indictment, like any other record, may be supplied by the court of whose record it constitutes a part," citing *State v. Simpson*, supra, and *State v. Smith*, 71 Mo. 45. In the case of *State v. Walker*, 167 Mo. 368, 67 S. W. 228, it is said that "where the certificate of the clerk of the court states that the information on which defendant was tried was not 'the original information filed in this cause, but a copy, as permitted to be restored by the court,' it must be presumed that the restoration was correctly made." The action of the court in allowing the copy of the lost indictment to be filed as and for the indictment was fully authorized by the previous rulings of this court, and there can be no question as to the power of the trial court in this regard.

Counsel for defendant complain in their brief of alleged improper remarks by the prosecuting attorney respecting his failure to bring witnesses to impeach the reputation of defendant. Whatever may have been his statements, they are not preserved in the bill of exceptions, and as such cannot be shown by affidavits, as was attempted to be done in this case, they cannot be considered upon this appeal. The authorities are all one way upon this subject. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443; *State v. Lamb*, 141 Mo. 298, 42 S. W. 827; *State v. Grant*, 144 Mo. 56, 45 S. W. 1102; *State v. McAfee*, 148 Mo. 370, 50 S. W. 82.

Instructions numbered 5 and 7 are criticised upon the ground, as claimed, that they limited the right of defendant to defend himself against Harry Lett, the deceased, alone, and were erroneous, and that the withdrawal from the jury of instruction No. 7 and the substitution of instruction No. 7a, after argument of counsel, did not cure the defect in said instruction No. 7, for the reason that instruction No. 7a is predicated solely upon the threats made by Harry Lett against defendant, and not upon the testimony of witnesses as to the conversation before the appearances of Leo Lett and Harry Lett at the time of the homicide. The only objection made by defendant to the instructions, so far as the record discloses, up to the time they were read to the jury, was as follows: "To the giving of which instructions, and each and every one of them from 1 to 13 inclusive, the defendant, by his counsel, objected for the reason that said instructions, severally and collectively, do not properly declare in writing all the law necessary for the jury in their deliberations." The record then shows that the court gave in-

struction number 7a, and following immediately thereafter, the record recites: "And which was read to the jury in lieu of instruction number 7, heretofore read to the jury and withdrawn as aforesaid. The defendant again renewed his objections to the instructions as a whole, because they did not properly declare all of the law in writing to the jury necessary for their deliberations, which objection was by the court overruled, to which action of the court in overruling defendant's objection to said instructions the defendant, by his counsel, then and there objected and saved his exceptions at the time." The record further shows that after said instruction number 7a had been prepared by the court, and before it was read to the jury, one of defendant's counsel was, at his own request, permitted to read it, and after doing so, he remarked "we have no objection; that is the law, only it is hard to read," thus showing that this instruction was not objected to, but was given by and with defendant's assent, and he cannot now be heard to criticize it. Defendant's objection to all other instructions was that they "did not properly declare all of the law, in writing, to the jury necessary for their deliberations." The only construction which can be placed upon this objection is that the instructions do not cover all the points of law involved in the case, and not that they are, in any respect, erroneous. We have held that when the instructions of the court are read to the jury, and the defendant desires further instructions, it is his duty, in fairness to the court, to call its attention to any matter of law arising in the case upon which the court had failed to instruct, and which was deemed necessary by defendant to be placed before the jury in order that they might arrive at a just verdict, and in the event of the failure of the court to so instruct, it becomes the duty of the defendant to except at the time. *State v. Bond* (not yet officially reported) 90 S. W. 830. But conceding, for the sake of the argument only, that timely objections were made, and exceptions saved to instructions numbered 5 and 7a, such instructions, when read together and in connection with each other, as they should be, embraced the right of the defendant to defend himself against both Harry and Leo Lett, were exceedingly fair to the defendant and beyond criticism, and presented that feature of the case properly to the jury.

We are unable to appreciate the criticism upon instruction number 4, to the effect that it instructs the jury that the intentional killing of a human being with a deadly weapon, without any lawful provocation, must be presumed to be murder in the first degree. The instruction does not so state; nor does the case of *State v. Silk*, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959, or *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895, so hold. On the contrary, it is said in *Silk's Case* that a homicide committed by the use of a deadly weapon,

and without deliberation, is murder in the second degree. The same rule was announced in the *Fairlamb Case*. The instruction under consideration, in defining murder in the first degree, tells the jury that in order to convict defendant of that offense, they must first believe that the killing was with deliberation and premeditation. It says, "if the jury believe from the evidence that the defendant, O. P. McCarver, shot and killed Harry Lett, as charged, and that at the time or before the shot was fired, the defendant had formed in his mind the willful, premeditated, and deliberate design or purpose to take the life of the deceased, and that the shot was fired in furtherance of that design or purpose, and without any justifiable cause or legal excuse therefor, as explained in these instructions, then the jury should find the defendant guilty of murder in the first degree." The instruction is in line with all the authorities as to what it takes to constitute murder in the first degree, and is free from objection.

No one can read the testimony disclosed by this record without coming to the conclusion that the evidence fully supports the verdict. There is nothing in the record which tends in the least to show that the verdict was the result of prejudice or bias against the defendant. Upon the other hand, the testimony clearly shows that the homicide was deliberate and premeditated, and without the slightest excuse or justification. The instructions are free from objection, and were very fair to the defendant. He had, we think, so far as disclosed by the record, a fair and impartial trial, and must now bear the punishment which the law imposes for its transgression.

Finding no reversible error in the record, we can but affirm the judgment, and direct that the sentence pronounced be executed. It is so ordered.

GANTT, J., concurs. FOX, J., not sitting.

BRADSHAW v. EDELEN et al.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. PUBLIC LANDS—ISLANDS—GOVERNMENT OWNERSHIP.

Where an island in the Missouri river was surveyed by the United States government prior to the admission of Missouri into the Union, it belonged to the United States and passed to a citizen under a federal patent.

2. SAME—PATENTS—EFFECT—EVIDENCE.

A patent issued by the federal government is prima facie evidence that all the pre-requisites of the law necessary to its issuance have been complied with.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Public Lands, § 322.]

3. BOUNDARIES—UNITED STATES SURVEYS—FIELD NOTES.

Field notes of United States surveys of public lands will control in ascertaining locations, even though the monuments established by the government surveyor cannot be found.

4. EJECTMENT—ISLANDS—ACCRETION—QUESTIONS FOR JURY.

In an action to recover possession of an island in a navigable stream, whether accretions to the lower portion of the island were gradual and imperceptible, or whether they were formed by sandbars and afterwards became connected with the island, *held* a question for the jury.

Appeal from St. Louis Circuit Court; Robert M. Foster, Judge.

Ejectment by R. B. Bradshaw against Pleasant A. Edelen and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Frank K. Ryan and E. P. Johnson, for appellant. Hickman P. Rodgers, for respondents.

BURGESS, P. J. This is an action of ejectment, begun in the circuit court of St. Charles county, for the possession of two islands in the Missouri river, in said county, and containing $322\frac{00}{100}$ acres, being part of sections 5, 8, and 9, of township 47, range 7 E., designated on the plat of the county surveyor of said county as "Nicholson's Island East of Slough," and the other island, containing 135 acres, being part of sections 5 and 6, same township and range, designated on said plat as "Nicholson's Island West of Slough," and stating the fractional quarter sections and the number of acres of land in each fraction. The petition is in the usual form in such cases. Ouster is laid July 28, 1902. Defendants' answer was a general denial, and a plea to the jurisdiction of the circuit court of St. Charles county on the ground that the lands sued for are situated in St. Louis county. Plaintiff made reply to the answer by general denial. On application of defendants the venue of the cause was changed to the circuit court of the city of St. Louis, resulting, upon trial had before the court and jury, in a verdict and judgment for defendants. In due time plaintiff filed motion for a new trial, which being overruled he saved an exception, and brings the case to this court for review.

The salient facts of the case, as disclosed by the record, are substantially as follows: Plaintiff read in evidence, as color of title, a deed from David Morrell and Susan, his wife, by Barton Bates and Edward Haren, trustees under deed of trust to David Nicholson, dated April 14, 1865, purporting to convey two parcels of land in St. Charles county, aggregating 3,167 acres; the larger tract being bounded on the south by the Missouri river. This larger tract originally included about one-half of the space subsequently occupied by "Nicholson's Island East of Slough"; the bank of the river in 1871 running through said island, the then boundary of said larger tract before it began to wash away. Swamp land patent No. 264, St. Charles county, to Jane and David Nicholson, Maggie Tracy, and R. B. Bradshaw, dated April 8, 1902, conveying to them, for \$270, said "Nicholson's

Island West of Slough," stating fractional sections, etc. Swamp land patent No. 265, in all other respects the same as last, conveying to same parties, for \$322.90, "Nicholson's Island East of Slough." Warranty deed of said Jane Nicholson, widow of David Nicholson, David Nicholson, Maggie Tracy, and John H. Tracy, her husband, to R. B. Bradshaw, dated and acknowledged July 28, 1902, conveying to him their interest in said premises for \$270. The evidence for plaintiff tended to show that David Nicholson began to occupy and improve the tract of land described in said deed of David Morrell and wife by trustees to him prior to 1876, by building houses and a sawmill on it, cutting timber on and clearing land, placing tenants on and paying taxes on it, all under claim of ownership, continuously, until he died in 1880, and this occupancy and claim of ownership of it was kept up continuously by his administrator and then by his heirs to the time of trial, except portions of it that washed away, and what they sold in the meantime. David Nicholson died November 27, 1880, and left surviving him, besides his widow, Jane, four children, David, Annie, Nellie, and Maggie Nicholson. The latter was married to John H. Tracy. Annie and Nellie died in 1887, both unmarried. These islands were not there during David Nicholson's lifetime, but were formed since his death. Defendant Edelen was on the land sued for when this suit was brought, and defendant Smith also in possession of it. Prior to the conveyance from David Morrell by trustees, to David Nicholson, there was an island in the Missouri river, on the St. Louis county side, called Little's Island, above where the premises sued for are situate. The main channel of the river was between it and the St. Charles county side. Little Island was a long strip of land with the lower end of it narrow, its head being up the river, and the whole of it above where the premises sued for are located. After David Nicholson began clearing his said tract of land, about 1876, or subsequently, the bank of the river began to cave in rapidly and wash away, and continued to do so until quite a large portion of said tract disappeared and the river ran over the space it formerly occupied. The head of Little's Island also then began to wash away, and this caving in and washing away of the bank and island continued until the channel between Little's Island and the St. Charles county side filled up so that where boats used to land there is now for about a half mile timber and farming land. There was evidence that the island itself gradually washed entirely away, six years or more before this trial, and the main channel of the river changed to the St. Louis county side; that after Little Island washed away a bar formed in there above, and bars were formed in the river below as it washed away, and they continued to form up to the time

on this trial; that Nicholson's Islands were not formed on any part of where Little's Island had been, but in front of Nicholson's land; that prior to David Nicholson's death there was no island in the river in front of his property. As Little's Island washed away, bars formed below, willows grew on them, the water flowed between, and the bars finally became connected by settling between them. The caving in and washing away of the Nicholson land also formed bars in front of that land, and together they formed Nicholson's Islands. There are three or four of the formations, sloughs all over them, and a slough dividing the two islands. They had been forming and had willows on them in 1802. Before the Nicholson land caved in the whole river there was channel, but after the caving in there was a number of channels, and boats sometimes ran up the slough between Nicholson's Islands and the St. Charles county shore, and sometimes through the fields, but the main channel there after that was always on the St. Louis county side. Carl Edwards, county surveyor, named the islands Nicholson's Islands in 1902, when he made the survey for school lands. Lines drawn horizontally from the present bank and Nicholson's tract include all of the islands in the two patents. The patents include the land in the islands, but there is a little sandbar covered with willows between them and the St. Charles county shore, not included in them. The main channel of the Missouri river has been on the south side of these islands ever since prior to 1802.

Plaintiff's survey of these islands was made from the St. Charles county side of the river. A range line from St. Louis county prolonged into St. Charles county will not correspond, and a survey made from the St. Louis county side would not agree with the figures in plaintiff's plat made from the St. Charles side. There would be a difference in them, but how much is not stated. Little's Island, or Island No. 102, is shown on certified maps of St. Louis county, but not on those of St. Charles county. At the time of plaintiff's survey, in January, when the water was low, there were little pools of water between the point of Nicholson's Island and Little Island, or, rather, the sandbar where the lower end of Little's Island had been. There was a slough between them, and in ordinary stages of water it always ran through, and when the water was at a stage of 12 or 13 feet it covered the sandbar, where the lower end of Little's Island had been. According to plaintiff's statement, which is by no means clear in this particular, "there is a bank, well defined, at the head of Nicholson's Island, 14 feet high, and the slough is between this bank and Little's Island, now a sandbar. You could never drive across the slough between Nicholson's Island and the main land. The bank of the Missouri river in 1871 (marked on plaintiff's plat of Nicholson's Island) is taken from the record of

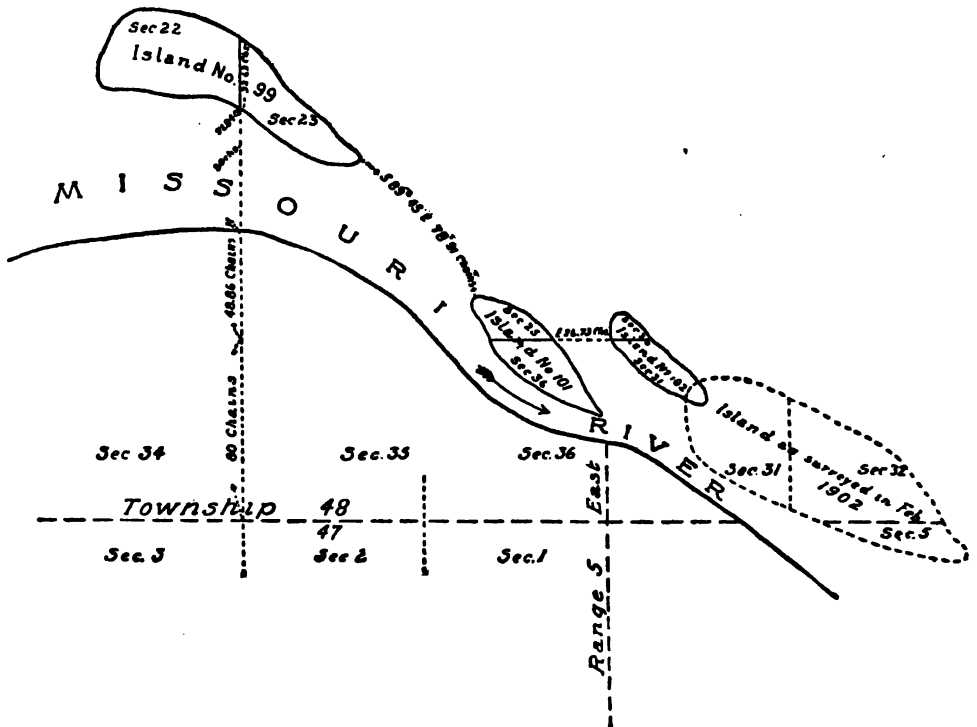
surveys of Carl C. Ertz, county surveyor of St. Charles county, made in 1871, and according to that map plaintiff's plat and extending line from St. Charles county, and best information the surveyor could get, Little's Island entirely washed away, and a sandbar is located where the balance of it had been, which is under water at ordinary stages. Said surveyor never extended the St. Louis county lines to ascertain whether it was located there."

The foregoing presents the plaintiff's case in chief, and the point insisted on by the defense is that the defendants acquired title to Little's Island, or No. 102, and that it washed away at the head, and accretions formed to it at its foot; that there remains about five acres of the original island at the head of the island; that it always constituted one island and is owned in fee by defendants; and that there never was a Nicholson's Island there.

The evidence introduced by defendants tends to show that in the year 1820, about a year prior to the admission of the state of Missouri into the federal Union, the United States government made a survey of an island in the Missouri river, not far from its confluence with the Mississippi, and which was designated "Island No. 102," and field notes of said survey, bearing date July 8, 1820, were found as a part of the records of the office of the Secretary of State of Missouri, a certified copy of which field notes was received in evidence. While somewhat ambiguous, said field notes would seem to show that the only monuments mentioned therein were trees. For instance: "Set a post on the margin of an island, corner of Th. secs. 30 and 31, T. 48, N., R. 7 E., from which a B. elder 10 in. dia. bears N. 14 E. 65 L. and a cotton 18 in. dia. bears S. 56 degrees 3 links. * * * 4.37 a cotton 20 in. dia." In 1849 the United States government issued to one Laurentius M. Eller a patent "for the fractionals on island in Missouri river, of sections thirty and thirty-one, in township forty-eight, of range seven, east, in the District of Lands subject to sale at Saint Louis, Missouri, containing fifty-nine acres and seven-nine hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General, which said tract has been purchased by the said Laurentius M. Eller." The Eller title, so obtained, became vested through meane conveyances in John M. Little, James W. Little, and Mary E. Brown, defendants in this case; the deed by which the said defendants acquired title being of date October, 1875, and describing said island as being "through accretions supposed to contain 130 acres, more or less." The county surveyor of St. Louis county and his brother, also a surveyor, both testified that they located a part of the land in dispute, and which had for many years been known as "Little's Island," as well as

"Island No. 102," within the bounds of said United States survey of 1820, and within the same township, sections, and range described in said patent to Eller, but that a large portion of the upper, or westerly, part of the island had disappeared, and a large addition had been made at the foot, or easterly end thereof, making a contiguous body of land aggregating more than 500 acres, while but 5 acres of the ground as originally surveyed in 1820 remained at the time of the trial. These two surveyors described in detail the manner in which they identified the land by lines of survey, and from their testimony it would appear that the survey of 1820 connected Island No. 99 with the St. Louis county shore, Island No. 101 with No. 99, and Island No. 102 with No. 101, and that the same witnesses conducted their survey in the same manner.

Defendants introduced in evidence the following plat:



In connection with this plat, an explanation appearing from the testimony in the cause is important, and it is one that runs all through the case. It seems that all surveys of the character herein involved are connected with a meridian line, and that in the meridian involved in this case there is a jog at the Missouri river to such an extent that a certain township, section, and range in the river ascertained from the St. Louis county side would locate a point nearly a mile away from a point described by the same township, section, and range numbers ascertained from the St. Charles county side

of the river. And the United States surveyors and the surveyors who testified for defendants in this case all reckoned from the south side of the river, while the surveyors who testified for plaintiff and on whose surveys the county of St. Charles acted in the matter reckoned from the north side. Aside from the testimony of defendant's surveyors, the identity of the land patented to Eller is thoroughly established by testimony of John M. Little, one of the defendants, who testified that he knew the island in 1846; that he went there at that time with his father and cut timber; that his father afterwards purchased it; and that it had been in the family until the time of the trial below. This witness had been on the land at frequent intervals, and produced receipts for taxes paid on the same by him and his family covering a continuous period from the year 1854 to the time of the trial, 1903. He

also produced a redemption certificate, which was admitted in evidence, showing that the county of St. Louis sold the land involved herein on the 14th of October, 1864, to one B. A. Hill for taxes, and that James R. Little (ancestor of said defendants) redeemed same from said purchaser on June 14, 1865.

Capt. John M. Gillham testified for defendants that he had been steamboat master and pilot and otherwise engaged in running boats on the Missouri river since 1858, and remembered Little's Island ever since that time. It was the first island west or above where the Burlington Bridge now stands. All of

plaintiff's witnesses identified Nicholson's Island (which plaintiff claims to have acquired by the action of the county court of St. Charles) as being the first island west, or above, the said Burlington Bridge. Capt. Gillham described the action of the river on Little's Island as wearing or washing away land at the head, or westerly end, thereof, and by slow degrees adding to the foot, or easterly end, thereof, apparently moving the island down stream half a mile or more; and also testified that, when he first ran the river at that point, the channel was between Little's Island and the St. Charles county shore, but that along in the 70's the river took a change at that point, the channel going to the St. Louis county side, apparently moving Little's Island from the south to the north side of the river. Two other steamboat captains of similar experience gave similar testimony. Plaintiff's counsel in the examination of these witnesses, as well as in the cross-examination of other witnesses for the defense, endeavored to make it appear by their testimony that additions to the island were made by bars forming below, separate and distinct from the island proper, and afterwards attaching themselves thereto, and the witnesses adhered to the fact that these additions to the island were made by gradual accretions attached to the main land of the island when first appearing. Christ Warnecke testified for defendants that he had known Little's Island since 1862; that he moved on it in 1871, lived there five years, built a house and stable on it, raised good crops and chopped 140 cords of wood off of it; that there were large trees on it at that time, some of which he had seen there six months before the trial below. This witness said that he had seen this island every month since 1871 and lived close to it all that time, and that the island which is there now, and which is called Little's Island, is the same island which he farmed more than 30 years before. This witness also testified to the washing away of the island at the head and the forming of additions thereto by gradual accretion. This was followed by corroborative testimony of 10 or 12 citizens of St. Louis county who lived in the immediate vicinity.

The evidence shows that trees of large size, and ancient, bulky, blackened stumps were in the corn fields on the island, all of which trees and stumps were within the knowledge of nearly all of defendant's witnesses, and in existence on the land within a month of the trial. Furthermore, there is testimony in the case that some of these trees were sycamores and of slow growth, and that one of them, measuring over 11 feet in circumference, was a large tree when defendants' witness Brown was a small boy.

At the conclusion of the evidence the plaintiff asked the court to give the following instructions: "(1) The court instructs the jury that if they believe from the evidence

that Little's Island was lost by being entirely washed away by the waters of the Missouri river, and that afterwards an island or sandbar formed where Little's Island stood, and that said sandbar or island, or the accretions, if any, thereto, is the land in controversy, still this will not defeat plaintiff's right to recovery. (2) The court instructs the jury that if you find from the evidence that a sandbar or island formed in the Missouri river opposite or below Little's Island, and that the waters of the Missouri river ran around said island or sandbar for any considerable length of time, and that the defendant is occupying said island, or islands, or sandbar, thus formed, then such island or sandbar is not an accretion to said Little's Island, although the jury may find from the evidence that such sandbar or island afterwards was connected with said Little's Island or any part thereof, and your verdict must be for the plaintiff. (3) The court instructs the jury that if you believe from the evidence that the land in controversy is an island, or islands, formed in the Missouri river, and not Little's Island, or an accretion thereto, as explained to you in other instructions, and that said land was sold in the county of St. Charles, Mo., to plaintiff and his grantors, then the plaintiff is entitled to recover, and your verdict must be for the plaintiff. (4) The jury are further instructed that, if they believe from the evidence that Island No. 102 or Little's Island washed away, then defendants and those under whom they claim lost all claim that they may have had to said island and the land that formed the same, notwithstanding the jury may believe from the evidence that the land or some portion thereof formerly composing said island was precipitated from the water of said river and settled upon or became attached to a formation of land below it in said river, and that the latter formation now forms a portion of the land described in the petition of plaintiff. (5) If the jury believe from the evidence that there is and has been continually a slough or channel of the Missouri river between the land in controversy and Little's Island, then the plaintiff is entitled to recover, and your verdict must be for plaintiff. (6) The jury are further instructed that the defendants have not proved any title to the premises described in the petition of plaintiff. (7) The jury are instructed that under the pleadings and evidence in this cause they will find a verdict for the plaintiff." The court refused each and all of said instructions, to which action of the court in refusing said instructions and each of them the plaintiff at the time excepted.

The plaintiff further asked, and the court gave to the jury, the following instructions: "(8) The jury are instructed that under the evidence in this cause the land described in the petition of plaintiff is situate in St. Charles county. (9) The jury are further

instructed that Island No. 102, or Little's Island, in the Missouri river, was in St. Louis county, and that, if they believe from the evidence that said island was entirely washed away, then defendants and those under whom they claim lost all claim they may have had to said island. (10) The jury are instructed that the statute of limitations did not run against the state of Missouri or St. Charles county, and that defendants did not acquire any title by any possession they may have had of the same to any portion of the land sued for, as against the patents for the same issued by St. Charles county and read in evidence by plaintiff. (11) The jury are further instructed that if they further believe from the evidence that the land described in the petition herein is an island or islands formed in the Missouri river below Island No. 102, or Little's Island, or below where it was formerly situated, then the title to the same vested in the state of Missouri, and the swamp land patents, signed by Vic D. Dierker, presiding judge of the county court, and the deed from Jane Nicholson, David Nicholson, Maggie Tracy, and John H. Tracy, her husband, to R. B. Bradshaw, read in evidence by plaintiff, vested the legal title of the land therein described by said Bradshaw. (12) The court instructs the jury that if they believe from the evidence that the land in controversy was not formed by accumulations of soil, slowly and imperceptibly washed up or deposited against the lower end of Little's Island, but that said land was formed by sandbars forming in times of high water in the river, below, near, or contiguous to Little's Island, and by deposits of sand, sediment, and soil carried on said bars by succeeding floods, said sandbars were transformed into Little's Island, or by waters of the river receding therefrom, then defendants did not acquire any title to the land so formed, and your verdict must be for the plaintiff. (13) The jury are instructed that accretions to land can be formed only by gradual and imperceptible deposits from the river, the progress of which cannot be observed from day to day, but only in considerable periods of time, or by a like gradual and imperceptible recession of the water of the river, and they are therefore instructed that if they believe from the evidence that sandbars were formed in times of high water in the river, either contiguous to or near Little's Island, that subsequently became land attached to said island, that such land so formed is not an accretion to said island, and defendants did not acquire any title thereto by reason of any title they may have owned to said island. (14) The jury are instructed that although they may believe from the evidence that the land lying west of or up the river from the line marked 'Slough' on the plat of Nicholson's Island, read in evidence by plaintiff, was a part of the original Little's Island or of accretions thereto formed by gradual and imperceptible

deposits from the river, yet if they further believe from the evidence that the land began to form east of or down the river from said line marked 'Slough' on said plat, and that the same was, at the time it began to form, separated by a channel or slough of said river through which water flowed at seasons of low water, which channel or slough gradually filled up, then the land formed east of or below said line marked 'Slough' on said plat was not an accretion to said land lying west of or above the same on said plat, and the jury will find a verdict for plaintiff for all the land lying east of or below said line marked 'Slough' on said plat. (15) The court instructs the jury that the patent of the county of St. Charles, Mo., to plaintiff and his grantors is prima facie evidence that the title to the land therein described was in the county of St. Charles, Mo., and the introduction of said patent in evidence made out a prima facie case for plaintiff, and the burden is upon the defendants to overcome such prima facie case by proving to the satisfaction of the jury that the land in controversy is Little's Island, or accretions thereto, as explained to you in other instructions. (16) The jury are further instructed that, if they find a verdict for plaintiff, they will assess his damages at any sum not exceeding \$300, they may believe from the evidence is the rental value of the premises they find he is entitled to recover, from the 29th day of July, 1902, to the present time, and also find what they may believe from the evidence is the monthly value of the rents and profits of said premises in a sum not exceeding \$25."

Over the objection and exception of plaintiff, the court, at the request of defendants, instructed the jury as follows: "(1) The court instructs the jury that, if you believe from the evidence that the defendants John M. Little, James W. Little, and Mary E. Brown are the same persons described in the deed from Elizabeth Little and introduced in evidence, then they became owners of the land described in the patent from the United States to Eiler, also introduced in evidence in this case; and, if you further believe from the evidence that such land was in the form of an island in the Missouri river, then the boundaries of said land extended in each direction to the water's edge, and all new land or soil which you believe from the evidence may have been added to such island by gradual accretion to its shores, or by the gradual recession of the waters of the river from its shores, became a part of such island and also became the property of said defendants, even though such accretions and new land so formed and added to said island extended over and included portions of that territory where land owned by Nicholson had formerly been located, provided you also believe from the evidence that said land of said Nicholson located in said territory as above described had been washed

away by the river to the level of the river's bed, and to such extent that the channel of said river flowed over the same locality occupied by said portions of land of said Nicholson prior to the formation of said accretions and new land. And if you further believe from the evidence that the land in dispute in this suit is made up of land described in said patent from the United States government, or any part of same, and new land gradually added thereto by accretion or recession, as above described, then the plaintiff acquired no title or right of possession to the land in dispute by reason of the patents to same made by the county of St. Charles of its officials, and your verdict should be for defendants."

Plaintiff claims that the islands sued for existed prior to the year 1895, but that they were not surveyed or numbered and could not be located, and that, having been formed in a navigable stream, they belonged to the state; that by the act of 1895 (Laws 1895, p. 207; section 8846, Rev. St. 1899) they were granted to the counties in which located; that the lands in question are located in and belonged to St. Charles county, and by sales thereof by the county court of said county to Jane and David Nicholson, Maggie Tracy, and R. B. Bradshaw, and patent issued to them by said county in pursuance of said sale, they acquired the legal title to said "Nicholson's Island West of the Slough"; that the same is true with respect to "Nicholson's Island East of the Slough," which was sold by said county to the same persons; and that as plaintiff acquired by deed the interests of Jane Nicholson, widow of David Nicholson, Dora Nicholson, Maggie Tracy, and John H. Tracy, her husband, he is the owner of the legal title to said land and prima facie entitled to its possession. The argument is that under the state of facts recited the burden is upon the defendants to disprove the title shown by plaintiff in order to sustain the verdict, and that they have failed to do this; that their only claim to do this is based on the patent issued May 1, 1849, to Laurentius M. Eller for an island in the Missouri river, on a certificate of entry, the date of which does not appear, that the island is neither numbered nor named in it, nor does it embody any plat or refer to any survey, but merely conveys fractionals on island in the Missouri river of sections 30 and 31, township 48, range 7 E., containing 59.79 acres, and that this is not the land sued for; that the surveyor, testifying for defendants, stated that he could not locate it, and the evidence fails to do so, and that the patent should have been excluded. In support of plaintiff's position, he cites the case of Long v. Higginbotham, 56 Mo. 245; but it is said in that case: "The law applicable to deeds from the government to individuals, and between parties grantor and grantee, is not so strict in its

requirements of certainty in their description of the lands conveyed, as in sheriff's sales and other proceedings in invitum. In the former, parol evidence is allowed to explain and identify and locate." In the case of Wildecorn v. Rosemiller (C. C.) 118 Fed. 295, it is said: "Island No. 42 [in the Missouri river] was conveyed by the general government, and thus appropriated and reserved by it in 1820, before the admission of the state into the Union. It and the control of the river never passed to the state under the act of admission. It continued to be the property of the United States until it was patented in 1896 to this plaintiff." The field notes of the United States survey of Island No. 102 of date July 8, 1820, a certified copy of which was introduced in evidence by defendants, clearly established that Little's Island was surveyed by the United States government prior to the admission of this state into the Union, which occurred August 10, 1821. The weight of the evidence shows that Little's Island and Island No. 102 are one and the same. The island is question, having been surveyed by the general government, and in this way appropriated and reserved by it, in 1820, before the admission of the state into the Union, continued to be the property of the United States until it was patented to Laurentius M. Eller. A patent issued by the United States government is at least prima facie evidence that all prerequisites of the law necessary to its issuance have been complied with. Cramer v. Keller, 98 Mo. 279, 11 S. W. 784. It has also been held that field notes of United States surveys of public lands will control in ascertaining locations, even though the monuments established by the government surveyor cannot, as in this case, be found. Carter v. Hornback, 139 Mo. 238, 40 S. W. 893; Minter v. Crommelin, 18 How. 87, 15 L. Ed. 279. There was some difference between the evidence of the surveyors who testified in the case as to the location of the island in question, owing to the fact that the township and range line south of the Missouri river run north from the south, and the lines north of the river run south from the north. They seem to vary from one-half mile to a mile. But the Elbring brothers, surveyors, who testify for defendants, located the land described in the government patent to Eller as being within the island, township, range, and sections described in said patent, and, as no other land was located within the same, this testimony could have had no application to any other island. While the evidence shows that the principal part of Little's Island washed away at its head, there were several acres of its lower end which had not washed away, and to which accretions gradually formed, so that its identity was not entirely destroyed. Nor do we think it a matter of any consequence that Surveyor Elbring did not find the monuments mentioned in the government survey, as they were

simply trees, and would necessarily, in so many years, undergo so many changes as to place them beyond recognition. There was an abundance of evidence tending to show that the accretions to the lower end of Island No. 102, or Little's Island, were gradual and imperceptible, and that the land in possession of the Little family is in fact but one island. It is true there was evidence on the part of the plaintiff which tended to show that the accretions at the lower end of the island were occasioned by sandbars forming there, which afterwards became connected with the island, but upon this question the evidence was conflicting, and the weight thereof for the consideration of the jury.

Plaintiff's case seems to rest entirely upon the proposition that Little's Island was washed away. Unless this was so, from our point of view, the defendants, having through mesne conveyances succeeded to the title of the patentee, Laurentius M. Eller, became the owner, not only of the island, but also all accretions to any part of it remaining since the time of the government survey. That Little's Island had not, up to the time of the trial at least, been entirely washed away, is indicated by the trees and stumps of apparently more than 50 years of age standing in the corn fields. The idea that a slough ran between "Nicholson's Island West of the Slough" and "Nicholson's Island East of the Slough" cannot be correct if, as contended by plaintiff, Nicholson's Island and Little Island were one and the same. While the evidence shows that there was a ravine in Little's Island, that did not have the effect of dividing it into different tracts. According to the evidence, some of the large stumps of which we have spoken were situated in this ravine, or slough.

Plaintiff contends that there was no evidence as to when the island described in the Eller patent sprang up; but we think that as the record shows that in the year 1820 the United States government made a survey of an island, designated as "Island No. 102," in the Missouri river, not far from its confluence with the Mississippi river, field notes of which survey were afterwards found as a part of the records of the office of the Secretary of State of this state, and a certified copy thereof read in evidence in this case, there can be no question that the island sprang up or was formed before it was surveyed, and therefore before Missouri was admitted into the Union of states.

We find no error in the instructions given at the instance of the defendants or in the refusal of the court to give the instructions asked by the plaintiff. Taking the instructions given as a whole, they presented the law of the case very fairly to the jury.

The judgment is for the right parties, and should be affirmed. It is so ordered. All concur.

STATE v. GRANT.

(Supreme Court of Missouri, Division No. 2,
March 6, 1903.)

COURTS—JURISDICTION OF SUPREME COURT— CONSTITUTIONAL QUESTIONS — ABANDONMENT.

Failing to call the attention of the trial court, in the motion for a new trial, to the objections urged during the progress of the trial that the law involved was unconstitutional, must be treated as an abandonment of the constitutional question, so as to deprive the Supreme Court of jurisdiction on appeal, although appellant's brief urges such constitutional question.

Appeal from Circuit Court, Dunklin County; James E. Hazell, Special Judge.

Frank Grant was convicted of violating the local option law, and appeals. Cause transferred to the St. Louis Court of Appeals.

This cause is here upon appeal by defendant from a judgment of conviction in the Dunklin county circuit court upon an indictment charging the defendant with a violation of what is commonly known as the "Local Option Law," which had been adopted in that county. The sufficiency of the indictment is nowhere challenged, and there is no reason for reproducing it here. On the 31st day of May, 1904, the defendant was put upon his trial before a jury for the commission of the offense charged. The evidence was heard, the court instructed the jury, and the causes, which had been consolidated, were submitted to them, and they returned a verdict of not guilty in cases Nos. 23 and 24, and a verdict of guilty in case No. 2, assessing defendant's punishment at a fine of \$300. Judgment was rendered in accordance with the verdict, and from this judgment defendant prosecuted his appeal to this court, and the cause is now here for consideration.

W. R. Satterfield, for appellant. The Attorney General and Rush C. Lake, for the State.

FOX, J. (after stating the facts). At the very inception of the consideration of the record before us, we are confronted with this question, has this court any jurisdiction to finally determine this cause? It is conceded that the offense charged, upon which this trial and conviction was had, is a misdemeanor, and it is manifest that unless the record discloses that some constitutional question is involved, and has been properly preserved for review, this court is without jurisdiction.

The record discloses that the appellant, during the progress of the trial, when the state was proceeding to show by the records the adoption in that county of the local option law, interposed objections to such evidence; but subsequent to the trial and in the brief now before us appellant makes the following declaration: "The defendant now, however, abandons and does not further in-

sist on the court reviewing said objections and exceptions to such offerings and the rulings of the court upon the same, and for the purpose of this trial admits that the county court records and all proceedings up to the election, the election, and notices of the same, as well as the notice of the result, were legal, and that at the date of the alleged violation of the law for which the defendant stands convicted the local option law was in force and effect in Dunklin county, Mo. The defendant likewise abandons all objections to the constitutionality of the local option law which were made and argued at the time the objections mentioned above were made and argued, except objections Nos. 10 and 11, which are as follows, to wit: (10) Because the penalties prescribed by the local option act are excessive, and in violation of section 25, art. 2, of the Bill of Rights. (11) Because the adoption of the local option law disturbs and renders unsettled the financial policy of the county in which it is adopted."

When we reach the motion for new trial, it is made manifest that appellant does not follow up the objections Nos. 10 and 11 urged in the foregoing statement in the brief. It is nowhere assigned in the motion for new trial, as a ground why it should be granted, that the local option law, which defendant was convicted of violating, was unconstitutional in any particular. It is alleged in such motion that "the court erred in admitting illegal and irrelevant testimony, in this, to wit: in permitting the state to offer the evidence over the objection of the defendant, the orders of the county court, and other and further evidence tending to show that the local option statute was in force and effect in Dunklin county, Mo." It is clear that the motion for new trial in no way challenges the constitutionality of the law or its sufficiency in any respect. The only complaint is that the court permitted evidence tending to show that the local option statute was in force and effect in Dunklin county, Mo. This complaint has been abandoned by the express declaration of defendant as heretofore indicated, in which he states that the "local option law was in force and effect in said county."

Failing to call the attention of the trial court in the motion for new trial to the objections urged during the progress of the trial, that the local option law was unconstitutional, must be treated as an abandonment of the constitutional question. The action of the trial court upon the motion for new trial is nearing the final action of the court in the cause, and it is essential in such motion to call the attention of the court to all questions upon which it is sought to have it pass. If such is not done, it cannot be said that the court passed upon a question which is omitted from the motion for new trial.

The constitutional question referred to in

the record has repeatedly had the attention of this court, and litigants seeking to have the cases which have fully determined that question reconsidered can only do so by preserving such question in the record in such manner as would authorize the court to review it.

This cause upon the record before us is properly within the jurisdiction of the St. Louis Court of Appeals, and it is therefore ordered transferred to that court. All concur.

BROWN et al. v. SOUTH JOPLIN LEAD & ZINC MIN. CO.

(Supreme Court of Missouri, Division No. 2, March 8, 1908.)

FRAUD—MATTERS OF OPINION—LIABILITY.

Where a person says that a body of ore through which a drill hole has been made is pay ore, it cannot be otherwise treated than a mere expression of opinion that it will pay, and an action for fraud and deceit cannot be predicated thereon, even though the opinion was unwarranted as shown by development of the mine; it being true that a drill hole had been made, and that the drill showed that it passed through ore.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, §§ 12, 13.]

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by C. J. Brown and another against the South Joplin Lead & Zinc Mining Company. From an order sustaining a motion to set aside the verdict of the jury, and granting a new trial, plaintiffs appeal. Affirmed.

This cause is here upon appeal by the plaintiff from an order of the Jasper county circuit court sustaining in behalf of respondents a motion to set aside the verdict of the jury and granting a new trial.

This was an action brought by the plaintiffs against the defendant for damages for fraud and deceit. The suit was brought on January 2, 1902. The plaintiffs alleged in their petition that on or about the — day of February, 1900, Henry B. Pain, a director and agent of the defendant in charge of its land in Jasper county, Mo., and the defendant by its agent, the said Henry B. Pain, for the purpose of inducing plaintiff, C. J. Brown, and his associate, L. H. Pounds, to enter into the mining lease described in plaintiff's petition, falsely and fraudulently represented to them that it had drilled a hole in a shaft sunk on lot 9 to the depth of 186 feet, and that there was a body of pay ore found therein 50 feet in depth, and that said pay ore was struck at a depth of 136 feet from the surface and continued rich in ore to the depth of 186 feet, and that the said defendant falsely represented to the plaintiffs that there was no old drifts within less than 50 or 60 feet on the east of said shaft, and none whatever on the north thereof, and that the ground thereunder was solid and had never been mined. The allegation is made that the plain-

tiffs relied upon the representations as true, and believed them to be true, and that they were thereby induced to and did sign the mining lease by which they obligated themselves to pump water, put in machinery, and sink the shaft on lot No. 9 to a depth sufficient to open up the lower run of ore, as shown by the drill; that is, to a depth of from 136 to 186 feet, and to plank the shaft and timber it, as provided in said lease, and to do many other things as provided in said lease. That afterwards the plaintiffs, relying upon said representation as true, and believing them to be true, and being deceived thereby, entered into said mining lots, and expended and invested their money therein in the development of said lots and in sinking a shaft on lot No. 9, and placing machinery thereon, and pumping water therefrom, and running a drift from said shaft. That the said representations so made by defendant were false, and known to be false, by the said defendant's agent when he made them, or that they were made as of his own knowledge, and that plaintiffs relied upon said representations as being true and thereby induced to sign said lease; and that they sunk said shaft No. 9, and spent a large sum of money before they discovered the drift under said shaft, and that said ground was not as represented. The answer consisted of a general denial. The record discloses an immense volume of evidence introduced upon the trial of this cause. While in the brief of appellant we find the general statement that the evidence established the false representations made as charged in the petition, yet there is a failure to point out specifically the evidence of plaintiff or other witnesses in support of such allegations; hence we are left to an examination of the abstract of record to ascertain, what in fact, were the representations made to induce the plaintiff to enter into the contract of lease for this mining property. The only question presented upon this appeal is the correctness or incorrectness of the action of the trial court in sustaining the motion for new trial. We shall not undertake to review the entire testimony in this cause; hence it is sufficient in order to dispose of the legal propositions involved to briefly indicate in this statement the testimony relating to the representations made.

J. M. Strickler, a witness for plaintiff, testified partly as follows: "Brown, myself, and Pain went to the South Joplin Lead & Zinc Mining Company's ground in the southwest part of the city for the purpose of looking the ground over. Mr. Brown considered the question of taking a lease on the ground, and I went there, and walked over all the ground, and we questioned Pain as to the conditions. I asked particularly about where the old drifts were, as the water was up so we couldn't get into the ground, and told him I didn't think Mr. Brown desired to take the lease without understanding what the ground

was, and whether there was solid ground where they had started the new shaft on lot 9. Mr. Pain walked all over the ground with Mr. Brown, myself, and Mr. Miller. That was the first time I met Mr. Pain. We started on the west side of the ground, where they had started to put in a double barrel pump, and he explained that shaft to us. We went over west where they were sinking a shaft that was then down about 50 feet, and I asked the question whether that shaft was in solid ground, and he said it was. He stepped to the east of it, and told us there were no old drifts on lot 9 near that shaft—within perhaps 60 feet. He stepped across to the corner of the mill, stating that the old drifts were over there, and that there were no drifts north of the shaft. He also stated that they had drilled this spot before they commenced the shaft, and that there was pay ore from 136 to 186 feet, and part of it very rich. Those were the statements made. Q. Point out the point, as near as you can, whether Colonel Pain told you that it was solid ground from that place onto the shaft? A. The mill was on lot 10. He pointed out and designated the corner of the mill outside which was about 60 feet from this shaft. There was another shaft in here on lot 10. That drift run from this shaft, and then continued to another shaft. Q. Did Pain tell you that he had been in the ground and knew the location of the drifts? A. I don't know that he spoke about being in the ground. Q. Did you ask him whether he had been in the ground? A. I don't think so. Q. Had you ever heard of drilling to demonstrate the quality of the ground before you came to Joplin? A. Yes, sir. Q. Ever have any drilling done? A. Yes, sir. Q. You knew that a record of the drilling was kept? A. I knew sometimes it was kept. Q. You knew the object of the drilling? A. Yes, sir. Q. You get something out of the ground in any kind of drilling? A. Yes, sir. This is sand-pumped out. Q. As a matter of fact, you knew in ordinary drilling some record was kept for the purpose of showing what the drill had gone through? A. Sure. Q. You didn't ask him for a copy of the record? A. Brown asked him for a copy of the record, and he said he would get it. Q. You were told this company had been mining there for a period of 10 or 12 years on this ground? A. Yes, sir. Q. You could see from the dump pile that there had been an enormous quantity of dirt taken out of that ground there? A. Yes, sir. Q. You knew it was going to be an expensive proposition to pump the water? A. Yes, sir. Q. You then went East, and got your friend Pounds to go into this matter? A. Yes, sir. Q. Told him that you had looked into it fully, and that it was a good thing? A. Yes, sir. Q. You told him you investigated the truth of the statement? A. I told him I investigated from this statement, and examined the ground, and knew a good deal had been taken out, and it was undoubtedly good ground. Q. You told Pounds that you knew

this ground? A. I knew of the ground. It had the reputation of being very good ground—had produced a good deal of ore. Q. Where did you hear the reputation of the ground? A. Around Joplin. Q. Hear any one else speak of it besides Pain? A. I spoke to Guyer, the ore buyer. He told me he bought more ore there than any other place around here. Q. Did you inquire about the ground around Joplin? A. I asked several men, and they said if we could get solid ground it undoubtedly would produce a great deal of ore. We would have a good thing if we could get solid ground. I spoke to Morgan and to Guyer, the ore buyer, and several others. Q. Cox told you he had been working that ground a number of years? A. He spoke of the ground—that he had been there for some time. Q. And told you he had been our foreman and superintendent? A. I think so. Q. And told you that he had been mining the ground as a lessee for a year or two? A. I think he did. Q. Did you ask him any questions then about the condition of the ground, etc.? A. Yes, sir. Q. Did you ask Charley Cox anything about the ground and its condition? A. Yes, sir; I spoke about the ground and asked about the ground. He said it was very good ground, and that they had cut drifts from the old shaft, pointing out the shaft marked down here over to the other shaft. Q. Did he tell you they run straight across or in a circle? A. They all said it run around in a circle, as it is marked there. Q. Did he tell you to what depth that had been cut? A. Yes, sir; that is, he said it raised from one shaft to the other. It was perhaps—my recollection is—in the neighborhood of 140 or 150 feet. Q. When you found out Cox had managed that ground for us there for three or four years as general superintendent, and that after that he had mined it himself for a couple of years on his own account, you got all the information you could out of him about the ground? A. Yes, sir. Q. I want to know if you inquired of that man anything with reference to those drifts? A. Yes, sir. Q. You did ask him about that drift? A. Yes, sir. Q. You asked him all the questions that you could think of that were bearing upon the operations you were expecting to put through there? A. I asked Mr. Cox concerning the drift. What he left there, and whether there was any ore. He said there was."

Plaintiff Mr. C. J. Brown testified partly as follows, upon the subject of representations: Q. Did you go out with him [meaning Pain] and Strickler to look over this property? A. Yes, sir; I looked it over with Pain a number of times before Strickler went. Strickler and I were related. He was manager of an interest in Galena in which I had been interested in another enterprise. We were looking for something of the kind. I was looking about the Joplin district. One day Colonel Pain told me of a nice plat of ground he had out there, and, by his invitation, we looked it over a number of

times, and finally Strickler came from the East. He took me to his room and showed me the product of the 40 for the last five years. It made a very fine showing. Q. He had an account of the ores sold from the 40? A. Yes, sir, for five years. Q. He showed you those? A. Yes, sir. Q. Do you recollect the circumstance of your going out with him and Strickler? A. Oh, yes. I called Strickler's attention to it as soon as he came back. The first opportunity we set to go out with Pain. Strickler was a man with more experience, and could look it over, and I had simply talked with Pain. When Strickler came to look, he immediately suggested the question of what had been done in the ground. I had never discussed the matter of drifts. It hadn't occurred to me as so important, but Strickler said at once, 'the value of this lease will depend a good deal on whether we are free from the other working, and whether we got this water all to pump, and whether the ground is solid.' And he and Colonel Pain discussed the question of drifts, and where they laid with reference to this shaft, and Colonel Pain marked out where he understood the nearest drift came to and the new shaft. That was under the corner of the mill, I think some 60 or 70 feet away. He said there was no drift nearer than that; no drift nearer than that to the new shaft, and they purposely selected that place because it was solid ground. Q. What was said by Colonel Pain about the discovery made in the drill hole that the shaft was going down on? A. Well, he told me in his own words what the pencil copy of the drill hole afterwards showed. He said there was 50 feet of good pay ore there, and the last 20 odd feet went through practically solid ore. The drill hole disclosed that, and from 56 to 86, as I remember, the drill disclosed a very rich bed of ore. Q. From 56 to 86? A. From 156 to 186 as I remember it. A. Q. Do you recollect that being repeated to Strickler? A. Oh, yes, certainly; it was talked a dozen times. We would meet Colonel Pain often on the street, and he was accustomed to coming out every day, of course. Q. I mean before you got to the deal, and before you agreed on the lease—the time Strickler states you and he and Pain went there that you went out a couple of times, and that out there in your presence there, was there anything said by Mr. Pain about what was discovered in the drill hole? A. Yes, sir. Mr. Pain gave a very eloquent description of it—the whole business. Q. Now, was anything said about any work north—any cutting to the north—or was it simply that the nearest cutting was 60 feet? A. That question was specially raised by Strickler. He and Pain discussed about the drifts, and we never talked about it. I didn't think about the importance of being away from that ground, but Strickler and Pain especially discussed the location of the drifts. Q. I want to know what Pain said about the

nearest drift that was to the shaft. A. The nearest that drift come, about under the corner of the old mill. That is about 60 feet awy. Q. He made that statement? Did you hear anything said about how it was north of the shaft? A. Well, north, where that ore bed was, from that north, that was supposed to be solid ground from Pain's talk and everybody's talk."

On the part of the defendant there was testimony by witnesses tending to show substantially the following state of facts: That a Mr. Harwood told Brown that the only man in the company that knew anything about the ground was McCelland, and that Pain was a very sanguine man as to mining property, and that he had never been in the ground, and that the company would not be responsible for anything that Mr. Pain had said with reference to the ground. That Cox had been superintendent for a number of years, and had done the last mining that had been done on the ground, and he could see Cox and find out anything he could from him. That McKee had made a survey of the ground, which survey was shown to Brown, and that Brown and Harwood took a lead pencil and tried to trace on the plat the large drift that is referred to in the evidence, and thus called Brown's attention to the location of this drift. At this interview between Harwood and Brown, the whole matter was gone over. That although the lease was possibly signed up before Strickler, the superintendent representing the plaintiffs, saw McCelland, before the lease was actually delivered and became effective, the date of the delivery being between May 29, 1900, and June 2, 1900, McCelland went over the ground with Strickler, and told him that his best information was from the mines and the plat by McKee, that the shaft was in the neighborhood of 30 feet west of the west line of the old drift, and that the shaft on lot 9 was located at that point so as not to get too far away from the lower run of ore which had been developed at the bottom of the old drift. The plaintiffs employed Cox, the old superintendent of defendant, to assist them in sinking the shaft, and Cox testified that he told Strickler and Brown both about the location of the drifts in the ground, and about where they were: "I gave them, as near as I could, knowing the ground as I did—I gave them a description and the location of the ground from memory, as near as I could."

The lease as executed by the parties to this proceeding contains this provision: "That he [meaning the lessor] will forthwith sink the new shaft commenced on lot nine (9) to a depth sufficient to open up the lower run of ore, as shown by the drill; that is, at the depth of from 136 to 186 feet; the work of sinking and cribbing this shaft shall be done in the same substantial manner as the first 50 feet thereof, and all openings in this shaft shall be planked on both sides of openings

planks, and then planked across on the top and the bottom of opening; the work on this shaft to be kept up continuously by as many men as can be advantageously employed therein; and no ore shall be cut from the upper runs of ore until after this shaft is completed." It also appears that under the terms of the original lease plaintiffs were obligated within one year from the date of the lease to purchase the plant at the appraised value agreed upon, or return the same in good condition; they were obligated to pay this defendant 25 per cent royalty; and there is testimony tending to show that on February 18, 1901, Brown and Strickler met the board of directors of this company, and obtained from the board a new proposition in reference to this matter, releasing them from their obligation to purchase the plant, reducing the royalty from 25 per cent. to 20 per cent. and purchasing from defendant the machinery; and at this interview with this board of directors McCelland, Pain and Harwood all testified that no complaint was made by Brown and Strickler as to false representations, and this testimony neither Brown nor Strickler contradicted.

At the close of the evidence the court instructed the jury, and the cause was submitted. The jury returned a verdict finding the issues for the plaintiffs, and assessed their damages at the sum of \$14,400.42. In due time and form defendant filed its motion for new trial, and on the 31st day of January, 1903, being the next regular term, said motion was by the court sustained, as evidenced by the following entry of record: "Now comes on for hearing the motion for a new trial heretofore filed herein. By consent the motion is taken up and being seen, heard and fully understood by the court, the motion is sustained on the ground and for the reason that the court erred in admitting improper, illegal, incompetent, and irrelevant evidence upon the part of the plaintiffs, over the objections of the defendant and to injury of defendant; the court erred in giving instruction No. 1 on behalf of plaintiffs; that the court erred in ruling that the statement and allegation in plaintiffs' petition, to wit, that there was a body of pay ore found herein (in the drill hole) 50 feet in depth, and that said pay ore was struck at the depth of 136 feet from the surface, and continued rich in ore to the depth of 186 feet, was a statement and representation of facts on which a recovery could be maintained. The court now being of the opinion that it is impossible for any person to know whether ore discovered by drilling a hole in the ground is pay ore or not, and that the above statements and allegation in the petition is not statement of fact on which a recovery can be had, but an expression of opinion on which the plaintiffs had no right to rely; that the amount of damages found by the jury in their verdict is excessive." Plaintiffs herein filed their motion to set aside the order granting a new

trial in this cause, which motion was by the court overruled, and from the action of the court in granting a new trial and overruling the motion to set aside the same, plaintiffs prosecute this appeal, and the record is now before us for consideration.

McAntire & Scott and Thomas & Hackney, for appellants. C. O. Tichenor, Meredith & Harwood, and Thomas Dolan, for respondent.

FOX, J. (after stating the facts). The record in this cause confronts us but with one proposition; that is, was the action of the trial court in setting aside the verdict of the jury and granting defendant a new trial, improper or erroneous, and did such action constitute such error as requires this court to reverse it, with directions that the trial court enter judgment upon the verdict of the jury, as returned in the cause. We shall not attempt to review all the evidence disclosed by the record, for if this cause is ever retried, and again reaches this court, it will be time enough to treat of the evidence applicable to that trial in which a final judgment has been rendered, hence we must be content with disposing of the one proposition before us; that is, was the motion for new trial properly or improperly granted?

Instruction No. 1, given in the trial of this cause, was complained of as error in the motion for new trial, and in the order granting a new trial one of the reasons assigned by the court for awarding it was predicated upon the error in giving this instruction. This instruction was as follows: "The court instructs the jury that if they find from a preponderance or greater weight of the evidence; that on or about — January or February, 1900, Henry B. Pain was agent of defendant; and that the defendant by its agent, the said Henry B. Pain, for the purpose of inducing the plaintiffs C. H. Brown, and his associate, L. H. Pounds, to enter into the mining lease read in evidence represented to said C. H. Brown and J. M. Strickler falsely and fraudulently that it had drilled a hole in a shaft sunk upon lot No. 9 to a depth of 186 feet, and that there was a body of pay ore found thereon 50 feet in depth; and that said pay ore was struck at the depth of 136 feet from the surface and continued rich in ore to the depth of 186 feet; and that the said defendant, through its said agent, further falsely represented to the plaintiffs that there were no old drifts within less than 50 or 60 feet on the east of said shaft, and none whatever on the north of said shaft; and that the ground thereunder was solid, and had never been mined, and if you further find from the evidence that the plaintiff C. H. Brown relied on said representations as being true, and believed the same to be true, and was thereby induced to and did sign the mining lease read in evidence, and that plaintiff L. H. Pounds immediately after the execution of said lease, on account of said representations, was induced to, and did, take

an assignment of said lease from said Brown and assumed the one-half of the expense to be incurred under said lease, and that afterwards the said plaintiffs, relying upon said representations as being true, and believing them to be true, and being deceived thereby, entered into the possession of said mining lots and expended and invested their money therein, in the development of said lots and in sinking of said shaft on lot 9, and placing mining machinery thereon, and pumping water therefrom and running drifts from said shaft, and if you further find from the preponderance or greater weight of the evidence that said representations were false and known to be false by the said agent of the defendant when he made the same, or if you find that the said representations were made by the agent of the defendant as of his own knowledge, and that plaintiffs relied on the said representations as being true, the said representations would be fraudulent even though the said agent may not have known at the time whether they were true or false, and that said representations were made with intent to and did deceive the plaintiff, you will find the issues for the plaintiffs and assess their damage at such sum as you may find the plaintiffs expended in sinking said shaft, driving said drifts for pumps, and pumping and other expenses reasonably necessary in complying with the terms and conditions of said lease up to the time when the plaintiffs discovered the falsity of said representations, that is, up to the time that they discovered that the ore in said drill hole was not as represented, if it was not as represented, and up to the time that the plaintiffs discovered that the representations as to the nonexistence of drifts near said shaft on lot nine aforesaid were untrue, if they were untrue, less the value of the ores taken by plaintiffs from said lot while operating said lease, not to exceed the sum of \$15,000." It will be observed in that instruction that it predicates one of the grounds of recovery upon the representation that the defendant had drilled a hole in a shaft sunk upon lot No. 9 to a depth of 186 feet, and that there was a body of pay ore found thereon 50 feet in depth, and that said pay ore was found at the depth of 136 feet from the surface, and continued rich in ore to the depth of 186 feet. In view of the evidence of the plaintiff Brown upon those representations charged in the petition, we are clearly of the opinion that this instruction was erroneous, and the trial court was fully warranted in granting a new trial on account of such misdirection to the jury. Mr. Brown, one of the plaintiffs in this case, positively testified that the defendant, through its agent, Mr. Pain, by reason of whose representation, plaintiffs seek a recovery, told him exactly what the pencil copy of the drill hole afterwards showed, and further stated that Mr. Pain had said to him that there was 50 feet of good pay ore, and that the last 20

odd feet went through practically solid ore, and Mr. Brown said in substance that the drill hole afterwards disclosed just what Mr. Pain had told him, and that from 156 to 186 feet the drill disclosed a very large bed of ore. Now it is manifest that those representations, at most, can only be treated as a representation of what the drill hole showed, for it will not be seriously contended that plaintiffs were relying upon a representation that this body of ore would be found to exist when the point was reached in sinking the shaft, for it is certain that he knew that the defendant or Mr. Pain, its agent, could not have possibly have gone down into the ground before the shaft was sunk, and that Mr. Pain's representations must be confined as to what the drilling indicated. This being true and Mr. Brown stating positively what the drill hole disclosed, and that Mr. Pain had told him just what the pencil copy of the drill hole afterwards showed, takes that representation out of this case, and it was error for the court to embrace it in instruction No. 1 given to the jury under the testimony in this cause.

That plaintiff Brown in this case understood such representation, not that it was an absolute fact that upon sinking the shaft the body of ore as stated in the representation in fact existed in the ground, but that the representation was in reference to what was disclosed by the indication of the drill hole, is emphasized by the contract of lease entered into by the plaintiff himself. The plaintiff Brown contracted to sink the new shaft commenced on lot 9 to a depth sufficient to operate the lower run of ore, not in accordance with any representations made by the defendant, but as was shown by the drill, that is, at the depth of from 136 to 186 feet. Here we have a full recognition by the contract itself that plaintiff Brown was proceeding to sink this shaft for the purpose of reaching ore which was shown by the drill. If a person owning land should represent that he had drilled the land, and that the drilling disclosed that the drill hole went through so many feet of ore, which representations were false, and in fact the drilling disclosed that it went through no ore at all, and a party relying upon those representations, and no means at hand to determine their truth or falsity, should be induced thereby to enter into a contract, it might be said that such false representations would furnish a cause of action for rescinding the contract or for the recovery of damages, but a representation that he went through a body of pay ore, the mere fact that the representation was false in respect to the ore being pay ore, could not possibly furnish any cause of action. There is a wide difference of opinion among men as to when ore will pay, and when a person says that a body of ore through which a drill hole has been made, is pay ore, it cannot be otherwise treated than a mere expression of individual opinion

that it will pay. The opinion as to its being pay ore is similar to a person looking at a field of agricultural land and saying that land will produce 40, 50, or 60 bushels of corn to the acre, which is nothing more than the expression of an opinion that it will so produce it; and the statement of such facts in the form of representations can never be made the basis of a ground of action for fraud or deceit, for the reason that the person to whom they are made will be presumed at least to regard such statements as a mere expression of opinion. The law in this country is well settled as to the nature and character of false representations which can be made the basis of an action to vitiate a contract or to recover damages for fraud and deceit. In *Wilson v. Jackson*, 167 Mo. 135, 66 S. W. 972, this court in discussing representations made as to what land in Alabama was capable of producing, very clearly indicates the rule upon this subject. It was there said: "These representations related to what the Alabama land was capable of producing, evidently a matter of opinion, and not shown by the evidence to have been unwarranted. The evidence does not show that it was represented that the land had produced, but that it could produce the articles mentioned in abundance. Representations of that character, even if unwarranted, are not misrepresentations of facts that would vitiate a contract." *Cornwall v. Real Estate Co.*, 150 Mo. 377, 51 S. W. 736. Mr. Bigelow, on *Frauds* (volume 1, p. 472), makes very clear the distinction to always be kept in mind between a representation which consists of matter of fact and those representations which are to simply be regarded as a mere matter of expression of opinion. He says: "The general proposition of law is that the representations must consist of matter of fact, and word 'fact' is here used in distinction *inter alia*, from opinion. Opinion then, generally speaking, does not constitute a legal representation. *Barnard v. Coffin*, 138 Mass. 87. Opinion may be expressed in regard to facts incapable as everybody knows of clear knowledge, the nature of the center of the earth or moon, a vein of silver runs under a certain tract of land far away from any indications of fact, the existence of an underground lake, the state of the weather a month hence; these are some of the many obvious expressions." This same author, further distinguishing between representations of a fact and a mere expression of opinion, says, at page 493: "A false and fraudulent representation by the vendor of the amount of hay cut from a farm the previous year has been held good ground for an action of deceit. It would doubtless be otherwise of representations of the amount of hay or wood to be cut on a farm."

In *Gordon v. Butler*, 105 U. S. 553, 26 L. Ed. 1166, plaintiff sought to recover for an alleged fraud practiced on him in obtaining from him a loan of ten thousand dollars up-

on insufficient security. The fraud of which the plaintiff complained was that the defendant had made a written estimate of the value of the security which contained fraudulent exaggerations of the values made by two third parties. The property upon which the estimate of value had been made was a quarry. The court in discussing that case, said: "To justify any imputation of fraud in giving the certificate, it was necessary to show that the parties signing it had knowledge at the time, that the value of the property was materially less than their estimate. And, from the nature of the property, and its imperfectly developed condition, such knowledge was impossible. No one could know its actual value until further development was made. Until then, any estimate must have been entirely speculative and conjectural. It would depend as much, perhaps, upon the temperament and expectations of the party making it as upon any knowledge of facts. The law does not hold one responsible for the extravagant notions he may entertain of the value of the property, dependent upon its future successful exploitation, or the result of future enterprises; nor for expressing them to one acquainted with its general character and condition. How could an over estimate in such case be shown? Other estimates would be equally conjectural. The law does not fasten responsibility upon one for expressions of opinion as to matters in their nature contingent and uncertain. Such opinions will probably be as variant as the individual who gave them utterance. A statement of an opinion assigning a certain value to property like a mine or a quarry not yet opened is not to be pronounced fraudulent because the property upon subsequent development may prove to be worthless; nor is it to be pronounced honest because the property may turn out of much higher value. The case of *Holbrook v. Connor*, which arose in the Supreme Court of Maine, 60 Me. 578, 11 Am. Rep. 212, illustrates this doctrine. There the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict, but the Supreme Court set it aside. It appeared that the land had not been tested; and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells on neighboring lands, and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action. "Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its

value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries. For opinions upon matters capable of accurate estimation by application of mathematical rules or scientific principles, such, for example, as the capacity of boilers, or the strength of materials, the case may be different. So, also, for opinions of parties possessing special learning or knowledge upon the subject in respect to which their opinions are given, as of a mechanic upon the working of a machine he has seen in use, or of a lawyer upon the title of property which he has examined. Opinions upon such matters are capable of approximating the truth, and for a false statement of them, where deception is designed and injury has followed from reliance on them an action may lie. But to this class the present case does not belong. It falls within the first class mentioned. It follows from these views that the court below should have directed the jury, upon the close of the plaintiff's testimony, to find a verdict for the defendants; for, from the nature of the subject, in relation to which the certificate was given, the estimate of value was nothing more than a conjectural opinion, which, whether true or false, constituted no legal cause of complaint."

There are numerous other cases along this same line, all maintaining that a representation which is manifestly a mere expression of opinion, can never be made the basis of an action for fraud and deceit or to rescind a contract, hence it is apparent that so far as those representations relate to pay ore, that it has absolutely nothing to do with this case and can form no basis for recovery. The distinction must clearly be kept in mind between a representation that the land had been drilled and that the drilling disclosed at least some mineral, which representation was false, and the drilling disclosed no mineral at all, which false representations induced the execution of the contract, and, on the other hand, representations which merely represented that the drilling disclosed pay ore, which subsequently developed was false, and that while there was some ore, it was not pay ore. As heretofore indicated, in the former the false representation under certain circumstances might be made the basis of a cause of action for fraud or deceit or to vitiate a contract; but in the latter, a representation as to pay ore must be treated as a mere expression of opinion. What one man might think was pay ore another might not consider worth prospecting. As to whether or not it was pay ore would depend upon a number of conditions and circumstances, the state of the market, the price

of labor and supplies, and numerous other things would have to be taken into consideration in order to determine whether a body of ore was to be classed as pay ore or not, and any expression or representations that land had been drilled and the drill hole extended through a large body of pay ore, cannot be treated otherwise than a mere expression of opinion that the ore through which the drill hole extended was rich or pay ore. However, upon this proposition, there is no necessity to pursue this subject further, for plaintiffs' own testimony establishes the fact that so far as the representations of Mr. Pain in respect to the ore disclosed by the drill, that they were true; hence cannot be made a basis of recovery in this cause. The conclusions reached that instruction No. 1 was erroneous, and fully warranted the court in granting a new trial, renders it unnecessary to discuss the other two reasons assigned by the court as a basis for awarding the new trial. As indicated in the commencement of the discussion of this case, we will not undertake to review the evidence or the law applicable to it upon the other remaining propositions, as to the fraudulent representations in respect to the old drifts, nor as to the effect of the changing of the terms in the contract of lease on February 18, 1901. We cannot foreshadow what the evidence will be upon the retrial of this cause; we take it however that if the testimony shows that the plaintiffs knew that Pain, who was acting for the defendant, knew nothing by actual knowledge of the location of those old drifts, and was merely expressing an opinion as to where they were located, and making an estimate upon the ground or on the plat of the premises, that the court will, as a matter of law, tell the jury that such statements and expression of opinions do not constitute any false representations. And, again, that the court will, if the facts are disclosed upon the retrial of this cause, as are indicated in the record now before us, that the plaintiff and Strickler, before the execution of this lease, made full inquiry of Cox, who had done a great deal of mining in connection with the old drifts spoken of, and other persons familiar with the ground, and ascertained from them more accurate knowledge than the defendant's agent, Pain, could possibly give them in respect to where the old drifts were located, and relied upon such information and by reason of Cox's experience employed him to superintend the sinking of the shaft on lot No. 9, give a similar declaration of law to the one above indicated.

The testimony in the record before us indicate that Mr. Strickler, who was examining this property for the plaintiff, and who had considerable knowledge of mining properties in that section of the state, made quite extensive inquiries in respect to this lot of ground as to the drifts which might interfere with its successful operation, and if this lease was executed upon information secured by Strickler,

and not by reason of any representations made by Pain as to the old drifts, then there can be no recovery. We will not further discuss the questions presented by this record, for if this case is retried, and again reaches this court, new and additional testimony may be presented by the record, therefore we decline to further express an opinion upon this controversy.

The trial court was fully warranted in granting a new trial, and its action in doing so should be affirmed, and it is so ordered. All concur.

STATE v. RUCK.

(Supreme Court of Missouri. Division No. 2.
March 6, 1906.)

1. CRIMINAL LAW — APPEAL — RECORD AND PROCEEDINGS NOT IN RECORD — INSTRUCTIONS.

Where the original bill of exceptions on file in the office of the clerk of the circuit court did not contain the instructions, and there was no direction in the bill calling for their insertion by the clerk, the mere fact that the clerk of his own motion copied them into the record did not make them a part of the record, and the action of the trial court in giving and refusing instructions, not otherwise made a part of the record, cannot be reviewed.

2. SAME — BILL OF EXCEPTIONS — STATUTE — DUTY OF CLERK.

Under Rev. St. 1899, § 866, providing that it shall not be necessary, for the review of the action of any lower court, that the instructions shall be copied or set forth in the bill of exceptions filed in the lower court, provided the bill of exceptions so filed contains a direction to the clerk to copy the same, and the same are so copied, it is competent for the defendant in a criminal prosecution, in his bill of exceptions, to state that the court gave certain instructions and directed the clerk to insert them in the bill, but, unless defendant in making up his bill did call for the instructions given and refused, it was not for the clerk of his own accord to make the instructions a part of the record.

3. HOMICIDE — ASSAULT WITH INTENT TO MURDER — SUFFICIENCY OF EVIDENCE.

In consideration of whether there was sufficient evidence to justify the jury, in its conclusion of an assault with intent to murder, not only the nature of the weapon, but the physical strength of the person wielding it, the fact that the prosecuting witness was entirely off of his guard and not anticipating an assault, the nature and character of the blow, the fact that four men were united in an assault on one man, and the vicious motive inspiring the assault, must all be taken into account.

4. SAME — STATUTE — DEADLY WEAPON.

The language of the statute "shall assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm with intent to kill," does not require that the assault should have been made with a deadly weapon per se.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 119.]

5. SAME — QUESTION FOR JURY.

It was for the jury to say, on a prosecution for assault with intent to murder, whether a heavy quart beer bottle in the hands of a powerful man was not likely to produce death or great bodily harm, when aimed at a vital part of the victim's body.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 562, 563.]

6. SAME—INTENT.

On a prosecution for assault with intent to murder, evidence examined, and *held* that whether the assault was made with intent to murder was a question for the jury.

7. INDICTMENT AND INFORMATION—ISSUES AND PROOF.

It is competent to prove that others not indicted conspired with the defendant in the indictment, to commit the offense charged.

8. CRIMINAL LAW—EVIDENCE—ACTS OF CO-CONSPIRATORS.

On a prosecution for assault with intent to murder, where the evidence already introduced tended to prove that three men were present and taking part in the assault, and that defendant had assaulted the prosecuting witness with a bottle, and the three men with defendant at the time of the assault were arrested a few moments afterwards in their flight, evidence was admissible to show that they were armed with the same character of weapons as that with which the assault had been committed.

9. SAME—TRIAL—PROVINCE OF COURT—COMMENT ON EVIDENCE.

A statement by the court of the grounds of its ruling as to the competency of evidence is not objectionable as a comment on the evidence.

10. SAME—IDENTITY OF ACCUSED—STANDING FOR IDENTIFICATION.

On a prosecution for assault with intent to murder, it was competent to permit the state to have the prosecuting witness identify the defendant as his assailant, and for that purpose to have the prisoner stand; the evidence showing that he was sitting behind his counsel at the time.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 768, 873.]

11. SAME—APPEAL—HARMLESS ERROR.

On a prosecution for assault with intent to murder, any error in permitting prosecuting witness to state, why he was carrying a weapon was harmless as to defendant.

12. HOMICIDE—EVIDENCE—DESCRIPTION OF WEAPON.

Permitting prosecuting witness to describe the bottle with which he was assaulted, and the other bottles which were found on the accomplices of defendant, was not error, merely because the state was not able to procure the particular bottle with which defendant struck witness, especially where it appeared that the bottle when last seen was in the hands of defendant, who fled presumably with it in his hand, and was not arrested until a month later.

13. CRIMINAL LAW—OBJECTIONS TO EVIDENCE.

An objection to evidence, on the ground of immateriality, amounts to no objection at all.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1633-1637.]

14. SAME—IDENTIFICATION OF ACCOMPLICES.

On a prosecution for assault with intent to murder, permitting accomplices of defendant to be brought into court, to see if prosecuting witness could identify them as the men who were with defendant and taking part in the assault, was not error.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 767, 769.]

15. SAME—CORROBORATION OF CONFESSION.

It appeared that the general scheme and purpose for which defendant had gone to the city, where the assault took place, was to commit assaults on nonunion drivers during a teamsters' strike, and that the assault in question was committed on a nonunion hackman. Defendant was not arrested until a month after the assault, when he made a confession of his guilt in the presence of several police officers. *Held*, that the testimony of an officer in whose presence the confession was made was admis-

sible to show that when arrested defendant told where he was rooming, and that the officer next day went to the room and found certain weapons there, some of which were in defendant's valise, which he identified as his; the weapons being of the character indicated by defendant's confession.

16. SAME—PRELIMINARY EVIDENCE AS TO VOLUNTARY CHARACTER.

The admission of a confession by defendant shown by preliminary examination, in the absence of the jury, to have been voluntarily made, was not erroneous, merely because the court refused to permit certain accomplices of defendant to testify that they had been threatened and statements extorted from them; no effort having been made to show that the alleged duress was exercised in the presence or with the knowledge of defendant, or that other accomplices were cognizant of any duress on the defendant.

17. SAME—APPEAL—QUESTIONS REVIEWABLE.

The question whether the court instructed the jury as to all the law covering all of the phases of the case cannot be raised on appeal, where all the instructions given by the court are not incorporated in the record.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2943.]

18. SAME—ARGUMENT OF COUNSEL.

On a prosecution for assault with intent to murder, a statement of counsel for the state, in argument, that one of the persons with defendant, as they came down the street on which the assault was committed, proposed that they "would go after that scab," was justified by testimony of a police officer who heard defendant's confession, which was admitted in evidence, that defendant said that as they came down the street one of the party said, "We will go across and get that scab," or "We will go across there and try to get him."

19. SAME—STATUTE—COMMENTS OR FAILURE OF ACCUSED TO TESTIFY.

Under Rev. St. 1890, § 2638, providing that, if the accused shall not avail himself of his right to testify on the trial, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place, where evidence of the state is uncontradicted, it is not error for counsel for the state to allude to it as "undenied, undisputed by no living or unliving witness," though defendant did not testify.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1672.]

20. SAME—OBJECTION TO REMARKS OF COUNSEL.

An objection to remarks of counsel, in argument, "We object to that statement under the law," is too indefinite, where counsel had made a number of statements, and it would have been difficult for the court to have pointed out the specific statement to which the objection alluded.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1690, 1691.]

Appeal from St. Louis Circuit Court; Robert M. Foster, Judge.

Ernest Ruck, alias John Miller, alias The Soldier, alias Whitney, was convicted of assault with intent to kill, and he appeals. Affirmed.

Daniel L. Cruice and S. S. Bass, for appellant. The Attorney General, John Kennish, Thos. B. Harvey, and Walter H. Saunders, for the State.

GANTT, J. At the April term, 1904, of the circuit court of the city of St. Louis, the assistant circuit attorney filed an information, charging the defendant, Ernest Ruck, with the crime of assault with intent to kill on purpose and with malice aforethought, upon one Basil Rutherford, at said city, on the 23d day of February, 1904. The defendant was duly arraigned, and entered his plea of not guilty. At the same term he was put upon his trial before a jury and convicted, and his punishment assessed at two years in the penitentiary. Motions for a new trial and in arrest of judgment was filed, heard, and overruled and exceptions saved, and thereupon the defendant was sentenced in accordance with the verdict, and from that sentence appealed to this court.

On the trial no evidence was offered on behalf of the defendant, and the testimony on the part of the state tended to prove the following facts: During the months of January and February, 1904, in the city of St. Louis, the union carriage and hack drivers were engaged in a general strike. Thomas Wand was then the proprietor of a livery stable in said city, and, on account of the strike, his carriage drivers had quit his employ. Basil Rutherford, the prosecuting witness, had been in the city but a few months, and in the latter part of January, 1904, while the strike was on, accepted employment from Thomas Wand as a carriage driver. Rutherford had been solicited by the striking drivers to quit, and he had been threatened, and rocks were thrown at him while engaged in his work, and, because of the danger of personal violence, he was carrying a pistol to defend himself, at the time the assault charged in the information was committed. The defendant, Ernest Ruck, was a teamster, residing in Chicago, Ill. A few days before the date of the offense charged, the defendant had been ordered by the president of the Teamsters' Union to go to St. Louis to assist in the strike. He was given \$15 and went to St. Louis, reported at teamsters' headquarters, and at 1106 Franklin avenue, met Innis and Rowbotham, who were in charge of the strike. There he was given instructions that he was to "knock these fellows (nonunion drivers) off the wagons," and to "get out and pull them in the hospital." The defendant was placed upon the pay roll of the union at St. Louis as an "organizer," and was paid for his work \$6.50 per day. He was not an organizer, but was employed, as stated, to "slug" drivers who had taken the place of the strikers. On the night of February 22, 1904, Rutherford had driven a couple of passengers to No. 2315 Chestnut street, between 10 and 11 o'clock. He was waiting in the street with the carriage to take them back to the hotel. When he had been waiting about a half an hour, the servant came to the door, informed him that he need not wait longer for his passengers and asked for the amount of his charges. The

servant disappeared to get the money, and Rutherford went up the stone steps to the door to receive it. While standing at the door waiting, a man, whom he afterwards identified as the defendant, came up the steps, and Rutherford, thinking he was going into the house, stepped aside. Without speaking a word the defendant struck Rutherford on the head with a large beer bottle. Rutherford jumped off the steps, and three other men standing on the east side of the steps began hurling bottles at Rutherford's head, one of which struck him over the eye, inflicting a deep ugly gash in his scalp. Rutherford drew his pistol and began firing at his assailants. The four men immediately ran across the street; three of them turning and running east, and the other (the defendant) running west. Rutherford pursued the three men a short distance, and until they were intercepted and placed under arrest by some policeman who had been attracted by the firing of Rutherford's pistol. Two of the men had empty bottles in their pockets when arrested, and the other threw some bottles on the ground just before the arrest. The defendant Ruck escaped that night and was not apprehended until about a month thereafter. He was still in St. Louis when placed under arrest. After his arrest he made a full, voluntary confession orally, and afterwards repeated it, when it was reduced to writing, in which he detailed all the facts as to why he came to St. Louis, and the purpose of his coming, to wit, to participate in the strike as an "organizer," to slug "scabs," or nonunion hack drivers, having been sent down from Chicago on that mission by C. P. Shea, president of the teamsters' union, upon a salary of \$6.50 per day. In his confession he stated that, after assaulting Rutherford, he ran, and as he ran Rutherford shot him through the arm, and he exhibited to the police officers at the police headquarters the wound in his arm, and said he had the wound treated on the night of the assault by a doctor near Fourteenth and Franklin avenues. This statement of his was corroborated by Dr. Sturhahn, who identified the defendant on the stand and testified to dressing the wound that night. In regard to the assault on the night of the 22d of February, the witness testified that defendant said in the office of the chief of detectives in St. Louis, after his arrest, that he and three men who were with him on the night of the assault had been at Crowley's saloon, and Chief Desmond asked him where Crowley's was, and he said: "Way out that way [indicating]—I do not know just what street it is—and we came in from there." That as they came down Chestnut street, some one of their crowd proposed to go over and assault this carriage driver (the prosecuting witness in this case). The carriage was standing in front of 2315 Chestnut. He said he had some bottles in his pocket. The driver was standing in the door. He said: "We slugged him, and he took a

shot at me." He said he started up the steps where the prosecuting witness was standing, and struck him with one of the bottles, when Rutherford commenced shooting at him and shot him in the arm. He pulled up his sleeve and showed where he was shot. The other three parties with the defendant on the night were Michael Ryan, Frank O. Gettings, and Thomas McLespy. Ryan and Kelly also came down from Chicago, according to defendant's confession, to engage in the strike, and they were identified at the trial as two of the parties that were with the defendant that night. Various errors have been assigned for the reversal of the judgment, and further facts in regard to the admissibility of evidence, and the rulings of the court during the trial, will be noted in the examination of the errors assigned by counsel for the defendant.

1. Preliminary to a discussion of the various points raised and argued by counsel, it must be noted that counsel for the state challenged the correctness of the record and sued out a writ of certiorari to correct the transcript certified to this court by the clerk, by striking therefrom the recital that certain instructions were given by the court, and the copy of the same in full in the transcript, for the reason that the original bill of exceptions, on file in the clerk's office in this cause, neither contains nor calls for the aforesaid instructions, and therefore the same were improperly and improvidently copied into this transcript certified to this court, and formed no part of the true record of this case on this appeal. The writ was granted, and by virtue of the statute (section 817, Rev. St. 1899), in order to properly determine the question thus raised, the clerk of the circuit court of St. Louis was directed to forward to this court the original bill of exceptions filed in this cause by the defendant, which he did. The original bill shows that, when the evidence on the part of the state was all in, and the state had rested, the following occurred: "Thereupon the defendant offered the following instruction in the nature of a demurrer to the evidence offered by the plaintiff, to wit: [Here copy] Which said instruction the court overruled, to which ruling of the court, the defendant by counsel duly excepted then and there at the time. Defendant offered no evidence. The above was all the testimony offered." There is nowhere in the bill, then, any recital or statement that "thereupon the court instructed the jury," and setting out the instructions, nor is there a statement that "thereupon the court gave the following instructions [here the clerk will copy the same]," nor is there anywhere in the bill any instructions requested by the defendant and refused by the court, except the instructions already noted in the nature of a demurrer to the evidence. Section 866, Rev. St. 1899, as amended in 1885, provides: "It shall not be necessary for the review of the action of any lower court on appeal or

writ of error, that the motion for new trial in arrest of judgment, or instructions filed in the lower court, shall be copied or set forth in the bill of exceptions, filed in the lower court, provided, the bill of exceptions so filed contains a direction to the clerk to copy the same, and the same are so copied into the record sent up to the appellate court." Under this section it was perfectly competent for the defendant, in his bill of exceptions, to have stated that the court gave certain instructions and directed the clerk to insert them in the bill of exceptions; but it is equally clear that, unless the defendant, in making up his bill of exceptions, did call for the instructions given and refused, it was not competent for the clerk of his own accord to make the instructions a part of the record, or a part of the bill of exceptions. It is for a party appealing from the judgment of a trial court to save his exceptions to such matters as do not constitute a part of the record proper and incorporate them in his bill of exceptions. This whole matter was considered in the case of *Ross v. Railroad Co.*, 141 Mo. 890, 38 S. W. 926, 42 S. W. 957. It is plain from that case that, unless the instructions given and refused were duly directed to be copied into the bill of exceptions, or were copied in full into the original bill of exceptions made and saved to the action of the court in giving and refusing the same, the bill cannot be amended by the oral testimony of the witnesses after the term of court at which the case is tried, or the term at which the bill is signed by the judge. As the original bill of exceptions, on file in the office of the clerk of the circuit court, did not contain the instruction, and there was no direction in the bill calling for their insertion by the clerk, the instructions constituted no part of the record in this case, and the mere fact that the clerk, of his own motion, has seen fit to copy them into the record, does not make them a part of the record, and therefore the action of the court in giving instructions for the state, and refusing instructions asked by the defendant, save and except the one instruction in the nature of a demurrer to the evidence, cannot, and will not, be reviewed by us in the disposition of this appeal.

2. We proceed, then, to the first assignment of error urged by the defendant in his brief and argument, to wit, that the verdict of the jury is against the law and against the evidence. To sustain this proposition, it is earnestly insisted that the gist of the evidence, with which defendant is charged, is the intent with which it was committed, and that the state wholly failed to prove this specific intent, to wit, the intent to kill the prosecuting witness. As a corollary to this proposition, it is argued that the state wholly failed to prove that the weapons used were deadly weapons, and having alleged that the defendant used "large and heavy glass bottles," and the only testimony being that the

defendant struck the prosecuting witness with a bottle with a long neck, resembling a beer bottle, the proof did not sustain the charge of the offense named. Many cases are cited from the various appellate courts, to the effect that the particular intent charged must be proved to the satisfaction of the jury. It seems to be argued also, inferentially, that, because the defendant did not say anything before he struck Rutherford on the side of the head with a beer bottle, the intent was not established. We are wholly unable to accede to the contention of the learned counsel for the defendant. Of course, it was necessary to satisfy the jury, under the information, that the assault was committed with intent to kill, and the jury by their verdict have distinctly found that such was the intent of the defendant. On this appeal it is not the province of this court to disturb the verdict and finding of the jury, unless there was no substantial evidence upon which the finding could be based. In the consideration of whether there was sufficient evidence to justify the jury in its conclusion, not only the nature of the weapon but the physical strength of the person wielding it, the fact that the prosecuting witness was entirely off of his guard, and not anticipating an assault, the nature and character of the blow, and the fact that four men were united in the assault on one man, and the vicious motive inspiring the assault, must all be taken into account. The statute does not require that the assault should have been made with a weapon deadly per se, but its language is "shall assault or beat another with a deadly weapon, or by any other means or force likely to produce death or great bodily harm with intent to kill," etc. It is said by the defendant that the weight of the bottle used in making the assault was not proved, the size was proved, but the weight was not shown; but it was for the jury to say whether a heavy quart beer bottle, in the hands of a powerful man, was not likely to produce death or great bodily harm when aimed at a vital part of the victim's body. As said in *State v. Drumm*, 156 Mo. 216, 56 S. W. 1086: "Such things as all persons of ordinary intelligence are presumed to know are not required to be proved, and the size and heft of a quart beer bottle is a matter of such common knowledge that it was entirely unnecessary to prove its weight in order to enable the jury to find that it, as used by a man of the size and weight of the defendant, was a deadly weapon. Whether it was a deadly weapon was a question of fact for the jury, and the intent with which the defendant used it on the prosecuting witness was for the jury to find from all the circumstances. And in this case there was abundant evidence outside of the vicious blow itself, to prove the intent to kill the prosecuting witness. Two of the men engaged in the assault, Ruck and Ryan, were two of a committee whose sole mission in St. Louis at that time was to slug and assault

nonunion hack drivers, and had been sent from Chicago for this specific purpose, and paid at the rate of \$6.50 per day. And the evidence tended to show that they were peculiarly fitted for the work for which they were imported into this state. The jury were well justified in reaching the conclusion that these men, who would accept employment to do such work, and come all the way from Chicago to St. Louis to engage in it, would not hesitate to kill one of their victims, or, in the language of the defendant himself, "put him in the hospital"; nor was the jury left in any doubt as to the intent with which the defendant and his associates went across the street to the door where the prosecuting witness was waiting for the fares which his passengers owed him. Officer McCarthy testified that the defendant said that, as they came down Chestnut street, one of the party proposed to go over and assault the carriage driver, and they all went together for that purpose, as was abundantly shown by the fact that they all engaged in throwing bottles at him, and in addition to the wound on the head, which defendant inflicted, one of the others struck him over the eye, and cut a deep gash, and so a common intent could be easily inferred from their expressed purpose and their combined assault on the prosecutor, and the facts fall clearly within the rule announced in *State v. Kempf*, 26 Mo. 430, in which Judge Richardson, speaking for the court, said: "It is, of course, not necessary to prove any formal or expressed agreement or intent, but it may be inferred from circumstances, and is a question of fact for the jury." And the evidence was amply sufficient to show that all four of the assailants participated in the intent, and that they were all actuated with the same common and unlawful purpose. The facts in the case of *State v. Meyers*, 174 Mo. 352, 74 S. W. 862, are wholly dissimilar from those indicated by this record. It would have been a most illogical conclusion for the jury to have reached, had they found, in the face of all these circumstances, that the defendant and his associates only intended a simple and common assault.

3. It is urged that the learned circuit judge erred in admitting the testimony showing that the defendant's associates Ryan, McLespy, and Gettings also joined in the assault immediately after defendant had dealt the prosecuting witness the blow with the quart bottle, because it is said this would be to charge the defendant with responsibility for the acts of others. The evidence is so clear that all four of these parties were accomplices in making the assault that it is too obvious for discussion, almost, that it was entirely competent to show what each of them did in accomplishing the common purpose. It would seem that the defendant's contention on this point is that, as the information failed to charge the conspiracy, or that the crime was committed jointly by the defendant

and others, it was not permissible for the state to offer evidence of the acts and conduct of such others acting in concert with the defendant in the commission of the offense charged. The law is too well settled to admit of a doubt that it is perfectly competent to prove that others not indicted had conspired with the defendant in the indictment to commit the offense charged. In *King v. William Stone*, 6 Term Rep. 527, the prisoner was indicted for treason, the evidence tended to show that the prisoner conspired with John Stone and William Jackson. The two latter were not indicted, nor was there a charge of conspiracy in the indictment. The evidence of his conspiracy was received. In *Gill v. State*, 59 Ark., loc. cit. 430, 27 S. W. 600, the court said: "Nor is it material, as to the admissibility of the acts or declarations of the conspirator against the defendant, whether the former (the conspirator) be indicted or not, nor what the nature of the indictment is, provided the offense involves the conspiracy"—citing *Wharton's Criminal Evidence*, § 700. In *People v. McKane*, 80 Hun, loc. cit. 332, 30 N. Y. Supp. 100, the court said: "It is not necessary that the co-conspirator, whose acts and declarations in furtherance of the ends of the conspiracy are offered in evidence, should be a part of the record. It is plain that the indictment or nonindictment of a conspirator, whose acts or declarations are offered against his fellow, can neither impart any quality of verity or of relevancy to such acts and declarations, nor withdraw it from him, and hence his inclusion or exclusion as a party to the indictment is not material." That case was subsequently taken to the Court of Appeals, and is reported in *People v. McKane*, 143 N. Y. 455, 38 N. E. 950. Judge O'Brien wrote the opinion, in which all the judges concurred. He said: "When a conspiracy is shown, or evidence on the subject given sufficient for the jury, then the acts and declarations of the conspirators, in furtherance of its purpose and object, are competent, and, in a case like this, it is not necessary, in order to make such proof competent, that the conspirators should be charged in the indictment." This statement of the law on this point is reiterated by some of our most careful text-writers. *Wharton's Criminal Evidence*, § 700; 1 *Greenleaf's Evidence*, § 111; *Roscoe's Criminal Evidence* (8th Ed.) p. 432; *People v. Kief*, 126 N. Y. 661, 27 N. E. 556; *Goins v. State*, 46 Ohio St., loc. cit. 463, 464, 21 N. E. 476. And such was the conclusion reached by all the judges of this court in *State v. Kennedy*, 177 Mo., loc. cit. 118, 164, 165, 75 S. W. 979; *State v. Boatright*, 182 Mo., loc. cit. 46, 81 S. W. 450; *State v. Lewis*, 181 Mo. 261, 79 S. W. 671; *Bishop's New Criminal Proc.*, §§ 1248, 1249.

Again, under this same head, defendant assigns as error the admission of the testimony showing that when McLespy, Gettings, and Ryan were arrested by the police, a few moments after the assault, the officers found on their persons, and in their pockets, bottles.

As to this, we think there can be no doubt whatever as to the propriety of this evidence. The evidence, already in, tended to prove that these three men were present and taking part in the assault upon the prosecuting witness, and the defendant had assaulted him with a bottle. These three were arrested a few moments afterwards in their flight, and it was perfectly competent to show that they were armed with the same character of weapons as that with which the assault had been committed. The fact that they were thus armed was strongly corroborative of the statement of the prosecuting witness to the officers, of the character of the assault that had been made upon him, and was admissible also for the purpose of identifying them as the parties who had been engaged in the assault. As to the proposition that the court, in its ruling, made a comment upon the evidence, the record shows no exception taken on that ground, but we see nothing in the nature of a comment. The court simply stated the grounds of its ruling as to its competency. Under this same head, error is alleged in permitting the prosecuting attorney to ask the prosecuting witness to look at the defendant and state whether or not he was the man he saw in Chief Desmond's office. It was clearly competent to permit the state to have the prosecuting witness identify the defendant as his assailant, and for that purpose to have the prisoner stand up, as the evidence shows he was sitting behind his counsel at the time. *State v. Gartrell*, 171 Mo., loc. cit. 509, 71 S. W. 1045; *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741.

Again, it is urged that it was error to permit the prosecuting witness to state why he was armed. The court permitted him to state that there was a strike on, and he and his fellow hackmen (nonunion hackmen) had been threatened, and the drivers carried revolvers to protect themselves. While we think it was wholly unnecessary for the prosecuting witness to explain why he was carrying a weapon, as he was not on trial for that offense, we think no harm was committed in permitting him to explain that he did so because he was expecting an attack. The mere fact, also, that the court permitted the witness to describe the bottle with which he was assaulted, and the other bottles which were found upon the accomplices of the defendant, was not error simply because the state was not able to procure the particular bottle with which Ruck, the defendant, struck Rutherford, the prosecuting witness. The witness both saw and felt the bottle with which he was struck, and the fact that he did not stop and look for that bottle, instead of pursuing his assailants and securing their arrest, was no objection to his evidence. Besides, when the bottle was last seen it was in the hands of the defendant, and he fled presumably with it in his hand, and was not arrested until a month later. It was by no means a condition precedent to his description of the

weapon with which he was wounded that he should have first produced the weapon itself, when it was shown to have been in the hands of his assailant when he last saw it. Equally untenable is the position of counsel as to the admissibility of the testimony as to the arrest of the defendant on the 26th of March, 1904. The only objection made to this was that it was immaterial, an objection which we have often held amounted to no objection at all. A further objection to evidence is that the court permitted two of the accomplices, Kelly and Ryan, to be brought into court to see if the prosecuting witness could identify them as the men who were with the defendant and taking part in the assault on the night of the assault. This was entirely competent. *State v. Gartrell*, 171 Mo. 510, 71 S. W. 1045; *Rex v. Deering et al.*, 5 Carr & Payne, 165; *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530; *Garvin v. State*, 52 Miss. 207; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *Com. v. Whitman*, 121 Mass. 361.

Another objection to testimony is to that of Officer McCarthy, as to statements made by the defendant after his arrest to Chief Desmond, in the presence of McCarthy, Williams, and others. The question was: "Did he tell you with whom, or in what room, he was stopping? A. Room 20. Q. Was any statement made by him as to the articles that were in that room? (Objected to, as this was a month subsequent to the alleged assault.)" Counsel for the state and the defendant, at this point, seemed to have become involved in a wrangle, but the real objection now appearing from the record seems to have been that the defendant's counsel objected to the testimony of the officer as to the statement of the defendant as to certain weapons, slingshots, clubs, etc., which the defendant stated were in the room No. 20, the only objection being that it was incompetent to prove, in connection with the statement of the defendant that, when he was arrested, and told the officer where he was rooming, the officer, the next day, went to that room and found two clubs, some rocks, some balls of lead, slingshots, and a billy. The testimony in this connection further discloses that some of these articles were found in the defendant's valise, which he identified as his. The officer testified that the defendant stated that he and his companions got a billiard cue and cut it off, and stated that they prepared these things to assault "scab" drivers, and that he and Kelly had gone out to the woods and cut some sticks with which to make slingshots or bean-shooters, with which they proposed to shoot through carriage windows. The billy was made of sand and shot and was identified by defendant at Desmond's office, when he was making his statement. The trial court admitted this evidence, on the ground that it was corroborative of the fact that the defendant was a participant in the assault upon the prosecuting witness, and that

their possession by him corroborated his confession, and of the general scheme and purpose for which the defendant had come to St. Louis, to wit, an assault or assaults upon "scab" drivers, the identical character of offense for which he was then being tried. Taken in connection with the testimony already introduced, the defendant's statement or confession in evidence, there can be no doubt about the sufficiency of the identification of these weapons as being the same which the defendant had prepared, and were in his room, where they were found by the officer pursuant to his confession, and they were competent to establish the motive for the assault for which he was being tried, and as tending to show the intent of the assault to kill. It tended to prove that the same motive inspired the procurement and preparation of said weapons that actuated the assault on Rutherford. Its purpose was not to prove another and distinct crime, but its tendency was to establish the motive and intent with which the assault was made, and the common scheme or plan so related to the assault for which defendant was being tried, that it illustrated his conduct on the night of the assault. *State v. Bailey*, (Mo. Sup.) 88 S. W., loc. cit. 740, 741 and 742, and cases cited.

4. Again, error is assigned on the admission of the confession of the defendant. The preliminary examination by the judge, as to whether these confessions of the defendant were voluntary, discloses that they were made without any threat or compulsion, and without any hope of reward. The trial court excluded the jury from the courtroom and heard all the evidence as to the circumstances under which the confession was made. He permitted the defendant on this preliminary hearing to testify in his own behalf. The specific objection now urged is that the learned circuit court did not hear all the evidence with reference to the duress alleged to have been used in obtaining his confession. There is no merit whatever in the claim that the defendant was not permitted to make a statement of his side of the controversy as to the confession. There is not the slightest pretense that he offered to state any other fact which could throw light upon the inquiry thus being made. But it would seem that counsel now claim that error was committed in refusing to permit Ryan and others to testify that they had been threatened, and statements extorted from them. No effort was made to show that the alleged duress over these other parties was exercised in the presence, or with the knowledge, of the defendant, or that these other accomplices were cognizant of any duress upon this defendant. Upon a full examination, it sufficiently appears that the confessions and admissions were properly admitted, and the mere fact that the defendant testified that he made his confession through fear and violence did not overcome the prima facie case, and the

testimony of the officer. Indeed he did not offer himself as a witness, or any other testimony before the jury to show that his confession had been obtained by promises of clemency or extorted by fear of violence. *State v. Patterson*, 78 Mo. 695; *State v. Jones*, 171 Mo., loc. cit. 406, 407, 71 S. W. 680; *State v. Brennan*, 164 Mo. 487, 65 S. W. 325.

5. The sixth assignment of error is predicated entirely upon the assertion that the trial court erred in its instruction to the jury and erred in refusing certain instructions prayed by the defendant. As already noted, these instructions have not been made a part of the bill of exceptions, and hence they are not before us for review. It would be manifestly improper, upon our part, to discuss matters which are not legally a part of the record.

6. As to the ninth point in the brief of the learned counsel, to wit, that "the court failed to instruct the jury as to all the law covering all of the phases of the case," it is impossible for this court to determine, unless all of the instructions given by the court were incorporated in the record before us. In the absence of anything on that subject, the presumption must be, and will be, indulged that the instructions given were correct and covered every phase of the case.

7. Lastly, it is insisted that the learned circuit court erred in permitting Judge Harvey, special counsel for the state, to make improper remarks in his address to the jury. To understand this point it will be necessary to note the particular statements which were objected to. In his opening statement to the jury, Judge Harvey, in part, said: "The strike had been in existence possibly a month, or a little more than a month, when the defendant here, and two other persons, companions of his in the general enterprise, came to the city of St. Louis from Chicago. We expect to show by the evidence that they came here for the purpose, and under the—" At this point, Mr. Bass, counsel for the defendant, objected to any statement of a conspiracy, or what anybody else did upon the theory of a joint assault; that it was incompetent to try the defendant upon the theory of a joint assault under the pleadings in the case. Mr. Cruice, another of the counsel, also "objected on the ground that it was improper for Judge Harvey to state that the defendant and two other persons came from Chicago to St. Louis for the purpose of assaulting and knocking off of their boxes the carriage drivers who had the temerity and hardihood to drive carriages and hacks which had been abandoned, on the ground that, if true, it would prove a conspiracy which is not charged in the information." Obviously there was no impropriety in this statement of Judge Harvey's as to what he expected to prove in regard to the joint action of the defendant and his associates in the assault, and the employment and purpose

which actuated them in coming from Chicago to St. Louis. We have already indicated that it was entirely unnecessary to make all the parties defendants in the one indictment, or to charge them with a conspiracy. The law of this state is well settled that it was perfectly competent to show this, whether the parties were jointly indicted or not. See the cases already cited in the foregoing opinion. Again, Judge Harvey, in the course of his argument, was recounting the evidence that one of the party with the defendant, as they came down Chestnut street that night, proposed that they "would go after the scab." To the statement "go after the scab," Mr. Bass objected. There was no force in the objection. McCarthy testified that the defendant said, as they came down Chestnut street—one of his party said—"We will go across and get that scab," or "We will go across there and try to get him."

8. It is now urged that the circuit court erred, in that it did not direct the jury to disregard the remarks of Judge Harvey with respect to the failure of witnesses to testify to certain propositions. This is based upon the following state of facts: Judge Harvey, in the course of his argument, said: "I care not whether the harm attempted to be done is by this man himself, or by the others who are with him. The effect is the same. You know, without an instruction from the court, that if you and I engaged in a common enterprise, and you succeeded in striking a man, and I did not, you are just as guilty as I; I just as guilty as you are. Each is an agent and confederate of the other, and each is held in the law, as you know they should be, for the acts of every one. Here is a case that seems to me calls for the punishment that should be made to fit the crime. Here we have testimony undenied, undisputed by no living or unliving witness—" Mr. Bass: "We object to that statement under the law." Judge Harvey, without stopping: "Evidence to the fact that three men are deliberately hired, and for so much money, they are base enough to take the \$6.50 and come here to the city of St. Louis, armed with such weapons as they see fit, for the declared purpose of knocking men off of the cab boxes and 'putting them in the hospital'—Can you conceive of any employment more dastardly than that?" After pursuing this course of argument at some length, Mr. Bass said: "I ask that the jury be directed not to regard the remarks of Judge Harvey with regard to the failure of witnesses to testify to certain propositions"—which the court denied. It is now insisted that the course of argument of Judge Harvey, in stating that the facts had not been denied, had reference to no one but the defendant. In the first place, the first objection, if it may be called so, was: "We object to this statement under the law." No reason whatever was assigned for the objection, but, conceding that counsel intended to

make this specific, that Judge Harvey's statement was a comment on defendant's failure to testify in his own behalf, still we think the statement of Judge Harvey cannot be reasonably construed as a reference to the defendant's failure to testify. A reading of the whole context shows that he was not discussing one specific piece of testimony, as was the case in *State v. Snyder*, 182 Mo. 523, 82 S. W. 12, but was discussing the general result of the trial, as the evidence had taken a wide range, including many facts and circumstances testified to by many witnesses, and argued that this evidence was undenied and undisputed, but another way of stating that which had been shown beyond contradiction; that the facts were, as he insisted they were. We think it is not fair to charge the counsel with having thus purposely and indirectly commented upon the failure of the defendant to testify; nor do we think it will do to give section 2638, Rev. St. 1899, such a construction that counsel for the state may not, in the course of an argument, if evidence of the state is uncontradicted, allude to it as undenied and undisputed. We think, moreover, that the first objection was entirely too indefinite. Judge Harvey had made a number of statements, and Mr. Bass simply stated: "We object to that statement under the law." We think it would have been difficult for the court to have pointed out the specific statement to which Mr. Bass alluded. As to the request for an instruction when Judge Harvey had concluded, along this line, directing the jury to disregard Judge Harvey's statement with regard to the failure of witnesses to testify, the court very properly refused it. To have done so would have wrought the very harm and injury of which the defendant now complains. Judge Harvey had not said that any witness had failed to testify, or that the defendant failed to testify; nor had he, as in the *Snyder Case*, stated that only two parties were present, one of whom was the defendant, and that the other party had testified, and his statement had not been denied. There the issue was narrowed down, and but one inference could have been drawn from the statement of the prosecuting attorney, that the defendant had not denied the statement of the other witnesses when he might have done so; whereas, in this case the assertion of the counsel for the state amounted to no more than an expression of his views as to the strength of the evidence in behalf of the state in a general way, and that it had not been rebutted, or there was nothing to the contrary. We do not think that the remark attributed to Judge Harvey was a violation of section 2638, and we would not be justified in reversing the cause on that ground alone.

We have thus patiently considered every assignment of error urged in behalf of the defendant by his counsel, and, neither singly nor collectively, are they sufficient to show any reversible error on the part of the cir-

cuit court. In our opinion the testimony was amply sufficient to support the verdict of the jury, and the defendant has been afforded a fair and impartial trial.

The judgment of the circuit court must be, and is, affirmed.

BURGESS, P. J., and FOX, J., concur.

BERRY COAL & COKE CO. v. CHICAGO. P. & ST. L. RY. CO.

(St. Louis Court of Appeals. Missouri. Jan. 2, 1906. Rehearing Denied Jan. 17, 1906.)

1. CARRIERS—CONNECTING CARRIERS—NECESSITY OF EVIDENCE.

A final carrier cannot be held liable for defaults of previous carriers in the performance of the contract of carriage, on the theory that it was a connecting carrier and handled the goods under the original contract of affreightment, in the absence of evidence in support of that theory.

[Ed. Note.—For cases in point, see vol. 9. Cent. Dig. Carriers, § 795.]

2. COMMERCE—INTERSTATE SHIPMENTS—APPLICABILITY OF STATE STATUTES.

Where property is received for transportation from one state to another, the shipment is an interstate one, and is not governed by state statutes.

[Ed. Note.—For cases in point, see vol. 10. Cent. Dig. Commerce, § 28.]

3. SHIPPING—GENERAL AVERAGE—GROUNDS OF CONTRIBUTION.

The owner of a ship cannot enforce contribution from the owners of the cargo to defray expenses incurred in rescuing the vessel from a peril encountered from bad seamanship, or from the unseaworthy character of the vessel, but is entitled to such contribution where the peril incurred was one solely incident to navigation, unmixed with negligence on the part of the owner or the crew.

[Ed. Note.—For cases in point, see vol. 44. Cent. Dig. Shipping, §§ 601-603.]

4. SAME—LIEN—ENFORCEMENT.

The shipowner's right to contribution from the owners of the cargo toward paying expenses incurred in saving the ship and cargo from destruction by perils incident to navigation constitutes a lien on the cargo, which may be enforced by requiring a deposit of money or an average bond from the respective owners of the cargo before their goods are delivered.

5. SAME—BONDS—REASONABLENESS.

A consignee of goods rescued from destruction by perils incident to navigation cannot be compelled to execute an average bond containing unreasonable conditions.

6. SAME—WAIVER OF OBJECTIONS.

A consignee who offered no objection to terms of a general average bond tendered him, and made no request to be permitted to make a deposit in lieu of giving bond, and protested against executing the bond solely on the ground that it could not lawfully be demanded, because the expense to which he was asked to contribute was due to negligence and was not subject to general average, and who soon afterwards offered to sign the bond, waived any possible objections to the terms of the bond.

7. CARRIERS—TRANSPORTATION CHARGES—LIEN.

It is only for charges connected with the transportation of property and essential to its conveyance from the point of shipment to destination that the carrier may assert a lien.

8. SAME—ENFORCEMENT BY FINAL CARRIER.

Where a shipment over the lines of several carriers is not made under a through bill of lading, and the different carriers concerned in the shipment are not shown to constitute a connecting line by virtue of any traffic arrangement or association, the final carrier may pay apparently proper transportation charges demanded by a previous carrier, or hold the property according to any lawful directions given for the enforcement of a lien for such charges, unless it has notice or knowledge that in the particular instance the charge is unlawful; and, while it must act in good faith towards the consignee, it is not bound to investigate at its own trouble and expense the merits of an apparently just claim preferred by a preceding carrier.

9. SHIPPING—GENERAL AVERAGE—EXECUTION OF BOND—EFFECT.

The execution of a general average bond by the owner of part of the cargo of a wrecked vessel does not preclude such owner from setting up, in defense of liability on the bond, that the wreck occurred from the negligence of the owner of the vessel, and is not the subject of general average.

10. SAME—DELIVERY TO CONSIGNEE—CONDITIONS—EXACTION OF AVERAGE BOND.

Where a shipment over the lines of various carriers is not made under a through bill of lading and the different carriers concerned in the shipment are not shown to constitute a connecting line by virtue of any traffic arrangement or association, the final carrier may demand of the consignee, as a condition of delivering the goods, the execution of a general average bond, which on its face is reasonable and proper, required by a previous carrier, without regard to the actual merits of the claim of the previous carrier to general average.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by the Berry Coal & Coke Company against the Chicago, Peoria & St. Louis Railway Company. There was judgment for plaintiff, and defendant appeals. Reversed.

Eleneious Smith and Douglas Robert, for appellant. R. L. McLaren and Wm. K. Koerner, for respondent.

GOODE, J. Both the parties to this action are incorporated companies. Plaintiff, under the name of Berry Coal & Coke Company, is the successor of the Berry-Horn Coal Company, and as such owns all the rights and interests of its predecessor. This action is, in form, trover, and was brought to recover damages alleged to have been suffered by the conversion of 1,360 sacks of cement, known as "Alpha Portland Cement," an article manufactured at Alpha, New Jersey. The petition states that on May 11, 1903, the Alpha-Portland Cement Company consigned to the plaintiff's predecessor, the Berry-Horn Coal Company, for delivery at East St. Louis, Ill., 1,360 sacks of cement, to be carried by lake and rail, in care of the Lehigh Valley Railroad Company, the Atchison, Topeka & Santa Fé Railroad Company, and the Chicago, Peoria & St. Louis Railroad Company, the defendant. That the consignor delivered the cement to the Lehigh Valley Railroad Company at Alpha, N. J. The petition further states that about June 1, 1903, this de-

fendant, the Chicago, Peoria & St. Louis Railroad Company, received said cement and undertook, pursuant to said consignment and as the last carrier in the line of transit, to deliver the cement to the Berry-Horn Coal Company at East St. Louis, Ill.; that, after the expiration of a reasonable time for arrival at destination, plaintiff demanded the cement of the defendant, and defendant refused and still refuses to deliver it. The petition charges that the value of the cement at East St. Louis at the time it should have been delivered was \$850, and prays damages to that amount. The answer, besides a general denial, contains these averments: The Lehigh Valley Railroad Company delivered the cement mentioned in the petition at Buffalo, N. Y., on board the steamer Seneca, a vessel owned by the Lehigh Valley Transportation Company, for water transportation to Chicago, Ill. On May 18, 1903, the steamer went aground in the St. Clair river with the cement on board and constituting part of the cargo; it became necessary to lighter the cargo and use tugs to release the steamer, and to incur expense in so doing; the owners and master of the steamer incurred such expense, and the steamer and cargo were thereby saved; the Lehigh Valley Railroad Company received the cement from the steamer Seneca at Chicago, May 22, 1903; said company being instructed by the Lehigh Valley Transportation Company, the owners of the steamer, not to deliver the cement to the consignee at East St. Louis, Ill., until said consignee had signed a general average bond, agreeing to pay its part of the expense of rescuing the vessel; said bond was delivered to said Lehigh Valley Railroad Company at the time it received the shipment; the Lehigh Valley Railroad Company delivered the shipment to the Atchison, Topeka & Santa Fé Railroad Company at Chicago with a like instruction and accompanied by the average bond; the railroad company last named delivered the cement to this defendant with the same instruction and the same bond; the cement arrived at East St. Louis, May 29th, loaded in two cars, and thereupon defendant presented plaintiff, as successor of the consignee, the Berry-Horn Coal Company, the average bond and requested plaintiff to sign it, tendering plaintiff the sacks of cement on condition that it signed the bond. Plaintiff refused to sign, and defendant continued to hold the cement ready for delivery whenever the bond was signed. Afterwards, and while in defendant's custody, the cement was destroyed by an overflow of the Mississippi river. The averments of the destruction of the property by the flood are not material to the questions before us, and need not be recited, as there is a concession that the destruction occurred through the act of God. The answer further states that, after all, but a small part of the cement had been destroyed. Plaintiff agreed to sign the average bond, provided

the cement had not been injured by the flood. The reply was a general denial. For the plaintiff there was testimony going to show the purchase of the cement, its cost and value. This was practically all the evidence for the plaintiff. At the conclusion of it the defendant requested the court to declare that under the pleadings and evidence it was not entitled to recover, but the court refused the request.

Certain facts were agreed to by the parties, the substance of which is as follows: The cement was received May 18, 1903, on board the steamer Seneca, at Buffalo, for transportation by water to Chicago, Ill. The steamer sailed from Buffalo on said date at 12:05 a. m., bound for its port of destination. The voyage was prosperous until May 19th at 2 o'clock a. m., at which time the steamer "was running on the range at the head of the southeast bend of the St. Clair river." While at that point of her voyage, the steamer's steering gear refused to work on the starboard side. The auxiliary steering gear was put into force, but before the vessel could be stopped, she went aground at Squirrel Island Point. "The vessel was found to be out 3 feet 6 inches forward and 1 foot aft." The master immediately sent to Detroit for lighters and tugs, which arrived the next day, and the vessel was lightered of about 600 tons and thereby released so she could proceed on her voyage at 5:20 a. m. She moved up the St. Clair river, came to anchor at 6:15 a. m. and immediately started to reload the cargo, which was put aboard by 7:15 p. m. on that day. It was found, on examination of the hull and water bottom, that a number of the frames were broken and the shell plates corrugated. The owners and masters of the vessel became liable to the owners of the tug and lighters for the services of the latter vessels in aiding the Seneca, and also became liable and promised to pay for services rendered in repairing the vessel; all of which liabilities the owners of the Seneca subsequently paid. By the use of the tug and lighters the Seneca and all its cargo were saved, and, but for the use of them, both would have been lost. The steamer arrived at Chicago May 22, 1903, and thereupon its owner, the Lehigh Valley Transportation Company, delivered the cement to the Atchison, Topeka & Santa Fé Railroad Company at Chicago, and at the same time delivered to said railroad company the two waybills accompanying the shipment, with this direction written on each: "680 bags of cement, under protest; property not to be delivered until attached average bond is signed by the consignee. Return bond to E. J. Henry, Agt. L. V. T. Co." The average bond was attached to the waybills. The Atchison, Topeka & Santa Fé Railroad Company carried the cement to Pekin and there delivered it to the Chicago, Peoria & St. Louis Railroad Company, at the same time delivering said average bond and the

waybills containing the instruction that the cement was not to be delivered until the average bond was signed. On May 23, 1903, John A. Whiteside, master, Reynolds Hill, engineer, and S. P. Campbell, mate, executed a protest before a notary public in the county of Cook, state of Illinois, stating the charges for the cement to be \$68.40 on each 680 sacks, or \$136.80 on the whole shipment of 1,360 sacks, and that the property was not to be delivered until the average bond was signed by the consignee. The protest contained the details in regard to the going aground of the Seneca and her rescue by lightering the cargo, as we have stated them. On the waybills was a notation of the advances on the cement to the amount of \$136.80, to be collected from the consignee before delivery of the property. It was further agreed that the average bond and protest and the direction on the waybills regarding the condition and delivery of the property were made by the Lehigh Valley Transportation Company, the owner of the steamer Seneca.

The average bond was as follows: "Whereas, it being represented that the steamer Seneca, whereof J. A. Whiteside is, or lately was master, having on board a cargo of general merchandise in which we are interested as owners, shippers or consignees, sailed from port of Buffalo on or about the eighteenth day of May, 1903, bound for Milwaukee and Chicago, and in the course of her said voyage, the steamer grounded at southeast bend of St. Clair river, May 19th, 1903, and it became necessary to lighter cargo and use tugs to release the steamer, and certain other expenses were entered into, and that thereby certain losses and expenses were incurred, and other further losses and expenses, consequent thereon, may yet be incurred, and that such losses and expenses may be a charge by way of general average or otherwise, upon the vessel, her freight and cargo, or either of them: Now, therefore, we, the subscribers, owners, shippers or consignees of such of the cargo of said vessel as we have severally described and set opposite our respective signatures hereto, in consideration of the premises and of the delivery to us respectively of such cargo, or so much thereof as may be saved, without retention pending an adjustment of said losses and expenses, do hereby, for ourselves, our respective executors and administrators, severally and respectively but not jointly, nor the one for the other, covenant and agree to and with the Lehigh Valley Transportation Co., owners or agents of the owners of the said vessel and with one another, that the losses and expenses aforesaid, or so much thereof, as upon an adjustment of the same to be stated by Mather & Co., Adjusters of Averages, according to the laws and usages of this port in similar cases, may be shown to be a charge upon the said cargo, or upon any of the cargo of said vessel which may be received by us, shall be paid

by us, respectively, according to our several and respective parts or shares thereof, unto the said Lehigh Valley Transportation Company, when such adjustment is completed and due notice given thereof. Provided, however, that if any of said cargo has been shipped under bills of lading containing an agreement that the York Antwerp Rules shall be the rules of adjustment, such agreement shall not be affected hereby, but in all other respects this bond shall remain in full force. And we further promise and agree to furnish said adjusters, upon their request, all information which they may deem necessary to a correct adjustment of this case. This bond may be executed in several parts of like tenor and date, the whole of which are to constitute but one bond, with the same effect as if each of said parts were severally signed by us. In witness whereof, we have to these presents respectively set our hands, in the city of * * * this * * * day of * * * one thousand, nine hundred and * * *."

The above is, in substance, all the evidence adduced in the case. The waybills were attached to the stipulation regarding the facts, but their contents, further than stated, are not important. After refusing a declaration of law for a finding in favor of the defendant, the court gave a declaration for the plaintiff which imported that plaintiff was entitled to recover unless the grounding of the Seneca was not due to negligence on the part of her owners or crew, and that if she grounded because her steering gear, for some unexplained reason, failed to work properly, plaintiff was entitled to recover. The court, as trier of the fact, entered judgment in favor of the plaintiff for \$951.15, to which, and to rulings on requests for declarations, the defendant excepted at the time. The defendant had tendered \$103.43 to plaintiff as the proceeds received by defendant for that portion of the cement not ruined by the flood. An appeal from the judgment was allowed to this court.

No bill of lading or contract of affreightment was put in evidence, nor was there any proof regarding that contract. The answer, however, says the cement was delivered to the steamer Seneca by the Lehigh Valley Railroad Company, and the agreed facts show it passed from the Seneca, or its owner, the Lehigh Valley Transportation Company, into the custody of the Atchison, Topeka & Santa Fé Railroad Company for further transportation, and then into the custody of the defendant. But it does not appear whether the reception of the property by the several carriers was under separate and distinct contracts between them and the Alpha Portland Cement Company, as shipper, or under the original bill of lading between the consignor and the initial carrier, the Lehigh Valley Railroad Company. Neither is it shown that the different carriers had any traffic arrangement or association of interests which would

warrant the holding that they received the cement, not as independent, but as connecting carriers. The waybills are before us, but a waybill is a very different document, in legal effect, from a bill of lading. A waybill goes with the shipment and shows the routing, freight charges, and such matters, whereas a bill of lading represents the property itself in many ways, contains the contract of affreightment, and largely fixes the respective rights of the carrier, the shipper, and the consignee. We grant that a waybill, though it is not the instrument which embodies the affreightment contract, might contain notations or statements which would tend to show the shipment was a through one and uphold the conclusion, as against the carrier which made the notations, that the different companies over whose lines the property had passed transported it as connecting carriers. But the only reference to a connecting line on the waybills which accompanied the cement refers to no line but the Lehigh Valley Railroad Company. There is not a minute or notation of any kind to show the Lehigh Valley Transportation Company was a connecting carrier with the defendant and the other railway lines over which the property was conveyed. Beyond the reference on the waybill to the Lehigh Valley Railroad Company, we know nothing of the relation to each other of the several companies which handled the cement, either in their general business or in respect of the particular shipment. For aught that is shown, the company which owned the Seneca may have acted independently in transporting the shipment and pursuant to a separate contract between it and the consignor. To hold a final carrier liable for defaults by previous carriers in the performance of the contract of carriage, on the theory that the final carrier was a connecting one and handled the property under the original contract of affreightment, some evidence to that effect must be adduced. *Wyman v. Railroad*, 4 Mo. App. 35; *Nanson v. Jacob*, 12 Mo. App. 125; *Id.*, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; *Shewalter v. Railroad*, 84 Mo. App. 589; *White Com. Co. v. Railroad*, 87 Mo. App. 380. This was an interstate shipment and not governed by the Missouri statutes; the property having been received by the first carrier outside of this state. The defendant received the property from an intermediate carrier, with a positive direction not to deliver it to the consignee until the latter executed the general average bond in favor of another intermediate carrier, the Lehigh Valley Transportation Company.

The position taken by the plaintiff is that it was not bound to sign the bond, because the stranding of the steamer Seneca in the St. Clair river was due, not to a peril of navigation, but to the negligence of the owners or the crew of the vessel. The cause of the grounding of the steamer was the failure of its steering gear to work. The

is that this failure was a circumstance from which the court, as trier of the fact, was justified in drawing the inference that the accident to the vessel was due to negligence for all the consequences of which the owners of the vessel were responsible; not to a maritime peril which entitled those owners to general average from the owners of the cargo toward defraying expenses incurred in rescuing the vessel and making such repairs on it as are subject to general average. A great deal is said in the briefs on the question of whether, as matter of law, such an accident is regarded as one resulting from a peril of navigation, or may be found as a fact to have been due to negligence. We deem it unnecessary to go into that question, because, in our opinion, the right of the defendant to exact the average bond of the plaintiff before delivering the cement does not depend on it. It is the law that the owner of a vessel cannot enforce contribution in the nature of general average from the owners of the cargo to defray expenses incurred in rescuing the vessel from a peril encountered, not as incident to navigation, but from bad seamanship, or from the vessel being unseaworthy. *Lowndes, Gen. Av. (5th Ed.)* p. 28 et seq., § 4; *Conrad v. De Montcourt*, 138 Mo. 311, 39 S. W. 805. If the Seneca had carried the cement to destination, and the dispute over the average bond had arisen between its owners and the plaintiff, the question of whether the ship and cargo were endangered by a maritime peril or by defective construction or unskillful handling might be decisive of the owner's right to exact an average bond. We do not say it would be, even then; for the point is irrelevant under the facts, and we need not decide it. Now, there can be no doubt that the owner or master of a ship is entitled to contribution from the owners of the cargo toward paying expenses incurred in saving the ship and cargo from destruction by perils solely incident to navigation and unmixd with negligence on the part of the owner or the crew. *Lowndes, Gen. Av. p. 19, § 1*. For such contribution the shipowner has a lien on the cargo. *Id.*, p. 327 et seq., § 77. It follows that if the Seneca fell into peril as a natural incident of her voyage, her owner was entitled to general average from the various owners of the cargo toward making up the expense necessarily incurred in saving her and the cargo, and had a lien on each portion of the cargo for its proportion of the expense.

The methods of enforcing this lien are requiring a deposit of money or an average bond from the respective owners of the cargo, before their goods are delivered. The usual mode nowadays is by taking an average bond. *Lowndes, c. 9*. The custom of requiring such a bond developed from the fact that when a rescued vessel arrives at destination where the cargo ought to be delivered, the amount of contribution due from the different owners of the cargo cannot be as-

certaind at once, so that payment may be made before delivery; the amount due from each must be computed; and in order to retain to the shipowner the benefit of his lien pending the computation and to allow the consignees to get their goods at once, an average bond is taken from the consignees, by which they agree to pay their several portions of the expense, when ascertained, according to the rules governing general average. Sometimes a consignee may desire to make a deposit sufficiently large to cover his portion in any event, and this he may do. The consignee is further protected in that he cannot be compelled to execute an average bond containing unreasonable terms. *Conrad v. De Montcourt*, supra. In the present case the plaintiff offered no objection to the terms of the bond, nor did it ask to make a deposit in lieu of giving bond. Neither does it now prefer any objection to the bond, further than that it could not lawfully be demanded for the reason that the expense to which plaintiff was asked to contribute was due to the negligence of the crew or owner of the steamer Seneca, and was not subject to general average. Indeed, within a fortnight after plaintiff had refused its signature to the bond, it wrote the defendant, offering to sign it, meanwhile, the cement had not been injured by the high waters. This demonstrates that plaintiff waived any objections to the terms of the instrument. Therefore it cannot maintain the position that it rightly refused to sign at first and the defendant wrongly refused to deliver the property until it signed, unless the law excused it from signing because the wreck of the Seneca was due to negligence and the expense thereby entailed fell exclusively on the owner of the vessel.

If the defendant was not bound to investigate the causes of the disaster to the Seneca, in order to ascertain whether it might withhold the cement until the bond was executed, we need inquire no further nor look into the question of the cause of the wreck. The defendant, as final carrier, knew nothing of the circumstances which gave rise to the demand by the Lehigh Valley Transportation Company for an average bond. If defendant had known as a fact, or had had good reason to believe the wreck was due to the negligence of the crew in managing the vessel, or of the owner of the vessel in sending it on a voyage when unseaworthy, possibly defendant would have been bound to take notice that plaintiff could not be called on for general average contribution, and would have been guilty of conversion in withholding the cement from plaintiff until the bond was signed. *Steamboat Virginia v. Kraft*, 25 Mo. 76, 81; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *White v. Vann*, 6 Humph. (Tenn.) 70, 73, 44 Am. Dec. 204. Defendant neither knew nor had reason to believe the disaster to the steamer was due to any cause which would invalidate the

claim for contribution from plaintiff as owner of a portion of the cargo, but had every reason to believe the contrary. The bond contained recitals adapted to show the casualty was due to a natural maritime peril. These questions occur: When does the illegality of a lien claimed by a prior carrier against a shipment entitle the consignee to demand the shipment from the final carrier without discharging the lien? To what extent, in ordinary circumstances, is the final carrier bound, at his peril, to ascertain the legality of the claim? What is the law concerning those matters in the special instance of a claim for general average? Those inquiries presuppose that the shipment was not shown to have been transported under a through bill of lading and that the different carriers were not shown to constitute one connecting line by virtue of some traffic arrangement or association. This assumption is made, not because we hold it to be an essential element of the decision, but because the facts in the record justify it, and we wish our judgment to be no broader than the case requires.

We answer in the first place that the charge for which the lien is asserted must be one connected with the transportation of the property and essential to its conveyance from the point of shipment to destination, for it is only for such charges that a carrier's lien exists. *Steamboat Virginia v. Kraft*, 25 Mo. 76. If the charge of the previous carrier possesses this character, then the final carrier is justified in paying it and holding the property according to any lawful directions given for the enforcement of the lien, unless the final carrier has notice or knowledge that, in the particular instance, the charge is unlawful, either as being extortionate or for some other reason. We answer further that the final carrier must act in good faith toward the consignee; and it is for this reason that if he has knowledge or notice of the illegality of the charge by an intermediate carrier, he will not be sustained in advancing it or enforcing the lien. *Armstrong v. Railroad*, 62 Mo. App. 639. It is not incumbent on the final carrier to investigate, at its own trouble and expense, the merits of an apparently just claim preferred by a preceding carrier. We apprehend that this would be true whether the lien was asserted by virtue of the law of the land, or of the sea, as in the case at bar, or of business usage, or of a habit of business between the parties. In the *Armstrong Case*, supra, the plaintiff, a wheat buyer, had entered into an agreement with an elevator company to clean, mix, and load his wheat into cars for a stipulated charge. Under the arrangement the defendant railroad company would stop plaintiff's cars of wheat at the elevator, and, when they were cleaned, the elevator company would return them to the

railroad company. A great many cars had thus been handled; the railroad company paying the elevator company its charges for cleaning the wheat. In the course of the business, one car received from the elevator company by the railroad company was found, on reaching destination, not to have been cleaned by the elevator company. Thereupon the plaintiff refused to reimburse the railroad company the charge paid by it for the cleaning. After stating it to be a carrier's duty to see that previous charges on property in transit are reasonable before paying them, the opinion declared the railroad company, as a common carrier, was under no duty to ascertain by inspection, before receiving the cars of wheat from the elevator company, whether the wheat had been cleaned, but in the absence of knowledge to the contrary, had the right to presume it had been.

A statute of this state gave a lien on a steamboat to a person furnishing supplies or stores under contract with a master or owner of the boat. Rev. St. 1845, p. 98. In defense of an action to enforce such a lien, it was contended that the party who contracted for the supplies was not the master or owner of the boat; but the Supreme Court held that the person furnishing them was not bound to investigate that matter on pain of forfeiting his lien. *Steamboat Lehigh v. Knox*, 12 Mo. 508. The decision is germane to the point in hand.

In *White v. Vann*, 6 Humph. (Tenn.) 70, 44 Am. Dec. 294, Vann had received from persons operating a railroad as lessees, property belonging to White, to be carried from the terminus of the railroad to Knoxville. Vann paid said lessees certain charges claimed by them against the goods for freight transportation. There was proof of a custom on the part of interstate common carriers in the United States to advance, for the benefit of the owners of the goods in transit, previous charges for freight and storage. But it appeared White had a contract with the lessees of the railroad, according to which said lessees had already been paid for transportation of said property. For this reason White asserted the lessees were entitled to no lien, and that Vann was not justified in advancing the freight. At the trial the presiding judge charged that Vann was entitled to be reimbursed for advances made by him for White's benefit in payment of lawful charges on his goods, and that the special contract with the lessees did not vary his liability to Vann, unless the latter was informed, or had reasonable ground to believe, the special contract existed. It was held, on review of the case by the Supreme Court of Tennessee, that this charge was right, as Vann had a right to rely on the custom of the country in advancing the charges.

In *Bowman v. Hilton*, 11 Ohio, 303, the action was replevin. Bowman shipped a lot

of goods from Cleveland, consigned to himself, care of Forsyth & Hull, Maumee City, Ohio. Forsyth & Hull had relinquished business before the goods reached Maumee; wherefore they were deposited with another firm at that place, and by said firm sent to a firm at Providence, and thence shipped by a boat, of which Hilton, the defendant, was master, to Brunersburg. Hilton paid the charges from Cleveland to Brunersburg—that is, for transportation over the entire route. When the goods were taken from Hilton's possession, they were found to be damaged about one-third their value. Hilton claimed the right to retain them for the advances made by him. The trial court instructed, in effect, that Hilton was liable for such damage as occurred by his own negligence or that of some one with whom he was in partnership, but not for damage done by anybody else while transporting the goods. The court declared that from the general course of business and the directions on the goods, Hilton had the right to receive them from his immediate consignor and presume the owner had authorized the consignment; and to entitle him to a lien for a commission and advances, the law imposed on him no duty beyond what a prudent man, under like circumstances, would have done in the management of his own business. The judgment of the lower court was affirmed.

In *Bissel v. Price*, 16 Ill. 408, Price, the plaintiff below, sued to recover advances made on certain merchandise received of J. H. Harmon & Co., who were forwarding merchants at Peru, and for freight due for transporting the merchandise from Peru to Peoria. When the goods were opened at the defendant's store, they were found to be damaged, whereupon the defendant refused to pay Price his freight and the advances he had made to Harmon & Co. for antecedent charges. It appears the damage was done before the goods came into Price's hands; and it was held, on appeal, that he was not bound to examine the goods before receiving them in order to ascertain their condition, because such a course of business would be impracticable. Citing *Angel, Carriers*, § 231; *Bates v. Todd*, 1 Moo. & Rob. 186, and *Warden v. Greer*, 6 Watts (Pa.) 424. Speaking of the rule by which a succeeding carrier can pay the charges of a previous one, the opinion says the authority to make such payments extends no further than is reasonably required by the necessities of commerce; that in making such advances for the consignee, the carrier is bound to act in good faith and with ordinary prudence in ascertaining the goods to be in good condition and the previous charges reasonable; that when he has done this, he has done all the law requires of him, and the owner is bound to recognize and sanction his action in making the advances.

In *Wabash R. R. v. Pearce*, 192 U. S. 179, 24 Sup. Ct. 231, 48 L. Ed. 397, it appeared that the plaintiff had shipped some boxes of curios from Japan to St. Louis in bond; the boxes not to be opened until they reached St. Louis, their destination. The purpose was to protect the articles from frontier custom house inspection. A bill of lading accompanied the shipment, by which the different carriers were notified of the terms of the contract requiring the goods to be carried to St. Louis, the port of destination, before they were opened. An intermediate carrier, the Canadian Pacific Railroad Company, for its own convenience, diverted the shipment to St. Paul, where the custom house officers examined the boxes and assessed the duty thereon at \$264.81, which sum said railroad company paid in order to regain possession of the goods. The goods were afterwards delivered to another railroad company and by the latter to the Wabash Railroad Company, which carried them to St. Louis. Under its traffic arrangement the Wabash Company was responsible for the previous charges on the goods. It paid the charges and tendered the goods to the consignee at St. Louis on condition of the repayment of its advances, including the federal imposts. If the goods had been transported to St. Louis in bond, as they should have been, they would have been opened and examined there and retained by the custom house officers until the duty was paid. But, as it was, on their arrival they were found to be broken and damaged, wherefore the owner refused to pay the Wabash Company the charges advanced. Instead, he replevied the property. That cause was first decided by this court in favor of Pearce, on the ground that the shipment was unlawfully diverted by the Canadian Pacific Company to St. Paul, instead of being carried in bond to St. Louis as the bill of lading required, and therefore, the prepayment of duties at St. Paul was no necessary incident of the carriage; that, moreover, as each carrier was apprised of the contract by the bill of lading, and the goods had been damaged by a violation of the contract, every carrier into whose hands they came had notice of the breach of the contract committed in diverting the goods from their bonded destination in St. Louis to St. Paul, where they were subjected to Federal inspection; that, hence, the Canadian Pacific Railroad Company was not justified in paying the duty at St. Paul, or the Wabash Company in holding the goods until the owner repaid those duties. After settling that the case involved a federal question and that import duties on goods in transit might properly be paid by a carrier, the Supreme Court of the United States held the Wabash Company was justified in paying the previous charges, including the duty, and that if Pearce had been wronged by the change of the bonded destination by the

Canadian Pacific Company, he had a remedy against said company, but could not refuse to pay the Wabash Company what it had advanced for him. It is true, Pearce would have had to pay the duty in St. Louis, and that the payment by the Wabash Company inured to his benefit; but it is true, too, that the contract had been breached in its vital feature by changing the bonded destination of the goods, and that, if it had not been breached, there would have been no duty paid in St. Paul by the Canadian Pacific Company, and hence no lien for the duty would have existed in favor of a subsequent carrier. The goods would simply have gone, as desired, to St. Louis, and Pearce would have paid the duty there himself. But the essence of the decision, so far as it bears on the present controversy, is that, though the charge for import duties arose from the tort of an intermediate carrier, the final carrier who had paid the charge in good faith and without knowledge of the facts out of which it arose was entitled to retain the goods for reimbursement. This was equivalent to holding that a final carrier is not bound to investigate, at his own risk, the origin of a lien asserted against property in transit by a preceding carrier.

Accepting this as the law when the previous charges are for freight or other common services we come to the ultimate question of whether a good reason exists for modifying the rule when the lien asserted is one of general average. Now, instead of there being any reason for modifying the rule in a case of the latter kind, there is this additional reason for upholding it, at least in the present case: The execution of a general average bond by the owner of part of the cargo of a vessel does not preclude such owner from setting up, in defense of liability on the bond, that the wreck occurred from the negligence of the owner of the vessel and is not the subject of general average. This was directly held by the Supreme Court of Missouri in a carefully considered judgment by an accurate jurist. See opinion by Barclay, J., in *Conrad v. De Montcourt*, 138 Mo. 311, 39 S. W. 805. Perhaps, in some particulars, the execution of such a bond might compromise the rights of the owner of the cargo; but it does not in any way impair his right to resist payment of contribution on the ground that the expense to which he was asked to contribute occurred from the unseaworthiness of the vessel or the crew's lack of skill, or any other cause for which the law casts the entire loss on the owner of the vessel. Such a bond is intended as a temporary expedient, a *modus vivendi*, and, as said before, is resorted to in order that the property may be delivered promptly to the consignee without depriving the shipowner of the benefit of his lien for general average or the consignee of his right to show the loss was not subject to general average. This being true, the

plaintiff would have been in no way prejudiced by signing the bond; hence it would be unreasonable to allow it to throw on the defendant the responsibility of saying whether negligence caused the shipwreck and whether the plaintiff could be compelled to contribute to the consequent expense. On its face the demand for the execution of the bond was just; for the right to exact a general average bond under such circumstances is given by law, and the terms of the bond presented for plaintiff's signature were reasonable, or, at least, not questioned. Those terms did not attempt to commit plaintiff by an admission that the accident to the *Seneca* was due to a peril of navigation. The recital of the circumstances of the wreck purports only to be as "represented." Plaintiff refused to sign because the disaster was not due to a peril of the sea; but this matter the defendant was not bound to investigate. It had the right to demand a bond before delivering the cement, and leave the question of the cause of the disaster to be settled between the plaintiff and the owner of the vessel. The result is that the plaintiff wrongly refused to execute the bond, and cannot now recover for the subsequent loss of the cement by an act of God while in the defendant's custody.

We have been cited by respondent to certain cases in which carriers were denied a lien for transportation charges as against the owners of the freight, when the goods had been received for carriage, not from the owners or persons acting by authority, but from a tortfeasor who delivered the property for shipment contrary to the will and rights of the owners. *Fitch v. Newberry*, 1 Doug. (Mich.) 11, 40 Am. Dec. 33; *Robinson v. Baker*, 5 Cush. (Mass.) 137, 51 Am. Dec. 54; *Stevens v. R. R. Corp.*, 8 Gray (Mass.) 262; *Gilson v. Gwinn*, 107 Mass. 126, 9 Am. Rep. 13; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541. In our opinion the present controversy does not present the proposition determined in those adjudications.

The judgment is reversed, and the cause remanded, to be disposed of in accordance with this opinion. All concur.

PATCHEN v. DURRETT.

(St. Louis Court of Appeals. Missouri. Jan. 18, 1906. Rehearing Denied Jan. 30, 1906.)

1. JUSTICES OF THE PEACE—AGISTER'S LIEN—ENFORCEMENT—COMPLAINT.

The right to an agister's lien, conferred by Rev. St. 1899, c. 47, art. 2, is of statutory creation, enforceable by a summary remedy; and hence a complaint before a justice of the peace to enforce the same must state all the facts requisite to give the justice jurisdiction of the cause.

2. SAME—AMENDMENT—APPEAL.

Rev. St. 1899, c. 47, art. 2, conferring an agister's lien, contains no inhibition against allowing amendments in the circuit court on ap-

peal from a justice to show the existence of jurisdictional facts; and section 4236 declares that all proceedings under the article, not otherwise specially provided, shall be governed by the general laws concerning replevin. *Held* that, where a complaint to enforce an agister's lien before a justice failed to contain jurisdictional facts, such facts might be shown by an amendment after appeal to the circuit court under section 4079, providing for amendments on appeal from judgments of justices to supply defects necessary to promote substantial justice.

Appeal from Circuit Court, Lewis County; E. R. McKee, Judge.

Action by Daniel Patchen against Jacob W. Durrett. From a judgment in favor of plaintiff on appeal from a justice's judgment for plaintiff, defendant appeals. Affirmed.

R. J. McNally, for appellant. N. W. Simpson, for respondent.

Opinion.

GOODE, J. This action was instituted before a justice of the peace for the purpose of enforcing the agister's lien given by the statutes. Rev. St. 1899, c. 47, art. 2. The complaint contained no averment to show that the plaintiff, Patchen, resided in the township wherein the action was begun; that is to say, in La Belle township. Judgment was rendered by default before the justice of the peace in favor of the plaintiff, and the cause was appealed to the circuit court. The defendant appeared in the latter court, and filed a motion to dismiss the case for the reason that the court had no jurisdiction of it, as the justice of the peace had no jurisdiction in the first instance. Plaintiff was permitted to amend his complaint by inserting an averment that he was a resident of La Belle township; and, after this amendment was made, the court overruled the motion to dismiss. A jury trial followed, which resulted in a verdict for the plaintiff, and judgment accordingly. The defendant appealed to this court.

It is assigned for error that the plaintiff was wrongly permitted to amend his original statement. The position taken by the defendant is that the proceeding was begun before a court of inferior jurisdiction, and seeks to enforce a special statutory right, unknown to the common law, by a summary method different from the ordinary procedure; hence, that unless every jurisdictional fact was stated in the original complaint, the justice had no jurisdiction, and, as the jurisdiction of the circuit court on appeal had to be derived from that of the magistrate, no amendment of the complaint was permissible, but the proceeding should have been dismissed on defendant's motion. The proposition that the facts requisite to give the justice jurisdiction of the cause, should have been stated, is sound, as the agister's lien is of statutory creation and the remedy to enforce it summary. *Schultheis v. Nan*, 4 Mo. App. 592; *Burns v. Lidwell*, 6 Mo. App. 192; *Stone v. Kelley*, 59 Mo. App. 214. When

courts of limited and inferior jurisdiction are exercising special statutory powers in a mode of procedure unknown to the common law, all jurisdictional facts must affirmatively appear on the face of the papers. *State v. Metzger*, 26 Mo. 65; *Haggard v. Railway Co.*, 63 Mo. 302. And the same rule has often been applied to superior courts when the right at issue was purely statutory and a new method of enforcing it was provided by the statute. *Werz v. Werz*, 11 Mo. App. 26-32; *Galpin v. Page*, 18 Wall. 350, 371, 21 L. Ed. 959; *Pulaski County v. Stuart*, 28 Grat. 879. This rule governs actions before justices under our statutes giving double damages against railway companies for killing stock. *Haggard v. Railway Co.*, supra. Yet in such an action an amendment of the complaint is permitted in the circuit court, to show the animal was killed in the township wherein the action was brought or an adjoining township, so as to complete the statement of the facts essential to jurisdiction. *Mitchell v. Ry. Co.*, 82 Mo. 106. And the like rule prevails in attachments for rent under the landlord and tenant act. *Daniel v. Atkins*, 66 Mo. App. 342. In such cases, as in others wherein it is vital to jurisdiction that certain facts be shown, amendments to show the facts are allowed by virtue of the statute providing for amendments on appeals from judgments of justices of the peace, to supply defects and omissions so as to promote substantial justice. Rev. St. 1899, § 4079.

An exception to this liberal rule has been made in forcible entry and unlawful detainer proceedings, on the ground that the chapter of the statute providing for those remedies furnishes a scheme of procedure complete in itself, and containing no authority for jurisdictional amendments. *Johnson v. Fischer*, 56 Mo. App. 552. The counsel for the present defendant strives to liken this action on an agister's lien to one of forcible entry, as both are of a summary character, and thereby make the decision last cited a controlling precedent. This argument, and the foregoing general considerations discussed by counsel, lose their force because of a certain provision of our statutes relating to agister's liens. The last section of the very article of the statutes on which this action is based provides that all proceedings under the article, when it is not otherwise specifically provided, shall be governed by the general laws of the state concerning actions of replevin. Rev. St. 1899, art. 2, § 4236. The article contains no inhibition against allowing amendments in the circuit court, in order to show the existence of facts on which depended the jurisdiction of the justice before whom a proceeding was instituted. Now, in actions of replevin, such amendments are allowable in the circuit court on appeal from a magistrate's judgment. *Dowdy v. Wamble*, 110 Mo. 280, 19 S. W. 489; *United States Fidel-*

ity & Guaranty Co. v. Foskett-Kessner Feed Co., 100 Mo. App. 724, 73 S. W. 364. Therefore we have no doubt that the circuit court was right in ruling that the plaintiff might amend his complaint.

The judgment is affirmed.

BLAND, P. J., and NORTONI, J., concur.

CARSON v. DEWAR.

(St. Louis Court of Appeals. Missouri. Jan. 16, 1906. Rehearing Denied Jan. 30, 1906.)

1. CHATTEL MORTGAGES—EXECUTION—EVIDENCE—QUESTION FOR JURY.

In an action by a mortgagee to recover mortgaged chattels, evidence held to authorize submission to the jury of the questions whether the owner of the property authorized the execution by another of a bill of sale of the property to himself, and whether he also authorized the execution by such person of the mortgage and obtained a portion of the proceeds thereof.

2. APPEAL—RECORD—QUESTIONS REVIEWABLE.

Where a chattel mortgage was not preserved in the bill of exceptions, in an action by the mortgagee to recover the property, his right to recover the property before default could not be reviewed.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by C. L. Carson against Thomas C. Dewar. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry B. Davis, for appellant. L. P. Crigler, for respondent.

GOODE, J. The record in this case is imperfect in that evidence is omitted which is material to some of the questions raised on the appeal. The action is replevin to recover the possession of a desk and other articles of office furniture. Plaintiff obtained judgment. His claim to the possession of the property in dispute is founded on a chattel mortgage executed to secure a promissory note. When the mortgage was given, the property belonged to the defendant Dewar, but the mortgage itself was executed by Ralph R. Roberts, whether in his own name or in Dewar's does not appear as the fact is not stated, nor is the instrument in the record; but from the points raised, we suppose the mortgage was made in the name of Roberts. A bill of sale, dated April 10, 1904, embracing the same property covered by the mortgage was put in evidence. This bill of sale purports to have been signed by Dewar, and to transfer the property in controversy to Roberts; but it was admitted that Dewar did not personally sign it. The contention is that it was signed in his name by Roberts pursuant to authority duly conferred. The mortgage was given after the date of the bill of sale and, therefore, if the latter instrument was valid, the title to the property was in Roberts at the time the mortgage was made, and passed by it to the plaintiff. Dewar

contends that his name was forged to the bill of sale, and that all the dealings with the property by Roberts were unauthorized by him (Dewar) as owner, and therefore were void.

The court instructed the jury that if Dewar authorized the execution of the bill of sale, or if, after the loan for which the mortgage was given was made, he (Dewar) received the proceeds, or any part thereof, from Roberts, knowing the facts and circumstances under which the money was obtained, then the mortgage was valid as against Dewar. The counsel for the defendant (appellant) concedes that the real point in the case is whether Dewar authorized or ratified the act of Roberts in signing Dewar's name to the bill of sale. Dewar had an office in the Frisco Building in the city of St. Louis, in which he did business as a broker. Roberts swore that he and Dewar were partners, but the latter denied that they were, and asserted instead that when Roberts was destitute, he was given employment in the office, more as a matter of charity than from any other motive and to enable him to earn a living for his family. A good deal of evidence was introduced tending to show a partnership existed, and that because of the fact, Roberts had power to mortgage the property in dispute. But this theory seems not to have been carried into the instructions. Dewar insists that Roberts not only forged his name to the bill of sale, but mortgaged the property without his authority, and kept the proceeds. Unquestionably, there was evidence for the jury to weigh, tending to establish both that Dewar authorized the mortgage and that he got the proceeds of it. The evidence tends, too, to show that he gave Roberts the bill of sale in order to enable the latter to raise money on the property. One witness (George W. Miller) swore positively that he saw the bill of sale exhibited to Dewar by Roberts with the statement that he (Roberts) owned the property and had the right to mortgage it; and that when Roberts made this statement, he asked Dewar if it was true, and Dewar said it was. Miller was at the time inspecting the property with a view to making a loan on it. So far as the genuineness of the bill of sale, as Dewar's act, was concerned, the issue was for the jury.

It is contended that as there had been no default in the payment of the debt secured by the mortgage when this action was instituted, plaintiff was not entitled to the possession of the property. The court instructed the jury that under the terms of the mortgage it was not necessary for the note to be due before plaintiff could take possession of the property, provided plaintiff's rights were in danger, or the property had decreased in value to such an extent as would cause a prudent man to deem himself insecure. Inasmuch as the mortgage has not been preserved in the bill of exceptions for our inspection, we know nothing of its terms and,

hence, cannot pass on the point of whether the action was begun before plaintiff's right to possession had accrued.

The case was well tried as far as we can determine from the record before us, and the judgment will be affirmed.

BLAND, P. J., and NORTONI, J., concur.

FARMERS' EXCH. BANK v. CRUMP.
(St. Louis Court of Appeals. Missouri. Jan. 30, 1906.)

1. VENDOR AND PURCHASER — ACTION FOR PRICE—CONVEYANCE TO THIRD PARTY.

A vendee sold land to defendant, who assumed the vendee's indebtedness to the vendor; the vendee agreeing to pay accrued taxes and interest on a mortgage. No deed having been executed by the vendor at that time, the vendee procured the execution of a deed from the vendor to defendant. *Held* that, at the time of the acceptance of the deed by defendant, the vendor's right to sue on the contract for the amount due him became fixed, and was not defeated by the subsequent failure of the vendee to pay the interest and taxes.

2. PARTIES—PLAINTIFFS—REAL PARTY IN INTEREST.

Where a vendor, indebted to a bank, deposited a deed with the bank on an understanding that it should deliver the same to the vendee on payment of the price, and apply the same to the vendor's indebtedness, there was a sufficient assignment to the bank to entitle it to sue the vendee for the price under Rev. St. 1899, § 540, providing that actions shall be prosecuted by the real party in interest.

Goode, J., dissenting.

Appeal from Circuit Court, Scotland County; E. R. McKee, Judge.

Action by the Farmers' Exchange Bank against Daniel Crump. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

James P. Nesbit owned certain lots in the city of Memphis, Scotland county, Mo., incumbered by a school mortgage of \$400. Nesbit sold his lots to James E. Latham, giving him a bond to make a deed on payment by Latham of the purchase price, to wit, six promissory notes of \$25 each; Latham assuming the payment of the \$400 school fund mortgage. Afterwards, and before Nesbit had made a deed, Latham and defendant Crump entered into the following contract: "This contract and agreement made and entered into by and between James E. Latham of Memphis, Mo., party of the first part, and Dan Crump of city and state aforesaid, party of the second part has this twenty-sixth day of June, 1898, exchanged, sold or bartered to the party of the second part his residence property, consisting of one lot and dwelling in Memphis, Mo.; the same being occupied by himself and family at present, formerly owned by James P. Nesbit, on which there is \$400 school money and \$100 due James P. Nesbit. In exchange for above said property, party of the second part sets over to the party of the first part a certain tract of land known

as the Billy Moore land, situate some three or three and one-half miles to the northwest of Memphis, Mo., and consisting of thirty-seven acres more or less and on which there is \$450 school money—each party to this contract hereby agrees to assume the other's indebtedness as above set forth; each to pay the interest on the respective indebtedness or loans on the property he gets in exchange, commencing on or about the first day of December last; each to pay the taxes for the last year on the property he exchanges. And agree each to transfer to the other his property by good and sufficient warranty deed; party of the first part to have the city property free of rent for three months from this date, at which time he hereby agrees to render peaceable possession, unless an arrangement be made for further occupancy—party of second part renders possession of the farm on the first day of March, A. D. 1899. To this contract and agreement the parties hereto have hereunto subscribed their hands and seals this date first above written. James E. Latham. [Seal.] Dan Crump. [Seal.]" Crump conveyed his 37-acre farm to Latham, and Nesbit, at Latham's request, made a deed conveying the town lots to Crump, but did not deliver it to him, but deposited it with the plaintiff bank to be held by it in escrow until Crump should pay the bank \$100 in discharge of Nesbit's indebtedness to the bank, evidenced by the following note: "\$100.00. Memphis, Mo., Dec. 31, 1898. Thirty days after date I, the subscriber of Memphis, county of Scotland, state of Missouri, for value received, promise to pay to the order of the cashier of the Farmers' Exchange Bank of Memphis, one hundred dollars, at its banking house in Memphis, Scotland county, Missouri, with interest at the rate of eight per cent. per annum after maturity, having deposited with him as collateral security six promissory notes signed by James E. Latham for twenty-five dollars each. War. deed to property for which notes were given, and in case this note shall not be paid when due I hereby give said cashier authority as my agent to sell said collateral, or any part thereof, for cash on my account at the maturity of this note or at any time thereafter, at public or private sale, at his discretion, without advertising the same or giving notice, and to apply the proceeds of said collateral to the payment of this note and any interest due thereon, with costs and expenses of executing this trust. James P. Nesbit. [L. R. 2 Cent Stamp.]"

It was agreed by and between Nesbit and the bank that, on the payment of the \$100 by Crump, the deed should be delivered to him, and the notes should be delivered to Latham. On examination of the deed by the cashier of the bank, he suspected that the property was erroneously described, and for the purpose of having the matter investigated placed the deed in the hands of the bank's attorney, who in turn delivered it to Myers

for examination. Myers found the description correct, and, after holding the deed in his possession for several months, being ignorant of the fact that it had been deposited with the bank, and believing that Crump was entitled to its possession, delivered it to him, and Crump immediately filed it for record. On December 1, 1897, there was \$67.98 back interest due on the school mortgage on the town property, which Latham failed to pay, and which Crump was compelled to pay. For the reason he was compelled to pay this back interest and also some back taxes on the town property, he refused to pay the \$100 to the bank or to Nesbit. The suit is to recover the \$100, with interest; the petition alleging that the bank ratified the delivery of the Nesbit deed to Crump. The answer was a general denial and a plea of the five years' statute of limitations. The verdict was for plaintiff for \$128.50.

Mudd & Pettingill, for appellant. Smoot, Boyd & Smoot, for respondent.

BLAND, P. J. (after stating the facts). The case was tried on a third amended petition, which defendant moved to strike out on the ground that it was a departure from the original petition and substituted a new cause of action. The motion was overruled, and defendant answered. Whatever variance, if any there was, between the original and third amended petitions, was waived by the answer and by defendant going to trial on the petition as amended. *Sanguinett v. Webster*, 153 Mo. 343, 54 S. W. 563; *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981; *Scovill v. Glasner*, 79 Mo. 449; *Holt County v. Cannon*, 114 Mo., loc. cit. 519, 21 S. W. 851; *Walser v. Wear*, 141 Mo., loc. cit. 462, 42 S. W. 928.

By the contract of June 26, 1898, defendant agreed to pay the \$100 due from Latham to Nesbit, the balance of the purchase money due Nesbit on the town lots. To the extent of this payment the contract inured to the benefit of Nesbit, and there is no doubt that he, as such beneficiary, might sue on the contract in his own name to recover the \$100. *School District ex rel. v. Livers*, 147 Mo. 580, 49 S. W. 507; *Rothwell v. Skinner*, 84 Mo. App. 169. The right of Nesbit to sue and recover on the contract became fixed on the acceptance of the deed from him by defendant, and could not be thereafter defeated by the failure of Latham to pay the interest that had accumulated on the school mortgage prior to December 1, 1898, or the back taxes on the town lots. *School District v. Livers*, supra. But it is contended that there was no assignment of Nesbit's cause of action to the plaintiff bank. There was no written or formal assignment of the cause of action from Nesbit to the bank; but the deposit of the deed by Nesbit with the bank, under an agreement that the bank should receive the \$100 in payment of Nesbit's debt to it, and deliver the deed to defendant and surrender up

the collateral notes of Latham, was, in effect, an assignment sufficient to make the bank the real party in interest. Being the real party in interest, the suit was properly brought in its name. Rev. St. 1899, § 540.

The evidence shows that the deed from Nesbit came into defendant's possession on October 14, 1899. The court treated the date of the delivery of the deed as the date when the right of action accrued to the bank. We think, under all the evidence, this was a proper construction of the contract. The suit was commenced on January 2, 1904, less than five years from the date when the right of action accrued. Therefore it is not barred by the five years' statute of limitations.

Upon the whole record, we think the judgment is for the right party and for the correct amount. It is therefore affirmed.

NORTONI, J., concurs. GOODE, J., dissents.

CORNET et al. v. BOYLE.

(St. Louis Court of Appeals. Missouri. Jan. 30, 1906. Rehearing Denied Feb. 8, 1906.)

MONEY RECEIVED—PURPOSE FOR WHICH RECEIVED—RECOVERY.

Where a grantor deposited with an agent of the grantee a certain sum to guaranty the payment of taxes by the grantor, he was entitled to recover such sum on the payment of the taxes, though the grantee had meantime conveyed to a third person subject to the taxes, to whom the sum deposited was transferred to make the payment, but who refused to refund it on learning that the taxes were paid.

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by Henry Cornet and Fred Zelbig, copartners under the name of Cornet & Zelbig, against Richard A. Boyle. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

The suit is for money had and received. A jury being waived, the trial was had before the court, who found the issues for the defendant. Plaintiffs have appealed here. The facts out of which the controversy grew are as follows. About July, 1899, Kaime & Company, real estate agents, representing Mrs. Addison in the sale of certain valuable real property, situate on Olive near Sixteenth street, in the city of St. Louis, negotiated a sale thereof to Cornet & Zelbig, and before the sale was consummated by the execution of the deed of conveyance, Cornet & Zelbig negotiated the sale of the same property to one Thomas T. Lingo, who was represented in the transaction by defendant, Boyle, also a real estate agent. It appears that the taxes for 1899 were then assessed against the property and in amount, they aggregated about \$144.30. Inasmuch as the tax bills were not then made out, and for that reason the taxes could not be paid, the purchasers, Cornet & Zelbig, not having sufficient knowledge of the financial responsibility of the grantor,

Mrs. Addison, insisted upon and required her to make a deposit of the sum of \$144.30, presumably the amount of such taxes, as a collateral guaranty of her covenant against incumbrances in the deed to be delivered that day, and thereupon her agents, Kaime & Co. made such deposit with the purchasers, Cornet & Zeibig, and took a receipt of some sort therefor, which receipt is not in this record. As above stated, on the same day and before the deed was delivered to them, Cornet & Zeibig renegotiated the property to Lingo, who in turn was represented in that transaction by his agent, the present defendant, Boyle, and the deed from Mrs. Addison was executed by her at the instance of all concerned, directly to Thos. T. Lingo, instead of to the immediate purchasers, Cornet & Zeibig. This deed is not in evidence, but it appears from the admissions on both sides that it contained the usual covenant against incumbrances, etc. In truth, this entire controversy rests upon the fact that Mrs. Addison's deed contained that covenant. Thos. T. Lingo, the grantee in Mrs. Addison's deed, was not satisfied with the covenant in the deed against incumbrances without further security in that behalf, therefore he, through his agent Boyle, made a like requirement of Cornet & Zeibig as to a deposit of the amount of the taxes, \$144.30. Therefore, and thereupon at the time of the delivery of the deed by Mrs. Addison to Boyle's principal, Lingo, Cornet & Zeibig turned over to him, Boyle, as agent for Lingo, the said amount of money which they had received from Mrs. Addison's agents, Kaime & Co. The arrangement whereby the money was placed in the hand of Lingo's agent, Boyle, by Cornet & Zeibig, was reduced to writing by the parties at the time, and is in words and figures as follows: "Whereas, by a certain warranty deed from Clara Gantt Addison and Murray Addison, her husband, to Thomas T. Lingo, dated July 15, 1899, conveying property in block number 512, containing a front of twenty feet (20) on the north line of Olive street by a depth northwardly of one hundred, six feet, four inches (106.4) the west line being forty feet (40) east of Sixteenth street, said grantors have conveyed and warranted against the taxes for the year 1899. And, whereas, said tax bills are not ready for payment and said taxes cannot be paid at this date, and whereas, said Lingo insists that the amount of said taxes, to wit, \$144.30, should be retained by a third party to guaranty the payment of said taxes when payable within the time specified by law, and whereas said grantors have agreed and did consent and did deposit with Cornet & Zeibig the amount of said taxes, \$144.30, for the purposes above mentioned. And, whereas, said Cornet & Zeibig gave a receipt to said grantors for said amount, and guarantied them against any claims for damages by reason of the covenants, and warranty contained in their said deed, and whereas, said Cornet & Zeibig

have further paid to Richard A. Boyle, as agent for said Thomas T. Lingo, the amount of said taxes, \$144.30. Now, therefore, said Richard A. Boyle, hereby for himself, administrators and assigns, binds himself, his administrators and assigns that said taxes will be paid, if not, that he will pay the same, and hold harmless said grantors, their administrators and assigns, and said Cornet & Zeibig, their successors, administrators and assigns, against all claims, and he does hereby guarantee payment of same within the time required by law."

About the same time, Lingo, through his agent, Boyle, sold the property to one Charles M. Hays, and executed to him a deed of conveyance containing the usual covenants, except a special covenant against incumbrances, inasmuch as it was specially provided in such deed that the covenant against incumbrances did not apply to the then current taxes of 1899; in other words, the deed from Lingo to Hays was subject to the taxes of 1899. In order to render this special covenant possible, and in order to induce Hays to accept it subject to said taxes, Boyle, the agent of Lingo, Hays' grantor, turned over to Hays the amount of money, \$144.30, which he then held on account of said taxes under the writing above set out. This money Hays accepted from Boyle, Lingo's agent, together with such special covenant in the deed in lieu of the usual covenant against all incumbrances. So much for the several transfers and the final disposition of the fund of \$144.30 which is the subject of this controversy. A few weeks later, when the tax bills were ready for payment, Kaime & Co., acting as agent for Mrs. Addison, the grantor, in the deed to Lingo, paid the taxes on the property in accordance with the covenant in Mrs. Addison's deed, and called upon the parties to whom in fact they had sold, but to whom they had not executed the deed; that is, Cornet & Zeibig, produced the receipt showing the payment by them of such taxes, and demanded the said \$144.30 theretofore deposited by them, and Cornet & Zeibig repaid the same. Thereupon those plaintiffs, Cornet & Zeibig, called upon this defendant, Boyle, Lingo's agent, to refund to them the same amount. Boyle demurred, saying that his principal, Lingo, had sold the property to Hays, subject to the taxes, and had paid the money to him to cover the same. For this reason he declined to reimburse the plaintiffs. It further appears that Hays was quite wealthy, owning large properties in St. Louis, and that he afterwards called upon the collector in the month of December and within the time allowed by law to pay such taxes, and found that the same had been paid. It also appears that Boyle, through an intermediary, after learning that the taxes had been paid by Kaime & Co., and in order to help Cornet & Zeibig out of the difficulty, endeavored to induce Hays to refund the money which had been turned over

to him for that purpose, but he declined to do so, maintaining that some one had volunteered to pay his taxes for him, and he would not reimburse them. Upon this state of facts, suit was instituted by Cornet & Zeibig against Boyle as for money had and received, seeking to recover from Boyle the amount of money they had refunded to Kalme & Co. for Mrs. Addison. The court refused all of the instructions requested on either side and it will therefore serve no good purpose to encumber the opinion with them. After hearing the case, the court took the matter under advisement for a few days and then found the issues and entered judgment for the defendant. There is no controverted question of fact in the record, and inasmuch as the court, by its refusal of instructions, repudiated the views of the law presented by counsel on either side, it is difficult indeed to discover from the record just what opinion the learned trial judge entertained.

E. C. Slevin, for appellants. John Boyle, for respondent.

NORTONI, J. (after stating the facts). It becomes the duty of the court to construe the writing, and to do this intelligently, we must first inquire its purpose. It is patent that Lingo, the grantee under the deed from Mrs. Addison, was not satisfied with the covenant therein against incumbrances, in view of the fact that the property then stood incumbered with the current taxes to the amount of \$144.30, which was not then susceptible of discharge for the reason stated. He therefore required a further security collateral to that covenant, to the end that he should be secure from any possible failure of Mrs. Addison to discharge the incumbrance. We reach this conclusion from the plain wording of the instrument, to wit: "And whereas said tax bills are not ready for payment and said taxes cannot be paid at this date, and, whereas, said Lingo insists that the amount of said taxes, to wit, \$144.30, should be retained by a third party to guaranty the payment of said taxes when payable within the time specified by law," etc. The purpose then was to "guaranty the payment" of this amount that Mrs. Addison's fund was deposited to guaranty the payment of Mrs. Addison's debt. The debt was not thereby paid but it remained a valid and subsisting obligation against Mrs. Addison for the payment of which she was liable. In the event she failed to discharge it within the time specified by law, the fund on deposit should be used for that purpose to the end that Lingo, the grantee, should be held harmless.

This was the state of facts within the contemplation of the parties at the time Cornet & Zeibig turned the guaranty fund over to Boyle upon receipt of which Boyle obligated himself, shorn of all unnecessary verbiage,

as follows: "Now therefore, said Richard A. Boyle hereby * * * binds himself * * * that said taxes will be paid, if not, that he will pay the same and hold harmless said grantors * * * Cornet & Zeibig * * * against all claims, costs or damages against said taxes for 1899 on said property and he does hereby guaranty payment of same within the time required by law." Now the question is, for whom did Boyle guaranty upon accepting the fund? He must be understood to have guarantied that Mrs. Addison would pay the taxes within the time required by law, and in event she failed to do so, he would discharge the same with the guaranty fund belonging to her then in his hands, and hold harmless the grantor, Mrs. Addison, and Cornet & Zeibig, from further responsibility thereon. This must be true for the reason that the debt about which the contract was executed and collateral to which the deposit was made, was the debt of Mrs. Addison, and the moneys were her moneys, and Mrs. Addison deposited the collateral thereto as a guaranty therefor. He could not have undertaken to stand good for the debt as a debt of Lingo or Hays or of himself, for the obligation to pay rested upon neither one of these parties at the time of the execution of the contract under consideration. But being the debt of Mrs. Addison. It was not only her right, but the obligation rested upon her as well to discharge the same and upon discharging the debt to which the fund was held as collateral, she was, of course, entitled to the return of the collateral. The deposit having been made in the first instance by Mrs. Addison with Cornet & Zeibig, there was privity between them and it was proper for her to apply to those with whom she had deposited the collateral to recover the same. And it was proper conduct on the part of Cornet & Zeibig to promptly repay, as they did; the taxes having been paid by Mrs. Addison within the time required by law prior to December 31st. Section 9225, Rev. St. 1899. The principal debt for which Boyle held the fund as collateral was thereby extinguished within the time specified, and Boyle should have forthwith returned to Cornet & Zeibig the collateral held by him. There was privity existing between Cornet & Zeibig and Boyle, and it was proper for them to exhibit the tax receipts, and demand the return of the money from Boyle, and Boyle should have forthwith refunded, as Cornet & Zeibig had done. Boyle acted at his own risk in turning the fund over to Hays. No authority is found in the writing therefor, and if loss occurs to him on account thereof, it should fall where it belongs, not on Cornet & Zeibig, who are innocent and injured parties. There is privity existing between Boyle and Hays, and Boyle should proceed to call him to account for his conduct in the matter which is indeed reprehensible.

Entertaining these views, the judgment of the trial court will be reversed, and the cause remanded, with directions to the circuit court to enter judgment in favor of the appellants for \$144.30, together with interest at the rate of 6 per cent. per annum from the date of the filing of this suit before the the justice.

It is so ordered.

BLAND, P. J., and GOODE, J., concur.

GRAHAM v. OLSON et al.

(St. Louis Court of Appeals. Missouri. Jan. 30, 1906. Rehearing Denied Feb. 13, 1906.)

1. EASEMENTS—WAY OF NECESSITY—IMPLIED GRANT.

Where, in partition of certain land by deed, it was recognized that two of the parcels which had no outlet to a highway were of less value than two others located on a highway, whereupon it was agreed that the coparceners to which the rear parcels were conveyed should have a right of way over the two front parcels to the highway, such way rested in implied grant as a way of necessity, though it was not mentioned in the partition deeds, and was not a mere parol license.

2. SAME—TRANSFER OF TITLE—EFFECT.

Where a way of necessity resting in implied grant was based on a separate valuable consideration passing to the grantors, the easement passed as an appurtenance with each successive transfer of title to the land.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 65.]

3. SAME—PRESCRIPTION—VESTED INTERESTS.

Where an easement of a right of way was based in the first instance on a valuable consideration, and had been acquiesced in by all the parties and their grantees for the statutory period of limitations, such right thereby ripened by prescription into a vested interest appurtenant to the lands for the benefit of which it was made.

4. ESTOPPEL—DEEDS.

Where, prior to the conveyance of certain land fronting on a roadway, the parties measured the quantity of ground contracted to be conveyed from the side of the roadway, and it was understood between them that no part of the road was sold or conveyed by the deed, the grantor was not estopped from denying that no part of the roadway was so conveyed by the fact that the deed so described the land as to include a portion of the road.

Appeal from Hannibal Court of Common Pleas; David H. Eby, Judge.

Action by E. A. Graham against Andrew Olson and others. From a judgment for plaintiff, defendants appeal. Reversed.

In the year 1889, Andrew Olson, Nathaniel Gilbert, Jarvis Gilbert, and Dora Keith being four heirs at law of Braxton Gilbert, deceased, partitioned by agreement 80 acres of his estate which lay immediately north of and abutting the public road known as the "Centerville Road" in Marion county. The 80 acres in question were divided into four parts of 20 acres each, by drawing a line through the center of the 80 acres from east to west and from north to south. The 20 acres of Andrew Olson and those of Jarvis Gilbert, each under

the partition, fronted upon said public road; the 20 acres of Nathaniel Gilbert and Dora Keith, which were in the rear of those fronting upon the road, had no communication by roadway with the outside world. It was understood and agreed among the parties that the two tracts fronting on the road were of greater value than those in the rear, because of the superior advantages of the foremost tracts by reason of the public road, and Dora Keith and Nathaniel Gilbert agreed to the partition and accepted the lands lying off of the road upon the understanding and agreement with the other heirs that they should have a roadway 16 feet in width, to wit, 8 feet off of the east side of Jarvis Gilbert's tract and 8 feet off of the west side of Andrew Olson's tract, running from the southeast and southwest corners of said rear tracts along the dividing land line of the foremost tracts and connecting with said Centerville public road. This agreement was in parol. No part of it was reduced to writing, but was well understood and faithfully kept by all of the parties. In consummation of said partition agreement, deeds were executed among the several parties conveying the land as agreed, but no deed or other writing of any kind was executed conveying the road in question to Nathaniel Gilbert and Dora Keith. Both Jarvis Gilbert and Andrew Olson erected their fences 8 feet back from said land line, leaving said 16 feet roadway in accordance with the agreement and there maintained the same. The two heirs, Dora Keith and Nathaniel Gilbert, proprietors for whose benefit the roadway was fenced out, immediately took possession of the same as a roadway and continued to use and claim the same ever after. All of the parties treated the roadway as belonging to the last named and the two who had thus set their fences back in accordance with their agreement, testified as follows concerning the matter. Andrew Olson said: "We all made an agreement that Jarvis and I should give 8 feet apiece, so that the people who lived down below could come out, and we gave it. It was never sold. These 8 feet on each side of the line was given to make a roadway because we considered that the land on the road was worth more. I have a fence on my side of the roadway. This fence is 8 feet from the center of the line. There is 8 feet on the outside of my fence that I gave for the road." Jarvis Gilbert said: "We agreed that if they would take the two back 20's that they should have a road 16 feet wide through mine and Olson's tracts. This road we agreed between all of us should be taken 8 feet off the east line of my tract and 8 feet off the west line of Olson's tract, running through the whole length of our land. We had the land surveyed and the surveyor set the corners of the land and also the corners of the 16 foot road, and set stakes to mark where the corners were, both on mine and Olson's land. Olson afterwards fenced his tract of land and

the fence was placed so as to leave out of his land the 8 feet I have mentioned. I sold my 20 acres to Albert Lefever and when he bought he fully understood about this road, and he bought with the understanding that the parties north of us had the right to this 8 feet off of my line. This agreement was kept up by me and Albert Lefever since 1889." Afterwards, in 1890, Andrew Olson conveyed to Stephen Gilbert by warranty deed, one square acre in the southwest corner of his tract, adjacent to the line along said roadway. No mention or reservation is made in said deed regarding the road, but concerning this tract, the uncontroverted testimony of Olson, the grantor, is: "When I sold the one acre to Steve Gilbert we had made up the road and we agreed that he should take his one acre back from the road because he knew I had given it away and he did not claim it. I had given the eight feet and I could not sell it, and I never sold it. The roadway is still in use." On cross-examination he said: "I had given the eight feet away and I could not sell it and he agreed to it. He took his acre from the road; we measured from there. I did not sell him abutting right up to the 20 acres he had." Albert Lefever afterwards acquired this 1-acre tract by a competent conveyance and also the 20 acres owned by Jarvis Gilbert with the full understanding of all the facts connected with said roadway and conducted himself in full accord with such understanding, making no claim adverse to the parties who claimed the road. On November 1, 1901, plaintiff Graham, succeeded by a general warranty deed from Albert Lefever to the rights of Lefever in the 20-acre tract formerly owned by Jarvis Gilbert, and the one acre tract. In September, 1903, plaintiff, claiming to own same by virtue of said conveyance, inclosed that portion of the roadway passing over the land line between the one acre and the 20-acre tracts owned by him. Defendants, under their claim to the roadway, removed the fence so erected across said road by the plaintiff, whereupon this suit was instituted before a justice of the peace in trespass for damages for the wrongful tearing down of said fence. It found its way into the court of common pleas, where, upon a trial before the judge without a jury, the court found the issues for the plaintiff and assessed his damages at \$5, doubled the same and allowed him \$5 statutory penalty under the provisions of section 4573, Rev. St. 1899. The case comes here by appeal.

A. R. Smith, for appellants. J. J. Henderson, for respondent.

NORTONI, J. (after stating the facts). 1. In giving judgment for the respondent, the learned trial judge no doubt proceeded upon the theory that the appellants' right to the roadway was a mere parol license only, and therefore revocable at the will of the licensor (*Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536), that the action

of respondent in inclosing the road after notice to appellants that he intended so to do, was a revocation of the license and that therefore the appellants were trespassers in the act of removing the fence. We cannot concur in this view of the case. The uncontradicted showing in the record before us is to the effect that the road in question found its origin in necessity. It was in the first instance, and continued to be, a way of necessity. When the 80 acres formerly owned by the ancestor were partitioned, as no road touched the rear tracts, by agreement this way was established. Under such circumstances, the law would give the parties succeeding to the lands without outside communication, such road as a way of necessity, even though it were not expressly granted in the deed, and this would proceed upon the theory of an implied grant. The general rule on the subject is stated by Mr. Bishop in his treatise on Noncontract Law (section 872) as follows: "If one conveys to another, out of a parcel of land, a part lying neither on the highway nor on the grantee's other land, it will be useless to the new owner unless he can have access to it; hence, by presumption of law, the deed carries with it to the grantee a right of way over the unconveyed part." In *Ballard, Real Estate Statutes*, § 371, it is thus defined: "Most common of ways implied are ways from necessity, as where one sells another land so surrounded by other land as to be inaccessible except by passing over such grantor's land, the law implies a grant of way over such land." To the same effect we cite *Washburn on Easements* (4th Ed.) 258; *Goddard on Easements*, 269; *Anderson v. Buchanan*, 8 Ind. 182; *Stewart v. Hartman*, 46 Ind. 831; *Steel v. Grigsby*, 79 Ind. 184; *Logan v. Stogsdale*, 123 Ind. 372, 24 N. E. 185, 8 L. R. A. 58. "A way of necessity can only be raised out of land granted or reserved by the grantor, but not out of the land of a stranger. For if one owns land to which he has no access, except over the lands of a stranger, he has not thereby any right to go across these for the purpose of reaching his own." 2 *Washburn on Real Property* (3d Ed.) 282; *Stewart v. Hartman*, 46 Ind. 341.

This well-known principle of law, because of its inherent justness, has special application in estates by partition and the way of necessity is implied in a partition between co-tenants when the circumstances are such that the way of necessity would be implied in ordinary conveyances. The principle recognized is that the way of necessity lies in grant and that the deed of the grantor under the circumstances mentioned, creates a way when it is a way of necessity as much as it does when it is created by express grant. *Jones on Easements*, 309; *Ellis v. Bassett*, 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421; *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; *Blum v. Weston*, 102 Cal. 862, 36 Pac. 778, 41 Am.

St. Rep. 188. Upon principle, the same rule obtains in proceedings for partition under the statute, inasmuch as there is no difference in effect between an allotment by order of the court in such proceedings and an allotment by deed from all of the other tenants in common. *Blum v. Weston*, 102 Cal. 362, 38 Pac. 778, 41 Am. St. Rep. 188. It is said, however, that the right of way of necessity over lands of the grantor in favor of the grantee and those subsequently claiming under him, is not a perpetual right of way, but continues only so long as the necessity exists. *Palmer v. Palmer*, 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; *New York Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. 353. Be this as it may, there is a separate valuable consideration as well as the consideration of necessity, from which, in this case, the implied grant arises and which entered into the creation of this way. In the case at bar, the parties recognized the necessities and took them into account along with other matters in the partition. The uncontradicted evidence is that the tracts fronting on the highway were regarded as more valuable and that the rear tracts were of less value because of there being no road thereto and for this, a valuable consideration in addition to the necessities of the case, and the consideration for the deed out of which the implied grant arose, a way was provided by agreement, surveyed, staked out, and fenced as a right appurtenant to the land thus to be benefited. And although the right of way was not expressly granted by the deed it was an implied grant which rested, then and now, upon two sufficient principles to validate it in law as an effectual right or easement appurtenant to the lands which arose from, first, the necessities of the case; second, a separate valuable consideration passing between the parties which entered into the partition at the time. It is not essential in this case to proceed upon the theory of a prescriptive right arising by virtue of a lost grant, as is usually contemplated under the old law of prescription. *Power v. Dean*, 112 Mo. App. 288, 86 S. W. 1100. For here we have a way of necessity and the implied grant in furtherance thereof, and aside from this, an uncontrovertible grant in parol for a valuable consideration expressed by the manifest intention of the parties themselves in the laying out and fencing of the road by the grantors, and the entering into possession thereof by the grantees. The easement thus created attached to those parcels of the land for which it was created as an appurtenance and passed with each successive transfer of title to the successive owner. *Blum v. Weston*, 102 Cal. 362, 38 Pac. 778, 41 Am. St. Rep. 188; *Taylor v. Warnaky*, 55 Cal. 350. Mr. Jones in his work on Easements (section 260) says: "A right of way by prescription may be established in either of two ways: first, by use with knowledge on the part of the owner,

whose land is used, that the person using his land claims the right to use it; second, by a use so open and notorious that knowledge of a claim of right will be presumed." We have here a constant user of this way by the parties under the claim of right to use the same during all the years from 1889. Indeed, it is true that the use was permissive in one sense, that is, it was permissive in the sense that the parties owning the adjacent lands did not object to it, any more than they would had they actually made a deed conveying the road, for, as appears from their testimony, they did not claim to own the way and therefore had no right to object to its use by those for whose convenience it was established. Indeed, the permissive use in this case was the same as would have been if a deed to the road had been made by the grantors for they understood that they did not own the way, that the ownership thereof was vested in the parties under the agreement, and that they, the grantors, had no right to object. It was not permissive in the sense of licensor or licensee. This right having been thus enjoyed by the appellants under the circumstances detailed, for more than 10 years, the statutory period of limitation, the prescriptive right in addition to those heretofore considered is clearly established and such right is a vested right and not a mere license. *Power v. Dean*, 112 Mo. App. 288-297, 86 S. W. 1100; *Autenrieth v. R. R. Co.*, 36 Mo. App. 254-260. And the easement having been in the first instance based upon a valuable consideration, aside from the way of necessity and having thus ripened by prescription, it is a vested interest appurtenant to the lands and appellants were not trespassers in removing the fence erected across the same.

2. The point is made that respondent Olson, by having conveyed the one acre mentioned to Stephen Gilbert, which acre according to description in the deed abutted on the land line and would have included a portion of the right of way, and inasmuch as no reservation was made thereof in said deed, is thereby estopped in this case. It is only necessary to say in this connection that the uncontradicted testimony is that when the conveyance was made, the parties measured the acre of ground from the side of the roadway and that it was understood no part of the road was sold or conveyed by that deed; that both Stephen Gilbert and Lefever, a subsequent grantee of a portion of the lands, understood all about the roadway, made no claim to it, at no time fenced it or asserted ownership over it, permitted it to remain entirely in the possession and use of those for whom it was established, and treated it as an existing and vested right in the appellants.

The judgment will be reversed. It is so ordered.

BLAND, P. J., and GOODE, J., concur.

RENDLEN et al. v. EDWARDS et al.

(St. Louis Court of Appeals. Missouri. Jan. 30, 1906. Rehearing Denied Feb. 13, 1906.)

1. ESCROWS—REQUISITES.

Where certain deeds were not placed in the possession of a depository to be held by him until the performance of some condition, they were not held in escrow.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Escrows, § 1.]

2. DEEDS—DELIVERY—GRANTOR AS AGENT.

A grantor in a deed cannot deliver the same to himself as agent of the grantee.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 119, 120.]

3. SAME—DELIVERY—EVIDENCE.

Evidence held to establish that certain deeds to an heir's share of his ancestor's property, by which it was attempted to convey such share to the heir's wife, were not delivered until after the ancestor's death.

Appeal from Hannibal Court of Common Pleas; David H. Eby, Judge.

Action by William C. Rendlen and others against Willie Edwards and others. A decree was rendered in favor of plaintiffs; and from an order granting defendants' motion for a new trial, plaintiffs appeal. Reversed.

A. R. Smith and C. E. Rendlen, for appellants. F. L. Schofield and Schofield & Plowman, for respondents.

BLAND, P. J. Plaintiffs, William C. Rendlen, Albert E. Rendlen, Theodore G. Rendlen, Lydia M. Schanbacher, L. Aurora and Lillian T. Glenn, and John A. Schnitzlein, are the heirs at law of Catharine Rendlen, who died on January 2, 1902, seized in fee of a part of lot 4, block 13, in the city of Hannibal, state of Missouri, worth about \$3,500 and described as follows: Beginning at the southeast corner of said lot four, thence north on west line of Main street, $16\frac{1}{12}$ feet; thence westerly parallel with the south line of said lot 4, 42 feet; thence southerly parallel with the west line of Main street, $16\frac{1}{12}$ feet to the south line of said lot 4; thence easterly on the south line of said lot 4, 42 feet to the place of beginning. As to this parcel of real estate, Catharine Rendlen died intestate. Plaintiff Alice Rendlen is the wife of Theodore G. Rendlen, who is the son of Catharine Rendlen, and inherited an undivided one-fifth interest in the above-described real estate. On July 28, 1900, Theodore Rendlen and his wife executed and acknowledged a deed conveying the interest of Theodore Rendlen in the above-described real estate to Albert R. Smith, which deed contained general covenants of warranty. On the following day Smith executed and acknowledged a quitclaim deed, conveying the same parcel of land to Alice Rendlen. Neither of these deeds were filed for record until about two weeks after the death of Catherine Rendlen. Alice Rendlen testified that they were not delivered to her until after they were recorded. At the September term, 1902,

of the Hannibal court of common pleas, defendant Willie Edwards obtained a judgment against John Herl and Theodore Rendlen for the sum of \$1,444.75. On April 2, 1904, an execution was issued on this judgment and delivered to defendant Bowen, sheriff of Marion county, who seized and levied upon all the right, title, and interest of Theodore Rendlen in and to the aforesaid real estate and duly advertised the same for sale under the execution. To prevent the sale, plaintiffs procured a temporary injunction, from the Hannibal court of common pleas, which, on final hearing was made perpetual. On a motion for new trial, the court set aside its findings and judgment, and granted defendants a new trial, from which order plaintiffs duly appealed.

It is admitted that John Herl has no interest in the land levied upon, and it is conceded by both parties that if the deed from Theodore Rendlen and wife to Smith, and the deed from Smith to Alice Rendlen were delivered to her prior to the death of Catharine Rendlen, then the said Alice took nothing by said deeds; on the other hand, it is conceded that if these deeds were not delivered to her until after the death of Catharine Rendlen, she took a good title, having paid a good and valid consideration for the land with money procured from her mother, and the injunction should be made perpetual. Therefore, the case is to be decided on the facts, and requires an examination of the evidence in respect to what was done and said by the parties to the deeds. It appears that Smith is an attorney at law, and was attorney for Theodore Rendlen and wife at the time the deeds were executed. He did not purchase the land, paid nothing whatever for it, but was used as a mere conduit to pass the title from Theodore Rendlen to his wife, Alice. Smith testified that the deed from Rendlen and wife to himself was made out and executed in his office; that he handed the deed to Mrs. Rendlen, and she read it, and after it was acknowledged it was left in his office; that on the following day, at his office, he made a quitclaim deed from himself to Mrs. Rendlen; that she was not present when he made this deed, and did not know that it was executed; that he kept both deeds in a private box in the safe in his office until he was notified by Theodore Rendlen of the death of his mother, when he had both deeds recorded and sent back to him and that he then sent them to Mrs. Alice Rendlen. Witness also testified that at the time the deeds were made, it was not intended that they should be delivered; that the understanding was that he was to hold the deeds for Theodore Rendlen until after the death of his mother, and this was done, and that the actual delivery of the deeds was made about two weeks after the death of Catharine Rendlen; that he was simply acting "as aid to the title"; that the condition of the transaction was gone over in a legal way, and it

was found that a delivery of the quitclaim deed before the death of Catharine Rendlen would not pass the title to Alice Rendlen, and that he so advised Theodore Rendlen and wife; that neither of the deeds were delivered to him, but were simply left in his possession, and kept by him until after Mrs. Catharine Rendlen's death; that the reason why Theodore Rendlen and wife adopted the procedure of making a deed to him, and from him back to Mrs. Rendlen, was, as he understood it, that Theodore owed his brother and sister a thousand dollars, and had no money; that his wife borrowed the money from her mother, and let her husband have it, and he gave her the only thing he had to secure her in case of his death.

Alice Rendlen testified that her husband owed his brother and sister a thousand dollars, which he was anxious to pay, but he had no money, and she got the thousand dollars from her mother; that the only property her husband had for security was his interest in his mother's lot, and she bought his expectancy in it; that she did not know of his owing any other debts and thought the thousand dollars was all he owed; that the deeds were not delivered to her until about two weeks after Catharine Rendlen's death. On cross-examination, witness testified as follows: "I was present when the deeds were made out, and I signed them. I guess I was present when the second deed was made out. I don't remember whether they were both made out together. I don't believe they were. I knew about the second deed. I must have been present when it was made out. I gave it to Mr. Smith to take care of for me. He took care of the deeds for us." She also testified that she knew her husband did not own the whole of the property, but had only a one-fifth interest in it. The evidence is clear that the deeds were not put in Smith's possession to be held until the performance of some condition, therefore, they were not held in escrow by him. *Whelan v. Tobener*, 71 Mo. App. 370; 4 Kent, § 454. Were they delivered to Alice Rendlen? Delivery, in legal phraseology, as said in *Black v. Shreve*, 13 N. J. Eq. 455, means "the final absolute transfer to the grantee of a complete legal instrument sealed by the grantor, covenantor, or obligor." In *Vanstone v. Goodwin*, 42 Mo. App. 39, it was held: "The infallible test of delivery is the fact that the grantor has divested himself of all dominion over the conveyance, and, when the depositor, though the agent of the grantee, holds the instrument subject to recall of the grantor, there is no such delivery as to render it efficacious as a conveyance." The same ruling is made in *Hulser v. Beck*, 55 Mo. App. 668. See, also, *Tyler v. Hall*, 106 Mo., loc. cit. 321, 322, 17 S. W. 819, 27 Am. St. Rep. 337. In *Hammerslough v. Cheatham*, 84 Mo.

18, it is said: "To constitute a delivery of a deed by placing it in the hands of a third person, it must be done with the intent on the part of the grantor that it shall take effect as his deed in favor of the grantee."

Whether or not there was a delivery of the deeds to Mrs. Alice Rendlen depends, we think, upon the intention of the parties. According to Smith's evidence, the quitclaim deed was made without the knowledge of Mrs. Alice Rendlen and never left his possession until after the death of Catharine Rendlen. He, being the grantor in the deed, could not deliver it to himself as the agent of the grantee. It is true that Alice Rendlen testified that the Smith deed was handed to her, that it was in her hands, that it was in her care before she left Smith's office, and that she left it with Smith to keep. She did not testify to making more than one visit to Smith's office. She was there, as both she and Smith testified, on the occasion of the execution and acknowledgment of the deed to Smith and read this deed before she signed it. The deed from Smith, as shown by the deed itself, and Smith's testimony, was made at his office on the following day, and there is nothing to show that Mrs. Alice Rendlen was present at that time, and we think it is quite probable that her mind was confused in respect to the deed she did read, sign, and acknowledge, and that when she said she was present and read the deed she had in mind the deed made by her husband and herself to Smith. At any rate, it is more probable that Smith's memory is clearer and more accurate in regard to the details in respect to the execution of the two deeds than is that of Mrs. Rendlen, and we think his version of the matter should be accepted as correct. But in whatever light the testimony is viewed, we think there is no doubt that it was understood by the parties at the time the deeds were executed that the quitclaim deed would not be effectual to pass title to Mrs. Alice Rendlen, if delivered before the death of Mrs. Catharine Rendlen, and it was thought advisable that some security should be given her for the money she was lending her husband, and as a matter of precaution the deeds were executed, not to be delivered at the time, but to remain in the possession of Smith until such time as a delivery would effect a transfer of the title to the property to Alice Rendlen. They were not delivered, in fact, until such time had arrived, and we think the judgment of the trial court, making the injunction perpetual was the proper one to be rendered under the evidence.

The order granting a new trial is reversed and the cause remanded, with directions to the trial court to overrule the motion for new trial, and enter judgment making the temporary order of injunction perpetual. All concur.

BUCKBERG v. WASHBURN-CROSBY CO.
(St. Louis Court of Appeals. Missouri. Jan. 30, 1906. Rehearing Denied Feb. 13, 1906.)

1. SALES—QUOTATION OF PRICE—OFFER.

Plaintiff wrote defendant concerning the price of flour and defendant replied quoting certain flour at "\$5.10 jute or \$6.00 bulk," and stated that such quotation was for immediate wire acceptance. *Held*, that such letter was more than a mere quotation of price, and amounted to an offer to fill plaintiff's order at the price quoted.

2. SAME—MISTAKE.

Where a letter quoted flour for immediate acceptance "\$5.10 jute or \$6.00 bulk," such quotation disclosed a mistake on its face as to flour in sacks, so that plaintiff, an experienced flour buyer could not create a binding contract of sale by accepting the offer for delivery of flour in jute sacks.

Appeal from Louisiana Court of Common Pleas; David H. Eby, Judge.

Action by William Buckberg against the Washburn-Crosby Company. A verdict was directed in favor of defendant and from an order granting a new trial, defendant appeals. Reversed.

In 1904, plaintiff was engaged in the bakery and restaurant business, in the city of Louisiana, Mo., and the defendant was engaged in the manufacture of flour, in Minneapolis, Minn. On September 21, 1904, plaintiff wrote defendant, making the following inquiry: "Can you tell me if flour is going to get any cheaper, or still going to soar skyward? Please let me know." Defendant answered this inquiry by the following letter: "Minneapolis, Minn., Sept. 24, 1904. Mr. William Buckberg, Louisiana, Mo.—Dear Sir: Replying to your inquiry of the twenty-first would state, that we have absolutely no way of telling whether flour is going to advance or not. However, judging from the small amount of wheat that was raised in this country this year, and the large amount of that that is not fit for milling purposes, we should think that higher prices for flour would prevail in the future. For instance, on to-day's market, Gold Medal delivered Missouri points, is worth \$5.10 jute or \$6 bulk. Wish we could give you more definite information but that is simply impossible and the quotation made above is for immediate wire acceptance. Yours truly, Washburn-Crosby Co." On the day plaintiff received the above letter he wired defendant as follows: "9/28, 1904. To Washburn-Crosby Co., Minneapolis, Minn.: Send hundred fifty barrels Gold Medal Jute at your quotation of Sept. twenty-fourth. Wm. Buckberg." On receipt of this telegram, defendant shipped to itself, a car load (150 barrels) of Gold Medal flour, in jute sacks, and sent a copy of the invoice to plaintiff. To the original invoice and bill of lading, defendant attached a draft drawn on plaintiff at Louisiana. The flour was billed at \$6.10 per barrel and the draft was drawn accordingly. After the arrival of the flour at

Louisiana and after the draft was presented by the bank to plaintiff, he wired defendant as follows: "Oct. 4th, 1904. To Washburn-Crosby Co., Minneapolis, Minn.: Flour arrived. You quoted me Gold Medal at five ten. Why have you charged me six ten. Wire answer. Wm. Buckberg." In response to this telegram defendant wired plaintiff as follows: "10/4, 1904. Dated Minneapolis, Minn., 4. To Wm. Buckberg, La., Mo.: Five ten error see our letter twenty-sixth, six ten best can do writing. Washburn-Crosby." And followed the telegram with the letter quoted below: "Minneapolis, Minn., Oct. 5, 1904. Wm. Buckberg, Esq., Louisiana, Mo.—Dear Sir: Replying to your wire of the fourth we have wired you that price of \$5.10 jute in our letter of the twenty-fourth was an error. By looking at this letter very carefully you will see very clearly the price of \$5.10 could not be right as we say '\$5.10 jute or \$6.00 bulk,' and you know very well that bulk flour is not worth 90 cts. per barrel more than the flour in jutes. Furthermore, we call your attention to our letter of the twenty-sixth, acknowledging receipt of your order, in which we have stated plainly that we have entered order for 210-140s Gold Medal Baker's Use at \$6.10 net in sax, delivered. \$6.10 is absolutely the best we can do on this flour. This is a close price and we are very sure that it will make you a profitable purchase. We trust that you will take care of the car promptly upon its arrival. However, if you are not in position to do this let us hear from you promptly and we will have the car diverted. Yours truly, Washburn-Crosby Company."

The foregoing exhibits constituted all the written evidence in the case that passed between plaintiff and defendant. William Buckberg further testified that he was familiar with the value and the price of flour in this community, at the time of the above-mentioned transactions, and that he had been buying flour at times from this company and other persons for several years. The defendant attempted to show by him that he knew, when he received this letter, that the quotation of the flour therein was an error and mistake, and that he attempted to take advantage of this mistake. The court sustained objections to this testimony and the defendant then and there saved its exceptions. The petition alleges that plaintiff contracted with and purchased of defendant 150 barrels of Gold Medal brand flour, in jute sacks, at \$5.10 per barrel, to be delivered by defendant at the city of Louisiana, and that defendant had failed and refused to deliver the flour at the price agreed upon, to plaintiff's damage in the sum of \$150. The answer was a general denial. At the close of the evidence, the court instructed the jury that under the pleadings and the evidence in the case, the verdict must be for the defendant. The verdict was rendered for defendant, but on motion of plaintiff it was set aside and a new

trial granted. Defendant appealed from the order granting a new trial.

Matson & May, for appellant. **Ball & Sparrow**, for respondent.

BLAND, P. J. (after stating the facts). It will be observed that defendant's letter of September 24 contains no direct offer to sell flour in jute sacks, at \$5.10 per barrel, but that it is a mere quotation of that day's market. On the strength of this quotation plaintiff telegraphed defendant as follows: "Send hundred fifty barrels Gold Medal Jute at your quotation of Sept. twenty-fourth." The flour was shipped, consigned to defendant, and billed at \$6.10 per barrel. Instead of \$5.10, the market price previously quoted. On the trial the learned circuit judge held that the evidence failed to prove that a contract for the sale and delivery of the flour had been consummated, but after the verdict changed his view, and granted a new trial. Which of these views is correct. is the question presented for decision by the appeal.

In *Am. & Eng. Ency. of Law* (2d Ed.) vol. 7, p. 138, par. 2, it is said: "A quotation of prices is not an offer to sell. In the sense that a complete contract will arise out of the mere acceptance of the rate offered or the giving of an order for merchandise in accordance with the proposed terms. It requires the acceptance by the one naming the price, of the order so made, to complete the transaction. Until thus completed there is no mutuality of obligation." In volume 24. of the same work, at page 1029, it is said: "The offer must be distinct as such, and not merely an invitation to enter into negotiations upon a certain basis." "Merely naming a price does not necessarily import an assent to sell to the inquirer at that price," says Benjamin in his work on Sales (6th Ed., p. 73). He illustrates the text by saying: "In a late case (*Smith v. Gowdy*, 8 Allen [Mass.] 566) S. wrote G., 'How many rags have you on hand, and your price for them?' G. replied, 'We have about a ton, and our price is 3½ cents.' S. answered, 'We will take the rags at the price you name.' To which G. made no answer, but, when called upon, refused to send the rags. Held, no sale; the first real offer being from S. that he would take the rags, and G. never having agreed to send them." The Kansas City Court of Appeals, in *James & Sons v. Fruit Jar & Bottle Co.*, 69 Mo. App., loc. cit. 213, quoting from *Bruner v. Wheaton*, 46 Mo., loc. cit. 366, held: "To constitute a valid contract there must be a mutual assent of the parties thereto, and they must assent to the same thing in the same sense."

But the letter does more than quote the market price of flour; in effect. it said to plaintiff that defendant would fill his order for flour at the price quoted, if he would wire his order immediately on receipt of the

letter. Plaintiff, on receipt of the letter, immediately wired his order, hence there was a completed contract for the flour, unless it failed or is invalid on account of a mistake in quoting the price of flour, in jute sacks, patent on the face of defendant's letter of September 24. That the quotation of Gold Medal flour in jute sacks at \$5.10 per barrel is a mistake or typographical error. we think is beyond doubt. The same brand of flour was quoted at \$6 per barrel, in bulk; in sacks its market value could not have been less than \$6, but was necessarily \$6 per barrel, plus the value of the sacks and labor of sacking it. Plaintiff was an experienced buyer of flour and must have known the quotation was an error, therefore, his order was an attempt on his part to take advantage of defendant's error and make a profit for himself. That a binding contract cannot arise in such circumstances is too plain for argument. The shipment was to defendant, not to plaintiff and he was not authorized to receive the flour from the carrier, until he first paid for it at the rate of \$6.10 per barrel. The shipment was an offer, and the only valid one made by defendant, to sell the flour to plaintiff. He refused to take the flour on the terms offered, therefore there was no contract made for its sale.

The judgment is reversed, and the cause remanded with directions to the circuit court to overrule the motion for new trial and enter judgment on the verdict of the jury. All concur.

LITTLE et al. v. CUNNINGHAM et al.
(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

EQUITY—MAXIM.

Where plaintiffs, in a suit for injunction against the maintenance of a call bell and private telephone in connection with the main line of an unincorporated association, after a verdict in their favor, but before judgment, proceeded to disconnect the private telephone without any authority from the court, their conduct barred their right to the injunction, under the maxim that "he who comes into equity must come with clean hands."

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 185-187.]

Error to Circuit Court, Knox County; E. R. McKee, Judge.

Action by William Little and others against John Cunningham and another. From a judgment in favor of plaintiffs, defendants bring error. Reversed.

The plaintiffs in error were the defendants in the court below. The bill prays an injunction against defendants, restraining them from maintaining a call bell and private telephone in connection with the main line of an unincorporated voluntary association owning a small telephone line for mutual convenience in Knox county. The facts substantially are that 22 farmers, one of whom is the present defendant John H. Cunning-

ham, voluntarily associated themselves together and without being incorporated for that purpose, denominated and styled their association the "Rutledge & Greenburg Telephone Company," the purpose and object of which was to erect and maintain a small neighborhood telephone line of about 12 miles in length; each member of the association was to and did pay, on becoming a stockholder in the association, the sum of \$10. With this fund the line was constructed. About the same time a constitution and certain by-laws were adopted for the government of the association by the provisions of which the management of the company and its property was vested in three directors who were chosen and entered upon the duties of said office. They chose a president and secretary from among their number. By the constitution and by-laws it was provided that each stockholder of the concern was to have the right to connect a telephone in his residence with the line, the member purchasing and owning such telephone, at an additional expense of about \$15 each. Under this arrangement, defendant John H. Cunningham, as such stockholder, had installed in his home a telephone. The defendant, Logan Rule, owned no stock in the association nor had he any right to participate in the enjoyment and advantages of the telephone line. He was a neighbor and friend of Cunningham, however, and installed in his residence a telephone and by mutual friendly arrangement with Cunningham, ran a wire into the residence of the latter and by means of what is termed in the record a "call bell," his telephone was attached to the telephone maintained by Cunningham in connection with the main line. The theory of the defendant is that it was merely a neighborly arrangement whereby Cunningham and Rule and their families could have private communication and Mr. Cunningham would not be required to contract the additional expense in providing a different telephone for the neighborly line mentioned, the one instrument serving both lines. The result of this arrangement, however innocent the motive, was to provide Mr. Rule and his family connection with the main line, of which they took advantage by frequently holding conversations with others than their neighbor Cunningham along said line. The directors and a number of the stockholders of the association protested against this invasion of their rights but to no avail. On one occasion a committee representing the association called upon Mr. Cunningham and sought to have him remove the call bell and disconnect what was known as the "Rule line." This he declined to do. Some feeling was manifested on either side of the controversy, and persuasive influence having failed to prevail, the board of directors were instructed to institute this proceeding, and the suit is brought by the directors as trustees of an express trust on behalf of all of the members of the association. The

bill alleges substantially the facts as stated with a greater degree of precision than is here necessary, and alleges a violation of the rights of the association and its membership by reason thereof; irreparable injury, etc.; that no adequate remedy at law may be had on account thereof, etc.; and prays the court to grant injunctive relief to the effect "that the defendants may be perpetually restrained and enjoined from maintaining said line and connection of the said line of said Rule with the line of said association, and that they may be compelled to remove said call bells, and prohibited in the future from connecting the line of said Rule with the line of said association, and that the said Rule be perpetually enjoined and restrained from the use of said line of said association, and for such other and further relief as to the court may seem just and proper." The answer was a general denial, and on the 8th day of June and at the June term, 1903, of the Knox circuit court, the cause came on for trial. The court impaneled a jury and took its verdict upon certain material issues of fact, which were submitted in three several interrogatories pertaining to the merits of the controversy. The verdict was in the affirmative and found the facts as stated. Thereupon, without proceeding further, the cause was continued by the court to the December term, 1903, and at the December term, without a further hearing, the cause was continued by the court a second time until the June term, 1904. At the June term, 1904, on the 11th day of June, more than one year after the verdict of the jury aforesaid, the cause came on for further hearing before the judge and the defendants filed their amended answer raising several questions, among which it is alleged that during the pendency of the suit and since the verdict of the jury at the June term aforesaid plaintiffs, without warrant of law, proceeded to and did, in a high-handed manner, etc., cut the wire belonging to defendant Cunningham and thereby disconnected his telephone, and of course that of Rule from the main line, and thereafter maintained its telephone line without defendants being connected therewith. On this score, one of the plaintiff directors testified, and in fact the uncontradicted evidence shows, that the plaintiffs proceeded without authority on July 21, 1903, shortly after the verdict of the jury aforesaid and about 11 months prior to a final hearing and decree in this case, to cut the wire as alleged, thereby disconnecting Cunningham from the line of the association, which action operated as well to disconnect the Rule line, and they ever after remained so disconnected. Notwithstanding the conclusive showing that the plaintiffs had thus proceeded *vi et armis* to administer for themselves a portion at least of the relief for which they pray in the bill, the court decreed a perpetual injunction as prayed. There are a number of assignments of error. One alone will be noticed and that

is the action of the trial court in granting the relief prayed, in view of the facts last above stated.

O. D. Jones, for plaintiffs in error. C. D. Stewart, for defendants in error.

NORTONI, J. (after stating the facts).
1. One of the ancient and familiar maxims of equity jurisprudence is that "he who comes into equity must come with clean hands." The maxim has been otherwise stated: "Who does iniquity shall not have equity." *Bleakley's Appeal*, 66 Pa. 187; *Hershey v. Weiting*, 50 Pa. 240, 244, 245; *Millington v. Hill, Fontaine & Co.*, 47 Ark. 311, 1 S. W. 547. "They must come with clean hands, with a conscionable regard for the rights of others, ready to do equity on their part, and seeking only equity at the hands of the court." *McVey v. Brendel*, 144 Pa. 235-249, 22 Atl. 912, 13 L. R. A. 377, 27 Am. St. Rep. 625. And in discussing this salutary principle, it is said: "Generally, when a party seeking the intervention of equity has been attempting to secure his ends by means resembling those which he seeks to enjoin he will be denied relief." 11 Amer. & Eng. Ency. Law (2d Ed.) 163. In *Sinsheimer v. United Garment Workers*, 77 Hun, 215-218, 28 N. Y. Supp. 321, it is said by the Supreme Court of New York: "It is a familiar principle in equity that the plaintiff must come into court with clean hands. Under the circumstances disclosed by the papers in this case, if the defendant were guilty of any violation of law, the plaintiffs were certainly equally implicated, and under this condition of affairs it is difficult to see how they would have a right to the intervention of a court of equity. In dealing with questions of this nature the court should be studious to see that the rights of all parties are protected; and that the forms of law should not be permitted to be used on behalf of one party against another, when the party seeking the intervention of the court has been endeavoring to secure his ends by means similar to those which he seeks to enjoin on the part of his antagonist."

2. The principles of equity identical with the principles of justice and truth as they are, are applied by a court of conscience on the status of the case and the parties as they are revealed at the time the relief is administered by decree, rather than at the date of the institution of the suit, inasmuch as by virtue of these wholesome principles arise the conditions which are imposed by the court "as the price of the decree it gives," and, if unfavorable circumstances have arisen by the wrongful conduct of the parties during the pendency of the suit, the court will take such circumstances into account at the final reckoning, and dispose of the controversy by ascertaining the then existing equities of the case, and dispose of the same in "the form and frame of the orders and decrees, both interlocutory and final, whereby equitable

terms are imposed as a condition precedent to equitable relief granted," if any be granted. *Whelan v. Reilly et al.*, 61 Mo. 565-570. From the principles enunciated, it appears that whatever may have been the rights of the defendants in error to the relief prayed for at the time of the filing of the bill and at the time of the trial of the interrogatories by jury at the June term, 1903, it was the duty of the court to be guided on the final hearing by the principles of equity as they were invoked by the changed conditions appearing from the uncontradicted evidence then adduced, and to have entered its decree in accordance with the facts then developed and the equitable principles applicable thereto. It is palpable that the defendants in error, by their unwarranted intrusion in cutting the wire and disconnecting the plaintiffs in error from the main telephone line during the pendency of the suit, and thus assuming to themselves without warrant authority to acquire by force of arms the relief which they had prayed the court by their bill to grant, placed themselves as much beyond the pale of conscionable conduct as had plaintiffs in error by their acts complained of in the bill. Indeed, it is true that plaintiffs in error were the first wrongdoers, but the doctrine that a prior wrong on the part of one will justify a subsequent wrong on the part of the other certainly can have no countenance in a court of equity where the principles that "he who seeks equity must do equity" and "he who seeks equity must come with clean hands" guide and direct the chancellor. It is manifest from the record that the cause of the defendant in error became polluted during the pendency of the suit with the same character of wrongful conduct toward the rights of the plaintiffs in error as had the cause of the plaintiffs in error been polluted by the prior misconduct on their part, and the cause of the defendants in error having thus become soiled with their own iniquity, they could have no equity. It therefore appears to the court from the uncontroverted evidence adduced at the final hearing that there was no equity in the case of the defendants in error at the time of the decree, and the relief should have been denied.

For the reasons given, the judgment is reversed, the injunction dissolved, and the bill dismissed.

BLAND, P. J., and GOODE, J., concur.

SANDERS et al. v. ST. LOUIS, I. M. & S. RY. CO.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

1. DRAINS—ESTABLISHMENT BY RAILWAYS — PROCEEDINGS TO COMPEL.

Rev. St. 1899, § 1110, authorizing county courts on the petition of 20 landowners to cause ditches or drains to be constructed along the sides of railroads and to maintain an action against the corporation in the name of the coun-

ty for all expenses incurred in the construction and maintenance of such ditches or drains, does not authorize the county court to compel the construction of drains by the railroad.

2. APPEAL—MANDAMUS—PROPER MODE OF REVIEW.

No appeal will lie from the county court in proceedings for the establishment of drains along the railroad, its act being ministerial, and not judicial, and the proper remedy on refusal of the court to act is by mandamus.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 34.]

Appeal from Circuit Court, Ripley County; Samuel Davis, Judge.

Petition by F. M. Sanders and others against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of respondent, the petitioners appeal. Affirmed.

C. D. Yancey, for appellants. Martin L. Clardy, Jas. F. Green, and L. F. Dinning, for respondent.

NORTON, J. There are a number of questions presented in the briefs. In the opinion of the court, the right to the relief prayed for is decisive on the record before us and it will be principally noticed. The proceeding was instituted in the county court of Ripley county by 20 petitioners, contiguous landowners along respondent's railway, praying said county court to make an order directing and commanding the respondent railway company to cause to be constructed and maintained suitable ditches and drains on the sides of its railway, etc. The case found its way into, and was dismissed by, the circuit court. The petitioners prosecute this appeal.

The statute upon which they rely is as follows: "It shall be the duty of every corporation, company or person owning or operating any railroad or branch thereof in this state, and of any corporation, company or person constructing any railroad in this state, within three months after the completion of the same through any county in this state, to cause to be constructed and maintained suitable ditches and drains along each side of the roadbed of such railroad, to connect with ditches, drains, or water-courses, so as to afford sufficient outlet to drain and carry off the water along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad; and in case such corporation, company or person shall fail or neglect to construct and maintain such ditches or drains within the time limited in this article, the county courts of the counties through which such railroad has been or may be located are hereby authorized and required, upon the petition of twenty landowners of such county along the line of and contiguous to such railroad, to cause such ditches or drains to be constructed and maintained, and such court may maintain an action against such corporation, company or person so failing to construct and maintain such ditches or

drains in any court of competent jurisdiction, in the name of such county, and shall be entitled to recover all costs, expenses and damages incurred and accruing in the construction and maintenance of such ditches or drains; and it shall be the duty of every corporation, company or person owning or operating any railroad or branch thereof in this state, to cause all dead or dry vegetation and undergrowth upon the right of way occupied by such railroad company to be cleaned off and burned up or removed twice in each year, for the purpose of preventing the spread of fire, and the destruction of property, to wit: Between the 1st and 15th days of August, and between the 5th and 25th days of October, in each year; and any corporation, company or person failing to comply with the provisions of this section shall incur a penalty not to exceed five hundred dollars, and be liable for all damages done by said neglect of duty." Section 1110, Rev. St. 1899. The provisions of this statute are sought to be invoked by the 20 contiguous landowners, as above indicated, who joined in a petition otherwise sufficient but fatally defective in that it prays the county court to order the railway to construct the ditches and fails to pray the said court to construct the same or cause their construction at public expense and charge the expenditure thereof against the railway company. The prayer of the petition is as follows: "Wherefore your petitioners pray the court to make and enter an order herein, commanding and directing the said St. Louis, Iron Mountain & Southern Railroad Company to proceed without unnecessary delay, to cause to be constructed, and thereafter to be maintained, suitable ditches and drains on each side of its said railroad, in said Ripley county, to connect with ditches, drains or water courses, so as to afford sufficient outlet to drain and carry off the water whenever the same has been obstructed or rendered necessary by the construction of such railroad, as is contemplated and provided by section 1110 of the Revised Statutes of Missouri of 1899. And your petitioners will ever pray," etc.

It will be observed that there it no authority vested in the county court by the statute quoted to order or enforce the railway company to provide such ditches, etc. The statute imposes upon the railway company the duty of providing such ditches and drains, it is true, as follows: "It shall be the duty of every corporation * * * owning or operating any railroad * * * within three months after completion of the same * * * to cause to be constructed and maintained suitable ditches and drains along each side of the roadbed of said railroad;" and it then provides that, "in case such corporation, company or person shall fail or neglect to construct or maintain such ditches or drains * * * the county courts * * * are hereby authorized and required, upon the petition of twenty landowners of such coun-

ty along the line of and contiguous to such railroad, to cause such ditches or drains to be constructed and maintained and such court may maintain an action against such corporation, company or person so failing to construct and maintain such ditches or drains * * * in the name of such county and shall be entitled to recover all costs, expenses and damages incurred and accruing in the construction and maintenance of such ditches or drains."

The argument advanced by the appellants is that the language employed in the section to the effect that the county court is "authorized and required" upon presentation of the petition mentioned, "to cause such ditches and drains to be constructed," empowers and authorizes such court to make an order directing the railroad company to construct and maintain such ditches and enforce such orders. The court is not persuaded by this argument. The statute seems plain and unambiguous on its face. There is no question of statutory construction involved. It is a plain simple matter of interpretation of the language employed by the Legislature from which the manifest intention appears to be that it was contemplated by the lawmaking power that in event the railway company defaulted in the statutory duty imposed, then if it were a matter of sufficient public concern to interest 20 contiguous landowners, the powers of the county court might be invoked to the end that such ditches and drains be supplied by public expenditure in that behalf under the orders and authority of that court; and that the court would thereupon be "authorized and required" to "cause such ditches and drains to be constructed" at public expense and charge the same against the defaulting railroad company, and reimburse the public treasury for such expenditure by suit at law in the name of the county against the railroad company in any court of competent jurisdiction, in which suit the county would be entitled to recover "all costs, expenses and damages incurred and accruing in the construction," etc. There is certainly no word in the statute, when its context is examined, conferring authority upon such court to make or enforce an order upon the railroad company or other person owning or operating the road to construct the ditches and this court is neither authorized nor disposed to read such authority into it by strained construction. The provisions are ample and sufficient to subserve all practical public purposes, as they are plainly written. The statute, being in derogation of the common law, must be strictly construed and nothing can be taken by intendment which is not manifestly within its letter or spirit.

2. It seems quite clear that the action of the county court contemplated under these provisions, is in its nature, ministerial rather than judicial, and therefore the pending controversy is one of that class in which no appeal is allowed from the county court. *Barnett v. Pemiscot County Court*, 111 Mo. App.

693, 86 S. W. 575. Upon failure of such court to act on a proper petition, mandamus and not appeal would be the proper remedy. As to whether or not the county court would be authorized by the statute to thus appropriate the public revenues under certain of the provisions contained in our Constitution of 1875, or as to whether such statutory provisions are valid when measured by the Constitution, we express no opinion, for the reasons, first, that it is unnecessary to a decision of this case, and, second, because questions of that nature are cognizable by the Supreme Court and above and beyond our jurisdiction.

For the reasons stated, the judgment of the learned trial court is affirmed.

BLAND, P. J., and GOODE, J., concur.

HOUCK v. CHICAGO & A. RY. CO.
(St. Louis Court of Appeals. Missouri. Feb. 12, 1906.)

1. NEGLIGENCE—USE OF LAND—PLACES ATTRACTIVE TO CHILDREN.

Machinery contained in a railroad pump-house, situated in a place not ready of access from the public road, which is attended by an engineer, and which is, in fact, not of a character especially enticing to children, is not a "place attractive to children," within the meaning of the law of negligence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 55.]

2. SAME—MEASURE OF DUTY—TRESPASSERS.

A child who was warned to keep out of an engine room, and who, nevertheless, entered the room on his own motion, was a trespasser, and employes about the engine room were bound only not to carelessly injure him after his presence was known.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 45-47.]

3. MASTER AND SERVANT—LIABILITY OF MASTER—TORTS OF SERVANT.

A master is liable for the tort of his servant, although committed in direct disobedience to his orders, if it is committed in connection with something within the scope of the servant's duty.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1217-1225.]

4. SAME.

An engineer in charge of an engine room, whose duty it was to keep children out of the room, and away from the machinery, acted within his apparent authority in asking a child to enter the room, and the master was liable for consequent injury to the child.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1217-1225.]

5. NEGLIGENCE—DUTY TO EXERCISE CARE—LICENSEES.

An engineer, who invited a child into the engine room, was bound to use care proportionate to the danger for the child's safety.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 42-44.]

Appeal from Circuit Court, Audrain County; J. D. Barnett, Judge.

Action by John Houck, by his next friend, against the Chicago & Alton Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Scarritt, Griffith & Jones, for appellant.
Allen Stallings and P. H. Cullen, for respondent.

GOODE, J. Action founded on a personal injury. The appellant company maintains a large tank near its depot in the town of Mexico, Mo., whence its locomotives take water. About $1\frac{1}{2}$ miles from the depot is a pond which supplies water to the tank. This pond is immediately south of defendant's right of way. Between 20 and 30 feet west of it are an engine and pump used to force the water through pipes into the tank at the depot. The engine and pump are inclosed in a frame house 20 feet square of two rooms, and the evidence goes to show there is an entrance to each room, one on the west and one on the south side of the house. The access to this house from the railroad and the public road was quite inconvenient. It was fenced, except on the side next to the right of way; but there was a narrow opening between a post of the fence and a bridge abutment which a person could get through. This opening was 200 feet from the pumphouse. To get to the house from the railroad, it is necessary to go down a high dump. The motive power of the engine is gasoline, and a part of the contrivance is a cylinder in which the gasoline is exploded. A fly wheel, connected with the engine, is near the northwest corner of the room, and a metal shaft $2\frac{1}{2}$ inches in diameter and 5 or 6 feet long ran from the engine to near the east side of the room. By means of a cog at its east end, which worked into another cog attached to a perpendicular shaft, the horizontal shaft transferred the power from the engine to the perpendicular shaft which ran below the floor, and, as we understand, operated the pump. The horizontal shaft ran east and west within four or five feet of the south wall of the building, and the space between it and the wall was vacant. The house is about a quarter of a mile from the city limits and the same distance from the nearest residence. Grown people and children skated on the pond in the winter and sometimes fished in it in summer, but did so against the will of the railway company. An employé of the appellant by the name of Kenealy was in charge of the engine house and pumping machinery. Signs were posted about the premises warning persons not to trespass. Respondent got hurt in the engine house on June 14, 1904. He was at the time 9 or 10 years old. As he was walking along the vacant space between the horizontal shaft and the south side of the room, his coat or jacket caught on a setscrew in the shaft, and the revolution of the shaft broke his arm. The boy was visiting that day at the home of Mr. Kenealy, where he was in the habit of going to play with Kenealy's children. At noon, Mrs. Kenealy prepared her husband's dinner and gave it to her daughter

Hannah, or to her daughter and respondent, to take to him. Respondent swore that he carried the dinner and Hannah some drinking water, and that it was not uncommon for him to go along when Kenealy's dinner was taken to him. Kenealy was sitting under a clump of trees 50 or 60 feet from the engine house talking to some section hands, when the children arrived. They gave him his dinner and then respondent began to fish in the pond not far from the pumphouse.

Thus far the testimony is in accord but at this point it diverges. Respondent testified that, while he was fishing, he noticed that the engine had stopped and carried the information to Kenealy, who arose and started to the engine house, remarking to the respondent as he went into the door, "Turn the wheel," meaning, as we understand, the fly wheel of the machinery. Respondent turned the wheel, and at the same time Kenealy started the engine by reaching for and moving a lever which controlled its operation. As Kenealy did this, the respondent was going out of the room, and, as he went out, his jacket caught in the manner we have stated, resulting in the injury to his arm. Kenealy testified that, when his dinner was given to him, he told the boy, as he had done before, to stay away from the grounds, at the same time giving his daughter the dinner pail and telling her to go home; that she and the boy started away together and got out of sight, and Kenealy did not see the boy any more until about the time the accident happened. He said that, when he started the children homeward, he noticed the engine had stopped, and went into the engine room to start it; that, as he did so, respondent came running in and asked to help, was threatened against remaining on the premises, told to go out, and did so. Kenealy then started the engine, and immediately an exclamation from the respondent attracted his attention, and he saw that respondent was caught on the shaft. The movement of the machinery was stopped at once. Respondent admitted that he had been warned previously not to come about the engine house. The assignments of negligence are: First, that the defendant kept in the pumping house attractive and dangerous machinery, engines, and appliances calculated to excite the curiosity of children, and to attract them to go near and use it, and defendant knew children were in danger of being attracted by the machinery, unless it was carefully guarded, and on the day of the injury it was left unguarded. Second, that, knowing respondent's immature age, the defendant, its agents and servants, negligently employed, directed, and invited him to carry to Kenealy his midday meal, and carelessly induced and invited respondent to enter the premises wherein were the dangerous engine and machinery. Third, that, for a long time prior to the day of the injury, respondent had been going on

the premises by the direction and invitation of defendant and its servants, and by their direction and invitation had assisted them in the discharge of their master's business; that on the day of the injury he was carelessly directed by the servant of the defendant, in charge of the pumping house and engine, to watch the engine which was then in operation, and notify said servant if it stopped; that he did watch the engine and notify the servant when it stopped, and thereupon said servant negligently requested, invited, and permitted the plaintiff to enter the engine house and remain in a narrow passway between the machinery and the walls, and, while the plaintiff was there, the defendant's servant carelessly started said engine and machinery and carelessly directed and permitted defendant to assist in starting same; that, when said machinery started, plaintiff was in an eminently perilous situation, if the machinery moved, as the defendant's servant knew, or could have known by ordinary care; and that with such knowledge, or means of knowledge, defendant's servant carelessly and negligently started the engine, and plaintiff was hurt. Fourth, that the servants of the defendant, in charge of the pumping house machinery, were careless and negligent men, as the defendant knew, or by ordinary care could have known, and defendant was guilty of negligence in having such men in its employ.

We may dismiss, without consideration, the averment of carelessness in directing respondent to take Kenealy's dinner to him, for, whatever negligence could be predicated of this simple direction, it was in no sense the proximate cause of the accident. We may likewise dismiss the allegation of negligence on the part of the defendant in having incompetent servants in charge of the pumping machinery, because it was supported by no proof. Kenealy was the only servant in charge, and nothing to impugn his competency was shown. Negligence, in those two particulars, was not carried into the instructions.

In two of the instructions given for the respondent, the court noticed, as though it bore on the case, the rule of law against leaving dangerous machinery unguarded in a spot where children are likely, from their natural impulses, to play with it, or otherwise expose themselves to injury from its movements. In one of those instructions, the jury was told that, if the owner or occupant of grounds creates and maintains thereon something especially attractive to children and apt to injure them, he is negligent if he fails to properly guard it. That proposition was stated abstractly, without any attempt to apply it to the facts in the present case. The jury was not directed to give a verdict on a finding that the defendant had been guilty of keeping the pumping machinery unguarded where children frequented.

In the fourth instruction for the respondent, the same proposition was again alluded to in a negative way, but not as a basis for a verdict in respondent's favor. The condition on which the jury was directed, by that instruction, to give a verdict for the respondent, was a finding that Kenealy carelessly started the engine, when he knew respondent was in a position to be caught and injured by the machinery. It allowed a recovery, although the jury believed respondent had been guilty himself of contributory negligence in going into the engine house without permission, if the engineer, by ordinary care, could have avoided hurting him after he was seen to be exposed to danger. Though a verdict was not authorized on the theory that the accident was due to carelessness in leaving a machine where children were apt to be hurt by it, the court refused to take that theory out of the case by instructing, as defendant requested, that there was no testimony to show it had been guilty of that sort of negligence. We think prejudicial error was committed in bringing the subject before the jury. Probably that doctrine is sound, if cautiously applied; but, in the present case, every fact essential to its application is lacking. The machinery had not been left unattended, but, when the accident occurred, and constantly, so far as appears, was in charge of a competent engineer. It was remote from any residence, was inclosed in a building, so that there was no access to it except through the doorways; which, of course, the defendant company was not required to keep fastened during a summer day. Children came about the pond and the precincts of the engine house, but this was against posted warnings of the company and personal warnings given by the engineer. There is no proof that a child had ever entered the engine house before the occasion on which this boy was hurt. They had been driven away from the precincts incessantly. The machinery was not of a kind likely to be tampered with by children in a spirit of play, though any machinery will attract now and then, the curious gaze of children, as well as grown persons. The respondent himself testified to having been warned away several times by the engineer, and other witnesses swore he had been told two or three times that day to leave the premises. The leading decisions on the responsibility of the owners of dangerous machinery for injuries inflicted on children in consequence of the machinery being left, where they were attracted by it, are the "turntable cases." *Sioux City & Pacific R. Co. v. Stout* (U. S.) 17 Wall. 657, 21 L. Ed. 745; *Koons v. Railroad Co.*, 65 Mo. 592; *Nagel v. Railroad Co.*, 75 Mo. 653, 42 Am. Rep. 418. It would be inaccurate to say the rule has been confined to injuries done by that particular machine, but the courts incline to extend the principle of the "turntable cases" no further than the

precedents require. In truth, difficulty has been experienced in stating a principle for those decisions which can be reconciled with the proposition that the owner of premises is not responsible for injuries to trespassers on them, received in consequence of the condition of the premises, when there is no carelessness or willful misconduct by the owner. We think the controlling circumstance is the extent to which the machinery is likely, from its construction and situation, to attract children, together with the dangerous character of the appliance.

According to the rule in analogous matters, it would be for the jury to say whether the attractiveness and danger were so great as to lay an owner liable, if an injury occurred; but the cases show that the courts have exercised much control over this question. Various authorities supporting it were considered in *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891, 47 Am. St. Rep. 668, and *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847. In those opinions the general rule of law regarding liability for injuries to trespassers was contrasted with the exception allowed in instances where children are enticed into peril by attractive machinery, placed where they are wont to play, and an attempt made to mark the distinction between the two doctrines. The court said the "turntable cases," and others like them, had reached the limit of liability; that in all of them a dangerous object had been left exposed and unattended in a place of common resort for children, and those were the facts on which a recovery was allowed. *Witte v. Stifel*, 126 Mo., loc. cit. 302, 28 S. W. 891, 47 Am. St. Rep. 668. In the present case, the pumping machinery was not in any just sense exposed, had not been left unattended, and was not in an open place frequented by children, and where they had free access to it, but in a building. The machinery was not shown to be of a character which especially enticed children into meddling with it. In view of those facts, we feel certain that the rule of decision adopted in the "turntable cases" should not be applied to this one. It has no application for another reason. The only witness who testified for the respondent regarding the facts of the accident was himself, and his testimony excludes the conclusion that he was enticed into the engine house by the machinery. He swore unequivocally that he went because the engineer requested his help in starting the machinery. The testimony of the respondent and of all the witnesses shows that instead of the machinery, from its attractiveness to children, inducing respondent to enter the engine room, the fishing had attracted him, and he had paid no attention to the engine until it stopped. When this happened, he followed the engineer inside, either because he was asked to help, as he swore, or because he was moved by a desire to see the engineer start the

engine, not by a childish propensity to play with dangerous machinery. Inasmuch as respondent admitted he had been warned to keep out, we hold that, if he entered the room on his own motion, and not on invitation of the engineer, he was a trespasser in a room where the defendant's servant had no reason to anticipate his presence, and the measure of duty to him was not to carelessly injure him after his presence was known. *Schmidt v. Distilling Co.*, 90 Mo. 234, 1 S. W. 865, 2 S. W. 417, 59 Am. Rep. 16; *Arnold v. St. Louis*, 152 Mo. 173, 53 S. W. 900, 48 L. R. A. 291, 75 Am. St. Rep. 447; *Smith v. Dold Packing Co.*, 82 Mo. App. 9. The cases just cited greatly resemble this one as to the point in hand, we think are not distinguishable in principle from it, and furnish us with the true rule of decision. The court should have eliminated from the consideration of the jury the issue of appellant's negligence in keeping attractive machinery in an unguarded state where children were likely to be inveigled into playing with it.

It is insisted by the appellant that, even though its servant in charge of the pumping engine requested the respondent to help him to start the machinery, defendant is not answerable, for the reason that the invitation was beyond the scope of the engineer's authority. In support of this proposition, we are cited to several decisions of this state and some from other states: *Snyder v. Railroad Co.*, 60 Mo. 413; *Sherman v. Same*, 72 Mo. 62, 37 Am. Rep. 423; *Mangan v. Foley*, 33 Mo. App. 250; *Flower v. Railroad Co.*, 69 Pa. 210, 8 Am. Rep. 251; *Everhart v. Same*, 78 Ind. 292, 41 Am. Rep. 567; *Railroad Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515; *Railroad Co. v. Harrison*, 48 Miss. 112, 12 Am. Rep. 856; *Ohurch v. Railroad Co.*, 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861. Those cases maintain the doctrine that a master is not answerable for a negligent or willful tort of his servant, unless the act is done in the general scope of the servant's employment; and, without doubt, this is sound law. As to whether the applications of it in all instances have been just, there is doubt, and, in truth, the decisions on the subject are irreconcilable. Much injustice is done nowadays in applying the doctrine of respondeat superior; sometimes by unduly curtailing its application, but in the vast majority of instances by unduly extending it. A master is liable for the tort of his servant committed in direct disobedience to his orders, if the tort occurs about something in the scope of the servant's duty. *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405; *Snyder v. Railroad Co.*, supra. The problem always is to say whether the particular tortious act of the servant was done in connection with some duty intrusted to him or independently of his duties. If

plaintiff's entering the engine room induced the accident, we are unwilling to concede that the defendant is without responsibility for the resultant injury. It was one of the engineer's duties to keep people, especially children, out of the room and away from the machinery, and he swore that he was in the habit of performing this duty. Now, if he was intrusted with the power to deny them admittance, it seems to us that it would be a fallacy to say he acted beyond his apparent authority when he asked a child to enter. Grown people assume that a man clothed with authority to exclude them from a place, may, if he chooses, grant them admission. We hold that the engineer acted within what, at least, appeared to be his duty, if he invited the respondent into the room. This matter is argued by the appellant's counsel in a manner which we conceive not to be exactly pertinent to the facts. The nonliability of the defendant is put on the ground that Kenealy had no authority to employ help in connection with running the engine, and it is said that, when he asked the boy to help him, he did what was beyond his right. But asking the boy to help him is not the essence of the inquiry. Respondent was not injured in turning the wheel, which, he said, was the act Kenealy asked him to do. He had turned the wheel without injury, and was on his way out of the room when his coat caught on the shaft. The important fact is that Kenealy's request was equivalent to an invitation or direction to the respondent to go where there was danger, and the invitation prevented him from being a trespasser, and entitled him to the care to avoid injuring him which would have been due to any other person there of right. This much, at least, can be said, notwithstanding the decisions of the Supreme Court in the Snyder and Sherman Cases, *supra*.

But this matter must be considered from another point of view. It cannot be said with certainty that entering the room was the proximate cause of the accident. It rather looks like the accident was due, either to some imprudence of the boy after he got in the room, or to carelessness on the part of Kenealy while he was in there, or to both causes. If Kenealy invited him into the room, he knew he was exposed to danger, and was under the legal duty of observing care for the boy's safety, proportionate to the danger. The vital questions in the case are whether he used proper care, under the circumstances, to prevent injury to the boy, and whether the boy himself, his age considered, was guilty of contributory negligence.

The cause should be treated, we think, in accordance with the views expressed in this opinion, and, that it may be, the judgment is reversed and the cause remanded.

BLAND, P. J., and NORTONI, J., concur.

CROW v. RELIABLE JEWELRY CO. et al.
(St. Louis Court of Appeals. Missouri. Feb. 18, 1908.)

1. JUSTICES OF THE PEACE—APPEAL—JUDGMENT AGAINST SURETY.

Since Rev. St. 1899, §§ 4081, 4082, 4083, only provide for judgment against the surety on an appeal bond on appeal from a justice, in connection with a judgment against the principal, an action may not be dismissed as to appellant, and judgment rendered against the surety alone.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Justices of the Peace, § 743.]

2. SAME—NEGLIGENCE OF SURETY.

Where appellee on an appeal from a justice wrongfully dismissed the action against appellant, and took a judgment against the surety on the appeal bond alone, the fact that the surety did not know of the judgment until after its rendition did not show negligence on his part.

3. JUDGMENT—EQUITABLE RELIEF.

Where, on appeal from a justice, appellee dismissed the action as against appellant and obtained a judgment against the surety on the appeal bond alone, in a suit by the surety to set aside the judgment, the petition having alleged fraud in procuring the judgment it was not demurrable though the nature of the fraud did not appear.

4. APPEAL—REVIEW—RECORD—DEMURRER.

A ruling on a demurrer to a petition is reviewable without any motion for a new trial or bill of exceptions.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1686.]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Suit by Charles A. Crow against the Reliable Jewelry Company and others. From a judgment sustaining a demurrer to the petition petitioner appeals. Reversed.

C. G. Shepard, for appellant. Faris & Oliver, for respondents.

GOODE, J. A demurrer having been sustained to the appellant's petition, he stood on his pleading and refused to amend; whereupon the petition, which was in the nature of a bill in equity, was dismissed, and final judgment entered against him. He appealed. According to the averments of the petition, the Reliable Jewelry Company is a corporation organized and existing under the laws of the state of Illinois, and J. A. Franklin, the other defendant is the sheriff of Pemiscot county. Heretofore, C. G. Shepard was engaged in the mercantile business in Caruthersville, in that county under the style of C. G. Shepard & Co. The Reliable Jewelry Company sued said Shepard before a justice of the peace for an alleged debt and judgment before the justice went against Shepard and in favor of the jewelry company. Shepard appealed to the circuit court of Pemiscot county and the appellant in this action, Charles A. Crow, signed the appeal bond as his surety. The appealed case came on for trial in the circuit court at the November term, 1908, and on the 28th day of November, a trial was had resulting in a judgment against Crow in favor of the Reliable Jewelry

Company. Said company, as plaintiff in the action pending on the account against Shepard, dismissed the action as to him, though he was the sole defendant and the principal on the appeal bond, and had judgment rendered against Crow alone as surety on the bond. Afterwards the Reliable Jewelry Company caused an execution to be issued on the judgment against Crow, and placed the writ in the hands of Franklin, the sheriff, for collection. When the petition in the present cause was filed, Franklin was threatening and attempting to levy the execution on the property in order to collect the judgment. The petition further alleges that before appellant became aware judgment had been rendered against him, the time for taking an appeal had elapsed. The appellant was not present when the cause was dismissed as to Shepard and judgment rendered against appellant, and he knew nothing of the judgment until the sheriff had attempted to enforce the execution. The petition further alleges that the dismissal of the claim as to the defendant Shepard was a fraud on the rights of the appellant, and committed without his knowledge or consent as was the rendition of the judgment against him as surety on the appeal bond after the dismissal against his principal; that, unless the sheriff is restrained from levying the execution, irreparable loss will result to the appellant, he will be compelled to pay out money on said judgment or his property seized and sold. The relief prayed was that the sheriff be restrained from attempting to enforce the execution, that it be recalled and the judgment against plaintiff in favor of the Reliable Jewelry Company declared null and void. Plaintiff contends that his petition stated a good cause of action. The only ground of demurrer was that it did not.

The statutes provide that on an appeal from a justice's court, if the judgment of the justice is affirmed, or on a trial anew in the circuit court, the judgment goes against the appellant, such judgment shall be rendered against him and his sureties on the recognizance for the appeal. Rev. St. 1899, § 4081. The next section provides that if an execution is issued on such judgment and the principal does not pay it, and the officer cannot find sufficient property of the principal to satisfy the same, such officer shall specify in his return by whom the money was paid. Section 4082. The succeeding section provides that if a surety on the appeal bond pays a judgment against his principal in full or in part, the surety shall be entitled to a judgment on motion against the principal for the amount paid by him with interest. Section 4083. Those statutes authorize a judgment against a surety on an appeal bond only in connection with a judgment against the principal. They do not intend that the plaintiff in a cause which has been appealed from a

justice's court, may dismiss the proceeding in the latter court as to the defendant, and take judgment against his surety. Such a rule is not to be ingrafted on the statutes, for it is incompatible with the general doctrine of the law regarding sureties, whose liability is discharged by a release of the principal. Moreover as to the sureties, the statutory remedy is summary, in derogation of the common law, and therefore calls for a strict construction. We think the rendition of the judgment against the appellant after the cause against his principal had been dismissed was directly contrary to the language of the statutes.

Neither was the present appellant necessarily guilty of negligence in the matter. So flagrant a departure from the statutory procedure was not to be expected; and it is well known that sureties on appeal bonds in cases appealed from justice's courts are not accustomed to look after the case in the circuit court, but rely rather on the party to the suit for whom they are sureties doing so and on the regular statutory steps being pursued. It would not be likely to occur to a surety that his principal might be released and judgment entered against him. But the essential fact is that the petition avers fraud in procuring the judgment. Whether this fraud consisted in a collusive arrangement between the parties to the case, pursuant to which the cause against the defendant was dismissed and judgment taken against Crow; or whether the judgment was in violation of an arrangement to dismiss the cause entirely; or whether the fraud was of some other form, the petition does not say; as perhaps it ought. But the proceeding below was so unusual and such an injustice to appellant that we think the facts ought to be investigated to see whether ground for equitable interference exists; and we think it does, unless Crow knew in advance of the action contemplated, and did not oppose it, or obtained knowledge of what had been done in time to take steps to have the judgment against him set aside during the term when it was rendered. We do not say the appellant had no right of appeal, but the circumstances stated warrant an inquiry. No attempt has been made to support the ruling of the lower court on the demurrer; the respondent's counsel having confined their suggestions to the proposition that the appeal cannot be considered because no motion for new trial or bill of exceptions was filed by the appellant. But as final judgment was entered on the demurrer, it and the judgment are part of the record proper. *Spears v. Bond*, 79 Mo. 467; *Hannah v. Hannah*, 109 Mo. 236, 19 S. W. 87.

The judgment is reversed, and the cause remanded, with the direction to overrule the demurrer. All concur.

PORTER et ux. v. ILLINOIS SOUTHERN RY. CO.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

RAILROADS—SALE—PURCHASER'S LIABILITY—TORTS.

Where defendant purchased all the franchises, assets, and line of railroad of another company, as authorized by Rev. St. 1899, § 1060, and the conveyance contained no assumption of liability for torts committed by the grantor company, defendant was not liable therefor.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 399, 800.]

Appeal from Circuit Court, St. Francois County; Robert A. Anthony, Judge.

Action by E. W. Porter and wife against the Illinois Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

William S. Anthony, for appellant. D. L. Rivers, for respondents.

GOODE, J. In this action the plaintiffs sued the Illinois Southern Railway Company for damage done to their crops by cattle which got into their fields on account of the failure of the Southern Missouri Railway Company to fence its line of railway through plaintiffs' farm. The damage was done in the summer of 1903, while the Southern Missouri Railway Company owned and operated the line of road. On October 15, 1903, said Southern Missouri Railway Company conveyed and transferred all its franchises, assets, and line of railroad to the defendant, Illinois Southern Railway Company, another corporation. This sale was made under the provision of section 1060, Rev. St. 1899. The contention of the defendant railroad company is that it cannot be held liable for the torts committed by its vendor, the Southern Missouri Railway Company. This point was considered and decided in *Karn v. Ill. Southern R. Co.* (a decision not yet officially reported) 89 S. W. 346. The present case is against the same defendant and on similar facts.

For the reasons given in the *Karn Case*, the judgment is reversed, and the cause remanded.

DQW v. KANSAS CITY SOUTHERN RY. CO.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

1. HIGHWAYS—ESTABLISHMENT BY PRESCRIPTION.

The use of a road by the public for more than 10 years establishes it as a public highway by adverse use.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 8.]

2. SAME—PUBLIC CHARACTER—QUANTITY OF USE.

The public character of a road does not turn on the quantity of travel if the thorough-

fare is open and in use by all having occasion to go over it.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 6.]

3. SAME — FAILURE OF COUNTY TO WORK ROAD.

On issue as to whether a road was a public highway the fact that it had never been worked by the county was an immaterial circumstance, where it appeared that the public had used the road for over 10 years.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 12.]

4. RAILROADS—HIGHWAYS—DUTY TO FENCE CROSSING.

Railroads are not required to fence roads which are public highways de facto.

5. TRIAL—DIRECTION OF VERDICT.

Where plaintiff's evidence made out defendant's case, a verdict for him should have been directed on request at the close of plaintiff's case.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 881-889.]

6. SAME.

Where, after a denial of defendant's motion for a directed verdict at the close of plaintiff's case, defendant introduced evidence, but none of it assisted the plaintiff's case, defendant's request for the direction of a verdict at the close of all the evidence should have been granted.

Appeal from Circuit Court, Newton County; Henry C. Pepper, Judge.

Action by Ben Dow against the Kansas City Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Cyrus Crane and O. L. Cravens, for appellant. Horace Ruark, for respondent.

GOODE, J. This action was instituted to recover damages for the killing of two mares belonging to plaintiff. The petition was in two paragraphs, of which the first was founded on section 1105 of the Revised Statutes of 1899, and asked for double damages on an averment that the animals went on the railroad track at a point where the law required defendant to fence its right of way, but which it had failed to do. The second paragraph prayed for single damages and alleged the animals were killed in consequence of the negligent manner in which the engineer and trainmen handled the train. Plaintiff lived some five miles south of the point of the accident. His mares went on the railroad track from a road or inclosed lane, the width of which was probably from 16 to 20 feet, though the fact cannot be ascertained certainly from the testimony. This lane ran immediately north of the farm of a man named Eppard. Defendant's railroad ran north and south on the west of or through Eppard's farm, and running north and south on the west of the farm was a public highway into which the lane opened. Eastwardly from the lane the country was rough and hilly, and after the lane opened into this broken country, it was no longer fenced but branched into several wooded roads or trails over the hills. When the

railroad was built, the lane was treated as a public highway, and cattle guards and wing fences were constructed across the railroad track on either side of it to prevent cattle straying from the lane along the right of way. Evidence was introduced having some tendency to prove the train could have been prevented from colliding with the animals by careful management; but there was evidence to the contrary, and the jury returned a verdict for defendant on that cause of action, thereby acquitting it of negligence. The court left it to the jury to determine whether or not the lane from which the animals entered the right of way had been opened and used merely for a private outlet or way of convenience, and not as a traveled public highway, with a direction to return a verdict for plaintiff if the lane was found not to be in public use. A request by defendant that the jury be directed to return a verdict in its favor was refused.

The sole question presented on the appeal is whether there was any evidence which supported an inference that the point where the animals entered the right of way was elsewhere than at the crossing of a public road which the defendant company was not required or allowed to fence. The testimony for plaintiff showed that 12 or more years before the accident the proprietors of the land on either side of the lane had fallen into a dispute about the boundary line between their farms, and, after having the adjacent fields surveyed several times, had opened the present lane, fencing it off from their fields. Since that time the lane has been constantly open to public use and every one who desired to travel it did so. Travel on it appears to have been infrequent of late years, but has never ceased. Men on horseback, lumber wagons, and other vehicles went through there occasionally; some every week. Plaintiff, who lived five miles away, testified that he had used the road and that it showed marks of travel. He said that though you could see such marks, the lane was washed, and a wagon could hardly get through now. Presumably the best informed witness on the subject was Eppard, whose farm lies just south of the lane. His testimony as to the use of the lane by the public was as follows: "Q. This was a traveled lane through there? A. People traveled it. Q. With wagons and horses? A. Yes, sir; and stock goes through there. Q. Is there a road leading off at the east end of this lane? A. Yes, sir. Q. Going up the hill? A. Yes, sir. Q. Is that a regular traveled road? A. Yes, sir; it goes out on the flats east of there. Q. And the lane is regularly traveled by the public? A. Yes, sir; it is traveled by the public. Q. Regularly? A. Yes, sir; whenever they want to. Q. Does anybody live over there on the flats? A. Yes, sir. Q. Is this road that is west of you, of the place where you rent, the regular Anderson and Neosho road? A. Yes, sir. Q. And this lane runs into that? A. Yes, sir."

It is to be borne in mind that all the evidence we are noticing on the question of the use of the lane by the public was introduced by the plaintiff. In our judgment it establishes conclusively that it was a public and traveled road and had been for more than 10 years; and hence the public had acquired a right in it by adverse use. *Easley v. Railway Co.*, 113 Mo. 236, 20 S. W. 1073. Nor does the public character of the road turn on the quantity of travel, if the thoroughfare was still open and in use by all who had occasion to go over it. All the testimony on the point goes to show that years ago the lane was set apart and dedicated by the adjoining proprietors as a public passway from the country lying to the eastward, to the highway on the west of Eppard's farm, and had been in continuous public use ever since. It was not shown that the road ever had been worked by the county authorities; but this was an immaterial circumstance to disprove it was a public highway, if the people at large had acquired by prescription the right to travel over it and were exercising the right. *Roberts v. Railroad*, 43 Mo. App. 287; *Brown v. Same*, 20 Mo. App. 427. Railroad companies are not required to fence their lines where public roads, de facto, cross them. *Luckie v. Railroad*, 76 Mo. 639. There is not the least doubt that the lane was a public road which the railroad company was not bound to fence. And the plaintiff having established that fact by his own witnesses, a verdict for the defendant should have been directed when requested at the close of plaintiff's case. *Pope v. Boyle*, 98 Mo. 527, 11 S. W. 1010. Nothing in the testimony introduced by the defendant assisted the plaintiff's cause by tending to prove the lane was not a public road; and the defendant having renewed its request for an order for a verdict in its favor, the request should have been granted. *Guenther v. Railroad*, 95 Mo. 286, 8 S. W. 371.

Judgment reversed. All concur.

MASON v. ROGERS et al.

(St. Louis Court of Appeals. Missouri. Feb. 18, 1906.)

1. REPLEVIN—DEFENSES.

In replevin for cordwood, the evidence showed that plaintiff sold some of the wood to a third person, and that defendant refused to let the third person haul it away on the ground that plaintiff owed defendant for wood that he had burned. *Held*, that defendant could not justify the refusal to let the wood go on the ground that the third person had no written order from plaintiff therefor.

2. SAME—COSTS.

Where, in replevin, the property had been demanded by plaintiff before the action was brought, and had been wrongfully detained by defendant, defendant was liable for the costs accruing prior to the service of the writ.

3. SAME.

In replevin, the constable serving the writ, testified that, two or three times before service, he tried to get defendant to let him turn the

property over to plaintiff, that defendant refused and reserved the right to give a forthcoming bond and that he stated that plaintiff could not come onto the place. On the day before the constable began to haul the property away, defendant's counsel requested him to withhold any more costs until the day of trial, if he could. *Held*, that defendant on being defeated in the action was liable for the costs incurred after the service of the writ.

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by J. A. Mason against Letha Rogers and others. From a judgment for plaintiff, defendants appeal. Affirmed.

G. G. Lydy, for appellants. Arch Johnson, for respondent.

GOODE, J. This is an action of replevin for 115 cords of dry wood alleged to be of the value of \$155. The wood was situated on a farm known as the Hardman Farm and a man by the name of Hardman lived on the place at the time the wood was cut. There is no contention against the respondent's ownership of the wood.

The points raised by the appellants are that the respondent made no demand for the property before he replevied it and that the defendant is not responsible for any of the costs of the action on this account, and not responsible for the costs that accrued after the constable presented the writ of replevin, because the appellants then disclaimed any ownership in the property or a right to retain it. The contest was really over the costs. The evidence for the plaintiff tended to establish that he had sold some of the wood to a man named Van Johnson, and when Johnson went to the farm to get it, Rogers, one of the appellants, refused to let him haul it away on the ground that Mason owed him (Rogers) for wood that he had burned. According to Johnson's testimony, Rogers said that whenever Mason paid for that wood, the other wood, which Johnson purchased from Mason, might be taken away. It is insisted that Johnson had no written order from Mason for the wood and therefore Rogers was justified in refusing to let him get it; but it suffices to say as to this point, that Rogers did not put his refusal on that ground, nor raise any question about Johnson's show of right. Another witness, W. N. Jones, testified that he went to the farm to get some of the Mason wood and after he had hauled part of it away, Mrs. Rogers came out and said she had orders to "fire the haulers" who were getting wood out of there. She admitted the wood belonged to Mason, but refused to let Jones finish his load for the reason that Mason was owing the appellants. An attempt was made to show that the objection of the appellants to the moving of the wood was due to the fact that the haulers left a gap in the fence. The testimony of the witnesses does not sustain that contention. Unquestionably, there was evidence to show that, before the action was

instituted, the wood was demanded by the respondent, or others for him, and wrongly detained by the appellants. Hence, as to the costs that accrued prior to the time of the service of the writ of replevin, appellants are liable. Henshaw, the constable who served the writ, swore that two or three times before serving it, he tried to get Rogers to let him turn wood over to Mason, but Rogers forbade him to do so. Henshaw said he disliked to see costs pile up, and for that reason attempted to conciliate the appellants. Rogers would not let him touch the wood, and said he could not have it. Henshaw said he went to see Rogers three or four times about the matter, and the latter reserved the right to give a forthcoming bond and hold the wood, but finally failed to give the bond. Rogers likewise said to Henshaw that Mason could not come on the place. Henshaw began to haul the wood away on a certain Monday. On the Sunday before, he received a letter from Roger's attorney requesting him to withhold any more costs until the day of trial, if he could. The court, in its declarations of law, declared that if it appeared from the evidence that respondent had made no demand of the appellants for the wood before he instituted the action, he could not recover the costs of the action, but a demand made by one having authority from the respondent was sufficient. That if the respondent made demand through other persons who were unknown to the appellants, and respondent failed to identify such persons, or to notify appellants that they had authority to act for respondent, the costs could not be charged against the appellants, but that by placing their refusal to deliver the wood on other grounds, the appellants had waived the right to identification of respondent's agents and their authority from him. The declarations of law were fair, and the evidence warranted the court's judgment in favor of the respondent. The wood was never surrendered to the constable, nor was there any offer to surrender it before the service of the writ. The mere request to the constable to withhold any costs until the day of trial, if possible, was not equivalent to relinquishing the property to him after appellants' repeated refusals to relinquish it.

The judgment is affirmed.

BLAND, P. J., and NORTON, J., concur.

HARBERT v. DURDEN et al.
(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

1. PROCESS — SERVICE — PUBLICATION — AFFIDAVITS — ORDERS.

The publication of process was not invalid because neither the affidavit on which the order for publication was made, nor the order itself, set out that defendants could not be served with process within the state.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 118.]

2. JUDGMENT—RECITALS—SERVICE—PRESUMPTIONS.

Where a judgment recited that defendants had been duly notified by publication and had made default, it would be presumed *prima facie* that the court acted on competent evidence that due notice had been given.

3. EXECUTION—MOTION TO QUASH.

Irregularities of procedure occurring prior to a judgment will not support a motion to quash an execution.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, § 468.]

4. SAME—PROCESS—AFFIDAVIT OF PUBLICATION—PROOF.

Where a motion to quash an execution was based on the affidavit of the proprietor of a newspaper in which process was published which by mistake failed to show due publication, but evidence was introduced conclusively establishing that due publication was in fact made, the motion was properly denied.

Appeal from Circuit Court, Pemiscot County; Henry C. Wiley, Judge.

Action by D. D. Harbert against E. T. Durden and others. From an order overruling a motion to quash an execution, defendants appeal. Affirmed.

Faris & Oliver, for appellants. Brewer & Collins, for respondent.

GOODE, J. This is an appeal from a judgment overruling a motion to quash an execution. The execution was issued on a special judgment which has been rendered against certain land in Pemiscot county. Those lands were attached in this action, which was brought to recover damages for the breach of covenants in a deed. The petition, which was duly verified, contained an allegation that the defendants were nonresidents of the state so that the ordinary process of law could not be served on them. On this verified allegation, an order of publication was directed to be published once a week for four consecutive weeks in a designated newspaper in Pemiscot county. The affidavit of the publisher of the paper which was filed in proof of the publication, failed to show that the order had been published a sufficient time before the term of the court, at which the judgment was rendered, to warrant a judgment at that term. This was the principal ground of the motion to quash. Another ground was that neither the petition nor the affidavit on which the order of publication was made, nor the order itself, set out that the defendants could not be served with process in this state. At the hearing of the motion, the proprietor of the newspaper in which the order of publication had been published, testified to facts proving that in truth the order had been published a sufficient length of time, and number of times prior to the term of court, to comply with the law. Copies of the various issues of the paper, showing the requisite number and dates of publication, were introduced in evidence. The proprietor testified that he had made a mistake in filling out his affidavit of

proof. The motion to quash the execution was overruled and the defendants appealed.

In support of the point that it was necessary for the verified petition, or the affidavit to it, to state that the ordinary process of law could not be served on the defendants in this state, we are cited to a case of *Hedrix v. Hedrix*, 108 Mo. App. 40, 77 S. W. 495. We consider that decision an erroneous construction of the statute, as to the point in hand, and overrule it.

The next proposition relied on by the defendants is that it was incompetent to show by the testimony of the proprietor of the paper and copies of the paper, that the requisite publication of the order of publication was made. The argument is that this fact can be proved only by the affidavit of the printer of the paper, with the copies of the publication annexed, and filed in court prior to judgment. The section of the statute invoked says that "when any notice or other advertisement shall be required, by law or the order of any court, to be published in any newspaper or made in conformity with any deed of trust or power of attorney, the affidavit of the printer or publisher with a copy of the advertisement annexed, stating the number and date of the papers in which the same was published, shall be sufficient evidence of the publication." Rev. St. 1889, § 4691. It will be observed that the statute does not, either by words or implication, express the thought that no other proof than the kind it mentions is competent. The general rule of law is that when a statute designates the mode in which due publication of a notice shall be proved, this mode is the only one for making the proof. *Comfort v. Ballingal*, 134 Mo. 281, 294, 35 S. W. 609; *Martin v. Allard*, (Ark.) 17 S. W. 878; *Martin v. Barbour*, 140 U. S. 644, 11 Sup. Ct. 944, 35 L. Ed. 546; *Luffborough v. Parker*, 16 Serg. & R. (Pa.) 351. All the decisions we have found upholding that doctrine were based on statutes which appeared to exact a certain mode of proof; instead of merely saying, as the one under examination does, that a given mode shall be sufficient. In other cases, where the statute was similar to the one under consideration, evidence of the very kind admitted in this case was held competent. *Claybrook v. Wade*, 47 Tenn. 555; *Robinson v. Hall*, 33 Kan. 139, 5 Pac. 763; *Colton v. Rupert*, 60 Mich. 313, 27 N. W. 520.

Without deciding the point, we incline to the opinion that its proper determination depends largely on the wording of the statute construed. The proof introduced below showed, beyond all doubt, that the law had been complied with in publishing the order of publication, and that the defendants had as complete notice of the pendency of the action as could be given by constructive service. The simple mistake made by the printer when inserting in his affidavit the dates on which the different publications of notice occurred is all that the defendants rely on

against the validity of the judgment. The most important circumstance bearing on the matter is overlooked. In the judgment rendered against the defendants, the court found as a fact that they had been duly notified by publication and had made default. Now all the cases on the subject, including those cited, hold that when such a recital occurs in a judgment, it will be presumed *prima facie* in an attack on the judgment, that the court acted on competent evidence in finding due notice had been given of the pendency of the action. *Raley v. Guinn*, 78 Mo. 263; *Comfort v. Ballingal*, and *Claybrook v. Wade*, *supra*. Irregularities of procedure occurring prior to a judgment will not support a motion to quash. *Horstmeyer v. Connors*, 51 Mo. App. 394. But it has been decided that such a motion, filed at a subsequent term and stating a ground going to the jurisdiction of the court, may be sustained by a return on the summons which failed to show service on the defendant, even when the judgment entry recites due service. *Brown v. Langlois*, 70 Mo. 226. This decision was based on the fact that a return on a writ of summons is part of the record. The motion to quash in the case at bar, is, in effect, an attempt to contradict and nullify the judgment recital of due publication of the order of publication, by the affidavit of the proprietor of the newspaper, which affidavit was ordered to be made a part of the record in the cause. We would go beyond the precedents, were we to hold that the judgment entry was impeachable, but that the affidavit was conclusive, and no evidence in aid of the judgment was admissible to show that a clerical error occurred in making out the affidavit.

The order overruling the motion to quash is affirmed.

PARIS MFG. & IMPORTING CO. v. CARLE et al.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

1. SALES—ACTION FOR PRICE—INSTRUCTIONS.

In an action for the price of goods sold, defendant claimed that she had verbally ordered of plaintiff's agent a much smaller quantity of goods, although she had signed a contract which called for the amount of goods delivered, and the court instructed that if defendant signed the order, knowing that it called for the amount of goods delivered, the verdict must be for plaintiff; that before there could be a contract of sale, the minds of the parties must have met, and that if defendant was misled by the statement of the salesman as to the quantity of goods defendant was purchasing, defendant had a right to refuse to accept the goods. *Held*, that the instructions were erroneous as leaving out of view the question whether defendant was fraudulently imposed upon by the agent.

2. CONTRACTS—VALIDITY OF ASSENT.

A party cannot avoid the obligation of a written contract signed by him by denying that he knew its contents or that it expressed the real agreement, unless fraud or artifice was practiced upon him, or he was enfeebled by ill-

ness, or ignorant and unable to read the writing, etc.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 415-417.]

3. SALES—VALIDITY.

Where a purchaser verbally ordered a certain amount of goods of a salesman, and he placed before her a written contract calling for a greater quantity of goods, and she signed it, she could not avoid the obligation of the written agreement.

Appeal from Cape Girardeau Court of Common Pleas; John A. Snider, Judge.

Action by the Paris Manufacturing & Importing Company against N. H. Carle and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

R. G. Ranney, for appellant. Robert L. Wilson, for respondents.

GOODE, J. This action was brought before a justice of the peace. The statement filed alleged that on September 18, 1903, and prior thereto, plaintiffs were partners; that on that day, the defendants gave a written order to plaintiffs for goods, wares, and merchandise, amounting to \$180.60; that on receipt of the order, plaintiffs delivered such goods, wares, and merchandise to the defendants in accordance with its terms and amounting to the sum mentioned; that defendants promised to pay plaintiffs said sum for the said goods, wares, and merchandise, but refused to pay, and plaintiffs seek judgment for the debt. The evidence goes to show that a day or two before September 18, 1903, E. B. Deane, a traveling salesman of plaintiffs, called at the millinery store of the defendants in Cape Girardeau and proposed to sell defendants a bill of goods. His conversation was with Mrs. Carle. On the next morning, he again went to the store carrying samples of perfumery which he exhibited, and afterwards took from Mrs. Carle, representing the firm of Carle & Mahn, a written order. This document is as follows:

"Paris Manufacturing & Importing Co.,
Manufacturing Chemists and Perfumers.

"Corner Main and Walnut streets,
St. Louis, Mo.

"For redemption of advertising coupons we will furnish free:

1 Doz. Card Perfumes	\$ 1 20
1 " Card Perfumes	1 80
1/2 " Perfume for Handkerchief.....	1 50

[Here follows a list of various articles concluding with:]

Total for advertising purposes.....\$25 00

Following the above list is a list of eight articles, amounting to \$7.50 in value, furnished free to apply on the freight charges of the goods.

Warranty.—We warrant that the goods shipped will be taken from the same general stock as salesman's samples. Should any article fail to give your customer entire satisfaction we will refund the price to him or furnish a new article free of cost provided not more than one-fourth the contents has been used.

Exchange.—Any goods in this assortment may be exchanged or returned for credit on a reorder at any time within eight months from date of invoice, or at any time thereafter provided the reorder be for twice the amount returned.

Return Cash Purchase.—Eighteen months from date of settlement if made as agreed herein, if the amount of retail sales is less than the wholesale price of this order the Paris Manufacturing & Importing Co. agrees to buy back sufficient goods to make up the difference. The conditions of this agreement are that the customer keep the goods well and tastily displayed, use advertising provided, and by the 10th of each month furnish us an itemized list of sales and goods on hand.

Terms of Settlement.—One-fourth of the amount due in three months, one-fourth in six months, one-fourth in nine months and one-fourth in twelve months without interest. A discount of 1% per month (12% per year), will be allowed for cash in 10 days. The above terms of credit will only be allowed in case account is closed by notes within 10 days from date of invoice; otherwise net cash 30 days. The vendor shall have a lien on all goods furnished until settlement is made."

Assortment.

2 Doz. Card Perfumes.....	\$ 75
2 " Card Perfumes	1 25
3 " Perfume for Handkerchief.....	2 00

There are 34 other kinds of articles in the list, of various values and making a total of \$180.60. These were the goods ordered by defendant. Afterwards, the statement follows that 100 bottles of two different sizes, with corks for same, were furnished free of charge.

Free with the above assortment one \$24.00 Oak Show Case. This case is well made, is 4 feet long, 40 inches high and 24 inches deep, wood doors and shelves.

The Paris Manufacturing & Importing Co. will send out coupons to each of 100 persons, the names and addresses to be furnished by customer, said coupons to be redeemed with goods furnished for such purpose in the above order and the coupons to be good for a present of 10 cents worth of goods or a credit of 25 cents on a 50 cent purchase.

Neither party shall be bound except as herein expressly agreed, and time is the essence of these agreements.

Sept. 18th, 1903.

Paris Manufacturing & Importing Co.—Gentlemen: On approval please ship the above mentioned goods via convenient transportation companies.

[Customer's Signature] Carle & Mahn,
Per Mrs. Mahn.

[P. O. Address] Cape Girardeau, Mo.

Freight Station.

Salesman: E. B. Deane.

Exhibit A. James E. King, Notary Public.

Although the order is signed, "Carle & Mahn, per Mrs. Mahn," Mrs Carle swore she signed it. It seems that the goods ordered were to be packed in a show case, and the defense is that Deane represented to Mrs. Carle that the plaintiffs sold bills of goods amounting to \$25, which were packed in a small show case, and other bills amounting to \$180.60 which were packed in a large case; that Mrs. Carle verbally ordered a bill of merchandise amounting to \$25 to be packed in a small case, and signed the order for the large bill under the impression that it was

for the small one. She swore she did not read the contract over before signing it but that Deane read part of it to her and she misunderstood its terms or was misled by him regarding them. We copy portions of her testimony. "I cannot state just the date I saw Mr. Deane, first, but it was in the week that we ordered the goods, and he was in my place the third time before we made the order, and that was either on the 17th or 18th, I cannot tell just which, about closing time, 9 o'clock or possibly a little after. He told us the goods were a good line of goods, and that we could get either of two sizes of show cases full; there was a \$25 size and another one he told us of at that time, and we said we had never handled perfumes or anything on that order, and that we would try a small sample case and were very much surprised when a large case came. Q. Why did you not read that order? A. Mr. Deane read me part of the order but kept it in his hands; I never had the order in my hands except to sign it. Q. Then when he read the order and he told you of the sizes of the cases, did you tell him what size you wanted? A. Yes, sir; and measured right on my counter just the place it would fit, and I told him I could not handle the larger case. Q. He measured on the counter just where it would fit? A. Yes, sir. Q. What did he say it would cost? A. \$25 case that would be, and that is what I thought I was getting. Q. When the case came was it the size that he measured on your counter? A. No, sir. Q. What was the difference? A. Well, the case I got must have been five feet in length, it was quite a good deal larger. Q. How much larger? A. Well, the one I ordered was about 2 or 2½ feet, and this was 5 feet long. Q. And you say you could not use the five-foot case as you had no room for it, and he said he could send a smaller case? A. Yes, sir. Q. When it came what was the size of the one you received? A. I did not measure it, I should estimate it at five feet. Q. Mrs. Carle, I believe you said you never read the order that Mr. Deane presented to you? A. No, sir. Q. Is this the order he presented to you? (Witness is shown original order.) A. I suppose it is; that is my signature, but Mr. Deane called over the amount of goods out of this order that was to be put up in the \$25 order. It was never his understanding, nor mine either, that we were to get a \$180 worth. He was to make up a \$25 order. Q. Did he refuse to let you read this order? A. No, sir. Q. How long have you been acquainted with Mr. Deane? A. Never knew him. I knew what his business was, knew his office was across the street, and that he was in and out over there. Q. Is this the only knowledge you had of him? A. Yes, sir. Q. You did not ask him to let you read this contract? No, sir. Q. Now, why is it that you did not know what you were buying? A. Because he stated to me

what I was buying. Q. You did not ask him to see this agreement? A. No, sir; he read off what would make the \$25 worth. Q. And you supposed you were to get the case and the goods for \$25? A. A small case, not the large case, as I told him I could not handle that, as I had no room for it. Q. Then you supposed you were getting all these goods and the case for \$25? A. Not those goods, but \$25 worth of goods. Q. And then a case? A. No, they furnished the case, and there was no charge for the case. Q. The goods were only to cost you \$25? A. Yes, sir; that was the amount I wanted to try. Q. And you refused to read the order? A. I did not refuse to read the order, but I did not read it. Q. You signed it? A. Yes, sir. Q. Now, Mrs. Carle, you said he only read a part of the order; how do you know that? A. I know that he did not read all those articles, for I know he did not have time. Q. Can you state what he did read? A. No, sir; I could not tell you, but I told him to select \$25 of the best articles, and we would leave it to his judgment to put up a small case. Q. Did he tell you this order was for \$180.60? A. If I took the whole order, but it was understood that I did not take the whole order. Q. But he told you the order was for \$180.60? A. Yes, sir; if I took the whole order. Q. You did not watch to see him mark out any of the order? A. He said he would put up a \$25 case. Q. Why didn't you make him mark off the articles so as to make \$25? A. That would have been proper. Q. You signed the order just as it was, knowing that it amounted to \$180.60. A. Yes, I signed that order. Q. Knowing that it was \$180.60? A. I knew the full order was \$180.60, but I thought I was getting only \$25 worth. Q. You knew that it called for \$180.60? A. I knew all that. Q. You say that he told you you were only to get \$25 worth? A. Yes, sir."

Deane testified that plaintiffs sold no bills of goods amounting to \$25 packed in small cases, but sold bills of only one amount. It seems that a show case was furnished free of charge to the customer. Mrs. Carle testified that she measured on her counter, to see what room she could afford to give to a case, and told Deane she could use none but a small one. Deane testified that she made some objections to the size of the case on account of her lack of room, and he told her they had small cases too and she could put goods out of the larger case into the small one, and keep the latter on the counter. He swore that this matter was talked over and Mrs. Carle agreed to buy the goods mentioned in the written contract. He swore further that he offered to let Mrs. Carle read the contract; that he read the substance of it to her, but did not name every article of goods; that it lay on the counter before her and she took it in her hands and signed it. On the morning the goods arrived, which

was a few days after the order was given, a clerk in the store of the defendants opened the case, and sold a small portion of its contents. When Mrs. Carle got to the store that morning, she repacked the goods in the case. After a correspondence in which she endeavored to have the plaintiffs take the goods back, and they refused to do so, she shipped them and the money received for what had been sold, to the plaintiffs by steamboat. Plaintiffs swore they never received nor saw the goods after they were shipped to defendants.

Plaintiffs requested an instruction that if the jury believed the goods were ordered in writing by defendants, the verdict must be for plaintiffs, notwithstanding the jury believed one of the defendants had told plaintiffs' salesman that defendants only wanted \$25 worth of goods. An instruction was given declaring that if defendant signed the order knowing it called for goods amounting to \$180.60, the verdict must be for plaintiffs. For defendants, the court instructed that before there could be a contract of sale, the minds of the contracting parties must meet as to the terms of sale; and if the jury believed the parties to the contract in question did not fully understand and concur in it, no sale was made and the verdict should be for defendants, that if defendants were misled by the statement of plaintiffs' salesman as to the quantity of goods defendants were purchasing, and signed the contract in the belief that it contained a far less amount than it did, defendants had a right to refuse to accept the goods; and if they were reshipped to plaintiffs within a reasonable time after the mistake was discovered, the verdict must be for defendants; that if the goods shipped to defendants exceeded in value the amount of defendants' order, the latter were not bound to receive the goods but had the right to reship them to plaintiffs, and if they were reshipped, the verdict must be for defendants. The jury found a verdict for defendants and judgment having been entered on it, plaintiffs appealed.

It is apparent at a glance that this judgment cannot stand. The case was tried and instructed on a wholly erroneous theory. The instructions to the jury left entirely out of view the question of whether defendants were fraudulently imposed on by plaintiffs' agent, and one of the instructions went so far as to give the defendants the right to repudiate the contract if the plaintiffs shipped more goods than defendants ordered. There was no contention that the bill of the goods, which amounted to \$180.60, exceeded the amount called for by the written order. In truth, the bill and the order exactly coincided. The only conceivable theory on which a defense could be established was, that plaintiffs' salesman fraudulently procured Mrs. Carle to sign the order by falsely stating its contents to her. In other words, that there was fraud in procuring the exe-

cution of the contract. No complaint was made about the quality of the goods, the sole objection being that plaintiffs shipped more goods than it was understood between Mrs. Carle and Deane defendants would purchase. We are cited to certain cases in which it was said that if one party to a written contract procured the signature of the other, whether by fraud or otherwise, and the instrument did not contain the contract actually made, but a different one, the parties signing were not bound. *Beck, etc., Co. v. Obert*, 54 Mo. App. 241. There are several decisions of that tenor in this state, all founded on the cases of *Briggs v. Ewart*, 51 Mo. 249, 11 Am. Dec. 445, and *Wright v. McPike*, 70 Mo. 175. Those cases have been directly overruled and are no longer the law. *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. Rep. 521; *Layson v. Cooper*, 174 Mo. 211, 73 S. W. 472, 97 Am. St. Rep. 545. The rule now is that unless some artifice or fraud is practiced to induce a party to sign a contract, the party signing cannot avoid the obligation of the instrument by denying that he knew its contents or that it expressed the real agreement. *Layson v. Cooper* and *Crim v. Crim*, supra; *Catterlin v. Lusk*, 98 Mo. App. 182, 71 S. W. 1109; *Magee v. Verity*, 97 Mo. App. 486, 71 S. W. 472. The exceptional instances in which a party escapes the consequences of his written obligation, are those in which, by some fraudulent contrivance, he was misled by the other party regarding the contents of the instrument, or where he was enfeebled by sickness and past understanding what he signed, or ignorant and unable to read the writing, or where some similar condition prevailed. Mrs. Carle had been in business for years, was an intelligent woman and thoroughly competent to contract. The defendants are therefore bound by the written order she gave, unless she was tricked into signing it by Deane from a fraudulent motive, and

without carelessness on her part. This case is indistinguishable from *Layson v. Cooper* and others we have cited, in which the courts held defendants could not be released from the obligation of written instruments executed by them, on the ground that the instruments were signed by the defendants in ignorance of their contents.

The only question we have been in doubt about is whether the case ought to be remanded for a trial of the issue of fraud in procuring Mrs. Carle's signature. There seems to have been some stress laid on the fact that Deane worked for a commission and was interested in increasing the order. But a study of Mrs. Carle's own testimony has convinced us that there is no substantial evidence of any fraud practiced by Deane to induce her to sign the order. He did not deceive her about its contents and she nowhere says that he did. The contract was spread out before her when she signed it. Her contention is that more goods were shipped than she and Deane understood defendants were buying. She swore she knew the order called for \$180.60 worth of merchandise, and justified her refusal to receive the goods by saying that Deane understood she was only buying \$25 worth. This evidence has no tendency to prove that Deane deceived her about the contents of the instrument. It only tends to prove that she and Deane had a verbal understanding and agreement which differed from the written one. When scrutinized, the defense is seen to be an attempt to substitute for the written agreement a verbal one; and this, of course, cannot be done.

The judgment will be reversed, and the cause remanded with the direction to enter judgment in plaintiffs' favor for the amount of the bill and interest.

BLAND, P. J., and NORTONI, J., concur.

POWELL v. ROBERTS.

(St. Louis Court of Appeals, Missouri, Feb. 13, 1906.)

PARTNERSHIP — DISSOLUTION — LIABILITY OF PARTNERS.

Where a firm of attorneys took a note for collection, and obtained judgment on the same, and dissolved partnership before collecting the judgment, one member of the firm was liable to the client for an amount collected on the note after dissolution of the partnership by the other member, and converted by the latter to his own use.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 636.]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by John H. Powell against F. D. Roberts. From a judgment for plaintiff, defendant appeals. Affirmed.

S. J. Corbett, for appellant. Brewer & Collins, for respondent.

GOODE, J. The facts in this case are undisputed, and those material to the point to be decided will be related. Prior to March 11, 1902, F. D. Roberts, the appellant, and J. T. Hunt, under the firm name of Roberts & Hunt, were partners in the practice of law in Caruthersville. Powell intrusted a promissory note to the firm for collection. The note was sued on before a justice of the peace and judgment obtained February 25, 1902. An execution was issued the next day and on April 14th, while the writ was in the constable's hands, Hunt compromised the judgment with the debtor for about half the amount due, gave his receipt therefor as attorney for Powell, but kept the money instead of paying it to his client. In fact, he left the state shortly afterwards. Powell sued Roberts for \$75, the sum collected by Hunt; the judgment in Powell's favor having been for \$155. Roberts & Hunt dissolved their partnership on March 11, 1902, after the judgment had been rendered in favor of Powell and an execution issued, but before April 14th, when Hunt collected and converted the money. Notice of the dissolution had been published before the last-named date in a newspaper published in Caruthersville. The defense is that Hunt could not bind Roberts by any agreement nor lay him liable by any tort, after notice of dissolution was given. Roberts was bound by the contract made with Powell while the firm of Roberts & Hunt was in existence, to attend to the collection of the note, and account for what was collected. Powell never made an agreement with Roberts to release the latter from responsibility for the due performance of the firm's undertaking; and certainly the dissolution of the partnership and notice of the fact would not terminate Powell's right to hold Roberts accountable on the contract between the two. There is no doubt that the judgment in the case was for the right party. Two cases which are counterparts of it will

be found among the reported decisions of the Supreme Court. *Bryant v. Hawkins*, 47 Mo. 410; *Dean v. McFaul*, 23 Mo. 78.

The judgment is affirmed.

BLAND, P. J., and NORTONI, J., concur.

CONRAD v. ILLINOIS SOUTHERN RY. CO.

(St. Louis Court of Appeals, Missouri, Feb. 13, 1906.)

RAILROADS — KILLING STOCK — FAILURE TO FENCE — EVIDENCE — QUESTION OF FACT.

Whether a railroad company, sued for the killing of an animal on its track, negligently failed to construct a proper fence and cattle guards, held under the evidence a question of fact for the determination of the trial court.

Appeal from Circuit Court, St. Francois County; Robert A. Anthony, Judge.

Action by William H. Conrad against the Illinois Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

William S. Anthony, for appellant. D. L. Rivers, for respondent.

GOODE, J. This action was instituted to recover the value of a cow killed by one of the appellant's locomotives. The accident happened in Randolph township, St. Francois county. The evidence tended strongly to show that though the railroad right of way was fenced where the animal was killed, and continuously through the township, the fence did not conform to the statute on the subject. The posts were 16 feet apart, so far apart that the wires sagged. The animal was killed about 150 yards from the crossing of the public road. There were cattle guards constructed at this crossing, but the evidence of the plaintiff was that they were so made as not to turn cattle, but stock could walk over them at will. No declarations of law were asked by either party except one, by the railroad company, that on the evidence the plaintiff could not recover. The court found judgment for the plaintiff.

The point raised on the appeal is that the evidence showed the statute was complied with by the railroad company, and therefore it is not liable for the death of the animal. This contention certainly cannot be maintained. The testimony on the subject was highly contradictory in respect to the cattle guard. Even the defendant's testimony regarding the fence, though it tended to show the fence would turn stock, showed it was not built as the law required. The point raised on the appeal involves the determination of the weight of the testimony, which is a matter for the trial court, not for this one.

The judgment is affirmed.

BLAND, P. J., and NORTONI, J., concur.

MANGOLD v. ST. LOUIS, M. & S. E. RY.
(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

1. RAILROADS—FENCES—COMMON-LAW DUTY.
Railroads are not required by the common law to fence their right of way.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 315-319, 356.]

2. SAME—STATUTORY LIABILITY.

Rev. St. 1899, § 1105, provides that railroads shall fence the sides of the road where it passes through cultivated fields or uninclosed lands, or shall be liable for damages done to animals on the road or by reason of any animals escaping from or coming upon lands, occasioned by the failure to construct such fences. *Held*, that the fact that a railroad company failed to fence its right of way where it passed through plaintiff's land, did not give him a cause of action, on the theory that he was prevented from raising crops because any crop put in would have been destroyed by cattle.

Appeal from Circuit Court, Butler County; James L. Fort, Judge.

Action by John Mangold against the St. Louis, Memphis & Southeastern Railway. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Phillips & Phillips, for appellant. James Orchard, for respondent.

GOODE, J. Plaintiff owns two farms or separate tracts of land in Butler county. In August, 1902, and January, 1903, defendant constructed a railway through the tracts, but has never built fences, gates, and cattle guards along its right of way. The petition alleges those facts and that because of defendant's failure to fence its right of way, plaintiff has been deprived, for three years, of the use of one of the tracts for agricultural purposes and of the other tract for two years; that the lands are chiefly valuable for agriculture; that their value is \$5 per acre and that this was the amount of damage sustained by plaintiff in consequence of the right of way being unfenced. Judgment was prayed for a sum equal to the amount of the full rental of the two tracts for the period mentioned. The answer was a general denial. On the trial of the case, judgment was given for plaintiff, and afterwards a motion for a new trial was filed and overruled, but a subsequent motion to arrest the judgment was sustained. It is from the order sustaining that motion that plaintiff appealed.

The only question presented for our decision is whether or not the petition stated a cause of action for damages. No allegation is made that plaintiff raised crops of grass or grain on the land and that these crops were damaged by the inroads of stock on account of the railroad being unfenced. Neither is there an averment of negligence in respect to throwing down fences or any other matter, except failing to construct fences and cattle guards. The facts relied on to make a case are that the statute imposed on defendant an obligation to fence its line which it violated, and, in consequence of the viola-

tion, plaintiff was deprived of the use of his lands for agricultural purposes. There is no direct averment that plaintiff could not cultivate the lands himself nor rent them for cultivation, but the reasonable intendment of the petition is that he could do neither. His attorney contends that those facts constitute a good case for damages. We interpret the petition to state a case on the statute, though in plaintiff's brief the argument is advanced that if no case is stated under the statute requiring railroads to fence, nevertheless one is stated at common law. Railroad companies are not required by the common law to fence their right of way. *Clark's Adm'r v. Hannibal, etc., R. Co.*, 36 Mo. 202, 220; 3 Elliott, Railroads, §§ 1180 and 1181. Hence, there was no breach of any common-law duty by defendant which would lay it liable to plaintiff, and we may dismiss that phase of the case without further remark.

Plaintiff is not without support from judicial opinions for the proposition that an action for the kind of damage he complains of, will lie against a railroad company when the damage was the result of an unfenced right of way required by statute to be fenced. *Emmons v. R. Co.*, 35 Minn. 503, 29 N. W. 202; *Id.*, 38 Minn. 215, 36 N. W. 340; *Id.*, 41 Minn. 133, 42 N. W. 789; *St. Louis, etc., R. Co. v. Ritz*, 33 Kan. 404, 6 Pac. 533. An examination of the statutes on which those decisions were based will show that the enactments merely required railroad companies to fence their lines, without specifying the kinds of injury for which they would be responsible if they did not. In our judgment, the Missouri statute on the subject furnishes no foundation for the plaintiff's demand. Such an action has never been sustained by any appellate tribunal of the state, and the understanding of the profession has been that the remedies of an adjacent proprietor against a railroad company for failure to fence, were confined to damages for injuries done to his domestic animals by trains, or to his crops by incursions of animals, or to fencing himself and recouping his outlay from the company. We have found no Missouri case which extended the liability of the railway company beyond those instances; and by reverting to the earlier decisions all doubt is dispelled regarding the maintenance of a case like the one at bar. The original railroad act was enacted in 1853. The section of that act requiring railway companies to fence their roads was incorporated in the Revised Statutes of 1855, chapter 39, as section 52. In most respects the section was like the one now in force on the subject. Rev. St. 1899, § 1105. But the statute of 1855, though it made railway companies answerable to the owners of stock for all damages to their animals by its agents or engines, contained no provision that the companies should be answerable for the damage done by animals escaping into adjacent fields on account of the railroad being unfenced. Our statute

contains a provision of that kind. In *Clark's Adm'x v. Hannibal, etc., R. Co.*, supra, the Supreme Court had occasion to construe the railroad fencing law of 1855 in an action wherein the plaintiff claimed damages, not only for the killing of stock and some other items; but for damage to crops by cattle and hogs which entered cultivated fields from the right of way. The trial court held that as the statute required railway companies to fence their lines, they were responsible for the last mentioned damage as well as the other items, but the Supreme Court decided that the statute, as it then stood, was designed to protect railroads, passengers, and trains, and prevent injuries to cattle and other animals on the track; that it required companies to fence their roads in and animals out, but did not require them to inclose the farms or fields of adjacent proprietors. It was further held that no absolute obligation was imposed even to fence the road; but that companies were liable, without proof of negligence, to owners of cattle and other animals injured while straying on railway tracks.

As to the contention that the statute made railway companies liable to adjacent owners whose crops suffered from the depredations of cattle which wandered into the fields from the right of way, the court said that it was a landowner's duty to fence his fields against the intrusion of stock; that the statute only relieved a landowner from the obligation of keeping his own cattle shut off from the right of way and cast the duty on the railroad company, so far as to make it responsible for injuries to stock by its trains in consequence of the animals going on an open track. That decision is direct authority against the present plaintiff. In fact, the case considered was stronger than his; for the statute construed laid down the duty of a railroad company to fence, in the same language that the present statute does, and the

mischief that plaintiff suffered from the defendant's failure to fence was the actual destruction of growing crops by trespassing cattle. Nevertheless, the company was held not to be answerable, for the reason that the extent of responsibility prescribed by the statute was injuries done to animals by trains and not to crops by animals. In the present case, no crops were destroyed by stock and, so far as appears, none were raised. The theory is that plaintiff was prevented from raising crops himself or renting to tenants, because any crop put in, would have been destroyed by cattle; a more remote damage from failure to fence than the one held to impose no liability in the *Clark Case*. It follows that under the statute, as it stood until amended to read as it does now, plaintiff would have had no cause of action. Does the amended or present statute furnish a basis for the action? The amendment adds nothing except that an adjacent proprietor may recover for damage done to him by reason of horses, cattle, mules, and other animals coming on his lands in consequence of a railway company's failure to construct fences and cattle guards. Now it is not alleged that the plaintiff was damaged in that way. Hence, the amendment does not assist his complaint, and he has no better case under the present statute than he would have had under the former one. In truth, as a penal law, this statute must be strictly construed. If the Legislature had not undertaken to specify what liabilities railroad companies should be under to an adjacent proprietor in the event of failure to fence their roads, there would be strength in plaintiff's position. But as the statute states the responsibility of the companies, we think it must be limited to the particulars enumerated.

The judgment is affirmed.

BLAND, P. J., and NORTON, J., concur.

LAWRENCE COUNTY BANK v. LAMBERT et al.

(St. Louis Court of Appeals. Missouri. Feb. 18, 1903.)

1. JUDGMENT—SCIRE FACIAS—REVIVOR—WHO MAY SUE.

A suit to revive a judgment being a mere continuation of the original suit, an assignee of the judgment is without legal capacity to sue out a writ of scire facias in his own name for such relief.

[Ed. Note.—For cases in point, see vol. 80, Cent. Dig. Judgment, § 1596.]

2. MORTGAGES—SATISFACTION—ACTION TO SET ASIDE—PARTIES.

Where the lien of a judgment assigned to defendants had expired by limitations, and scire facias proceedings brought by them to revive the judgment were void, leaving them with no lien on mortgaged land of the judgment debtor, defendants were not parties in interest in a suit to set aside a release of such mortgage nor entitled to contest plaintiff's right to relief.

Appeal from Circuit Court, Barry County; Henry C. Pepper, Judge.

Suit by the Lawrence County Bank against J. M. Lambert and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

L. Beasley, for appellants. W. Cloud, for respondent.

BLAND, P. J. To secure the payment of the promissory note of J. M. Lambert for \$1,100, payable to the Missouri Trust Company, Lambert and his wife, on July 31, 1888, conveyed in trust to B. H. Ingram, trustee, the following described real estate, situated in Barry county, Mo.: The north half of the northwest quarter and 20½ acres off the west side of the southwest quarter of the northwest quarter of section 34, township 24, range 29. The deed of trust was timely recorded in the recorder's office in said county. Interest was paid on the note and extensions of time of payment of the principal were granted from time to time by the Missouri Trust Company, who, prior to the 1st day of August, 1903, for value, transferred the note and deed of trust to the plaintiff. On the last-named day the last extension of time for payment expired, and Lambert made application to L. L. Allen, cashier of plaintiff bank, for a further extension. The negotiation resulted in the giving of a new or renewal note and the execution of a new deed of trust. The new note was given for \$950 (the balance due on the old note) payable to L. L. Allen, cashier of the plaintiff bank, due five years after date, with 8 per cent. interest per annum, payable annually. The new deed of trust conveyed the same lands to W. A. Rhea, trustee, for the benefit of L. L. Allen, cashier of the plaintiff bank. The old note and deed of trust were not surrendered to Lambert, but they were inclosed in an envelope with the new note and deed of trust and an abstract of the title to the lands, which had been furnished the Missouri Trust Company when it made the

original loan, and properly addressed and mailed to M. T. Abernathy, Cassville, Mo., the county seat of Barry county, plaintiff being located at Pierce City, some distance from Cassville. The evidence shows that Abernathy was an abstractor of titles and had been acting as agent for the plaintiff for a number of years in furnishing abstracts of title to lands and attending to the recording and satisfying of deeds of trust held by it. The old note was indorsed, in a manner, by Allen to give authority to Abernathy to acknowledge satisfaction of the old deed of trust. On receipt of the deed of trust, etc., Abernathy examined the abstract furnished the Missouri Trust Company and saw that it showed title in Lambert and then entered on the margin of the record of the old deed of trust the following release: "Release. The debt in the within deed of trust having been fully paid off and discharged, I hereby acknowledge satisfaction in full and release the property herein conveyed from the lien and incumbrance thereon, this eleventh day of August, A. D. 1903; note produced and canceled in presence of recorder. M. T. Abernathy, Assignee and Legal Holder of the Note. A. L. Galloway, Recorder of Deeds." Abernathy filed the new deed of trust for record and after it was recorded returned it and the old deed and note to Allen. On October 12, 1901, S. C. Hankins recovered a judgment against Lambert et al., in the Barry circuit court, for \$505. Afterwards Hankins assigned this judgment to the defendants, who, subsequently procured a renewal of the old judgment for \$800. After having forwarded the deed back to Allen, Abernathy discovered this renewed judgment on the records of the Barry circuit court and immediately informed Allen, whereupon, this suit was brought to set aside the satisfaction or release of the original Lambert deed of trust for the purpose of giving plaintiff's lien priority over the supposed lien of defendants, as judgment creditors of Lambert. The court granted the prayer of the petition by setting aside the release upon the margin of the record of the original deed of trust. Defendants appealed from this judgment.

The judgment reviving the judgment of October 12, 1901, in favor of S. L. Hankins, was not revived on a scire facias sued out by him in his name, but was revived in the name of the defendants on a scire facias sued out by them, as assignees of S. L. Hankins. A suit to revive a judgment is not a new suit but a continuation of the original one (Sutton v. Cole, 155 Mo. 206, 55 S. W. 1052), and a judgment can only be revived in the name of the original judgment creditor, therefore, the defendants were without legal capacity to sue out a writ of scire facias to revive the judgment, and the judgment as revived is void. *Blick v. Tanzey*, 181 Mo., loc. cit. 523, 80 S. W. 902. The lien of the original judgment had expired by limitation at the time of the trial. The defendants,

therefore, were not prejudiced by the judgment of the court and had no such standing in court as entitled them to contest the suit of the plaintiff; having no lien themselves upon the land, it was a matter of indifference to them whether the plaintiff's lien should date from the date of the old or the new deed of trust. They are in no position to complain of the judgment of the lower court.

The judgment is therefore affirmed. All concur.

Note to Lawrence County Bank v. Lambert.

(Ark. 1861) To a scire facias by a receiver to revive a judgment against an administrator, which under a decree in chancery had been assigned by the receiver to the widow of the judgment debtor, a plea setting forth the assignment is bad on demurrer, as merely an equitable title thereby vests in the assignee, with the right to control the collection and use the name of the plaintiff.—*Brearly v. Peay*, 23 Ark. 172.

(Ga. 1849) An assigned judgment, which has become dormant, may be revived by scire facias in the name of the original plaintiff, for the use of the assignee.—*City of Macon v. Trustees of Bibb County Academy*, 7 Ga. 204.

(Ind. 1853) Under Rev. St. 1843, in case of the assignment of a judgment, scire facias may issue in the name of the original plaintiff.—*Forbes v. Tiffany*, 4 Ind. 204.

(Iowa, 1860) A sale and transfer of real property, for which the vendor has recovered judgment for possession in an action for its recovery, will operate as an assignment of the judgment, and the purchaser may revive the judgment by scire facias in his own name.—*Wright v. Parks*, 10 Iowa, 342.

(La. 1871) Under Act 1853, providing that any party interested in a judgment may revive it, a purchaser of the judgment may revive it in the name of the judgment plaintiffs; and this, though they constituted a firm which has been dissolved.—*Watt v. Hendry*, 23 La. Ann. 594.

(La. 1878) A suit to revive a judgment that has become the property of a third person is properly brought in the name of the original plaintiff.—*Marbury v. Pace*, 30 La. Ann. 1330.

(La. 1880) An attorney, who, by special agreement with the client, is entitled to a certain commission—as here, 10 per cent.—on the amount recovered, which amount is evidenced by and embraced in a judgment, has a sufficient interest in the judgment to sue for its full revival.—*Martinez v. Succession of Vives*, 32 La. Ann. 805.

(Md. 1847) Under Acts 1830, c. 165, the person for whose use a judgment has been entered may prosecute a writ of sci. fa. to revive it in his own name.—*Clark v. Digges*, 5 Gill, 109.

(Mich. 1889) Scire facias may be prosecuted by the assignee of a judgment in the name of the assignor, where he alleges a bona fide assignment, and also that there is a sum unpaid on the execution rightfully belonging to the assignee; *Laws 1863*, p. 102, allowing

an assignee to pursue remedies in his own name, being permissive only.—*McRoberts v. Lyon*, 79 Mich. 25, 44 N. W. 160.

(Miss. 1844) A judgment recovered in the name of a surviving partner as such can be enforced only in his name or that of his personal representative. A sci. fa. to revive cannot be sued out in the name of the administrator of the deceased partner, even after the death of the survivor.—*Copes v. Fultz*, 9 Miss. (1 Smedes & M.) 623.

(Mo. 1904) At common law a judgment may not be revived in the name of its assignee.—*Bick v. Tanzey*, 80 S. W. 902, 181 Mo. 515.

(Mo. 1904) A proceeding to revive a judgment is not an action within Rev. St. 1899, § 3748, providing that any action which the plaintiff in an assigned judgment might have had thereon may be maintained in the name of the assignee.—*Bick v. Tanzey*, 80 S. W. 902, 181 Mo. 515.

(Mont. 1884) A judgment in favor of "E. C. & Co." cannot be revived in favor of two persons who make affidavit that they were surviving partners of E. C. & Co., there being no suggestion in the record of E. C.'s death or of the appointment of an administrator. This would be a change in the judgment, which cannot be made after the term at which it was rendered.—*Boyd v. Platner*, 5 Mont. 226, 2 Pac. 346.

(Mont. 1898) The assignee of a judgment may sue to revive it, under the law requiring suits to be brought in the name of the real party in interest.—*Haupt v. Burton*, 55 Pac. 110.

(Neb. 1902) An assignee of a judgment may maintain revivor proceedings upon it in his own name.—*School Dist. No. 34, Adams County v. Kountze Bros.*, 92 N. W. 597.

(N. Y. 1861) Where a judgment was obtained by a plaintiff in his lifetime, his personal representatives are not entitled to an action to revive the action and judgment in their name, under Code, § 121, relating to the abatement of suits by death, marriage, or otherwise, and of their revival.—*Ireland v. Litchfield*, 21 N. Y. Super. Ct. (8 Bosw.) 634.

(Ohio, 1867) The assignee of a judgment debt may have the judgment revived, although the debt to satisfy which the judgment debt was assigned is barred by the statute of limitations.—*Welsh v. Childs*, 17 Ohio St. 319.

(Ohio, 1880) A record of a judgment against three persons showed that, on motion and by consent of parties, the judgment was to stand against one as a surety only. Held a sufficient certificate that he was such surety to authorize him to maintain an action to revive said judgment after it had become dormant under Act Feb. 6, 1871.—*Peters v. McWilliams*, 36 Ohio St. 155.

(Pa. 1852) A surety who has paid a debt secured by judgment against the principal, and who is in other respects entitled to be substituted to the rights of the creditor, may revive the judgment without first having a decree of subrogation, and try his right on the scire facias.—*Baily v. Brownfield*, 20 Pa. (8 Harris) 41.

(W. Va. 1894) An assignee of a judgment cannot, in his own name, maintain a writ of scire facias to revive it, since he is not authorized to do so by Code 1891, c. 189, § 10, providing merely that an "action, suit, or scire facias may be brought on a judgment."—*Wells v. Graham*, 39 W. Va. 605, 20 S. E. 576.

DEES v. ST. LOUIS, M. & S. E. RY. CO.
(St. Louis Court of Appeals. Missouri. Feb. 13, 1906. Rehearing Denied Feb. 27, 1906.)

Error to Circuit Court, Wayne County;
E. M. Dearing, Judge.

Action by William Dees against the St. Louis, Memphis & Southeastern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

James Orchard, for plaintiff in error. O. L. Munger, for defendant in error.

GOODE, J. This case is, in all respects, like the case of James R. Moore v. Same Defendant (No. 9,952) 92 S. W. 756. The stock was killed at the same station, and at practically the same time.

For the reasons given in the Moore Case, the judgment in this one is affirmed. All concur.

PARDUE v. McCOLLUM et al.
(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

PARTNERSHIP—ACCOUNTING—PARTNER'S LIABILITY FOR RENT.

A partnership agreement for the operation of a saloon provided that defendant C. agreed to furnish a building. After the date to which the partnership contract was extended, C., who was the owner of the building used, conveyed it to his wife, who, with knowledge of the partnership contract, permitted plaintiff and C. to continue the saloon business therein without claim for rent until the partnership was terminated, when she directed that plaintiff's account be charged with rent from the date of the expiration of the contract. *Held*, that the business conducted after the expiration of the contract should be considered as operated according to the same terms, and that plaintiff was not liable for rent.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 793; vol. 32, Cent. Dig. Landlord and Tenant, §§ 881, 796.]

Appeal from Circuit Court, Iron County;
E. M. Dearing, Judge.

Action by J. T. Pardue against J. W. McCollum and others. From a judgment for plaintiff, defendants appeal. Affirmed.

H. H. Larimore, for appellants. N. A. Mozley, for respondent.

BLAND, P. J. Plaintiff and defendant J. W. McCollum, on January 12, 1900, made the following partnership contract: "This agreement made and entered into this, the twelfth day of January, 1900, by and between J. W. McCollum, of the county of Stoddard and state of Missouri, party of the first part, and J. T. Pardue, of the county of Stoddard and state of Missouri, party of the second part, witness that the party of the first part agrees and binds himself to furnish building, fixtures and original stock for a saloon to be conducted at the stand of J. W. McCollum and company in the city of Dexter, that the party of the second part agrees and binds

himself to run said saloon, devoting all his time to said business. That the stock of said saloon is to be kept up and maintained, and all running expenses are to be paid out of the proceeds of the sales made at said saloon in the course of business, that the profits after all costs for keeping up stock and all running expenses are to be divided equally between the said parties to this contract." On the back of the contract is the following indorsement: "This contract shall remain in full force and effect until January the first, 1902. This is the first day of January, 1901."

The evidence shows that each party to the contract performed his part of the agreement up to the date fixed for its termination, January 1, 1902, and that amicable settlement of the partnership accounts was made between the partners in January, 1901, and January, 1902. In January, 1902, J. W. McCollum conveyed the premises on which the saloon is situated to his wife, A. J. McCollum, the other defendant. After January 1, 1902, without expressly renewing the contract, or entering into any new arrangement for conducting the saloon business, it was continued until October of that year in the same manner as it had been conducted under the agreement, without objection on the part of either of the defendants. The net profits of the business, by agreement of the parties, were turned over weekly by plaintiff to R. A. Sissler, a bookkeeper and clerk in a drugstore belonging to defendants, and also bookkeeper for the saloon. On the closing of the saloon, in October, 1903, Mrs. McCollum directed the bookkeeper to charge, to the saloon account, \$450, as rent of the saloon building from January 1 to October 1, 1903, and, on settlement, to charge plaintiff with one-half this amount, \$225. This sum was charged to the plaintiff, and on the closing of the business all other matters of the partnership were amicably settled; but plaintiff objected to the rent charge, and it is agreed that this item was not settled, and that the sum of \$225, as his share of the rent, was withheld from him in the settlement, and that said sum is due him, if he is not liable to pay one-half the rent charge. (Other partnership items are embraced in the petition, but, as they were cut out of the case by the instruction of the court, it is unnecessary to give them any attention.) Plaintiff recovered the rent item with interest thereon, and the court having refused to grant defendants' motion for new trial, they appealed.

The evidence shows there was never an agreement, expressed or implied, between plaintiff and the defendants, or either of them, that either plaintiff, individually, or the saloon partnership, should pay rent for the use of the building, for the evidence is conclusive and all one way that, after the termination of the partnership agreement of January, 1902, the business of the partnership was continued by the tacit consent of all the parties to this suit; this being

so, in law, the presumption is that it was continued under the terms of the original partnership contract. In that contract, J. W. McCollum agreed to furnish the building, and his wife, by her course of conduct, with full knowledge of the contents of the contract, must be presumed to have assented that the business should be continued under the terms of the partnership contract. There is no error found in the record, but even if there was, the judgment is so manifestly for the right party that we would affirm it, irrespective of any and all error intervening at the trial.

The judgment is affirmed. All concur.

STROTHER v. AMERICAN COOPERAGE CO.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

1. LOGS AND LOGGING—SALE OF TIMBER—CONTRACT—CONSTRUCTION.

A contract by the owner of certain timber, by which he granted and sold "all the ash timber of the diameter of 15 inches and under," standing on certain land, and providing that for each and every 1,000 feet of lumber cut from such timber, to be measured by Scribner's log measure, the sum of 30 cents per 1,000 feet should be paid, constituted a contract for the sale of all timber on the land 15 inches and under at the stump.

2. INJUNCTION—JURISDICTION—CONTINUING TRESPASS—MULTIPLICITY OF SUITS.

Where complainant alleged that defendants were daily cutting timber from his land over 15 inches in diameter, in violation of a contract of sale under which they were only entitled to cut timber under such size, the bill stated grounds for equitable relief by injunction, both to restrain a continuing trespass, and to avoid a multiplicity of suits.

3. EVIDENCE—WRITTEN CONTRACTS—EXPLANATION BY PAROL.

Where a contract for the sale of all standing ash timber on certain land of the diameter of 15 inches and under, was unambiguous, parol evidence that all of such trees on the land were hollow at the butt, was inadmissible to explain or qualify such contract.

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by J. D. Strother against the American Cooperage Company. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Brewer & Collins, for appellant. Farris & Oliver and C. G. Shepard, for respondent.

BLAND, P. J. On April 13, 1903, plaintiff, by his attorney, C. G. Shepard, and P. P. Ferguson made and entered into the following contract: "This agreement made and entered into this, the 13th day of April, 1903, by and between J. D. Strother, of Pemiscot county, Missouri, party of the first part, and P. P. Ferguson, of Pemiscot county, Mo., party of the second part witnesseth: For and in consideration of the sum \$100 cash in hand paid by the party of the second part, to the party of the first part, the receipt of

which is hereby acknowledged and the further agreements, covenants, and stipulations herein mutually agreed to be kept, done, and performed, and the further sums of money herein agreed to be paid, the party of the first part does hereby grant, bargain, sell and convey to the party of the second part all of the ash timber of the diameter of 15 inches and under, now standing, being and growing on a tract of land containing 1,280 acres more or less, in township 18, range 11 E., in Pemiscot county, Mo., and being the land bought by J. D. Strother of Hunter and Davis; the said second party is to have the same time to cut and remove said timber as the first party has for moving timber on said land which yet belongs to him. The second party hereby agrees to pay to the first party for the timber above mentioned the sum of thirty cents per thousand for each and every thousand feet of timber so cut on said land, all of which said timber is to be measured by Scribner's log measure, said sum of 30 cents per thousand feet is to be paid monthly, for all the timber so cut the previous month; the second party agrees to enter on the removing of said timber on or before the 1st day of June, 1903, and use due diligence in the removing of said timber, and binds himself to cut and remove all of the merchantable timber hereby conveyed by the time heretofore given J. D. Strother for the removing said timber; the party of the first part hereby agrees that the \$100 so paid on said timber as above mentioned, shall apply as payment on the first timber cut by the second party, and there shall be no money due under this contract for timber so cut until sufficient amount has been cut to cover the amount of \$100 as aforesaid." Subsequently, Ferguson assigned and transferred the contract to the defendant, an Iowa corporation.

The evidence shows that plaintiff had purchased of the owner of the land, the standing timber on the 1,280 acres of land, mentioned in the contract; that this timber was largely ash, suitable for manufacturing into lumber, and that ash saw timber was worth \$6 per thousand in the stick; that ash timber 15 inches and under at the stump was too small to be used as saw timber and was worth only 30 cents per thousand; that there was a considerable quantity of ash timber 15 inches and under at the stump, standing on the land; that after acquiring the tract, defendant, by its superintendent and employees, went upon the land and at first only cut such timber as was 15 inches and under at the stump; that to ascertain the size of the trees they had a string by which they measured them, measuring around the trees at the place where they were to be cut; that later on they got a 16 foot pole and measured sixteen feet up the trees and cut all trees 15 inches and under at the top; that the plaintiff ascertained defendant was cutting timber over 15 inches at the stump, and saw Tucker, defendant's superintendent, and informed

him that his men were cutting timber over 15 inches at the stump. Plaintiff testified that Tucker expressed surprise at his men cutting timber larger than 15 inches at the stump, and assured plaintiff that it would not occur again and that the company would pay for the larger timber already cut, but that defendant continued to cut the larger timber. Plaintiff petitioned the court to enjoin the defendant from cutting timber on the land, over 15 inches in diameter at the stump. A temporary injunction was issued which on final hearing was made perpetual. Defendant appealed.

On the hearing defendant offered proof that the ash timber on the land was hollow and "swell-butted" and that an ash tree 15 inches at the stump was a mere pole or sapling and but a few inches in diameter a few feet up the tree, and that these facts were well known to the plaintiff and Ferguson at the time they entered into the contract. The court refused to hear this evidence. It was shown that the method of measuring timber by Scribner's log rule was to measure each stick at the small end, and that the lengths into which timber was cut when sold by the thousand, were 14, 16, and 18 feet. There is no evidence that defendant cut timber over 18 feet in length or exceeding 15 inches in diameter at the small end.

1. In respect to the contract of sale, we think it is plain that the timber sold was ash trees 15 inches and under at the stump, and this, according to the evidence, was the construction defendant's superintendent first put upon the contract and first acted on. It is the general understanding, when one speaks or writes about the size of a standing tree and says or writes that it does or will measure 15 inches, he means it will measure 15 inches in diameter at the stump, and it was so judicially determined in *Leonard v. Holland* (Ky.) 79 S. W. 227, where it was ruled that under a contract for the sale of oak trees, 12 inches in diameter, the diameter should be determined by measurement at the stump. It must be presumed that the parties, when they made the contract, had measurement at the stump in their minds, unless other expressions in the contract show they had a different understanding. Defendant contends that the stipulation in the contract that, "for each and every thousand feet of timber so cut on said land, all of which said timber is to be measured by Scribner's log measure, said sum of 30 cents per thousand feet is to be paid," shows that the timber sold was all ash timber on the land 15 inches and under at the top. This clause of the contract, relied on by the defendant, has sole reference to the measurement of the timber after, not before, it was cut, and was incorporated into the contract

as a rule by which to ascertain the amount of timber defendant should pay for.

2. Defendant contends that there is no equity in the bill, that it is not alleged that defendant is insolvent, and the proof shows that the timber had a market value and can be compensated for in an ordinary action for damages. The petition alleges, that the trespass—the wrongful cutting of ash timber over 15 inches in diameter at the stump—is of daily occurrence and to recover compensation in damages would necessitate a multiplicity of suits. The evidence supports this statement. The general rule in respect to the jurisdiction of courts of equity in cases of trespass is thus stated by Currier, J., in *Echelkamp v. Schrader*, 45 Mo., loc. cit. 507, 508. "The jurisdiction of courts of chancery in cases of trespass is of modern origin, and it is uniformly held that an injunction will not be awarded to restrain the commission of an ordinary trespass where the injury flowing from it is not irreparable, and where an adequate remedy may be had in the recovery of damages against a solvent party. Chancellor Kent reviews the subject elaborately in *Jerome v. Ross*, 7 Johns. Ch. 315 [11 Am. Dec. 484], and reaches the result above stated. He says: 'I do not know a case in which an injunction has been granted to restrain a trespasser, merely because he is a trespasser.'" This general ruling has several qualifications: one is; where the law does not afford an adequate remedy, a remedy by injunction exists, even though the trespasser is solvent. *Turner v. Stewart*, 78 Mo. 480; *Melcher v. Bank*, 85 Mo., loc. cit. 369; *Gordon v. Mansfield*, 84 Mo. App. 372; *State Saving Bank v. Kercheval*, 65 Mo. 688, 27 Am. Rep. 310; *Taylor v. Todd*, 48 Mo. App., loc. cit. 556; *Palmer v. Crisle*, 92 Mo. App. 510; *Heman v. Wade*, 74 Mo. App. 339. Another exception is when the trespass complained of is continuous or of frequent occurrence, or where the party complained of threatens to continue his wrong doing. Plaintiff's case clearly falls within this exception. Another exception is that injunction will lie to prevent a multiplicity of suits. We think the case also falls within this exception.

3. The excluded evidence offered by defendant to show that the ash trees on the land were all hollow at the butt, we presume was offered for the purpose of throwing light on the contract of sale. The contract is unambiguous; its language is clear and explicit and its terms easy of interpretation. therefore, parol evidence of any kind was inadmissible to explain, qualify, restrict, or enlarge any of its terms.

No error appearing in the record, the judgment is affirmed. All concur.

INMAN, AKERS & INMAN v. ELK COTTON MILLS.

(Supreme Court of Tennessee. March 3, 1906.)

1. SALES—CONTRACT—COMPLIANCE.

Where plaintiffs agreed to sell and deliver to defendants 50 bales of cotton at a specified price, but never at any time tendered a delivery of more than 49 bales, they were not entitled to recover for defendants' refusal to accept.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 387, 951.]

2. SAME—WAIVER OF TENDER.

Where a seller, on being notified that the buyer would refuse to accept the goods purchased, immediately declined to recognize the cancellation of the order and thereby kept the contract in force, the buyer's notice of cancellation did not obviate the necessity of a tender of the goods by the seller in order to authorize a recovery for the buyer's breach of contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1087.]

Appeal from Chancery Court, Lincoln County; Walter S. Bearden, Chancellor.

Action by Inman, Akers & Inman against the Elk Cotton Mills. From a judgment dismissing the bill, affirmed by the Court of Chancery Appeals, plaintiffs appeal. Affirmed.

Crownover & Crabtree and Gill & Holman, for appellants. Carter & Lamb, for appellee.

BEARD, C. J. The complainants in this cause are partners located and doing a cotton business in Atlanta, Ga., and the defendant is a corporation engaged in the manufacture of cotton goods at Fayetteville, in this state. The present bill is filed to recover the sum of \$508.64, which it is alleged has accrued to the complainants from a breach of an executory contract for the sale and purchase of 50 bales of cotton. On the 17th of June, 1904, the defendant sent to the complainants at Atlanta the following telegram: "If at 11½ delivered here you can ship Elk Cotton Mills here fifty bales of cotton strict low middling prompt shipment"—which was replied to by the complainants in the following telegram: "We accept 11½ strict low middling delivered at Fayetteville." This contract was immediately afterwards confirmed both by telegrams and letters exchanged between the parties. The complainants, not having the cotton on hand at Atlanta, ordered the same to be shipped from Columbus and other points in Mississippi, where they seemed to have cotton depots. On June 24, 1904, they delivered 21 bales to the railroad for shipment to defendants; on June 25th, 3 bales; and on June 27th, 26 bales. For some unexplained reason this cotton was much delayed en route to Fayetteville. Many complaints by letter and wire were made by defendant to the complainants as to this delay; and on July 6th, the cotton not then having been received, the defendants sent to the complainants a telegram canceling their order for the fifty bales, in re-

ply to which the complainants sent a message which read as follows: "Fifty bales shipped out promptly. Delay if any with the railroads. We will not accept cancellation."

The defendant declining to accept the cotton, which arrived in Fayetteville on the 7th of July, the same was sold by the complainants, and the present bill is filed against the defendant to recover the loss occasioned by this resale. In their bill the complainants insist that in Georgia, as well as in other cotton states, including Tennessee, a rule had been adopted by the cotton trade several years prior to the present transaction, known among men engaged in that trade as the "South Carolina rule," which embodied a use and custom of long standing, universal and notorious among cotton dealers and purchasers within this territory, that "prompt shipment," in a contract for the sale of cotton, meant a delivery to the common carrier within 14 days from the time of the contract, and the delivery of this cotton having been made within that period, that whatever delay occurred thereafter resulted from the action or nonaction of the railroads so receiving it, and for this complainants were not liable. It is further insisted in the bill that the complainants, upon the defendant's final declination to take this cotton, gave notice that it would resell it on its account, and that in the resale made in accordance with this notice the highest market price was obtained. The defendant answered, and averred that no such rule or use existed as was alleged by the complainants, or, if it did, averred that it was unknown to the defendant, and therefore did not bind it. It further averred that prompt shipment in its telegram and letters meant exactly what the terms expressed—that is, immediate shipment; that the need of the cotton covered by this contract was pressing at the time of the order, as was well understood by the complainants; and that it was in this view that promptness in shipment was made a term of the contract. It further denied that it had notice from the complainants of their purpose to make a resale of this cotton.

These were the defenses made in the original answer. It developed, however, in the taking of the proof, that only 49 bales of cotton of the shipments made by complainants to the defendant reached Fayetteville, 1 bale disappearing in course of transportation, and that only this number of bales, as a matter of fact, were tendered to the defendant, and only that number disposed of upon its resale. When this was disclosed, the answer was amended so that the Elk Cotton Mills as an additional defense averred that the complainants had breached their contract in failing to tender the 50 bales which had been contracted to the defendant.

The chancellor dismissed this bill, and the Court of Chancery Appeals has affirmed his decree, resting the affirmance upon the fact, as found by that court, that while it was

a custom of long standing and so uniform and notorious in Georgia, North Carolina, South Carolina, and other cotton states among dealers in cotton as to have become embodied finally in the rule referred to above, that prompt shipment meant a shipment within 14 days from the making of the contract, yet that this custom and rule were unknown to the defendant and to certain other mills in the state of Tennessee, and it was, therefore, held that the defendant was not bound by either, and that the delay in the shipment of this cotton was a breach of the contract, which barred complainants of a recovery.

There is very considerable authority for the contention made by the complainants that this contract, having been closed in Atlanta, was a Georgia contract, and that the terms used by the defendant in its telegram of June 17th, to wit, "prompt shipment," were to be construed with regard to the well-established usage, existing there, as well as elsewhere, in the cotton states; and this, though the defendant was without knowledge of the same. In *Star Glass Co. v. Morey*, 108 Mass. 570, it was held that a contract made in Boston for glass to be manufactured in Philadelphia and there delivered to the carrier is governed by the custom and usages prevailing in this latter city. In *Samuels v. Oliver*, 130 Ill. 73, 22 N. E. 499, the proposition is announced, as supported by many previous cases determined in that state, as well as upon the authority of *Lawson on Usages*, 47, 284-287, that a person dealing at a particular market will be taken to have dealt according to the known general custom and usage of that market; and this has been held to be the rule, whether he in fact knows of the custom or not. While the exact question has not been settled in this state, yet there is much in the reasoning of the court in *Railroad v. Naive*, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443, and the authorities there cited, which give support to the insistence of the complainants on this point. It is not necessary, however, for us to determine this question, as we think it clear the complainants must be repelled upon another and distinct ground. As has been seen, the complainants agreed to sell and to deliver to the defendant, at Fayetteville, 50 bales of strict low middling cotton, and the defendant agreed to purchase and receive that number of bales.

A delivery of a less number was not a compliance with this contract. So far as it affected the contract relations of the parties, a failure in the matter of 1 bale was as much as a failure to deliver any greater number of bales. The complainants sue to recover for the breach of an entire contract, and in order to maintain their bill they must show a compliance or a willingness to comply with it as an entirety. Failing in this latter regard, they fail altogether. *Tiedeman on Sales*, § 101; *Barker v. Reagan*, 4 Helsk. 590. Their insistence that they were relieved from

tendering 50 bales by reason of the repudiation of the contract by the defendant, under the facts found by the Court of Chancery Appeals, cannot avail them. If they had accepted the repudiation, or rather cancellation, of the contract contained in the telegram from the defendant, of July 7th, then this failure would not have affected, other matters out of the way, their right to recovery. This, however, they failed to do. They declined positively to accept the cancellation, and thus kept the contract alive between themselves and the defendant, and thus enabled the defendant, notwithstanding its attempted cancellation, to avail itself of any previous or subsequent breach on the part of the complainant. As is said in *Gentry v. Margolius*, 110 Tenn. 674, 75 S. W. 959: "It takes two to make a contract, and just as truly it takes two to do away with one, in the absence in the contract itself of a term allowing either party to retire at pleasure."

The rule of law on this subject is thus stated in 9 Cyc. p. 637: "If a promisee elects not to accept the remittance and continues to insist on the performance of the promise, as he may do, the contract remains in existence for the benefit and at the risk of both parties, and if anything occurs to discharge it from other causes the promisor may take advantage of such discharge." The following authorities are cited which support this text: *Smith v. Georgia Loan, etc., Co.*, 118 Ga. 975, 39 S. E. 410; *Kadish v. Young*, 108 Ill. 170, 43 Am. Rep. 548; *Howard v. Daily*, 61 N. Y. 362, 19 Am. Rep. 285. See also, *Ault v. Dustin*, 100 Tenn. 366, 45 S. W. 981.

In the leading case of *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, in discussing the effect of an unqualified and positive refusal to perform a contract, though the performance thereof is not yet due, the Supreme Court of the United States quote at length from the opinion of *Cockburn*, Chief Justice, in *Frost v. Knight*, L. R. 7 Exch. 111, as follows: "The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, * * * may be thus stated: The promisee, if he pleases, may treat the notice and intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he think proper, treat the repudiation of the other

party as the wrongful putting an end to the contract and may at once bring his action as on breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

We think, on this ground, that the complainants' bill was not maintainable, and therefore should be dismissed. The costs of the cause will be paid by the complainants.

SHEPPERSON et al. v. BURNETTE.

(Supreme Court of Tennessee. March 3, 1906.)

FORCIBLE ENTRY AND DETAINER—NATURE OF ACTION—PERSONS LIABLE—PERSONS CLAIMING THROUGH TENANT BY CURTESY.

Under Shannon's Code, § 5093, defining unlawful detainer as where the defendant enters by contract, either as tenant or claiming through or under a tenant, the action of unlawful detainer lies only where the defendant entered by contract and as lessee, or under a lessee, and hence that form of action will not lie against one who entered under a conveyance from a tenant by curtesy.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forcible Entry and Detainer, §§ 23-28.]

Appeal from Circuit Court, Bedford County; Jno. B. Richardson, Judge.

Action by John Shepperson and others against Amanda Burnette. From a judgment for defendant, plaintiffs appeal. Affirmed.

T. R. Myers, for appellants. T. H. Greer, for appellee.

NEIL, J. This was an action of unlawful detainer, brought originally before a justice of the peace of Bedford county, and from his judgment appealed to the circuit court of the county, where it was tried before Judge Richardson without the intervention of a jury. The following facts were agreed upon by the parties, viz.:

On November 12, 1860, Silas Pratt and wife conveyed to Jane Sutton, wife of Alfred Sutton, the land in controversy. Jane Sutton died over 30 years ago. At that time she and her husband were living upon the land mentioned and occupying it as their home. The plaintiffs are the children of Sutton and wife. In 1877 Alfred Sutton, the husband, conveyed the land to Flem Burnette. The latter died about 20 years ago, leaving the defendant Amanda Burnette as his widow. She has been occupying the place since that time, paying taxes and claiming as the widow of Flem Burnette. Alfred Sutton died August 12, 1903.

The present action was brought on the 3d of December, 1904.

It is conceded, and the facts furnished the legal basis for the conclusion, that Alfred Sutton was tenant by the curtesy of the

land. No question of the statute of limitations is made, or could be made, since it appears that the suit was brought within less than two years after the death of the life tenant. The only question considered in the court below, and the only question argued here, is whether a suit of unlawful detainer by the heirs of Jane Sutton would lie under the facts stated.

His honor held that it would not lie, and we are of opinion that his judgment was correct. The soundness of this conclusion will be apparent from the following considerations.

Under Shannon's Code, § 5093, unlawful detainer is thus defined:

"Unlawful detainer is where the defendant enters by contract, either as tenant or as assignee of a tenant, or as personal representative of a tenant, or as subtenant, or by collusion with a tenant, and, in either case, willfully and without force, holds over the possession from the landlord, or the assignee of the remainder or reversion."

It is perceived that one essential element of the definition is that the defendant or the one under whom he claims must have entered by contract. In the present case it appears, as already stated, that Alfred Sutton was tenant by the curtesy. Flem Burnette took such rights as he had, and no more. The same is true of the widow of Burnette, the present defendant. Tenancy by the curtesy is an estate for life created by the act of the law. The law vests the estate in the husband immediately upon the death of the wife without entry. 4 Kent, Comm. marg. pp. 27, 29. So it appears that neither the estate was created nor was possession secured by contract. Hence an action of unlawful detainer could not lie by the remaindermen against an assignee of the tenant by the curtesy holding over after the expiration of that estate.

Again, it is manifest from the language of the section which we have quoted that it applies alone to one who occupies the relation of tenant, or the assignee of a tenant, or the personal representative of a tenant, or a subtenant, or one holding by collusion with the tenant, and that the word "tenant" here has reference to the relation of landlord and tenant, and not the more remote meaning which the word "tenant" bears as used in the expressions "tenant by the curtesy," "tenants in common," and the like.

This point is brought out more clearly when we note that the section quoted was drawn from section 5 of the original act of 1821 (Acts 1821, c. 14), and when we observe the changes which were made when the Code section was prepared.

Section 5 of the original act read as follows:

"If any tenant or tenants for term of life or lives, year or years, or other person or persons, who are or shall be in possession of any lands, tenements, or hereditaments, by,

from, or under, or by collusion with such tenant or tenants, shall willfully and without force hold over any lands, tenements, or hereditaments, after demand and notice in writing given for the delivery of the possession thereof by his, her or their landlord or landlords, lessor or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his, her, or their agent or attorney, thereunto lawfully authorized, then such person or persons so holding over shall be guilty of an unlawful detainer." See Caruthers & Nicholson's Comp. St. p. 342.

This same section is reproduced, in substance, in the case of *Lane v. Marshall*, Mart. & Y. 255, 259.

Under this section, as it appears in the original act, there can be no doubt that the action would run against a tenant by the curtesy, and this seems to have been the understanding, as appears from the case last cited. It is apparent, however, that when the Code section was prepared the feature of the original act pertaining to life tenants was designedly omitted, and the scope of the action thereby very much narrowed.

It results that the judgment of the court below must be affirmed.

GALLATIN TURNPIKE CO. v. PURYEAR. (Supreme Court of Tennessee. March 3, 1906.)

1. ADMINISTRATORS—TIME FOR APPOINTMENTS—STATUTORY PROVISION.

Shannon's Code, § 3955, prescribing the times within which administration may be granted on the estates of decedents, applies to administrators de bonis non, as well as to original administrators.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 272.]

2. PARTIES—WHO MAY SUE—INTEREST IN SUBJECT-MATTER.

A person, sued by one acting as administrator de bonis non under the apparent authority of the county court, has such an interest as entitles him to apply for the revocation of the administration on the ground that the administrator was appointed after the expiration of the time limited by statute therefor.

Appeal from Circuit Court, Sumner County; B. D. Bell, Judge.

Suit in equity by the Gallatin Turnpike Company against D. B. Puryear. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed.

J. W. Blackmore, for appellant. W. A. Guild and D. B. Puryear, for appellee.

NEIL, J. On the 15th of January, 1904, a petition was filed by the plaintiff in the county court of Sumner county against the defendant. This petition contained the following allegations:

That John Byrns died intestate in Sumner county, Tenn., in the year 1841, and that at the January term of the county court of that county in the year 1842 administration was

granted on his estate; that in January, 1903, 62 years after the death of said Byrns, the county court made an order appointing another administrator for said estate, viz., the defendant, D. B. Puryear, who, under color of this appointment, has as such administrator de bonis non brought suit against the petitioner in the chancery court of Sumner county.

It is alleged that this action of the county court is directly in opposition to the provisions of the Code upon the subject, inasmuch as none of the exceptions provided for in the statute existed in favor of the said estate.

The prayer of the petition was that the administration should be revoked.

A demurrer was filed by the administrator, making two points: First, that the statutory inhibition did not apply to administrators de bonis non, but only to original administrators; and, secondly, that the petitioner did not occupy such a relation to the estate as that it could question the appointment.

The county court sustained the second ground of demurrer and dismissed the petition. Thereupon an appeal was prosecuted to the circuit court of the county, and there both grounds of demurrer were sustained, and the petition dismissed. From this latter judgment an appeal was prayed and prosecuted to this court, and errors have been assigned here.

The statute referred to is Shannon's Code, § 3955.

This section, with its various subsections, reads as follows:

"3955. The time within which administration may be granted shall be as follows:

"(1) When deceased was entitled to a remainder not reduced to possession. Where a person dies entitled to a vested or contingent remainder, not reduced to possession in his lifetime, ten years after the termination of the life or other particular estate on which the remainder depends, shall be given to administer upon his estate in said remainder.

"(2) Administration may be granted at any time within thirty years from the death of the deceased to any person entitled to distribution who was an infant or married woman when the deceased died.

"(3) A special administration may be granted for the purpose of prosecuting any claim against the government of the United States, without any limitation of time.

"(4) But in no other case shall letters of administration be granted where the deceased died twenty years before application made for the same; and all letters testamentary or of administration granted after the said period of twenty years, to any other than a distributee who was such infant or married woman, shall be utterly void and of no effect."

In the brief of counsel for the defendant in error we are referred to the statutes and

decisions of other states—the decisions referred to being *Crossan v. McCrary*, 37 Iowa, 684; *Adams v. Richardson*, 5 Tex. Civ. App. 439, 27 S. W. 29; *Kempton v. Swift*, 2 Metc. (Mass.) 70, *Bancroft v. Andrews*, 6 Cush. (Mass.) 493; *Holmes, Petitioner*, 33 Me. 577.

The Iowa and Massachusetts statutes seem to refer in terms to original administrations, and in Texas there seems to be a special provision in favor of administrators *de bonis non*.

These cases afford no aid in the construction of our statute.

We are of the opinion that the section of the Code which we have quoted was intended to cover the whole subject, and, no saving having been made in favor of administrators *de bonis non*, we can make none. It was designed as a statute of repose.

The first ground of demurrer must therefore be overruled.

The second ground must also be overruled. The complainant having been sued by the defendant, acting as administrator under the apparent authority of the county court, it had a direct interest in the question, whether he was a legal administrator. Under our decisions it could not raise the question collaterally in the suit brought against it, since the county court has original and independent jurisdiction in the appointment of administrators, and in the revocation of their letters. *State v. Anderson*, 16 Lea, 321; *Wilson v. Frazier & McKinney*, 2 Humph. 31; *Wilson v. Hoss*, 3 Humph. 142; *Franklin v. Franklin*, 91 Tenn. 119, 18 S. W. 61.

Having the interest stated, and there being no law authorizing the petitioner to make the controversy in any other court, it necessarily follows that it had the right to apply to the county court to test the validity of the appointment, and, in case that court should declare the appointment invalid, then to have the letters revoked.

Of course, we do not wish to be understood as intimating that a defendant, sued by an administrator, could institute an action in the county court for revocation of his letters, on the ground of any mere irregularity fallen into by the county court in the exercise of its powers, or that such defendant could raise a question as to whether that court had passed over one having a preferred right to administer and had selected one having an inferior claim. The present case, according to the facts set out in the petition, is one wherein the county court had passed the bounds of its authority under the statute; yet it is apparent that the court referred to was the only one that could deal with the question, since we cannot say that its action was absolutely void on its face, as it is possible one of the exceptions provided for in the statute may have existed.

It results that the judgment of the circuit court must be reversed, and the cause re-

manded to that court, with directions to reverse the judgment of the county court dismissing the petition, and to remand to that court for further proceedings.

Defendant will pay the costs of this court and of the circuit court.

HEARD v. ELLIOTT et al.

(Supreme Court of Tennessee. March 23, 1906.)

1. OFFICERS — DE FACTO OFFICERS — APPOINTMENT.

The office of entry taker was consolidated with that of county surveyor by Acts 1870, p. 115, c. 68. It was abolished by Acts 1875, p. 51, c. 55, and again established by Acts 1879, p. 65, c. 46. T. was elected county surveyor of S. county in 1881, but was not elected entry taker until April 4, 1887. He nevertheless had possession of the books and records of the entry taker's office from 1881 until 1904, held himself out as entry taker, was reputed to be, and was recognized as such by the public, and during all that time performed the duties of making entries. *Held*, that he was entry taker *de facto* prior to the date of his formal election as such, so that an entry taken by him on January 21, 1887, was valid.

2. SAME — CREATION OF OFFICE — ENTRY TAKER.

Acts 1875, p. 51, c. 55, abolished the office of county entry taker, and Acts 1879, p. 65, c. 46, entitled "An act to establish the entry taker's office," provided that there should be elected by the justices of the county courts at the April term of the court, or any quarterly term, every four years, an entry taker for any county in the state desiring to have an entry taker. *Held*, that such act of 1879 created the office of entry taker throughout the state, whether a county elected to fill the same or not.

3. COUNTIES — OFFICERS — ENTRY TAKER — ELECTION — EVIDENCE — PAROL PROOF.

The election of an entry taker by the justices of a county court, as provided by Acts 1879, p. 65, c. 46, can only be evidenced by the minutes of the court, and cannot be proved by parol.

Appeal from Chancery Court, Sequatchie County; T. M. McConnell, Chancellor.

Action by B. A. Heard against E. T. Elliott and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

By an act passed in July, 1870 (Acts 1870, p. 115, c. 68), the office of entry taker in the state was consolidated with the office of county surveyor. By chapter 55, p. 51, of the Acts of 1875, the office of county entry taker for the various counties in the state was abolished. On the 26th of February, 1879 (Acts 1879, p. 65, c. 46), the Legislature passed an act entitled "An act to establish the entry taker's office."

Section 1 of this act reads as follows:

"Be it enacted by the General Assembly of the state of Tennessee, that there shall be elected by the justices of the county courts, a majority of the justices being present, at the April term of the court or any quarterly term of said court, every four years, an entry taker for any county in this state which may desire to have an entry taker for their respective counties. Said entry taker shall hold his office for four years and until

his successor is elected, and qualified. That the county, if it revives the office of entry taker, may impose the duties upon the county surveyor or register, or elect some one else to fill the office."

The remaining sections concern the oath, bond and fees.

During the year 1881 J. A. Thurman was elected county surveyor of Sequatchie county, and his election was entered upon the minutes of the county court. The minutes do not show that he was elected entry taker, or that the duties of that office were annexed to his office as county surveyor.

On April 4, 1887, Thurman was elected entry taker by the county court, and this election was entered upon the minutes of the court.

The Court of Chancery Appeals finds and reports that from 1881 continuously until January or February, 1904, J. A. Thurman was in possession of the books and records of the entry taker's office, held himself out as entry taker, was reputed to be and was recognized as such by the public, and that during all this time he performed the duties of the office, making entries, etc.

On the 21st of January, 1887, defendant made his entry before Thurman. Complainant's entry was made on April 4, 1887, being after the formal election of Thurman as entry taker and the entry thereof upon the minutes of the county court.

Both entries are special. Defendant's grant was issued on his entry April 11, 1887. Complainant's grant was issued on his entry April 19, 1887. Both grants cover substantially the same land.

If defendant's entry is valid, his grant relates to it, and he has the prior right. If defendant's entry is void, complainant's right would be superior, since his grant would relate to his entry of April 4, 1887, and thus supplant defendant's grant of April 11th.

The case turns upon defendant's entry; that is, upon the question as to whether it is valid or invalid.

The chancellor decreed in favor of the defendant, dismissing the complainant's bill. On appeal the Court of Chancery Appeals affirmed the decree of the chancellor. From the latter decree an appeal has been prosecuted to this court, and errors have been assigned here.

C. C. Moore, for appellant. Stewart & Stewart, for appellees.

NEIL, J. (after stating the facts). We are of opinion that the Court of Chancery Appeals acted correctly in affirming the decree of the chancellor. The long possession by Thurman of the books and papers of the office and performance of the duties thereof with the acquiescence of the public, prior and up to the time when defendant's entry was made, constituted him an entry taker *de facto*; that is, if such an office was then in existence, a question which we shall pres-

ently consider. We adopt as correct the following definition made by Chief Justice Butler in *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409:

"An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised, first, without a known appointment or election, but under such circumstances of reputation or acquiescence as was calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such."

We have several decisions in this state bearing upon one or more of the points contained in the foregoing definition. They are *State v. Hart*, 106 Tenn. 269, 61 S. W. 780; *Mayor v. Thompson*, 12 Lea, 344; *Brewer v. State*, 6 Lea, 198; *Cheek v. Bank*, 9 Helsk. 489; *McLean v. State*, 8 Helsk. 249, 250; *Douglas v. Neil*, 7 Helsk. 437; *Kelley v. Story*, 6 Helsk. 202; *Calloway v. Sturm*, 1 Helsk. 764; *Turney v. Dibrell*, 3 Baxt. 235; *Ward v. State*, 2 Cold. 605, (91 Am. Dec. 270); *Blackburn v. State*, 3 Head, 690; *Venable v. Curd*, 2 Head, 582; *Moore v. State*, 5 Sneed, 510; *Pearce v. Hawkins*, 2 Swan, 87, 57 Am. Dec. 54; *Bates v. Dyer*, 9 Humph. 162; *Bank v. Chester*, 6 Humph. 458, 44 Am. Dec. 318.

The special portion of the definition above quoted which is applicable to the present case is the first specification; that is, where one acts "without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be."

The facts above stated show the required circumstances of reputation and acquiescence. Although there was no actual color of office, in any form of appointment or election, still the long exercise of the duties of the office and the acquiescence by the public would, as said in *Wilcox v. Smith*, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213, "afford a strong presumption of at least a colorable election or appointment." See, also, *Mallett v. Uncle Sam's Coal, etc., Mining Co.*, 1 Nev. 188, 90 Am. Dec. 484, and *Cary v. State*, 76 Ala. 78. None of our cases cited above

bear upon this special phase of the question. In all of them there was some form of election or appointment or holding over, to constitute color of office. As stated, however, we are of opinion that this is not essential, but that the long holding one's self out as entitled to the office and performing its duties and the general acquiescence of the public would be sufficient to constitute the person so acting, as to third persons, an officer de facto, and make his acts as such officer valid, since it appears from such a state of facts that the person so claiming and acting is an officer in the estimation of the public resorting to him for official acts and relying upon him.

We are not to be understood as intimating that the acts of a mere usurper are valid, but, as said by the Supreme Court of Oregon: "The color of right which constitutes one an officer de facto may consist in an election or appointment, or in the holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such length of time as to raise the presumption of colorable right by election or appointment." *Hamlin v. Kassaffer*, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176. As said by the Supreme Court of North Carolina: "A mere intruder or usurper is not ordinarily, but may become, an officer de facto in some cases * * * but when, without color of authority, he simply assumes to act, to exercise authority as an officer, and, the public knowing that, or reasonably ought to know that, he is a usurper, his acts are absolutely void for all purposes." *Van Amringe v. Taylor*, 108 N. C. 196, 12 S. E. 1005, 12 L. R. A. 202, 23 Am. St. Rep. 51. The distinction is found in the length of time during which the person has acted as an officer, and during which the public have acquiesced in his claim and acts. In the present case the time which had elapsed before the defendant's entry was made, during which the public had recognized Mr. Thurman as entry taker of the county and acquiesced in his acts as such, was sufficient to make him an entry taker de facto and his acts good as to third persons.

We think the conclusion above reached is reinforced by the fact that under the act of 1870 the office of entry taker and county surveyor had been consolidated, and under the act of 1879 the county court was authorized to devolve the duties of entry taker upon the county surveyor. The public were thus accustomed to associate the office of entry taker with that of county surveyor. This is a very material consideration, since it appears that in 1881 Thurman was really elected county surveyor. It was natural that the public should thereafter associate the office of entry taker with his office of county surveyor, and that it would seem very reasonable to them that he should immediately claim to be entry taker and act as such. Under these circumstances it is not probable

that any one would take the trouble to investigate the records to see whether the latter office had really been imposed upon the holder of the former.

We shall now recur to the question which we postponed a few moments ago. Did the act of 1879 create the office of entry taker for all of the counties of the state, or was there no such office until an actual election by the county court?

We are of the opinion that under a true construction of the act referred to the office of entry taker was revived all over the state, and until there should be an election by the county court it remained as any other unfilled county office. The caption designates the act as one to establish the entry taker's office. It had been previously abolished by the act of 1875. The purpose was to restore the office. We do not think this general purpose indicated by the title is overcome by the expression in the body of the act concerning a "desire" which any county may entertain to have an entry taker, or by the use of the expression "if it revives the office," etc. The substance of the matter was that the office was created for the whole state, but it was left optional with each county whether it would fill the office or not by an election.

The entry taker's office was therefore a legal one in Sequatchie county, and hence one as to which, other conditions concurring, there might be a de facto incumbent.

There is one other question in the case, which was given great prominence in the opinion of the Court of Chancery Appeals, and has been much debated by counsel, and we therefore notice it.

The Court of Chancery Appeals found that, although the minutes of the county court for the year 1881 did not show that Thurman had been elected entry taker, yet as a matter of fact he was elected entry taker by the justices of the county court. This conclusion was based on oral evidence taken as to what transpired in the county court during the terms of that year concerning this matter. This evidence was objected to by the complainant, on the ground that it was not competent to prove by oral evidence the official acts of the county court; that the minutes were the only evidence of the determinations reached by that body. This objection was overruled by the Court of Chancery Appeals. We think that court acted erroneously in so doing. The subject is fully considered by this court in an opinion delivered at the present term by Mr. Justice Shields in the case of *State ex rel. v. True et al.*, 98 S. W. —, and we refer to that case, without further elaboration.

In reaching the decision which we have announced on the merits of the case, we have excluded the finding which we have just referred to. It does not appear in the statement which precedes this opinion.

However, on the grounds previously set out, we ratify the conclusion reached by the Court of Chancery Appeals, and affirm its decree.

GOODLOE v. GOODLOE et al.

(Supreme Court of Tennessee. March 31, 1906.)

1. FRAUDS, STATUTE OF—CONTRACT TO DEVISE.

An oral contract by which deceased agreed to devise a farm to plaintiff, in consideration of plaintiff's abandoning a lucrative employment and entering deceased's service, was within the statute of frauds and unenforceable.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 132.]

2. SAME—PARTIAL PERFORMANCE.

Partial performance of a parol contract to devise land in consideration of services to be performed is insufficient to relieve the contract from the application of the statute of frauds.

3. WORK AND LABOR—INVALID OF CONTRACT—QUANTUM MERUIT.

Where plaintiff was not entitled to enforce specific performance of a parol contract to devise certain land to him in consideration of services rendered deceased, because of the statute of frauds, he was entitled to recover the reasonable value of his services on a quantum meruit against deceased's personal representatives.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, § 25.]

4. LIMITATION OF ACTIONS—ACCESSION OF RIGHT.

Where deceased in her lifetime promised to devise real estate to plaintiff in consideration of services rendered, there was no breach of the contract until deceased died without performing the same, and hence limitations did not begin to run against plaintiff's right to recover the reasonable value of his services until that date.

Appeal from Chancery Court, Maury County; Walter S. Bearden, Chancellor.

Action by J. M. Goodloe against J. P. Goodloe and others. From a judgment for plaintiff, defendants appeal. Affirmed.

G. T. Hughes and P. S. Chandler, for appellants. E. H. Hatcher and C. P. Hatcher, for appellee.

BEARD, C. J. The facts in this cause, as found by the Court of Chancery Appeals, are that the complainant, at the solicitation of his aunt, Miss Cornelia Goodloe, abandoned lucrative employment and entered into her service upon an agreement that she would leave a will giving to him a farm in Maury county, Tenn., and the personal property thereon. The service thus undertaken was faithfully and to the satisfaction of his employer rendered by the complainant until the date of her death, on the 9th of November, 1893. Having failed to discharge her obligation, either by will or otherwise, and her administrator and heirs declining to recognize it, this bill was filed to enforce specific performance of the contract, or, in the alternative, praying a decree fixing the value of complainant's services.

To so much of the bill as sought specific enforcement of the contract, the defendants

replied the statute of frauds, and to the prayer for alternative relief, they interposed the statute of limitations of six years to that part of complainant's claim which extended beyond that period.

The contract relied upon was one resting in parol, and was therefore unenforceable. It is true, as insisted by complainant's counsel, that the weight of authority, English and American, is that part performance of a contract under the conditions disclosed in this record, will take the contract out of the operation of the statute of frauds; but as early as *Patton v. McClure*, Mart. & Y., 333, it was held that partial performance of a parol contract for the sale and conveyance of land would not relieve from the application of the statute. This rule then established has since been applied in a great number of cases, so that it may now be regarded as a rule of property in this state.

The alternative contention of complainant is that upon a quantum meruit, not being able to avail himself of specific performance, he should be permitted to recover compensation for the full term of his service, although that term extended beyond the period of six years prior to the filing of his bill in this cause. In other words, the insistence is that the contract to devise this land as compensation to him was an open one, not void by reason of it resting in parol, but simply voidable, capable of being executed by Miss Goodloe at any time up to the day of her death, and was only breached when she died without having made such a devise; and, this being so, the statute of limitations should begin to run from that time.

Mr. Wood in the first volume of his work on Limitations (section 144), says: "Upon contracts all classes, whether written or verbal, the statute begins to run from the time when a right of action accrues." And we may add that a right of action upon a contract ordinarily accrues only at the time of the breach. Illustrating this principle, that author says, in section 160: "Where money has been paid under a contract that is void under the statute of frauds, because not in writing, the statute does not begin to run upon an action to recover it back from the time when it was paid, but rather from the time when the other party has done some decisive act evincing an intention to rescind the contract. *Collins v. Thayer*, 74 Ill. 138. Until that time no right of action exists; and, as the statute does not attach until a full, complete and present right of action exists, it follows, of course, that the statute does not begin to run until such right arises by a refusal of the party to perform the contract under which the money was paid"—citing *Cairo, etc., R. R. Co. v. Parks*, 32 Ark. 131.

If, in April, 1893, instead of agreeing to render services as a consideration for a devise or conveyance of the property, complainant had paid to Miss Goodloe a sum of money as

the whole or part of the purchase money for the same, and she had died, as in the present case, nine years thereafter, without either making a deed or a will, as she had agreed to do, and her heirs had then repudiated the contract, because in parol, we think there can be no doubt but that the statute of limitations, as against a recovery of the money so paid, would only begin to run from the date of her death, and that neither administrator nor heir would be permitted to say, while repudiating her contract, that the complainant was not entitled to recover the amount of money so paid, because of the fact that more than six years had elapsed since the date of its payment. On principle, we can see no difference between the cases. But it is said the question is not an open one in this state.

In *Byrn v. Fleming*, 3 Head, 658, an effort was made by complainant to obtain satisfaction for services rendered by him and expenses incurred in the support of his father and mother for a number of years, upon an alleged contract made by him with his father, in which the latter undertook to compensate him by giving the complainant a tract of land at his death; but it was held by this court that there was no evidence of any such promise or agreement. This holding necessarily disposed of the case. As, however, the complainant had sought to recover for a period of time running from 1832 to 1854, it was added by the court, as a dictum, as follows; "It is sufficient for the present case that, if such a contract or promise might be implied, the statute of limitations would form a bar to recovery for any services rendered beyond the period of six years before the commencement of the suit. An evidence of promise to give the land, or the acknowledgment of the obligation to do so, would not be admissible, either to support the action founded on an implied promise, or to defeat the operation of the statute." In *Taylor v. Wood*, 4 Lea, 504, the effect of the statute of limitations upon a claim for services rendered in such a contract was in question, and it was there held, not upon the authority of, but in accordance with, the dictum above, that the plea of the statute was a good defense against a recovery for more than six years' service. We think it evident, however, that this point was neither presented by counsel, nor seriously considered by the court, in that case. The application of the statute to such an account is assumed, apparently, without argument, and certainly without reference to authority. However, in *Green v. Orgain* (Tenn. Ch. App.) 46 S. W. 477, in an opinion delivered by Neal, J., the exact question was decided by the Court of Chancery Appeals upon facts bearing a strong analogy to those involved in the present case, and it was held that there the statute of limitations, as invoked by the defendant, did not apply, "because there was no breach of the contract to pay until the death

of the testator, and the cause of action against his estate did not arise until that time." This case was affirmed in an oral opinion by this court.

We are not satisfied with the dictum in *Byrn v. Fleming*, or the ruling in *Taylor v. Wood*, on the point in question, and those cases, so far as they conflict with the view expressed above, are overruled.

Other matters of controversy are discussed and disposed of by the Court of Chancery Appeals, and while they have been considered by us, yet we do not deem it important to embrace them in this opinion. We are entirely satisfied with the conclusion reached by that court, and in all respects its decree is affirmed.

HEARN et al. v. AYRES.

(Supreme Court of Arkansas. Jan. 20, 1906.)

1. JUDGMENT—JURISDICTION—PRESUMPTIONS—COLLATERAL ATTACK.

Where the record of a judgment affirmatively recites that it appears to the court that defendant has been duly summoned, it will be presumed, in the absence of evidence to the contrary, on collateral attack, that the court had evidence before it on which to base a finding in favor of its jurisdiction.

2. REPLEVIN—PROPERTY IN CUSTODIA LEGIS.

Property seized by a sheriff under a writ of replevin is to be regarded as in custodia legis from the date of seizure under the writ.

3. SHERIFFS AND CONSTABLES—SEIZURE OF PROPERTY—PARTIES TO SUIT.

Where a sheriff seized property under a writ of replevin, he thereby became privy to the prosecution of the suit.

4. SAME—LOSS OF PROPERTY.

Where a sheriff takes property into his possession under a replevin writ, he can only exempt himself from liability for its loss by showing that he made such disposition of it as the law directs or that its loss was not the result of his negligence.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, §§ 199, 200.]

5. SAME—TITLE TO PLAINTIFF—ATTACK.

Where property, seized by a sheriff under a replevin writ, was adjudged to belong to plaintiff, the sheriff could not, thereafter, question plaintiff's title or right to possession.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 204.]

6. REPLEVIN—SEIZURE OF PROPERTY—POSSESSION OF SHERIFF.

Where property is seized by a sheriff under a replevin writ it is regarded in contemplation of law as in the sheriff's possession, the defendant failing to give bond, until it is turned over to the plaintiff in replevin as provided by Kirby's Dig. § 6863.

7. SAME—RETURN—CONCLUSIVENESS.

In an action on a sheriff's bond for a false return on a replevin writ reciting that the property had been turned over to plaintiff, such recital was only prima facie evidence of the fact.

8. SHERIFFS AND CONSTABLES—FALSE RETURN.

In an action on a sheriff's bond for a false return on a writ of replevin reciting that the sheriff had delivered the logs seized under the writ to plaintiff, an instruction that the only way in which the sheriff could have delivered the logs to plaintiff so as to relieve himself of responsibility was by placing plaintiff in actual exclusive control of the logs, was proper.

9. SAME—MEASURE OF DAMAGES.

In an action on a sheriff's bond for a false return alleging the delivery of property replevined to plaintiff, the measure of damages was the reasonable value of the property not so delivered at the time it should have been delivered, independent of the value of the property stated in plaintiff's complaint in the replevin suit.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 370.]

10. APPEARANCE—EFFECT—WANT OF SERVICE—WAIVER.

Where defendants appeared and answered without objecting to the service, they waived any objection they might have had to the jurisdiction of the court on that ground.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 118-143.]

11. SHERIFFS AND CONSTABLES—EXECUTION OF PROCESS—STATUTES—PENALTIES.

In an action on a sheriff's bond for false return, plaintiff is not entitled to the penalty of \$50 prescribed by Kirby's Dig. § 4487, subd. 6, imposed for a sheriff's failure to execute process.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 371.]

Appeal from Circuit Court, Craighead County; Felix G. Taylor, Judge.

Action by E. M. Ayres against Sarah A. Hearn, as administratrix of the estate of J. L. Hearn, deceased, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

This was an action brought in the circuit court of Mississippi county, at Osceola, by the appellee, E. M. Ayres, against the appellants, Sarah A. Hearn, as administratrix of the estate of the late J. L. Hearn, deceased, and the sureties upon the official bond of said J. L. Hearn, as sheriff of Mississippi county, for the recovery of the value of a lot of cottonwood logs, claimed to have been lost through the negligence of the said J. L. Hearn, whilst they were lawfully in his custody, as such sheriff. The complaint after alleging the election of Hearn as sheriff, and the giving of bond with appellants (except Mrs. Hearn) as sureties, sets forth the following: That, on the 18th day of April, 1898, the plaintiff, E. M. Ayres, instituted an action of replevin against one Lucian Roy, in the circuit court of said county, to recover 1,400 cottonwood logs, the property of said plaintiff, and worth \$7,000. That a writ was issued in said cause by the clerk of the court directed to the sheriff of said county, and commanding him to take said 1,400 logs from the possession of the said Lucian Roy, the defendant in said cause, and deliver them to the plaintiff, E. M. Ayres. That the plaintiff executed proper, and good, and sufficient bond, which was accepted by the sheriff; and that the sheriff, acting by virtue of said writ, took said logs from out of the possession of the defendant, Lucian Roy. That, at the May term, 1899, of said circuit court, the plaintiff obtained a judgment, declaring him to be the owner of said logs and entitled to the possession thereof; and ordering a recovery accordingly. That said J. L. Hearn, sheriff, made a return

on the said writ of replevin, stating that he took the said logs from the defendant's possession and delivered them to the possession of plaintiff, Ayres; but, in point of fact, said Hearn, sheriff, did not deliver the said logs to the plaintiff, E. M. Ayres, nor did he, in any way, account for them to the plaintiff, although the plaintiff often requested him so to do, and by the negligence of the said sheriff, said logs were stolen or lost. That the said J. L. Hearn died in October, 1899, and the defendant, Sarah A. Hearn, subsequently qualified as administratrix of his estate. Wherefore the plaintiff prays judgment against the defendants for the sum of \$7,000, together with 10 per cent. interest per annum thereon since the rendition of said judgment; and \$500 forfeiture or penalty, and general relief.

All of the defendants upon whom service had been obtained except one, H. D. Tomlinson, answered. In their answer defendants "deny that the logs sued for were worth \$7,000; deny that the said J. L. Hearn had taken possession of said logs by virtue of any lawful process; deny that the said E. M. Ayres had obtained any valid judgment for said logs; deny that the said J. L. Hearn had not delivered the said logs to the said E. M. Ayres, as stated in the return upon the order of delivery in the Ayres-Roy replevin suit, alleging, on the contrary, that the logs were delivered into the possession of the said E. M. Ayres, and that the return upon the order of delivery, 'that the logs had been delivered to Ayres,' was conclusive of that fact and could not be contradicted in this proceeding; deny that they are liable to the plaintiff on account of the loss of said logs; deny that they were lost through the neglect or carelessness of the said J. L. Hearn. Defendants set up that the order of delivery in the replevin suit was executed by the sheriff taking possession of the logs named therein in Tennessee; that this act of the sheriff was without the jurisdiction of the court from which the order issued, and was therefore, void; that the plaintiff in the replevin suit (appellee here) had no interest in the logs, that he had no interest in the lands from which the logs were cut. They also set up that a certain judgment of the United States Circuit Court rendered subsequent to the time appellee claimed to have acquired title to the lands from which the logs were cut, adjudged the title to said lands and logs to be in one Palsdorfer and his wife, and that appellee had no title thereto, and that this was in a suit in which appellee was a party. They alleged that the judgment of the circuit court in the case of Ayres v. Lucian Roy in replevin is void for the reason that said court had no jurisdiction of the alleged subject-matter, and no jurisdiction of the person of the defendant therein." They further set up: "That, all of the defendants in the action, except H. D. Tomlinson, who was a nonresident of the

state and upon whom no summons had been served, are, and were at the time of the institution of the action, residents of the Chickasawba district of Mississippi county; that this suit was brought subsequent to the enactment of the act of the General Assembly of the state of Arkansas, dividing Mississippi county into the two judicial districts of Osceola and Chickasawba, and this court has no jurisdiction in this action over the persons of said defendants."

The facts in the case to sustain the verdict, so far as we deem it necessary to state them, are substantially as follows: On the 18th day of April, 1899, Ayres commenced an action of replevin in the circuit court of Mississippi county, Ark., against one Lucian Roy to recover 1,400 cottonwood logs cut on Flour Island. Armed with an order of delivery, the sheriff, J. L. Hearn, accompanied by Ayres, seized the logs when they were being prepared for rafting. The sheriff told Roy he would give him two days to make a bond, whereupon Ayres suggested to him that he had "better put a guard over the logs," which he declined to do, giving as a reason therefor that the river was falling too fast for them to get away with the logs. The sheriff made a return—not dated, itself—on the order of delivery, stating that he delivered the logs to Ayres April 19, 1899, and "notified ——— Roy, Lucian Roy's brother, and supposed to be his partner at the time of trial." In point of fact the logs were not delivered to Ayres, but they were stolen by Roy, or some one else, and rafted down the river. Circuit court opened on the first Monday in May following, and Ayres took a default judgment for the 1,400 logs. A few months later Sheriff Hearn died, and on the 12th day of April, 1901, Ayres commenced this suit against his estate and bondsmen to recover the value of the logs.

The appellee, over the objection of appellants, introduced the following: "E. M. Ayres, Plaintiff, v. Lucian Roy, Defendant. Comes the plaintiff in his own proper person and by his attorney, and, it appearing to the court that the defendant had been duly summoned to appear and answer, but made default. It further appearing to the court that the plaintiff is the owner of the fourteen hundred logs (1,400) cottonwood logs replevied in this action and entitled to the possession thereof. It is, therefore, considered, ordered, and adjudged by the court that the plaintiff do have and recover of the defendant, Lucian Roy, the (1,400) fourteen hundred cottonwood logs replevied in this action and all costs in their behalf expended for which execution may issue. It is agreed and stipulated by the plaintiff and all of the defendants that the above is a copy of the judgment rendered in the case of E. M. Ayres against Lucian Roy, and that it may be introduced as evidence. J. T. Coston. Semmes & Thomasson."

The introduction of this stipulation as

evidence is not made one of the grounds of the motion for new trial. Appellants failed to preserve their objection to it. The appellee also introduced in evidence the complaint of Ayres v. Lucian Roy, in which Ayres alleged that he is the owner and entitled to the possession of 1,400 cottonwood logs of the value of \$750, which the defendant Lucian Roy has possession of without right, etc. This complaint shows that it was filed in the circuit court April 18, 1899.

S. S. Semmes, G. W. Thomason, and A. G. Little, for appellant. J. T. Coston, for appellee.

WOOD, J. (after stating the facts). The judgment of the circuit court in the case of Ayres v. Roy, in which Ayres recovered judgment against Roy for the logs, is conclusive here as to the title and right of possession of the appellee to the logs which the sheriff took possession of under the order of delivery in that suit. Appellants alleged that the judgment was void for want of jurisdiction of the person of Roy, but they fail to show it. The judgment recites that "the defendant had been duly summoned to appear and answer, but made default." This was sufficient to show jurisdiction. It was the province and first duty of the court to determine whether it had jurisdiction of the person of the defendant against whom it was about to render judgment. The record affirmatively recites "it appearing to the court that defendant had been duly summoned." We must presume, in the absence of evidence to the contrary, on collateral attack, that the court had evidence before it upon which to base a finding in favor of its jurisdiction. "When the jurisdiction of a court of general jurisdiction depends upon facts not appearing in the record, they will be presumed in a collateral proceeding." *McConnell v. Day*, 61 Ark. 464, 33 S. W. 731, and cases cited.

When the sheriff executed the order of delivery by taking possession of the property named therein, from that moment such property was in custodia legis. *Cobbey on Replevin*, § 706; *Hagan v. Lucas*, 10 Pet. (U. S.) 400, 9 L. Ed. 470. Having seized the property by virtue of legal process in the replevin suit, he was on that account privy to the prosecution of that suit. *Prentiss v. Holbrook*, 2 Mich. 372. See *Gelston v. Hoyt*, 13 Johns. (N. Y.) 580. And he could only exempt himself from liability for loss of the property which had come into his possession in that proceeding by showing that he had made such disposition of it as the law directs, or that its loss was not on account of his negligence. It was not his province then, nor can he now question the right and title of the plaintiff in that suit. *Cobbey on Rep.* 1168-1178. As custodian of the property, at the termination of that litigation, he held the fruits of it subject to the lawful orders

of the tribunal whose duty it was to adjudicate the rights of the parties, unless after seizing it he had disposed of it as the statute directs. Kirby's Dig. § 6863. In contemplation of law the property, after seizure by the sheriff, remains in his possession (the defendant failing to give bond) until it is turned over to the plaintiff in replevin. As to whether he made legal disposition of it, was submitted to the jury upon proper instructions and there was evidence to support the verdict.

This view eliminates every question presented at the trial and so exhaustively treated in briefs of counsel, except the following:

1. The sheriff's return was not conclusive. The seventh paragraph of the complaint set out in the statement of facts shows that this was a suit in legal effect against the estate of the sheriff, and the sureties on his bond for false return. The return of the officer was directly questioned. This being true, the court did not err in refusing the request of appellants for instruction telling the jury that the return of the officer on the order of delivery in the replevin suit was conclusive, nor did it err in granting the request of appellee for an instruction to the effect that such return of the sheriff "was only prima facie evidence of the fact that the possession of the logs had been turned over to the appellee. *State v. Lawson*, 8 Ark. 380, 47 Am. Dec. 728; *Craven v. Higginbotham*, 83 Ala. 429, 3 South. 777; *Thorn v. Kimp*, 98 Ala. 417, 13 South. 749; *Mudfree on Sheriffs*, p. 429, § 866. The question of whether or not the logs in the replevin suit after being levied on by the sheriff were lost through his negligence was properly submitted to the jury, and there was a conflict in the evidence with ample evidence to sustain the jury's verdict. We therefore will not disturb it. The jury was properly directed in instruction No. 5b (which reporter will set out in note)¹ as to what would constitute a delivery of the logs to the plaintiff in the replevin suit, and there was evidence to sustain the verdict, that no such delivery had been made to appellee.

2. The measure of damages in the case is the value of the logs at the time they should have been delivered by the sheriff to the plaintiff in the replevin suit. The sheriff was simply their legal custodian, and if, through his negligence, they were lost, as the jury has determined, he was liable for their value, as they were when he, in the absence of a retaining bond, should have

turned them over to appellee, the plaintiff in the replevin suit. The jury was properly directed as to this. (See note for copy of instruction No. 6 for plaintiff).² It follows that the court was correct in refusing the following request of appellants for instruction: "The original order of delivery, affidavit and complaint in the replevin suit of *Ayres v. Roy*, state the value of the logs to be \$750. Your verdict, therefore, cannot in any event exceed said sum."

The allegation of value in the complaint in replevin is a matter of form in pleading. The plaintiff must prove the value, even if not denied, and he may prove a greater value than that alleged if he can. *Baily v. Ellis*, 21 Ark. 489; *Cobbey on Replev.* §§ 539, 540.

3. Appellants waived any objection they might have had to the jurisdiction by answering without making or insisting on a motion to abate for want of service.

4. The penalty of \$50 "for false return" was not authorized by the statute. This was not a suit under section 4487 subd. 6 for failing to execute process as contended by counsel for appellee, but, as we construe the complaint, it is a suit against the officer for false return.

In the respect indicated the verdict was erroneous. The judgment will be modified by reducing it here in the sum of \$50, and as thus modified, it will be affirmed.

DORSEY et al. v. CONNERLY.

(Supreme Court of Arkansas. Jan. 27, 1906.)

EXECUTORS AND ADMINISTRATORS—SALE OF CLAIM—SETTING ASIDE—JURISDICTION.

R. furnished the money with which C. purchased land, under an agreement to sell it and turn over to R. the proceeds equal to the amount advanced, with interest, and one-third of any surplus. C. sold the land partly on credit, taking notes. After the death of R., on suit of his administrator in probate court, the court found that the claim of the estate on the notes could not be realized in money or property, and ordered that the claim be sold. Held that, the court having had jurisdiction, the sale would not be set aside, in the absence of fraud in procuring the order therefor.

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Action by Jennie E. Dorsey and others against Katie K. Connerly. From a decree dismissing the complaint for want of equity, plaintiffs appeal. Affirmed.

Robinson & Merritt, for appellants. Baldy Vinson, for appellee.

BATTLE, J. On 15th of October, 1891, John C. Connerly purchased from the heirs

¹ No. 5b: "If the sheriff delivered the logs to Ayres, he was not responsible for their loss. His return states that he did deliver them to Ayres, and his return is prima facie evidence of that fact. Delivery of logs to Ayres does not consist in making a return stating that he delivered them to him, neither does it consist in merely telling Ayres that he placed him in possession of them, if Roy, or anyone else was in possession of them. But the only way he could have delivered the logs to Ayres so as to relieve himself of responsibility, would have been by placing Ayres in actual exclusive control of the logs."

² No. 6. "If you find that the plaintiff is entitled to recover under the instruction already given, you will fix the amount of your verdict at the actual cash value of the logs that were levied upon; and, if you see proper to do so, you may allow interest at the rate of 6 per cent. per annum on the value of the logs from the time they were levied upon to the present time."

of Horace F. Walworth, deceased, a tract of land, containing 542 acres, agreeing to pay therefor \$2,710. The land was conveyed by the heirs to Connerly. The money to pay for it was advanced by W. W. Rose under a contract that the title to the lands should remain in Connerly in trust for the following purposes and uses:

"That the said John C. Connerly should sell said lands or any portion thereof, upon the terms and conditions as to him [may] seem best, and for that purpose to make a deed or deeds to any purchaser or purchasers of said lands or any part thereof, and pay over the proceeds of such sales to said William W. Rose, until the original purchase money, together with 10 per cent. per annum interest thereon, had been fully repaid to the said William W. Rose; and that the proceeds arising from the sale, lease or rental of said lands after the repayment of the purchase money aforesaid, shall be distributed between the said William W. Rose and the said John C. Connerly in the proportion of one-third to the former and two-thirds to the latter,

"The said John C. Connerly shall account for and pay over to the said William W. Rose, the moneys received from said lands, as fast as the same is received, until the original purchase money, with interest, is repaid, when a settlement shall be made on the first day of each October, of the profits arising from the venture."

The contract was signed and acknowledged by both parties, and recorded.

Connerly sold the land to many persons and took from them notes for the purchase money. There is no contention, or effort to show, that any of the lands remained unsold, and we infer from the whole case that such is the fact. After these sales were made, the lands were overflowed by high water, and many of the purchasers were unable to pay for lands, and only \$500 were collected by Connerly.

Rose died in 1892, and Abner Gaines was appointed administrator of his estate, and qualified as such. The interest of the estate in the notes given for the lands was appraised at \$2,710.

On the 21 day of November, 1897, five years after the death of Rose, Abner Gaines, as administrator, filed a petition to the Chicot probate court, in that court, which is as follows:

"Comes Abner Gaines, as administrator of estate of W. W. Rose, deceased, and states that among the assets of said estate there is a claim against J. C. Connerly, as trustee for said intestate, inventoried and appraised at \$2,710.00; that said claim consists of an interest in the proceeds to be derived from the sale of certain lands conveyed to the said Connerly by heirs of Horace F. Walworth, all of which appear by reference to the agreement made on the 12th day of

December, 1891, and filed in the recorder's office of Chicot county, on the 19th day of same month, and recorded in record book N-1, page 194, and the power therein given the said Connerly by said intestate, which agreement containing said power is filed herewith marked Exhibit A, and made a part of this petition, with the conveyance to said Connerly from said heirs of Horace F. Walworth, to which the said agreement refers. Your petitioner further states that the said Connerly has not received the proceeds from said lands as contemplated by himself and the said intestate, at the time of making said agreement, except the sum of five hundred dollars, which petitioner believes he can collect; but, for the remaining interest, he says, that by the existing laws of this state, either in money or property, he is unable to realize, except through a long and expensive suit in chancery, he might subject the lands mentioned in said agreement to the claim, but that he is not authorized to take such steps without orders from this court. That upon the whole he believes it to be the best interest of all parties and to said estate, particularly, that said claim be sold under the order of this court; wherefore, your petitioner prays an order of sale of said claim, credited with the amount of \$500.00, collected and held by the said Connerly, and which your petitioner believes he can collect from him."

The court, being sufficiently advised in the premises, and finding that the claim "cannot be realized in money or property under existing laws, and that it will be for the benefit of said estate to sell the said claim," ordered that it be sold, and it was sold at public sale to Katie K. Connerly, wife of John C. Connerly, for the sum of \$3,000; she being the highest bidder. She paid the \$3,000 with her own money, and the sale was approved by the court.

Thereafter, in December, 1899, John C. Connerly died, and in March, 1900, the heirs of William W. Rose, deceased, instituted this suit against Mrs. Connerly to vacate the sale of the claim to her and to enforce the trust according to its terms. The defendant answered. The court heard the cause upon the evidence adduced, and dismissed the complaint for want of equity.

The \$2,710 advanced to John C. Connerly to pay for lands was a loan, for the payment of which Connerly did not bind himself personally, but agreed to hold the land in trust. The lands were to be sold, the loan and 10 per cent. per annum interest thereon were first to be paid out of the proceeds, and Rose was to receive one-third of the remainder. This was evidently compensation for the loan. Connerly sold the lands on a credit and took notes for the purchase money. Rose's portion of these notes constituted his claim against Connerly, as trustee. The Chicot probate court found

that this claim could not be realized in money or property.

We infer from this finding that all of the lands were sold on time. Why the court found that the claim in this form against the trustee cannot be realized in money or property under existing laws doth not appear. But the court, having jurisdiction to do so, has so found, and, such being the fact, had jurisdiction to order the sale of the claim; and, no evidence of fraud in the procurement of the order of sale or in the sale being adduced in the hearing of this case, the chancery court committed no error in dismissing the complaint of plaintiffs for want of equity.

Decree affirmed.

THOMPSON et al. v. VAN LEAR.

(Supreme Court of Arkansas. Jan. 27, 1906.)

1. PHYSICIANS AND SURGEONS—REGULATION BY STATE.

The Legislature may in the exercise of the police power regulate the practice of medicine and surgery.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Physicians and Surgeons, §§ 1, 2.]

2. SAME.

Acts 1903, p. 342, forbidding physicians and surgeons to solicit patients through paid agents, is a valid police regulation.

Appeal from Garland Chancery Court; Alphonzo Curl, Chancellor.

Suit by S. C. Van Lear against M. G. Thompson and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Wood & Henderson, Greaves & Martin, and Leland Leatherman, for appellants. R. G. Davies, for appellee.

RIDDICK, J. This is an appeal from a judgment of the Garland chancery court enjoining the defendants, M. G. Thompson and others, from instituting any prosecution against the plaintiff, S. C. Van Lear, under the statute prohibiting physicians from soliciting patients through paid agents or drummers, and enjoining them from otherwise interfering with the business and practice of the plaintiff.

The facts are as follows: In 1903 the Legislature passed an act forbidding physicians and surgeons engaged in the practice of medicine to solicit patients by paid agents. Congress, which claims jurisdiction over a portion of the Hot Springs reservation, has also provided by statute that physicians before prescribing the water of the springs shall be registered with the superintendent of the reservation, but that no physician shall be allowed to register who was engaged in soliciting patronage through the medium of paid agents. To aid the officers of the law to enforce these provisions against the practice of soliciting patients by hired agents, a number of the physicians of Hot Springs formed

an association called the "Visitors' Protective Association." The meetings of this association were public, membership in it was open to all physicians of the city, and it was supported by the voluntary contributions of its members. The chief purpose of the association, as before stated, was to aid in suppressing the practice among certain physicians of soliciting patients by hired agents or "drumming," as it was called; the members of the association believing that this method of securing patronage was not only illegal and unprofessional, but that it was highly injurious both to the profession and the general public. The efforts of the association to suppress this evil were not directed specially against plaintiff or any particular physician or school of medicine. On the contrary, the agent or detective of the association employed to look up evidence against physicians violating these statutes was instructed to investigate and report to the officers of the law evidence against every physician who was guilty of such practice, without regard to who he was, or whether he was a member of the association or not. The evidence shows that the plaintiff, Van Lear, was not permitted to register with the superintendent of the Hot Springs reservation as one of the physicians authorized to use the waters of the hot springs, or to prescribe the use thereof by his patients. The reason for this refusal to permit the plaintiff to register was that he was suspected of having solicited patients by hired agents, though it is not shown that the defendants were responsible for this act of the federal authorities. But the agent of plaintiff employed to look up evidence against physicians, it seems, discovered evidence against Van Lear tending to show that he was guilty of hiring agents to solicit patients for him, and that he was prescribing the waters of the springs to his patients without being registered, and he reported this evidence to the officers, which resulted in prosecutions against Van Lear, and injury to his business as a physician. Van Lear thereupon brought this action in equity against M. G. Thompson and other members of the association to enjoin them from further prosecutions or interference with his business. On the hearing the chancellor held that the law prohibiting physicians from soliciting patronage by hired agents was unconstitutional and void. He further held that the act of the state Legislature ceding jurisdiction to the United States over part of the Hot Springs reservation was void on the ground that Congress had no authority to accept such jurisdiction, and that Congress could not legislate and make penal the act of a physician in prescribing the hot waters of the reservation for his patients. This appeal brings his decision before us for review.

As to the jurisdiction of Congress over the Hot Springs reservation and its right to enact laws regulating the use of the waters thereof by physicians that, of course, presents

a question on which this court would follow the decisions of the federal courts. But we do not find it necessary to decide that question in this case; for, if the statute of the state Legislature prohibiting physicians from soliciting patients through paid agents be valid, it seems clear that the injunction ought not to have been granted in this case. For, if that was a valid statute, the purposes for which the defendants were associated were clearly legal. If soliciting patients by physicians through hired agents was unlawful, then this association was formed for the purpose of upholding the law and preventing its violation, and there would be no reason why an injunction should be granted, even if their agents made occasional mistakes and prosecuted innocent parties. The case would not be different if the act of Congress assuming jurisdiction over the reservation was invalid, for the state laws would then be in force there, and as the purpose of the association was lawful the fact that the agent of these defendants may have, when he found evidence against the plaintiff showing that he was guilty of violating the law, commenced the prosecution against him in the federal, instead of a state, court, would not justify the issuance of an injunction to stop such prosecutions, for the remedy of plaintiff at law in such a case was clear and adequate. He had nothing to do but to take an appeal and be discharged on showing that the law under which he was prosecuted in the federal courts was invalid. *Taylor v. City of Pine Bluff*, 34 Ark. 603; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402; *Davis & Farnem Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778; *Davis v. American Society*, 75 N. Y. 362; *High on Injunctions*, § 68.

So as before stated, the main question is whether the state law is a valid law or not. Counsel for appellee has argued with much earnestness that laws of this kind are unwise, and he quotes from Herbert Spencer, who says, in his *Social Statics*, that there are no sound reasons why the principles of free trade should not be extended to medical advice and practice. The drift of the argument of Mr. Spencer can be understood from the following extract therefrom: "All measures which tend to put ignorance upon a par with wisdom inevitably check the growth of wisdom. Acts of Parliament to save silly people from the evil which putting faith in empirics may entail on them do this, and are therefore bad. It is best to let the foolish man suffer the penalty of his foolishness. For the pain, he must bear it as he can; for the experience, he must treasure it up, and act more rationally in the future. To others, as well as to himself, will his case be a warning. And by multiplication of such warnings there cannot fail to be generated a caution corresponding to the danger to be shunned." *Social Statics*, 205. There is no doubt some truth in the assertion that it is not best for

the law to give too much aid, for people should be taught self-reliance. But this argument is one that should be addressed to the Legislature, and not the courts. If followed to its logical end, it would result in allowing every one to practice medicine who wished to do so, and that is in effect what the author contends should be done. But, however well that may sound as a theoretical proposition, it does not work well in actual practice if we judge by the statutes of the different states, for there is hardly a state in the Union that does not regulate the practice of medicine by requiring some showing of qualification before a license to practice is granted. The tendency is towards raising the standard for admission to practice rather than lowering it.

But, as before stated, those are questions for the Legislature, and not for the courts. The Legislature has acted in this matter, and whether the law be wise or foolish the courts must enforce it if it be valid. Whether or not it is a valid law is, as before stated, the only question we can consider. The learned chancellor in a well-written opinion held that it was not a valid law, for the reason that in his judgment it was an unwarranted interference with the rights of physicians; but we are not able to concur in this conclusion. Under its police power the state has the right to prohibit things that are hurtful to the comfort, safety and welfare of society. It is now well settled that in the exercise of this power the state may regulate the practice of medicine and surgery. *Gosnell v. State*, 52 Ark. 228, 12 S. W. 392; *Richardson v. State*, 47 Ark. 562, 2 S. W. 187; *Dent v. West Va.*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002; *State v. Edmunds* (Iowa) 101 N. W. 431; *Cooley's Const. Lim.* 745; 22 Am. & Eng. Ency. Law (2d Ed.) 780. The law in question concerns the public health over which the police power has the fullest sway, for, health being the sine qua non of all personal enjoyment, it is not only the right, but the duty, of the state to pass such laws as may be necessary for the preservation of the health of the people. 22 Am. & Eng. Ency. Law (2d Ed.) 922.

Counsel for plaintiff quotes Oliver Wendell Holmes as saying that, "if the whole materia medica was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes." We do not dispute that statement, for there may be some truth in it, and it is possible that the Legislature had something of the kind in mind when it passed this act. It may have thought that people are too much inclined to imagine themselves in ill health, too prone to consult doctors, and take medicine anyway, without being urged to do so by hired agents. If it is true, as the "eminent medical authority" quoted by counsel says, "that out of twenty-four serious cases of disease three could not be cured by the best remedies, three others

might be benefited, and the rest would get well anyway." If this be true, is it not better as a rule to "throw physic to the dogs," and let nature take her course. Now, it is probable that the conscientious physician would give that advice to his patient in a case where he needed no medicine. But it is not likely that a physician would hire an agent to drum up patients for him, only to say to them: "Go thy way; thou dost not need a physician." A physician who has secured a patient by means of a hired agent has paid out a certain sum to obtain his patient, and is under a strong temptation to put him through a course of treatment, whether he needs it or not, in order to get his money back and make a profit on his investment. And therein lies a danger to the public from such a practice. When a physician obtains patients in that way, he in effect buys them, just as if he said to the agent, "I will pay you a certain sum for every patient you send me"; or, "Will pay you a certain fee out of the money I receive from each patient you send me." Now, we do not think prudent people would wish to submit to the advice of a physician who had paid out money to get them under his treatment. To be successful, the agent would necessarily have to keep his interest in the transaction secret from the patient, and it can be easily seen that such a method of securing patients would very often result in imposition and fraud on the patient and in inducing many people to take treatment who did not need it.

As we have stated, even persons of good health are often too prone to imagine themselves in need of medicine. If it is unsafe to allow such persons to be solicited by hired agents to take what they do not need, how much worse is it to expose the sick to such influences. A man or woman who is laboring under a bodily disease is, other things being equal, more easily imposed on than one who possesses a sound mind in a sound body. The mind of the sick man, like his body, is in an abnormal condition. He is inclined to grasp at shadows and to pursue the wind, and is easily misled into paying money for medical treatment that he does not need. The man who is induced by an agent to buy goods of a merchant can see the goods and judge of their quality before paying his money; but the sick man must take the treatment for which he pays as a matter of faith. As to whether he will be benefited or not he can only conjecture. He can only judge of the value of the treatment to which he submits by its subsequent results, and not even then with any great degree of accuracy, for the causes which lead to health or disease are often obscure. They elude even the trained mind of the physician, and much more easily that of the patient.

The objections which we have stated to this method of securing patients, the temptations to which it would subject the physician and the danger to which it would ex-

pose the patient, show a wide distinction between the case of a merchant who drums for custom by hired agents and that of a physician who seeks patronage in the same way. The business of the physician directly affects the public health, and it does not follow because the merchant, the manufacturer, and others may solicit trade through hired agents that a physician may do the same thing. The Legislature has forbidden the physician to do so, and there are in our opinion sound reasons upon which to base the distinction. The law thus undertakes to protect the physician from the temptation and the patient from the danger to which they would be exposed by such a practice. When we consider how easy it would be in many cases for the professional drummer to impose on sick people, and even on those who are well, and induce them to submit to treatment they do not need, when we consider that a physician who had paid for a patient would be under a strong temptation to make a profit out of his investment and to give and charge for treatment whether the patient needed it or not, when we consider the fraud and imposition that would be encouraged by such a method of securing patients—we easily reach the conclusion that the law wisely prohibits a physician from seeking patronage by means of paid agents. It seems to us to be a regulation clearly within the power of the Legislature to impose upon those who practice medicine, and that this statute is valid at least to that extent. As we are of the opinion that the defendants were acting under a valid law, it follows that they were engaged in a lawful undertaking, and that there were no grounds for an injunction against them. It is therefore unnecessary for us to consider whether, if the law had been invalid, an injunction should have been refused on the ground that there was an adequate remedy at law.

For the reasons stated, we are of the opinion that the chancellor erred in granting the injunction. Judgment reversed, with an order to dismiss the complaint for want of equity.

STATE v. McCrARY.

(Supreme Court of Arkansas. Jan. 27, 1906.)

Appeal from Garland Chancery Court; Alphonzo Curl, Chancellor.

Application by A. S. McCrary for a writ of habeas corpus. From a judgment discharging the applicant, the state appeals. Reversed.

The defendant, A. S. McCrary, a physician engaged in the practice of medicine, was tried and convicted before a justice of the peace of Garland county of the crime of employing an agent to solicit and drum patients for defendant. The justice of the peace imposed a fine and rendered judgment that he

be imprisoned unless the fine and costs were paid. The defendant thereupon applied to Hon. A. Curl, chancellor, for a writ of habeas corpus, which was granted. The case was heard at term time before the Garland chancery court, and the chancellor, being of the opinion that the act under which the defendant was tried and convicted was void, ordered him discharged. The state appealed from this judgment.

Wood & Henderson, Greaves & Martin, and Leland Leatherman, for the State. R. G. Davies, for appellee.

RIDDICK, J. (after stating the facts). This case is controlled by the decision rendered on this day in case of *M. G. Thompson et al. v. S. O. Van Lear* (92 S. W. 773), wherein we held that the statute under which the defendant was prosecuted in this case was a valid law. The defendant was therefore, in our opinion, in custody under a valid judgment, and in our opinion the judgment of the chancery court ordering his discharge was erroneous.

The judgment was reversed, and cause remanded, with directions that the defendant be ordered into the custody of the proper officer, to be held under the judgment of the justice of the peace.

CROSSLAND v. STATE.

(Supreme Court of Arkansas. Feb. 3, 1906.)

1. LARCENY—SUBJECTS OF LARCENY—CHECKS.

Under Kirby's Dig. §§ 1821-1824, defining larceny as the felonious carrying away of the personal property, bonds, bills, banknotes, etc., of another, the stealing of a bank check of the value of \$15 is grand larceny.

2. SAME—EVIDENCE.

In a prosecution for larceny committed by stealing a bank check, evidence that defendant had, prior to the larceny, been accustomed to getting money and checks from the prosecuting witness under the same conditions as the check he was alleged to have stolen, should have been admitted in support of defendant's theory that his possession of the check was lawful.

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Styles T. Rowe, Judge.

E. B. Crossland was convicted of grand larceny, and appeals. Reversed.

The following are the grounds for new trial referred to in the opinion: "(2) The court erred in not permitting defendant to testify that he had, prior to the time he is alleged to have stolen the check mentioned in the indictment, been accustomed to getting money and checks from the prosecuting witness, Emmet Frizzell, and that the said Emmet Frizzell, prior to the alleged larceny, gave him money and checks from time to time, under the same circumstances, conditions and considerations as the check he is alleged to have stolen was given. * * *

(4) The court erred in refusing to permit the defendant to prove by the witness Emmet

Frizzell that he had at different times, prior to the alleged larceny, given to the defendant money, and in refusing to permit defendant to prove by the said Emmet Frizzell that he had from time to time, prior to the alleged larceny, given him like checks as the one the defendant was charged with stealing, and in refusing to permit the defendant to prove by the said Emmet Frizzell that the said money and checks were given under like conditions as defendant claims the check in controversy was given. (5) The court erred in not permitting defendant to prove by the witness Emmet Frizzell that he had a note of defendant's for \$250, but that this note did not in fact represent an indebtedness from defendant to him, but was for money and checks under like circumstances as defendant claims the check in controversy was given him."

Ira D. Oglesby, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

WOOD, J. Appellant was indicted in the Sebastian circuit court for the larceny of a bank check valued at \$15. The indictment was good. The stealing of the check as alleged would constitute grand larceny under sections 1821 to 1824, inclusive, of Kirby's Digest.

The court erred in excluding from the jury testimony concerning the prior transactions with Emmet Frizzell as to the giving by him of money and checks to appellant. This testimony tended to explain the appellant's possession of the alleged check and to throw light upon his intent in the transaction. It corroborated appellant's version, and was proper for the consideration of the jury. The court erred in overruling appellant's second, fourth and fifth grounds of the motion for new trial. Attorney General's confession of error is sustained.

The judgment is reversed, and the cause is remanded for a new trial.

CROSSLAND v. STATE.

(Supreme Court of Arkansas. Feb. 3, 1906.)

1. FORGERY—INDICTMENT—SETTING OUT INSTRUMENT.

An indictment for forgery should set forth the instrument forged according to its tenor, and by fac simile copy when practicable; and it is insufficient for it to give the substance of the forged writing, unless the writing itself is lost or destroyed, or is in the possession of defendant or otherwise inaccessible, in which case the disabling fact should be alleged, and it will be sufficient to state the substance of the instrument.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, §§ 66-76.]

2. CRIMINAL LAW—FORMER JEOPARDY—IDENTITY OF OFFENSE.

A conviction of grand larceny of a bank check, under Kirby's Digest, §§ 1821-1824, making such checks the subject of larceny, is not a bar to a subsequent prosecution for forgery of the check alleged to have been stolen.

3. FORGERY—INDICTMENT—SETTING OUT INDORSEMENT.

An indorsement of a note or check does not constitute in law a part of the note, and need not be set out in an indictment for forgery of the note or check.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, §§ 66, 67.]

4. SAME—FORGERY OF INDORSEMENT.

An indictment for forgery of an indorsement on a note or check must set out the indorsement, together with such averments as will make the offense affirmatively appear.

5. SAME—ADMISSIBILITY OF EVIDENCE.

In a prosecution for forgery, evidence that the manager for the prosecuting witness, who had authority to indorse such witness' name on checks, had been in the habit of giving money and checks to defendant for several months prior to the transaction in question, and had previously authorized defendant to write the name of prosecuting witness on checks, should have been admitted in support of defendant's theory that his possession and indorsement of the check were rightful.

6. WITNESSES — IMPEACHMENT — TESTIMONY BEFORE MAGISTRATE.

It was not competent to impeach a witness in a criminal case by asking him if he had not been asked certain questions before the committing magistrate, and what his answers were, where the witness did not answer such questions before the magistrate, and there was nothing in them upon which to base the foundation for his impeachment.

7. FORGERY — PROSECUTIONS — INSTRUCTIONS.

Where an indictment charges forgery of a check, and contains no charge of forgery of an indorsement on the check, and there is no proof of the forgery of the check itself, a charge authorizing a conviction of uttering and publishing a forged instrument, on the establishment of certain facts hypothesized therein, was erroneous.

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Styles T. Rowe, Judge.

R. B. Crossland was convicted of forgery, and appeals. Reversed.

Appellant was indicted for forgery and uttering a forged instrument as follows (omitting formal parts): The said defendant, in the district and county aforesaid, on the 1st day of November, 1905, fraudulently and feloniously did forge and counterfeit a certain writing on paper, purporting to be a check upon a bank, which said writing on paper is in substance as follows: "No. 120. Chatwell Bros. Fine Wines, Liquors and Cigars, 8 North First street. Fort Smith, Ark. Nov. 1, 1905. Pay to James G. Frizzell, or Bearer, \$15.20—Fifteen 20-100 Dollars. Chatwell Bros. By Walter Chatwell. To First National Bank, Fort Smith, Arks." And having indorsed on the back thereof "James G. Frizzell," with intent then and there fraudulently and feloniously to obtain possession of the money and property of Chatwell Bros., a partnership, and of James G. Frizzell, and of Palace Clothing Store, a partnership composed of J. H. Fox and R. F. Turner, against the peace and dignity of the state of Arkansas. The second count charged the uttering of the instrument, as set forth in the first count. The proof

tended to show that the appellant in Ft. Smith in November, 1905, bought of the Palace Clothing Company a pair of trousers, and presented the check described in the indictment in payment of same. He represented that his name was Frizzell, and that the check was made to him. The one to whom the check was presented inquired over the phone of the drawers of the check to know if such a check was out and all right. Upon being informed that it was, he called upon the appellant for identification, and appellant went out and came back with a young man who said that he knew appellant and "that he was all right." Thereupon payment for the trousers was taken out of the check and the balance was given to appellant in money.

Robert E. Frizzell testified in substance that he was the manager of the Beer business of his brother James G. Frizzell in Fort Smith, that he had authority to receive checks, to transfer and indorse same, that he got the check from Chatwell Bros. on Nov. 1st and put it in his vest pocket, that after supper about 7 o'clock he went to the closet leaving his vest on some soda boxes in the middle room of the store. He was gone a short time, and on his return found the appellant in his place of business. He detailed a short conversation had with appellant, after which appellant left. The witness stated that he found the check, next day in the possession of the Palace Clothing Company, said that he did not give the check to the appellant or authorize him to get it, that the check was in the same condition as when he received it from Chatwell Bros. except the indorsement James G. Frizzell. The word "bearer," he explains, was scratched out at the time the check was given in order that it might be payable only to James G. Frizzell. At this juncture the witness was asked "if he indorsed the name James G. Frizzell on the check or if it was so indorsed when it was taken." Appellant objected on the ground that he was "not charged with forging the indorsement or with uttering a check upon which there was a forged indorsement." The court sustained the objection as to the first count in the indictment, but held the question proper as to the second count, to which action of the court the appellant excepted. Witness answered that he did not indorse it, nor did James G. Frizzell. The following check was admitted as evidence to wit: "No. 120. Chatwell Bros. Fine Wines, Liquors and Cigars, 8 North First Street. Fort Smith, Ark. Nov. 1, 1905. Pay to James G. Frizzell \$15.20—Fifteen 20-100 Dollars. Chatwell Bros. By Walter Chatwell. To First National Bank, Fort Smith, Ark." Indorsed: "James G. Frizzell." Appellant objected and excepted to the ruling of the court.

By a series of questions appellant sought on cross-examination of witness Robert E. Frizzell, to establish that from time to time

during the last year, appellant had called upon him for money, and that he had been in the habit of letting appellant have money and checks from time to time, and let him have the check under consideration in the same way that he let appellant have previous checks. The court would not permit such evidence and the appellant excepted to the court's ruling. The court refused, over appellant's objection, to permit appellant to ask witness Frizzell if he was not asked certain questions before the grand jury in regard to letting appellant have money and checks, before the alleged forgery of this check, and if he did not refuse to answer these questions. Appellant then offered to prove that witness Robert E. Frizzell had the note of the appellant for \$250 which did not represent \$250 actually loaned or advanced by Frizzell to appellant, but that the note was given to stand as evidence of transactions between Frizzell and appellant, so that Robert E. Frizzell, in accounting with James G. Frizzell, might show that \$250 had been drawn out of the business for the \$250 note. The court would not permit such testimony, to which ruling appellant excepted. The appellant testified that he did not take the check in evidence, but that Robert Frizzell gave it to him. He said: "I went down there and told Mr. Frizzell I wanted him to let me have some money to buy some clothes; and he said he didn't have the money, but had this check, which I could take and get the clothes and get the money on the balance of it; that I could use the check. I indorsed James G. Frizzell's name on the check by the authority of Mr. Emmet Frizzell, who has charge of his business." Appellant offered to prove that at various times prior to the alleged offense, covering a period of six or seven months, Frizzell gave him money and when he did not have money gave him checks, and on several occasions when defendant wanted money he gave him checks payable to James G. Frizzell and told him to use them, which he had done; that sometimes Emmet Frizzell would indorse these checks himself and sometimes tell the defendant to do so and get the money; that these checks and the money that had been heretofore given him were under like circumstances as the one defendant is charged with stealing—all of which testimony the court held to be incompetent and excluded same, to which action of the court the defendant at the time excepted.

A plea of former conviction was interposed with the plea of not guilty and the record of the circuit court was introduced showing a conviction of appellant for grand larceny, the property being the check, which appellant, in the case at bar, is alleged to have forged and uttered. The court overruled the plea of former conviction. Appellant asked the court to instruct the jury, "under the law and the evidence to acquit the defendant," and also asked an instruction presenting

his theory as to the evidence he had offered, which the court had refused. The court on its own motion gave the following: (3) If you find from the evidence beyond a reasonable doubt that the defendant unlawfully and feloniously uttered and published the check mentioned in the indictment, including the indorsement thereon, as good, when he knew that it was false, and that he uttered and published the same, with the intent to obtain possession of the money and property of Chatwell Bros., or James G. Frizzell, then you should convict the defendant of uttering and publishing a forged instrument. There was a general verdict of guilty and the punishment fixed at two years in the penitentiary. A motion was filed in arrest of judgment on the ground that the indictment did not set out the forged instrument nor give any reason why the same was not set out, but instead sets out the substance of the alleged forged instrument. The motion in arrest was overruled. Appellant was sentenced, and he seeks by this appeal to reverse the judgment.

Ira D. Oglesby, for appellant. Robert L. Rogers, Atty. Gen., for the State.

WOOD, J. (after stating the facts). The motion in arrest should have been sustained. The alleged forgery was of a bank check. In the absence of statute, such an instrument must be set forth according to its tenor. The object of the rule is to enable the court to determine whether it is a writing that can be forged. 2 Bish. Cr. Proc. § 403. The mere substance or effect of the forged writing will not suffice, unless the instrument is lost or destroyed, is in the possession of the defendant, or otherwise wholly inaccessible to the pleader. Where such is the case, the disabling fact should be alleged. Then the substance will suffice. 2 Bish. Cr. Proc. §§ 403, 404. "Where the law requires" says Mr. Bishop "the words to be laid by their tenor, the indictment must introduce them in one of the ways which denote this, it will not suffice merely to set them out accurately in fact, and if the case is within any class of the exceptions as that the instrument is lost or is in the hands of the defendant * * * the excusing thing must be stated, or the indictment will be defective." 1 Bish. Cr. Proc. §§ 561, 562. The indictment for forgery should always set forth the forged, or counterfeit instrument by fac simile copy when practicable. The rules of correct pleading certainly require this. *State v. Bonney*, 34 Me. 383; *State v. Allen Twitty*, 9 N. C. 248.

2. As the cause must be remanded for new trial, it will be necessary to pass upon other questions presented. The plea of former conviction is not well taken. It is grand larceny under our statute to steal the check described in this indictment. Kirby's Dig. §§ 1821-1824, inclusive. The check under consideration was of the value of more than \$10 to its payee, James Frizzell. It did not

require any indorsement by him to enable him to draw the money on it. One convicted for this offense could not plead former jeopardy, if he were afterwards indicted and put on trial for forging the same check. The two offenses have nothing in common. They are not the same. One convicted for grand larceny could not be put in jeopardy by afterwards being put on trial for forgery.

3. As the present indictment will have to be quashed, and, as the matter will doubtless be referred to another grand jury, the district attorney, in case of another indictment, will doubtless conform his pleading strictly to the proof. Therefore we need not pass upon the question of variance. It is not improper to say, however, that an indorsement on a note or check, does not constitute, in law, a part of the note, and need not be set out in an indictment for forgery of such note or check. But if the indictment is "for the forgery of the indorsement, it must be set out, accompanied with such averments as will make the offense affirmatively appear." 2 Bish. Crim. Proc. § 410; McDonnell v. State, 58 Ark. 242, 24 S. W. 105.

4. The court erred in excluding evidence tending to show that Robert E. Frizzell, who was the manager of James Frizzell, and who had authority to indorse his name on checks, had been in the habit of giving money and checks to appellant for six months prior to this occurrence, and had authorized appellant to write the name of James Frizzell on checks before. This testimony was competent as tending to show the intent with which the alleged criminal act was done. It tended to show the relation between the appellant, and the agent of James Frizzell from whom the check was taken. The testimony tended to support the theory of appellant as to how he came into the possession of the check, and as to how the indorsement was made. It was not in the nature of self-manufactured evidence. It was not competent to ask Frizzell if he had not been asked before the committing magistrate as to whether or not he had been in the habit of giving appellant checks, as appellant claimed he had given him this one. And whether or not he had given appellant this check, and what his answers were. Frizzell had not answered these questions before the committing magistrate and there was nothing in these upon which to lay the foundation for his impeachment. These questions had no relevancy in the case, and were properly excluded.

5. It follows from what we have said that the court erred in giving the third instruction on its own motion. There was no charge of forging an indorsement on the check, and no proof that the check itself was forged. Hence under the present indictment, there could have been no uttering of a forged instrument. It is unnecessary to pass upon the second instruction asked for appellant and refused. What we have already said

sufficiently indicates what the law is upon the questions covered by this refused request.

The judgment is reversed, and the cause is remanded for a new trial.

CARPENTER et al. v. CROW.

(Supreme Court of Arkansas. Feb. 8, 1906.)

1. SALES—CONDITIONS—PERFORMANCE—WAIVER OF BREACH.

Where plaintiff sold cattle to defendant who gave notes therefor and agreed to furnish plaintiff certain quantities of fresh milk, and by a subsequent agreement plaintiff agreed to allow a rebate of \$300 if the defendant should faithfully perform his contract, he did not, by accepting and using the milk each day, waive his right to refuse the rebate on account of defendant's breach of the contract in furnishing milk unfit for use.

2. SAME.

Where plaintiff transferred cattle to defendant, taking notes therefor, but retaining title to secure the payment of the notes and the performance of an agreement by defendant to furnish certain quantities of fresh milk, plaintiff, by accepting the milk furnished, waived his right to claim a forfeiture of the contract and retake the cattle, because the milk furnished was unfit for use.

Appeal from Circuit Court, Lonoke County; George M. Chaplin, Judge.

Action by J. W. Carpenter and another against W. N. Crow. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

This is an action of replevin brought by J. W. Carpenter and Gus Breitzke against W. N. Crow to recover possession of 95 milk cows and 75 calves. The plaintiffs were the owners of the cattle, and sold them to one I. M. Tuller, who, in turn, sold to defendant Crow. The consideration for the sale from plaintiffs to Tuller was \$3,600, of which \$600 was paid cash at the time of the sale, and the balance was to be paid in monthly installments of \$200 each represented by the notes of Tuller executed to plaintiff. At the time of the sale of the cattle, Tuller and the Grand Prairie Creamery Company entered into a written contract with plaintiffs whereby they undertook to furnish to plaintiffs sweet milk in quantities, as ordered, not less than 100 gallons nor more than 400 gallons per day, and such amount of cream as should be ordered, during a term of two years, at the price therein named to be paid by plaintiffs on Tuesday of each week. It was agreed that "the milk and cream so furnished must be fresh and of the morning's milking of each day, or other milk satisfactory to party of the second part [plaintiffs]." The contract of sale of the cattle contained a stipulation that the title to the cattle should remain in the plaintiffs until all of the purchase-money notes should be paid, and also until said contract for the sale of milk should be fully complied with by said Tuller and the Grand Prairie Creamery Company and, that, in the event of their

failure to pay said notes as they fall due, or to comply with the contract to furnish milk that then the plaintiffs should have the right to take possession of the cattle. The contract of sale of the cattle and the milk contract were executed on May 15, 1901, and on January 8, 1902, when all the purchase-money notes had been paid except five, aggregating the sum of \$1,000, the plaintiffs executed and delivered to Tuller a written agreement whereby they agreed to extend the time of payment of said notes, and "to give I. M. Tuller a rebate of \$300 upon his indebtedness to it, conditioned upon the faithful performance" of said contract for the sale of milk. Defendant Crow on October 1, 1902, purchased the cattle from Tuller, and the milk contract, and thereafter furnished milk to plaintiffs under the contract and made payments on the purchase notes. Defendant claimed that after deducting the sum of \$300, which plaintiff had agreed to rebate, he had paid the debt down to \$104, which sum he tendered to plaintiffs. There is no dispute concerning the payments made on the notes, but plaintiffs refused to allow the rebate of \$300 for the reason, as they allege, that Tuller and defendant Crow failed to comply with the milk contract, that the milk furnished was impure and unfit for use. The quantity of milk mentioned in the contract was furnished daily for the full term of the contract, and paid for weekly by plaintiffs as provided by the contract, but plaintiffs introduced testimony to the effect that the milk was unfit for use and they sustained damages to their business as dairymen by reason of the failure of Tuller and Crow to furnish milk fit for use.

The court, on its own motion, over plaintiffs' objections, instructed the jury as follows: "That plaintiff continued to receive milk from defendant and make weekly remittances for same up to May 15, 1903. Any breach of the contract to furnish milk of certain grade and quality happening during the existence of the contract was waived by the plaintiff, and he is estopped from complaining on account of said breach and not entitled to recover in this action on said contract; nor is he entitled to set up a breach on this account to deny to the defendant the right to a credit \$300 on notes introduced in evidence. The court directs a verdict for defendant." The jury returned a verdict in favor of the defendant, and judgment was rendered accordingly. The amount tendered by defendant, \$104, was paid into court, and ordered to be paid over to plaintiffs.

Atkinson & Patterson, for appellants. Bradshaw, Rhoton & Helm and Trimble, Robinson & Trimble, for appellee.

MCCULLOUGH, J. (after stating the facts). The court erred in declaring the law and in giving the peremptory instruction to the jury to return a verdict for the defendant.

Plaintiffs' agreement to allow a rebate of \$300 on the notes was upon condition that Tuller and the creamery company should faithfully perform the contract for the sale of milk, and there was testimony sufficient to go to the jury that they had failed to do so. The milk contract stipulated only that the milk and cream should be "fresh and of the morning's milking of each day"; but it being an article of food, and plaintiffs having no opportunity to inspect it, there was an implied warranty that it should be fit for use. *Truschel v. Dean*, 92 S. W. 781; *Bunch v. Well*, 72 Ark. 343, 80 S. W. 582; 2 *Mechem on Sales*, § 1358. Furnishing impure milk was not a compliance with the contract and the jury should have been instructed that if there had been a default in the performance of the contract in this respect, the defendant was not entitled to the rebate.

It is, however, contended on behalf of appellee that appellants, by continuing to accept the milk and pay for it weekly until the term mentioned in the contract expired, waived the right to refuse the rebate on account of the quality of the milk furnished. It is argued that appellants should have refused to accept the milk, declared the contract of sale forfeited and reclaimed the cattle, otherwise they are deemed to have waived the right to object to the breach of the contract in this respect. This is not sound. Appellants had a right to accept the milk without waiving the breach of the warranty of its quality, and they have a right to refuse to allow the rebate because of the breach. *McDonough v. Williams*, 92 S. W. 783, and cases cited. The milk contract, and the agreement for rebate on the purchase notes, were separate and distinct contracts, and appellants, by accepting a quality of milk below the standard required by the contract, did not waive their right to insist that the conditions upon which they had agreed to allow the rebate had not been performed, nor did their acceptance of the milk estop them from saying that the conditions upon which they had agreed to allow a rebate had not been performed, nor was it an election on their part not to insist upon a breach of the contract. Counsel argue with much earnestness that the plaintiffs are estopped from claiming a breach of the contract, but we see nothing in this case upon which the doctrine of estoppel can be invoked, so far as the right to refuse the rebate is concerned. Appellee admits that he knew, when he purchased the cattle, the condition upon which the rebate was promised and the proof shows, if it establishes a breach of the contract at all, that the breach was committed by him after he purchased the cattle from Tuller. That being true, how can he plead an estoppel? It is different, however, as to appellant's right upon payment in full of the purchase notes by appellee, to claim a forfeiture

and retake the cattle on account of the breach of the milk contract. The acceptance of payments on the notes after breach of the milk contract was a waiver of the right to insist on the forfeiture. It would be manifestly unjust to allow appellants to continue to accept payments on the notes and at the same time insist that no title to the cattle passed because of the breach of implied warranty as to quality of the milk furnished. As we have already stated, appellants did not, by acceptance of the milk and making payment therefor, waive their right to refuse the promised rebate on the notes, nor their right to sue for damages for breach of the implied warranty of the quality of the milk, but by acceptance of payment of the notes they did waive their right to insist that no title passed because of the alleged breach of warranty.

The court erred in giving a peremptory instruction to the jury, but should have submitted the case to the jury upon proper instruction as to whether or not there had been a breach of the implied warranty of the quality of milk furnished under the contract. If there has been such a breach, appellee is not entitled to the rebate of \$300 on the notes as the agreement for allowance of the rebate is conditioned upon performance of the milk contract, and if it has not been performed the verdict should be for appellants because, according to the contract of sale, no title passed until the purchase notes should be paid in full. In other words, if the jury find that there has been a breach of the implied warranty as to the quality of milk furnished, then appellee is not entitled to the rebate of \$300 and must pay the full amount of the purchase notes before he can defeat appellants' right to recover the property. But appellants, by acceptance of the milk, and the payments made by appellee on the notes, are deemed to have waived their right to retain title until the alleged damages arising from such breach of warranty be paid, and they must recover such damages in a separate action brought for that purpose.

Reversed, and remanded for new trial.

TRUSCHEL v. DEAN.

(Supreme Court of Arkansas. Feb. 3, 1906.)

1. SALES—IMPLIED WARRANTY.

Where a buyer of grapes to be shipped from New York to Arkansas had no opportunity to inspect them, and the seller knew they were intended for resale at their destination, there was an implied warranty that they were in proper condition to stand the shipment and remain in merchantable condition, so that the buyer would have an opportunity to sell them.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 754-757.]

2. TRIAL—ERRONEOUS INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an action for the price of grapes shipped from New York for resale by the buyer in Arkansas, error in the refusal of an instruction

that the seller was required to ship grapes which were in proper condition to bear the shipment and be in merchantable condition on arrival at their destination, was not cured by an instruction that in determining whether the grapes were in merchantable condition when they were loaded on the car for shipment, the jury might consider the length of time merchantable grapes would keep, the manner in which they were loaded, and all other facts and circumstances.

3. SALES—ACTION FOR PRICE—EVIDENCE.

In an action for the price of grapes in which the defense was breach of implied warranty as to their quality, evidence held not to require a verdict for the plaintiff.

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Styles T. Rowe, Judge.

Action by Clyde Dean against George Truschel. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The plaintiff, Clyde Dean of Portland, N. Y., commenced this action against the defendant, George Truschel, of Ft. Smith, Ark., to recover \$457.61 on open account for one car load of grapes sold and delivered on board car at Portland. The contract of sale was evidenced by two telegrams, the first from plaintiff to defendant quoting prices of grapes loaded on board cars at Portland, N. Y., and the second from defendant to plaintiff accepting the offer and ordering shipment. The defendant set forth in his answer that the grapes were purchased for resale in Ft. Smith, which fact the plaintiff well knew, and accepted the order with that understanding; that there was an implied warranty on the part of the plaintiff that the grapes should, when shipped from Portland, be in proper condition to stand shipment to Ft. Smith and reach the latter place in merchantable condition so that defendant could have an opportunity to resell the same; that the same were not in such condition when shipped from Portland, but by reason of being overripe, were unfit for shipment so as to reach Ft. Smith in merchantable condition. At the trial the defendant introduced testimony tending to show that when the car reached Ft. Smith the grapes were mildewed, rotten, and unfit for use and that defendant refused to accept them. Also that the condition indicated that the grapes were either overripe, or wet when they were loaded into the car at Portland, that if they had not been wet or overripe when loaded, and the car had been kept iced en route they would have been in good condition upon arrival at Ft. Smith. One witness who examined the grapes on arrival at Ft. Smith said that the car was cool and that he found ice in the bunkers. It appears from other evidence that cars are provided for such shipments with ice bunkers, and that the bunkers must be filled with ice so that the car may be kept at the proper temperature throughout the journey. The bunkers of this car were filled at Portland and instructions were written in the face of the waybill to "ice this car heavily at Bellevue,

Ohio. Keep it iced to destination and charge the expense on the property." A witness for the plaintiff who inspected the grapes at Portland testified that they were, when loaded at Portland, in first-class condition and would stand 10 days' transit and still be in prime condition if the car had been kept iced during transit.

The court gave the following instruction of its own motion, over defendant's objection: "(4) In determining whether the grapes were in a merchantable condition when loaded into the car at Portland, N. Y., you should take into consideration the condition in which the grapes were when loaded into said car, the length of time merchantable grapes will keep when properly loaded into cars used for the purpose of carrying grapes, the length of time the grapes were in transit, the manner in which the grapes were loaded into said car, with all the facts and circumstances in evidence, and from all the facts and circumstances in evidence say whether the grapes were or were not in a merchantable condition when loaded in the car at Portland, N. Y." And refused the following asked by defendant: "Gentlemen of the jury, you are instructed that under the contract as shown by the evidence on this case, the plaintiff was required to load into the car at Portland, N. Y., grapes which were in such condition as to bear shipment to Ft. Smith, Ark., and be in merchantable condition upon arrival in Ft. Smith, Ark., that is, the shipper must have in mind the time ordinarily consumed in the means of transit employed, and the fruit must be in such condition as, under the ordinary conditions, to reach the point of destination in merchantable condition. Now if you find from the evidence that the grapes loaded into this car were in proper condition to stand shipment to Ft. Smith, Ark., and reach Ft. Smith, Ark., in merchantable condition, your verdict should be for plaintiff, if not, your verdict should be for the defendant." The jury returned a verdict in favor of the plaintiff for the amount sued for, and the defendant appealed.

Winchester & Martin, for appellant. A. A. McDonald, for appellee.

MCCULLOCH, J. (after stating the facts). In sales of goods where the purchaser has had no opportunity to inspect them there is an implied warranty that they are reasonably fit for the purpose for which they are ordinarily used; and when they are, under such circumstances, purchased for a particular purpose known to the seller there is an implied warranty that they are fit for that purpose. *Bunch v. Weil*, 72 Ark. 343, 80 S. W. 582, 65 L. R. A. 80; *Curtis Mfg. Co. v. Williams*, 48 Ark. 330, 3 S. W. 517; *Benjamin on Sales*, §§ 645, 656; 2 *Mechem on Sales*, § 1858.

The facts of this case fall squarely within the rule stated. The grapes were purchased

for resale in Ft. Smith and this purpose was known to the seller. Therefore, the seller impliedly warranted that the grapes were in proper condition to stand shipment to Ft. Smith, by the means of transportation afforded, and remain in merchantable condition, so that the purchaser could have an opportunity to resell them. It could not have been in contemplation of the parties that fruit should be shipped which would be worthless when it reached Ft. Smith and the seller only having had an opportunity of inspection and selection, he must be deemed to have warranted the fruit to be such as would, under the means of transportation afforded, reach Ft. Smith in salable condition. The instruction asked by the defendant embodied this view of the law and should have been given.

It is insisted by counsel for appellee that the instruction by the court of its own motion, conveys the same idea and that there is no substantial difference in meaning between that and the instruction asked by appellant. We do not think so. The court in this instruction said, that in determining whether the grapes were in merchantable condition when loaded into the car at Portland, the jury might consider the condition of the grapes at that time, the length of time grapes in such condition will keep when properly loaded, etc., but the court did not say that the grapes must have been in condition to stand shipment and then be fit for sale at Ft. Smith. The instruction, it is true, permitted the jury to consider the condition of the grapes when loaded on cars at Portland, the length of time grapes will, under ordinary means of transit, keep, the manner in which they were loaded, etc., but only for the purpose of determining whether the grapes were in merchantable condition when loaded. The court should have gone further and told the jury, as asked by defendant, that the test of merchantability in Portland was whether the condition of the grapes was such as to stand shipment to Ft. Smith and reach the latter place in condition fit for sale. The instruction of the court, without the further definition contained in the refused instruction, was uncertain and misleading. The jury might well have understood from it that their sole duty was to determine whether the grapes were in salable condition when delivered to the carrier at Portland, and that the other matters recited in the instruction were to be considered only for the purpose of reaching a conclusion on that point.

It is contended that the refusal to give the instruction was not prejudicial for the alleged reason that under the evidence the verdict must have been for the plaintiff anyway. It is true that a witness for plaintiff testified that the grapes when loaded at Portland were in proper condition to stand shipment to Ft. Smith and reach there in salable condition if the car was kept properly iced, and no accident occurred in transit. This

was not contradicted by direct evidence, and there was no direct testimony as to whether the car was iced after it left Portland. But it was shown that the car was iced at Portland and instructions given to ice it again at Bellevue, O., and to keep it heavily iced en route; that the car in due time reached Ft. Smith at proper temperature, and with ice in the bunkers; and that the grapes were in such poor condition that they could not, if the car was kept iced, have been in proper condition when loaded at Portland. At least, a witness of experience in handling fruit testified to that effect, and gave it as his opinion that from the condition he found it in after arrival at Ft. Smith it could not, if the car was kept iced, have been in proper condition when loaded. The jury might have inferred from these facts that the fruit was not in proper condition to stand shipment and that there was a breach of the warranty in that regard. Notwithstanding there was no direct proof that the ice bunkers of cars were refilled en route, the jury might have inferred from the fact that they were filled at the start, and instructions given to the carrier to refill them and keep them full, the car reached Ft. Smith in due time at proper temperature and with ice in the bunkers, that the worthless condition of the grapes was due to the fact that they were not in good condition when shipped, rather than to some accident or failure to keep the car properly iced en route. Appellant was, therefore, entitled to have the question submitted to the jury upon proper instructions.,

Reversed, and remanded for new trial.

McDONOUGH v. WILLIAMS.

(Supreme Court of Arkansas. Dec. 16, 1905.)

1. TRIAL — INSTRUCTIONS — APPLICATION TO EVIDENCE.

In an action for fraud and deceit alleged to have been practiced by defendant on plaintiff in the purchase of shares of stock from the latter, the undisputed evidence, including testimony of plaintiff himself, showed that plaintiff sold his stock outright to defendant, but claimed that he was induced to do so by his reliance on false representations and fraudulent concealments made by defendant. *Held*, that instructions allowing the case to go to the jury on the theory that defendant was acting as agent of plaintiff in the sale of the stock, and had fraudulently concealed the price received for it, were erroneous.

2. SAME — INVADING PROVINCE OF JURY.

In an action for fraud and deceit alleged to have been practiced by defendant on plaintiff in the purchase of shares of stock from the latter, an instruction cutting off as a matter of law all right of defendant to purchase the stock from plaintiff because of the fact alone of plaintiff's having previously authorized defendant to sell the stock, regardless of any severance of the relation of principal and agent, and regardless of the question whether plaintiff was then relying upon defendant for a full disclosure of all the facts, was erroneous, as such questions were for the jury.

3. FRAUD — MEASURE OF DAMAGES.

In an action for fraud and deceit alleged to have been practiced by defendant upon plain-

tiff in the purchase of shares of stock from the latter, the measure of damages would be the difference between the price paid to plaintiff for his stock and the actual value thereof at the time, if the latter exceeded the former.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 62.]

4. SAME — WAIVER OF RIGHT OF ACTION.

Where the vendor, in an executory contract for the sale of personal property, has been induced by fraud and deceit to enter into the contract, and subsequently performs the contract by delivering the property and receiving the purchase price after discovery of the fraud, he cannot maintain an action to recover damages for the fraud.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 30.]

5. CONTRACTS — CONSTRUCTION — DUTY OF COURT.

In an action for fraud in the purchase of property from plaintiff, the terms of the contract being evidenced by written letters and telegrams, it is the duty of the court to construe the contract and declare its terms to the jury.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 767-770.]

6. FRAUD — ACTION — ADMISSIBILITY OF EVIDENCE — DAMAGES.

In an action for fraud and deceit alleged to have been practiced by defendant upon plaintiff in the purchase of shares of stock from plaintiff, evidence was admissible to show the value of the property sold at the time of the sale.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 54.]

7. SAME — QUESTIONS FOR JURY.

In an action for fraud and deceit in inducing plaintiff to sell shares of stock, evidence considered, and *held*, that the question of fraud was for the jury.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Action by George T. Williams against James B. McDonough. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action brought by G. T. Williams against Jas. B. McDonough to recover damages for fraud and deceit alleged to have been practiced by the defendant to plaintiff's injury, in the purchase by defendant from plaintiff of shares of stock in the Montreal Coal Company, a domestic corporation owning and operating a coal mine in Sebastian county. The corporation was organized with a capital stock of \$50,000, of which \$24,000 was subscribed and issued, \$9,000 to the plaintiff Williams, \$3,500 to his brother-in-law Oscar P. Bonney, and \$11,500 to defendant McDonough. Williams and McDonough resided in the city of Ft. Smith and Bonney in Chicago, Ill. Williams represented Bonney and was authorized to act for him in the sale or disposition of his stock. McDonough was president of the corporation. Bonney was vice president and Williams was secretary, treasurer, and general manager. Williams managed the operation of the mine and the sale of coal and McDonough assisted in making collections and disbursement of funds. On January 14, 1903, the plaintiff sold and transferred his stock and Bonney's to the defendant for the par or face value paid in cash, and on May 11,

1908, this suit was commenced to recover damages resulting from the alleged fraud and deceit perpetrated by defendant in inducing the sale of the stock.

The plaintiff alleges in his complaint that by reason of the ties of friendship between himself and defendant and their intimate association as co-owners of the capital stock of the corporation, and managers of its business, a relation of trust and confidence subsisted between them and that by reason of that relation defendant was enabled to successfully practice the alleged fraud and deceit and that on that account he (plaintiff) relied upon the representations made by defendant. Also that he (plaintiff) was absent from the state of Arkansas for some time before the sale of the stock and, for that reason, relied upon the representations of defendant. He also alleged that defendant, knowing that P. A. Ball and T. W. M. Boone had the confidence of plaintiff, by false representations and fraudulent concealment of material facts induced them to advise plaintiff to sell his stock to defendant at par, and said Ball and Boone on the faith of said representations did so advise plaintiff to sell, and that he (plaintiff) relied and acted upon said advice. The said fraud and deceit are alleged to have consisted of the following, viz.: (1) That defendant falsely represented to Ball and Boone that the financial condition of the company was much worse than it was in fact and that the company must go into liquidation unless plaintiff sold his stock to defendant; (2) that he falsely represented to plaintiff and to Ball and Boone that the obligations of the company were more pressing than they were in fact, and that the creditors of the company were making more peremptory demands for payment than were in fact being made by creditors; and (3) that he fraudulently and deceitfully concealed from plaintiff and from Ball and Boone at the time he was negotiating with plaintiff for the purchase of the stock, the fact that he had already entered into a contract with one Franklin Bache for the sale of the entire capital stock of the corporation at a price largely in excess of the par value, which contract was consummated after his purchase from plaintiff. It is also alleged in the complaint that at the time of the purchase of the stock from plaintiff at par that the actual value thereof was greatly in excess of the par value, and damages are claimed in the sum of \$15,000 by reason of such false representations and fraudulent concealments, whereby plaintiff was induced to sell his stock.

The defendant filed his answer denying all the allegations of the complaint as to fraud and deceit, or misconduct of any kind, and denied that the market value of the stock at the time of his purchase of plaintiff's stock exceeded the par value; he denied that there was any relation of trust and confidence between himself and plaintiff at the

time of the sale or that plaintiff was ignorant of any facts connected with the affairs of the corporation of the sale of stock and he alleged that plaintiff sold the stock to him after a full investigation and with knowledge of all the facts. There is some conflict in the testimony as to what occurred between the plaintiff and defendant prior to December 10, 1902, in negotiating for the sale of the stock, but there are two important facts about which there is hardly any doubt. One is that plaintiff had offered to sell his stock to defendant at par, and the other that defendant had undertaken for himself and plaintiff to find a purchaser for all the stock at the best price obtainable. On the last-named date the plaintiff left the state and did not return until the day on which he transferred the stock to defendant, and the negotiations between them for the sale of the stock up to the final act of consummation of the sale by transfer of the shares was conducted altogether by written and telegraphic communications.

The following correspondence shows the negotiation after that date: On December 20, 1902, defendant, who was managing the business of the company, wrote a letter to plaintiff at Battle Creek, Mich., containing the following: "As to business, I did nothing definite in St. Louis. I could neither borrow money nor any find one that wanted our property. I am doing everything I can. Mr. Ball sent for me to-day and stated that, while the bank did not want to do anything that would hurt us, they would very much appreciate it if we could reduce our debt before the first of the year. I told him I did not think we could do so, but I would do all in my power. My hope still is that I may be able to buy you out, but I am not sure. I would not have any trouble in borrowing all the money that I want but for the fact that our company owes so much." On December 22d the plaintiff replied as follows: "Mr. McDonough, if you still want my stock and Bonney's at par you can take it, but you must decide between now and Saturday, as if my wife's condition will permit I wish to start home some time next week, probably Monday, and if you decide to take it I will stay here with Mrs. Williams until her condition is such that I can safely leave her or bring her home." On December 24th defendant wrote as follows:

"Fort Smith, Ark., December 24, 1903.

"Dr. Mr. Williams, Battle Creek, Mich.—
Dear Sir: In reply to your letter of the 22d Monday. It will take some days, probably thirty, for me to arrange to take your stock. If you will sign and return to me the inclosed option contract I think I can raise the money within the thirty days. I saw Van Cleave; tried to sell our plant to the people that bought Boones. Van Cleave showed them our telegram giving him until six o'clock that Thursday. When he failed in that he did all he could to interfere with the sale

of Prairie Creek. At least that is what Boone told me. He told Potter that he could have bought the Prairie Creek for one hundred thousand dollars less than he paid. At this writing I have no idea where I will turn for assistance in the premises. Yours truly, James B. McDonough.

"P. S. Mr. Williams, I have not been trying to close the deal with you because I thought you preferred that we sell out together, and of course if we could do that to advantage I wanted you to get the benefit. In other words, if our negotiations with Sengel, Van Cleave or the Central Coal & Coke Company had resulted in anything I knew you wanted the benefit of that sale. Hence, I have not been trying to get my friends to go in with me. I am not sure that I can get the money, but I know I cannot unless you give me the option. It will be necessary to have the writing from you and Judge Bonney before I can be sure. If you want to sell and you and the judge will sign, I feel that I can make the deal."

The plaintiff testifies that, after consultation with Bonney, they declined to give the option and so advised the defendant, and on January 4, 1903, defendant wrote as follows: "I am disappointed in not getting the option from you and Judge Bonney. Those of my friends who are willing to assume this burden with me and try to raise this property from the oppression of the creditor say to me, 'will Mr. Williams sell? Have you his agreement in writing?' When I tell him I have not they say they cannot make their arrangements until I have your agreement in writing. The Central Coal & Coke Company wrote that they did not care to buy at all. Garrison of the Big Muddy is out. Van Cleave and Sengel have disappeared from the face of the earth. At this time there is no way to turn to except to my individual friends, and to them I cannot turn except I have this option. If you will give the option I feel sure that I will buy you out. But I do not care much about it. It will be assuming a debt and a burden that I am not anxious to assume. I am willing to put more money into the property and run further risk, which I can do by the aid of my friends, but I will not urge it. I cannot raise \$12,500 in a day. I had it last summer, but it takes time, and before I arrange for it from my friends I must know in writing that you will sell. As soon as I know that I will go to work to raise the money."

The following telegrams then passed in the order herein set forth between plaintiff and defendant and between plaintiff and P. A. Ball:

"Ft. Smith, Ark. 1—10—03. Geo. T. Williams, Battle Creek, Mich. Have decided to take your stock and Bonney's at par as stated in your letter. Will pay thirty-five hundred today balance in two weeks. Answer. James B. McDonough."

"Battle Creek, Mich. 1—10—03. Jas. McDonough, Ft. Smith, Ark. Start home first of week wait till I reach there. Geo. T. Williams."

"Fort Smith, Ark., Jan. 10, 1903. Geo. T. Williams, care Phelps Sanitarium, Battle Creek, Mich. Acted on your letter in good faith. Work hard raised money and closed deal. Can't wait. Please wire confirmation at once. Am unwilling to proceed as in past. Considered our deal closed. Wire confirmation or take my stock. James B. McDonough."

"Battle Creek, Mich., Jan. 10, 1903. P. A. Ball, Ft. Smith, Ark. Mack wants stock at par. What do you advise? Geo. T. Williams."

"Jan. 10, 1903. Geo. T. Williams, Battle Creek, Mich. Would advise going in on deal same basis as Mack, not less than par. P. A. Ball."

"Battle Creek, Mich., 1—10—1903. Jas. B. McDonough, Ft. Smith, Ark. Am in duty bound to consult Bonney will do so Monday and wire you result think matter will be O. K. Geo. T. Williams."

"Geo. T. Williams, care O. P. Bonney. 1318 Ashland Place, Chicago, Ill. Consulted with Boone after we had investigated Mack's proposition and condition of company. We advise selling at par. Wire authority to close. P. A. Ball."

"St. Louis, Mo. Jan. 13, 03. James B. McDonough, Ft. Smith, Ark. Take stock at par Bonney's and mine. Leave to-night. Geo. T. Williams."

On January 10, 1903, defendant executed to Franklin Bache a written option for the purchase of the entire stock of the corporation on February 7, 1903, at the price of \$33,000, of which \$3,500 was paid to defendant on that day (Jan. 10th) under a stipulation in the option contract that the sum paid should be forfeited to defendant if said Bache should fail to make the next payment on February 7th. The plaintiff reached Ft. Smith on January 14, 1903, and at once transferred the stock (his own and Bonney's) to defendant upon payment of the price. The plaintiff testified: That he suspected that defendant had concealed material facts from him and immediately before he signed the transfer of the stock, he said to defendant: "Mr. McDonough, if you have obtained this stock from me fairly and squarely, without any misrepresentations, it is all right, you can have it, but if you used any undue influence or chicanery in getting possession of this stock, you will probably hear from me later on," and that defendant replied: "Mr. Williams, there is nothing of the kind at all."

The defendant's version of this interview just before the transfer of the stock is stated as follows: "At 2 o'clock I was at my office, and Mr. Williams came in about 2:30. He walked into the office and said: 'Mack, I am ready to do business with you.'

moment I got your telegram in Battle Creek that you had a deal on.' I said: 'Of course you knew that, because I told you that in one of my telegrams.' He said: 'I made up my mind that I was going to come to Ft. Smith and look into it.' I says: 'All right, you are here; now look into it.' I said: 'Mr. Williams, if you did not intend to sell your stock to me, why did you telegraph me that you were in duty bound to go to Chicago and consult Bonney, and that you would answer me from there, and that you thought the matter or offer would be all right, O. K?' He said that he did that for the purpose of delay, that he found out that he couldn't get home, and that his messages were simply to keep the matter up so that he could determine whether he should sell the stock to me or not. He says: 'I am ready to sell it. I have no objection to but just one thing. Bonney and I decided that we would not sell the stock to you, and we did not think it right for you to buy it at \$12,500 and turn it in to some new concern at \$26,000.' I said: 'Mr. Williams, before I answer that question, I want to say this: That the stock is now yours. You needn't sell it unless you want to. If you do sell it, and I buy it, it is mine. If I buy it, it is mine, and I will do with it as I please. I have a deal on —' He interrupted me and said: 'I don't want to know anything about your deal.' I said: 'Very well; if my deal goes through, I will make anywhere from \$5,000 to \$10,000. If it does not go through, and this mine is a failure, I will be a bankrupt.' He said: 'Oh, well; I will go your bond if you get into bankruptcy.'"

The instructions of the court and other features of the testimony will, as far as deemed important and essential to the decision of the case be discussed in the opinion. The jury returned a verdict in favor of the plaintiff in the sum of \$4,000 and the plaintiff subsequently entered a remittitur in the sum of \$1,112.50. The defendant appealed to this court.

Jas. F. Read, Winchester & Martin, Youmans & Youmans, and Rose, Hemingway & Rose, for appellant. Oscar L. & Lovick P. Miles, for appellee.

McCULLOCH, J. (after stating the facts). 1. This is an action for fraud and deceit alleged to have been practiced by appellant upon appellee in the purchase of shares of corporation stock from the latter. The complaint is framed upon that theory. It is therein alleged that defendant made false and fraudulent representations as to certain facts and falsely and fraudulently concealed certain facts and that plaintiff "believing that all had been fully and fairly disclosed by defendant, agreed to sell and did sell, to defendant his stock," at the par value thereof, and that the actual value at that time was far greater than its par value, and

for resale of the stock at a far greater price. The undisputed evidence, the testimony of plaintiff himself, showed that plaintiff sold his stock outright to the defendant but plaintiff claimed that he was induced to do so by his reliance upon false representation, and fraudulent concealments made by defendant. The court, in express words, so characterized the action in one of its instructions given at the request of the defendant, and told the jury that "before the plaintiff would be entitled to recover, he must prove by a fair preponderance of the evidence the alleged false representation," that they were known by the defendant to be false and were relied upon by plaintiff. Yet the court, in other instructions, allowed the case to go to the jury upon an entirely different theory, i. e. that the defendant was acting as agent of the plaintiff in the sale of the stock and had fraudulently concealed the price received for it and failed to account to plaintiff, his principal, for the full price received. The two theories are inconsistent with each other and these instructions are conflicting for if the defendant bought the stock outright from plaintiff he could not have then been the agent of plaintiff for the sale of the stock and could not be held to account. In an action for damages, for the price he received on a resale of the stock though he would be liable in such action for damages resulting from his acts of fraud and deceit, the measure of which would be the difference between the price paid to the plaintiff for his stock and the actual value thereof at the time, if the latter exceeded the former. 4 *Suth. on Dam.* §§ 1171, 1172; *Potter v. Necedah Lumber Co.*, 105 *Wis.* 25, 80 *N. W.* 88, 81 *N. W.* 118.

Instruction No. 1 given by the court is as follows: "If you find from the evidence in this case that the plaintiff gave to the defendant general authority to sell or dispose of his plaintiff's stock along with his, defendant's, in the Montreal Coal Company; that thereafter defendant, while the plaintiff was absent from the state, at Battle Creek, Mich., entered into a contract with a third party for the sale of the entire issued capital stock of said coal company at the price of approximately \$33,000 for the \$24,000 of said issued capital stock, and after having made said contract he (defendant) attempted to acquire and did acquire the stock of the plaintiff for a less sum of money than he had contracted to, and did sell the same for, you will find for the plaintiff in a sum equal to the difference between what defendant paid Williams for his, William's, stock and what he (defendant) got for said stock, unless you further find from the evidence in the case that defendant, before acquiring plaintiff's stock, explained fully to plaintiff his (defendant's) contract of sale of said stock to such third party, or that the plaintiff knew, or in the exercise of a due

degree of caution ought to have known the facts in regard to the contract for the sale of stock." This instruction, aside from erroneously putting the case before the jury upon a theory inconsistent with the pleadings and proof, is incorrect in that it cuts off, as a matter of law, all right of the defendant to purchase the stock from plaintiff because of the fact alone of the latter having previously authorized him to sell the stock, regardless of any severance of the relation of principal and agent, and regardless of the question whether plaintiff was then relying upon defendant for a full disclosure of all the facts, or had the right to so rely. Even though the relation of principal and agent subsisted between the parties they had the power to dissolve that relation and by agreement to create another of a different character, and if they did so, and the circumstances and further transactions between them were such as to absolve the quondam agent from disclosure of facts coming to his knowledge, then he could with propriety deal with the former principal without making such disclosure. These are questions of fact for trial juries to determine and not matters of law for the court. Upon the statement of facts made by the defendant, he had the right to have these questions passed upon by the jury, but the instruction just quoted entirely eliminated them from consideration. The fourth instruction given by the court is open to the same objection and was erroneous. The second was erroneous, because it declared the wrong measure of damages according to the rule herein before announced.

2. The court gave over the objection of the defendant the following instruction: "The court tells you as a matter of law that if you find from the evidence in this case that McDonough telegraphed Williams an offer of par for his (Williams') stock and Williams received such telegraphed offer, and before McDonough withdrew such offer, Williams telegraphed McDonough an acceptance of such offer, and you believe said offer or acceptance was not modified, a contract then was thereby made between McDonough and Williams for the sale of Williams' stock at par to McDonough, and all that occurred thereafter between McDonough and Williams as shown by the testimony in this case, except the mere fact of the actual transfer of the stock, is immaterial to this case and should be disregarded utterly by you, unless you believe that what occurred thereafter tends to explain the sale of stock; and the mere fact of the actual transfer is only material as showing compliance with the contract of sale into which Williams entered." The ground of appellant's objection to this instruction is that there was evidence tending to show that after plaintiff sent the message from St. Louis agreeing to sell the stock at par, he received information of the alleged fraud and deception and after receipt

of such information he proceeded to perform the contract, thereby waiving the alleged fraud. The question therefore arises: Can the vendor in an executory contract for the sale of corporation stock or other personal property, who has been induced by fraud and deceit to enter into the contract, and who subsequently performs the contract by delivering the property and receiving the purchase price after discovery of the fraud, maintain an action for damages for the fraud? It seems clear to us, upon principle, that he cannot, though a search of the adjudged cases reveals a paucity of authority on the precise question. Authority is not however, entirely lacking to sustain the proposition that the fraud is waived under such circumstances. *Thompson v. Libby*, 36 Minn. 287, 31 N. W. 52; *Thweatt v. McLeod*, 56 Ala. 375; *Gilmer v. Ware*, 19 Ala. 252; *Schmidt v. Mismar*, 116 Cal. 287, 48 Pac. 54; *Western Elec. Co. v. Hart*, 103 Mich. 477, 61 N. W. 867; *Edwards v. Roberts*, 7 Smedes & M. 544. In *Thompson v. Libby*, supra, Judge Mitchell, speaking for the court, says: "If the contract be executed in whole or in part, before the fraud is discovered, it is well settled that the purchaser need not rescind, but may retain the property and also bring his action for damages on account of the deceit. But to allow a purchaser who has discovered the fraud while the contract is still wholly executory to go on and execute it, and then sue for the fraud, looks very much like permitting him to speculate upon the fraud of the other party. It is virtually to allow a man to recover for self-inflicted injuries. The fraud is really consummated, and the damages incurred, by the acceptance of the property and paying for it. And if this is done after the fraud is discovered, the purchaser cannot say that he sustained this damage by reason of the fraud. It seems to us that if a party discovers the fraud before he enters upon the performance of the contract, he must decide whether he will go on under it or rescind. He cannot say it is a good contract for the purpose of authorizing him to accept the property, but not binding on him as to the price to be paid for it."

An executory contract which has been procured by fraud is not binding upon the party against whom the fraud has been perpetrated. He may, after discovering the fraud, either perform it or rescind it, and if with knowledge of the fraud he elects to perform it this is equivalent to his making a new contract, and to permit him, under those circumstances to recover for a fraud would be to do violence to every rule upon which compensatory damages are allowed. We are aware that there are some cases which appear to hold to the contrary but upon examination they will generally be found to be cases where the contract had been executed wholly or in part when the fraud was discovered, or where the fraudulent representations were

treated as warranties and damages awarded for breaches thereof. *Whitney v. Allaire*, 4 Denio, 554; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Nauman v. Oberle*, 90 Mo. 666, 3 S. W. 380. Of course, where the representation to a purchaser amounts to a warranty of title, value, or quantity, he may, without waiving the breach of the warranty, execute the contract and sue for the breach. The case of *Haven v. Neal*, 43 Minn. 315, 45 N. W. 612, is sometimes quoted as holding that performance of an executory contract after discovery of the fraud is not a waiver of the right to sue for the fraud, but in that case the contract had been partly executed when the fraud was discovered. We hold that no action can be maintained for the damages where the contract is executed after discovery of the fraud, and the court erred in so instructing the jury and in excluding evidence tending to establish the fact that appellee knew of the alleged fraud when he consummated the sale by transfer of the stock. The court gave other instructions to the effect that plaintiff could not recover if he had information of the alleged fraud, but he qualified each by a proviso that the jury must first find that the contract of sale was modified. By this qualification the court doubtless had reference to the question whether the contract was changed from a stipulation for sale partly on credit, to a sale for cash. The terms of the contract of sale were evidenced by the written letters and telegrams and it was the duty of the court to construe the contract and declare its terms to the jury, but whether this change amounted to a modification of the contract or not, it was still executory until the sale was completed by transfer of the shares of stock.

3. The court erred in excluding evidence offered by appellant tending to show the value of the corporation stock at the time of the sale. The rule hereinbefore declared as to the measure of damages rendered it competent to show the value of the property sold. If the stock was worth no more than the price received by appellee for it, then he was not damaged. 4 *Suth. Dam.* §§ 1711, 1712; *Potter v. Necedah Lumber Co.*, *supra*.

4. Appellant challenged the legal sufficiency of the evidence by a request for peremptory instruction to the jury to return a verdict in his favor, and we are now asked to dismiss the case for the same reason, instead of remanding it for a new trial. We are not prepared to say that the evidence is not sufficient to sustain a verdict for the plaintiff under proper instructions. It is clear from the evidence that the final transaction between the parties was a sale by plaintiff to defendant of his stock, not a sale by the defendant as agent of plaintiff, and that the defendant was not acting as plaintiff's agent in the resale to Bache. Therefore, as before stated, the evidence is not sufficient to hold the defendant in damages, to account as agent of the plaintiff, for the amount he received

for the stock in the resale to Bache. But there is evidence tending to establish a relation of trust and confidence between the parties extending up to the final consummation of the transfer of the stock by plaintiff to defendant. It is therefore a question of fact for a jury to determine under proper instructions whether, notwithstanding the severance of the relation of principal and agent, the confidential relation continued up to the time of the sale, and, if so, whether the plaintiff, on account of that relation, relied upon the defendant to disclose information concerning the prospective resale to Bache at a higher price than the par value and whether the defendant, knowing of such reliance, concealed the information from plaintiff or from Ball and Boone when he knew they were the trusted advisers of plaintiff, and consummated a purchase of plaintiff's stock at par in view of a certain resale at a much higher price. These are inferences of fact which the jury could have drawn from the evidence and we cannot say that the evidence was insufficient to warrant an inference favorable to plaintiff's contention, so as to entitle him to a verdict. There was no evidence that defendant misrepresented the financial condition of the company either to the plaintiff or to Messrs. Ball and Boone, nor that he misrepresented the urgent attitude of the creditors of the concern and that issue should have been withdrawn from the consideration of the jury.

5. Many exceptions were saved below to alleged misconduct of plaintiff's counsel during the progress of the trial, but as the cause must be reversed for the reasons already stated, we assume that the conduct complained of will not occur again in the trial anew, and we do not deem it necessary to discuss these exceptions or to determine whether appellant was prejudiced thereby further than to say that the remarks were improper, and should not have been indulged in.

For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

TERRY et al. v. CLARK et al.

(Supreme Court of Arkansas. Feb. 3, 1906.)

1. ATTACHMENT—WRONGFUL ATTACHMENT—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where, in an action for wrongful attachment, the evidence showed that the property belonged to the attachment debtor's children, under 16 years of age, as heirs of their deceased mother, evidence that the debtor controlled the property after the mother's death was inadmissible, as showing that he owned the same; it being his duty to control it for the benefit of the children.

2. TRIAL—INSTRUCTIONS—EVIDENCE TO SET ASIDE.

Where, in an action for the wrongful attachment of property belonging to the children of the debtor as heirs of their deceased mother, there was no evidence that the debtor was indebted to the attaching creditor at or before

their being out of repair, but in such case, the plaintiff or others using them would do so at their own risk."

(7) "The court instructs the jury that if they find from the testimony that the defendant did not construct the steps over the fence, and if it has not, by its conduct in continuously repairing the same, and keeping them in fix, assumed the obligation or held them out to the public as being for public use, then the defendant is not responsible for the use of them on the part of the plaintiff."

"The court instructs the jury that the burden of proof is upon the plaintiff to establish the fact that the railroad company constructed said crossing, and assumed the obligation to the public to keep the same in repair, and unless the proof shows this by a fair preponderance of all the evidence, your verdict should be for defendant."

The bare permission of the owner of private grounds to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises. But if he expressly, or impliedly invites, induces, or leads them to come upon his premises, he is liable in damages to them (they using due care) for injuries occasioned by the unsafe condition of the premises, if such condition was the result of his failure to use ordinary care to prevent it, and he failed to give timely notice thereof to them or the public. This principle is applicable to the case before us. If the appellant constructed the steps and expressly or impliedly invited, induced, or led persons to cross the same, it is liable in damages to them for injuries occasioned by the unsafe condition thereof, if it was the result of its failure to use ordinary care to keep the same in safe condition. If

it was unwilling to incur this liability it could have avoided it by removing the steps or giving timely notice of the condition to such persons or the public. *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235; *Sweeny v. Old Colony Ry.*, 87 Am. Dec. 644; *Stewart v. Penn. Ry. Co.*, 14 Am. & Eng. R. Cas. 679, 681; *Murphy v. Boston & A. Ry. Co.*, 133 Mass. 121; 18 Am. & Eng. Ency. of Law, 1136, 1137, 1138, and cases cited.

The instructions of the court to the jury, construed together and with reference to the facts of the case, are substantially correct.

The court instructed the jury, in part, as follows:

"The court instructs the jury that the defendant railroad company was under no obligation at any time to build or maintain steps over the fence where plaintiff claims to have received her injuries. Nor were they under any obligation to keep the same in a state of repair even if they originally built the same. You are, therefore, instructed that the defendant is not responsible for any injuries plaintiff may have received by reason of the defective condition of such steps, even if the same was due to the defendant's lack of attention to keep the same in repair."

Appellant objected to the giving of this instruction and saved its exceptions. The objection should have been sustained. The instruction should not have been given. But as it is obvious the jury did not follow it, and it was too favorable to appellant, it was not prejudicial, and as it should not have been given, the failure of the jury to follow it was also not prejudicial. *Ward v. Blackwood*, 48 Ark. 396, 3 S. W. 624.

Affirmed.

HAGGART & McMASTERS v. CHAPMAN-DEWEY LAND CO. et al.

(Supreme Court of Arkansas. Feb. 3, 1906.)

1. INJUNCTION—CUTTING OF TIMBER—IRREPARABLE INJURY.

An injunction will not lie to restrain the cutting of timber, where there is no showing of irreparable injury or that defendant is insolvent.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 105.]

2. QUIETING TITLE—CLOUD ON TITLE—WHAT CONSTITUTES CLOUD.

A decree affecting land, in a suit between strangers to the true title, does not constitute a cloud on the title of the true owner.

Appeal from Mississippi Chancery Court; E. D. Robertson, Chancellor.

Suit by Haggart & McMasters against the Chapman-Dewey Land Company and others. From a decree in favor of defendants, complainants appeal. Affirmed.

Appellants, Haggart & McMasters, brought this suit in equity to restrain appellee the Chapman-Dewey Land Company from cutting timber on a tract of land owned by appellants. They deraign title to the land from the state of Arkansas through a patent issued to H. R. Allen, and show a perfect chain of title. It is alleged in the complaint that the defendant claims to be the owner of the timber on the land under a bill of sale from W. H. Grider and his wife, Sue M. Grider, and is about to cut and remove the same, but that neither W. H. Grider nor his wife have title to the land or timber. No special injury to the land is alleged by reason of cutting timber, nor is it alleged that the Chapman-Dewey Land Company is insolvent. The Chapman-Dewey Land Company filed its answer, denying the allegations of the complaint concerning title in the plaintiffs, and alleged that the land was patented to J. H. McGarock, who died owning it, and left surviving his daughter and only heir at law, the said Sue M. Grider, who sold and conveyed the timber to defendant. The plaintiffs filed an amended complaint, making parties defendant the heirs of Sue M. Grider, who died after executing the timber deed to the Chapman-Dewey Land Company, and alleged that said Sue M. Grider claimed title to said land "under and through a decree rendered by the chancery court of Mississippi county at the October term, 1871, in a cause therein pending in which Wm. A. Erwin et al. were plaintiffs and Wm. Giles Harding et al. were defendants, and in said decree it was adjudged that Sue M. McGarock, the only heir at law of John H. McGarock, was the owner of said land and so claimed title thereto." It is further alleged that "nobody having any claim of title to said land was a party to the cause in which said decree was rendered, neither was any one under whom plaintiffs claim a party to said cause." The prayer of the amended complaint is that the aforesaid decree be canceled as a cloud upon the plain-

tiff's title. The heirs of Mrs. Grider being minors, the court appointed a guardian ad litem, who answered, denying all the allegations of the complaint. The court rendered a decree dismissing the complaint for want of equity, and the plaintiffs appealed.

N. W. Norton, for appellants. Rose & Coleman, for appellees.

McCULLOCH, J. (after stating the facts). This case, so far as it applies to the Chapman-Dewey Land Company is controlled by *Myers v. Hawkins*, 67 Ark. 413, 56 S. W. 640. It is neither alleged nor proved that cutting of the timber would result in irreparable injury to the land, nor that said defendant was insolvent.

On the other branch of the case, the plaintiffs seek to cancel, as a cloud on their title, a former decree of the chancery court adjudging the land to Mrs. Grider, rendered in a suit between strangers to the title—a suit in which neither the plaintiffs nor any privy to their title was a party. The land was wild and unoccupied. Did the decree constitute such a cloud upon plaintiffs' title that a court of equity can be called upon to remove? Judge Cooley says that "a cloud upon title is something which constitutes an incumbrance upon it, or an apparent defect in it; something that shows prima facie some right of a third party, either to the whole or some interest in it." 2 Cooley on Taxation, p. 1448. Judge Field, in *Pixley v. Huggins*, 15 Cal. 133, said: "The true test, as we conceive, by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the true owner of the property, in an action of ejectment brought by the adverse party founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion would arise for the equitable interposition of the court, as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality." This court has held that a tax deed void on its face is no cloud on a title. *Chaplin v. Holmes*, 27 Ark. 414; *Crane v. Randolph*, 30 Ark. 579; *Lawrence v. Zimpleman*, 37 Ark. 643; *Allen v. Ozark Land Company*, 55 Ark. 549, 18 S. W. 1042.

A conveyance of land executed by a stranger to the title, or the judgment of a court rendered in a suit between strangers to the title, cannot affect the true owner, and casts no cloud upon title of the true owner. It is not an "apparent title," nor does it prima facie create a right which the true owner, or even an occupant without title, of land, must bring forward evidence to rebut. *Rea v.*

Longstreet, 54 Ala. 291; Thompson v. Etowah Iron Co. 91 Ga. 538, 17 S. E. 663; Dunklin County v. Clark, 51 Mo. 60; Ward v. Dewey, 16 N. Y. 519. "If an entire stranger assumes to convey the premises to which he has no shadow of a title, and of which another is in possession, no real cloud is thereby created. There is nothing to give such a deed even the semblance of force. It can never be used to the serious annoyance or injury of the owner." Ward v. Dewey, *supra*. The same can be said of a decree rendered in a suit between strangers to the title. At most such decree serves only to adjudicate the title between these two, or to pass whatever title one may have had to the other. It does not cloud the title of the true owner.

The chancellor was, therefore, correct in dismissing the complaint, and the decree is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. GILLIHAN.

(Supreme Court of Arkansas. Feb. 3, 1906.)

1. MASTER AND SERVANT—ACTS OF INDEPENDENT CONTRACTOR—LIABILITY—CONSTRUCTION OF RAILROAD.

A railroad company was not liable to a landowner for the conduct of an independent contractor, who, in constructing the road on its right of way over the land, made roads through the land, destroyed rails, and threw down and destroyed fences.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1244-1246.]

2. TRESPASS — PLEADING — ISSUES — EVIDENCE ADMISSIBLE UNDER PLEADINGS.

In trespass against a railroad company for damages to plaintiff's land, owing to the destruction of plaintiff's fences, exposing the crops to stock by defendant's contractor, it was error to admit evidence of liability under a contract, in that the company agreed, at the time plaintiffs conveyed a right of way, to replace the fences in time to protect the crops.

Appeal from Circuit Court, Izard County; John W. Meeks, Judge.

Action by W. R. Gillihan against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

B. S. Johnson, for appellant. J. B. Baker & F. M. Hanley, for appellee.

MCCULLOCH, J. This is an action brought by W. R. Gillihan, the owner of certain lands in Izard county, to recover damages alleged to have been done to the lands by defendant railway company in constructing its road. He alleged that he conveyed to the defendant a right of way 100 feet wide through said lands, but that afterwards defendant entered upon and took an additional strip $7\frac{1}{2}$ feet wide through said land; that defendant's agents and employes took and destroyed 1,000 cedar rails, of the value of \$100; that said agents and employes, without plaintiff's consent, made roads through plaintiff's lands and thereby damaged same in the sum of

\$100; and that said agents and employes unlawfully and without authority threw down and destroyed plaintiff's fences, exposing the crops on said land to depredation of stock, which destroyed same, to his damage in the sum of \$500. Judgment was asked in the total sum of \$600. The answer denied that any of the acts complained of were committed by the agents or employes of defendant, and alleged that the railroad was constructed by an independent contractor under a written contract with defendant, and that defendant was not responsible for the acts of said contractor. The jury returned a verdict in favor of the plaintiff, assessing the damages upon each separate item as follows:

For taking land outside of right of way.....	\$ 25 00
For destroying rails.....	50 00
For making roads on land.....	10 00
For destruction of crops.....	75 00
Total.....	\$160 00

The undisputed testimony shows that the railroad was constructed by an independent contractor under a written contract, and that the railway company exercised no control over the work, except the general right of supervision and inspection, so as to ascertain whether or not the work came up to the requirements of the contract. The testimony tended only to show that the acts complained of were committed by the contractors or their agents and servants. A railroad company is not responsible for the wrongful or negligent acts of an independent contractor in the construction of its work. *Railway Company v. Yonley*, 53 Ark. 503, 14 S. W. 800, 9 L. R. A. 604; *Railway Co. v. Knott*, 54 Ark. 424, 16 S. W. 9; *Martin v. Railway Co.*, 55 Ark. 510, 19 S. W. 314. "An independent contractor may be defined as one who, in the course of an independent occupation, prosecutes and directs the work himself, using his own method to accomplish it, and representing the will of the company only as to the result of his work. Generally, where an independent contractor is employed to perform a work lawful in itself and not intrinsically dangerous, the company, if it is not negligent in selecting the contractor, is not liable for the wrongful acts or negligence of such contractor, and in order that the company shall be liable in such a case it must appear that it either exercised or reserved the right to exercise control over the work, or had the power to choose, direct, and discharge the employes of the contractor. In general it may be said that the liability of the company depends upon whether or not it has retained control and direction of the work. But neither the reservation of the power to terminate the contract when in the discretion of the engineer the work is not progressing satisfactorily, the right to exercise general supervision and inspect the work as it progresses, nor the right to enforce forfeitures, will change the relation so as to render the company liable." 3 Elliott on

Railroads, § 1063. The same learned author says: "For trespasses by contractors or sub-contractors, which were not the natural result of the work, or were not authorized or directed by the company, no liability attaches to the company." Volume 3, p. 1591. The same principle is announced by Judge Mansfield in *Railway Co. v. Knott*, supra. Now, applying these settled principles to the facts of this case, it is easily discovered that the liability of the railway company for the acts of the contractor or their servants is not established.

The alleged act in destroying cedar rails was plainly an unauthorized act, and not essential to the performance of the contract. The making of roads also falls within the same category. The testimony of the plaintiff covering this item was as follows: "Q. Now, I will ask you to state, Mr. Gillihan, for what purpose they made these roads? A. Well, as to their purpose, I guess they did it just probably to save going around. There was a good road to their works they could have used just by going a little further around. They either done it for that or else just to show what they could do."

The item of damage for destruction of crops is within the same class. If the fences were on the right of way, it was necessary to throw them down, and either the railroad company or the contractor had the right to do so without subjecting themselves to liability for damages. If they were off the right of way, the act of the contractor in throwing them down was unauthorized, and the railroad company is not liable. The plaintiff undertook to show that the railway company agreed, by verbal contract, at the time he conveyed the right of way, to replace the fences in time to protect the crops;

and the court instructed the jury that the company would be liable for damage to crops resulting from its failure to rebuild the fences. The defendant objected to the introduction of the evidence, as well as to the instruction of the court, and saved its exceptions. The evidence tended, if sufficient for any purpose, to establish a contract and a violation thereof; and the instruction permitted a recovery thereon. The complaint does not allege a contract, but a tort. The allegation concerning this item of damage is that "said defendant by its agents and employes unlawfully and without authority threw down and destroyed his fences, thereby exposing his entire crop to the stock," etc. It was error to admit this testimony and to give the instruction. *White River Ry. Co. v. Hamilton* (Ark.) 88 S. W. 978.

As to the remaining item of damage for taking land outside of right of way, it is shown that this was necessary in order to "borrow" sufficient dirt to construct the high "dump" or roadbed, and that the deed executed by plaintiff to the company conveying the right of way provided that the company could take the additional dirt outside of the right of way. The deed was not introduced in evidence, but a witness for the railway company was permitted, without objections, to testify as to its contents, and the same stands undisputed in the record.

On account of the insufficiency of the evidence and the errors already indicated, the judgment must be reversed, and the cause remanded for a new trial, and it is unnecessary to discuss the instructions given and refused, or to determine whether any other errors were committed in that respect.

Reversed and remanded.

RIDDICK, J., not participating.

MISSOURI, K. & T. RY. CO. OF TEXAS v. PARROTT.

(Supreme Court of Texas. May 2, 1906.)

TRIAL — REQUEST TO CHARGE — INSTRUCTIONS GIVEN.

Where, in an action for injuries to a railroad engineer, it was claimed that he was guilty of contributory negligence in failing to close a switch after running his engine over a cinder pit, a request to charge that if plaintiff failed to see that the switch was properly set for the main track, and that an ordinarily prudent man would see that the switch was properly set before he would have gone under his engine, etc., plaintiff could not recover, was fully covered by the charge of the court correctly defining negligence, ordinary care, and direct and proximate cause, and charging that if plaintiff was guilty of negligence in failing to cause the switch to be thrown back for the main line after entering the spur track with his engine, and that by failing to have the switch closed after entering the spur track in obedience to the requirements of a rule of the railway company, he was guilty of negligence, and the jury should find for defendant.

Certificate of Dissent from Court of Civil Appeals of Third Supreme Judicial District.

Action by Basil Parrott against Missouri, Kansas & Texas Railway Company of Texas. A judgment in favor of plaintiff was reversed by the Court of Civil Appeals (91 S. W. 601), whereupon the case was transferred to the Supreme Court on a certificate of dissent. Reversed.

Page, Miley & Price, for appellant. J. W. Parker and S. L. Staples, for appellee.

WILLIAMS, J. This question is presented by a certificate of dissent from the Court of Civil Appeals of the Third District. The certificate shows that the appellee, Parrott, sued for damages for personal injuries sustained by him while serving the appellant, railway company, as a locomotive engineer, under the following circumstances. He took his engine upon a spur track to a pit thereon, for the purpose of cleaning it of the ashes, etc., the switch connecting the spur with the main track being left open. While he was thus engaged, a train approached upon the main track, and ran into the open switch, colliding with appellee's engine and injuring him. The pleadings and evidence of the appellee claimed that this was due to the negligence of the employés controlling the train, while those of the appellant asserted that appellee's own negligence in failing to see that the switch was closed caused or contributed to his hurt.

The instructions given by the trial court, so far as stated in the certificate, are as follows: "(1) Negligence, as used in this charge, is the failure to do that which a man of ordinary care would do under the same or similar circumstances, or doing that which such a man would not do under such circumstances. (2) Ordinary care, as used in this charge, is the care a man of ordinary prudence would use under the same or similar

circumstances. (3) By direct and proximate cause, as used in this charge, is meant a cause without which the accident would not have happened.' And further instructed the jury as follows: 'Or if you believe from the evidence that plaintiff was guilty of negligence in failing to cause the switch to be thrown back for the main line after entering the spur track with his engine, or if you believe that rule 104a was in force at the time of plaintiff's injury and intended by the company to be observed by plaintiff, and that by his failing to have the switch closed after entering the spur track with his engine in obedience to the requirements of said rule, he was guilty of negligence * * * you will find a verdict for defendant.'"

The following special charge was requested by defendant and refused: "If you believe from the evidence in this case, that at the time said Parrott caused his engine to pass from the main track to said spur track or cinder pit, he failed to see that the switch was properly set for the main track, and if you further believe that an ordinarily prudent man, under similar circumstances, would have seen that said switch was properly set for the main track, and if you further believe that the failure of plaintiff to see that said switch was properly set (if you find that he did so fail) contributed to or was the direct and proximate cause of said accident and plaintiff's consequent injury, you are charged that the plaintiff cannot recover in this case and you will return a verdict for the defendant."

It was upon the refusal of this instruction that the difference of opinion arose between the judges of the Court of Civil Appeals, the majority holding that it was reversible error and Mr. Justice Key dissenting. The question certified is this: "Did the trial court err in refusing to give to the jury the appellant's special charge No. 2, quoted in the foregoing statement?"

The majority and the dissenting justice agree that the pleadings and the evidence raised the question of contributory negligence to be submitted to the jury stated in the special charge, and that it is a correct statement of the law, but differ upon the question whether or not the point was sufficiently presented in the charge of the court. It is therefore unnecessary to state the pleadings and the evidence set forth in the certificate. We are unable to see that the special instruction would have supplied anything that was lacking in the charge given. The objection is not tenable that the general charge only submitted the defense of contributory negligence in a general or abstract way and that for that reason the defendant had the right to a more specific instruction. Both instructions are specific, calling attention to the particular act or omission of plaintiff, pointed to by the evidence, upon which the charge of contributory negligence was predicated, and the question therefore is simply whether or not the spe-

cial charge would have added to that given any further rule applicable to the case, and, as we have said, we do not see that it would have done so. The special instruction, as we understand its effect, gives only a part of the same rule more comprehensively laid down in the charge of court, giving, however, in the place of the term "negligence," its definition, or a paraphrase of it. The charges given embrace a definition of the word, and, instead of repeating it in each succeeding paragraph, uses the word defined, leaving the jury to apply the definition. This is a form of instruction very generally adopted by trial judges, and is convenient as conducing to brevity of expression. We do not understand that a party has the right to have the court, after it has once defined a term, employ the definition, instead of the word, in all of the further instructions. That is a mere matter of arrangement, which must generally be left to the discretion of the trial court. As was said in *Willis v. McNeill*, 57 Tex. 478: "The phraseology and arrangement of the charge to the jury, when it conforms to the requisites of the statute and to the law of the case as applied to the issues and evidence, must be left, in a great degree, to the taste and discretion of the judge who gives it." *Railway v. Williams*, 75 Tex. 9, 12 S. W. 835, 16 Am. St. Rep. 867; *Railway v. Lehmborg*, 75 Tex. 66, 12 S. W. 838; *Railway v. Brazzil*, 78 Tex. 317, 14 S. W. 609.

It is said that the general charge is not so broad as that requested, in that the former might have been considered by the jury as applying to the conduct of plaintiff after he had gone upon the cinder pit, while the latter referred to his conduct at the time he passed with his engine from the main track to the spur, as well as after he had passed the switch and gone to the cinder pit. But we do not think this criticism of the main charge is well founded. The charge leaves the jury to determine whether or not plaintiff's failure to cause the switch to be thrown was negligence and, if so, make it defeat his action. It puts no restriction whatever upon the rule given, its meaning being that if such negligence were found it had the stated effect, without any reference to the exact time when plaintiff should have caused the closing of the switch and when he failed to do so. The test given is whether or not there was negligence in his failure as the jury should find it to have occurred.

We therefore answer that the trial court did not err in refusing the special charge.

PALMO v. S. W. SLAYDEN & CO.

(Supreme Court of Texas. May 2, 1906.)

APPEAL—STATEMENT OF FACTS—TIME TO MAKE.

Entry of judgment *nunc pro tunc* at a term after that at which the verdict was found is part of the trial, within Rev. St. 1895, art. 1379, authorizing the making of a statement of facts "after the trial" for the purpose of appeal.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by *Mi Palmo* against *S. W. Slayden & Co.* The Court of Civil Appeals (90 S. W. 908) reversed a judgment for plaintiff, and he brings error. Affirmed.

J. R. Downs and *Richd. I. Munroe*, for plaintiff in error. *Clark & Bolinger* and *Eugene Williams*, for defendants in error.

BROWN, J. The following statement is sufficient for the solution of the questions presented upon this application: *Mi Palmo* sued *Slayden & Co.* upon a contract for the sale of certain lands, and, upon a trial before a jury, obtained a verdict for the sum of \$9,508.35, and the judge of the trial court entered upon his docket the following: "11—13—03. Verdict for plaintiff for \$9,508.35." The judge did not make any memorandum, upon his docket or otherwise, of the judgment pronounced by him upon the verdict. The attorneys for the plaintiff in the case made a draft of a judgment and delivered it to the clerk of the court at the time that the verdict was delivered, or soon thereafter, which, however, was never entered upon the minutes of the court. No motion for new trial was filed at that term; no statement of the facts was prepared, neither was there any order made by the judge allowing any time after adjournment of the court for the making and filing of a statement of facts and bills of exception. The term of court expired on the 19th day of December, 1903. No action was taken in the court with reference to the case until the October term, 1904, when, on the 24th day of October, 1904, *Mi Palmo* filed a motion in the district court that the court should enter *nunc pro tunc* the judgment upon the verdict which was pronounced at the time that it was rendered. This motion was resisted by the defendants, but was granted by the court, and the judgment was entered in favor of *Mi Palmo* against *Slayden & Co.* for the amount of the verdict with interest; to which *Slayden & Co.* excepted and filed a motion for a new trial and in arrest of judgment, which were overruled, whereupon *Slayden & Co.* gave notice of appeal which was perfected in due time. *Slayden & Co.* then prepared a bill of exceptions to the action of the court in entering the judgment *nunc pro tunc* in which was embodied a statement of the facts, approved at the trial in November, 1903, which was approved by the trial court. The defendants below also filed bills of exception which were reserved at the trial in 1903 but which were not approved until the entry of the judgment *nunc pro tunc* in 1904. *Slayden & Co.* carried the case to the Court of Civil Appeals, whereupon *Palmo* made a motion in that court to make out the statement of facts and bills of exception which had been filed after the entry of the judgment *nunc pro tunc*, which motion was overruled. The Court of Civil Appeals considered the

statement of facts, and reversed the judgment of the district court upon a question which it could not have considered without the statement of facts produced on the trial.

The plaintiff in error presents to this court the proposition that the law does not authorize the making of a statement of facts in this case after the adjournment of the term at which the case was tried and for that reason the Court of Civil Appeals erred in not striking out the statement of facts and in reversing the judgment upon the question on which its reversal depends. The defendants in error present to this court the proposition that the district court had no power to enter the judgment *nunc pro tunc* in this case, because there was no memorandum or writing in the records of the district court of the previous term indicating that the judge of that court had actually pronounced a judgment upon the verdict. The application for writ of error was granted because of the conflict between the decision of the Court of Civil Appeals in this case and the opinion of the Supreme Court in the case of *Teas v. McDonald*, 13 Tex. 349, 65 Am. Dec. 65. In the case cited the district judge heard the evidence at one term of the court and, by consent of the attorneys, took the case under advisement until a subsequent term, more than a year from the time of the hearing, and, at the latter term, entered judgment upon the testimony formerly introduced, and then made a statement of the facts to which he certified, to the effect that the statement contained "all the evidence adduced on the trial as well as I recollect it after the lapse of so long a period of time." In passing upon the statement of facts, the Supreme Court said: "It is well settled that in the absence of a statement of all the facts, this court cannot revise the rulings of the court below in giving or refusing instructions. It is evident that the statement in the record cannot be received as an authentic statement of the facts, for two reasons. It was not made out and certified to by the judge until a year after the trial, and the certificate does not purport that it certainly contains all the evidence adduced in the case, but only that it is all that the judge can recollect, 'after the lapse of so long a period of time.'" It is apparent that the learned judge who wrote that opinion did not give to the matter that mature consideration that characterizes his opinions, and we are constrained to believe that the defect in the certificate was the controlling fact in producing the conclusion of the court. We do not consider the case as authoritative upon the question now presented for our decision.

Plaintiff in error contends that the trial court had no authority, after the adjournment of the term at which the trial was had, to make up a statement of the facts proved at the hearing. Article 1379, Rev. St. 1895, contains this provision: "After the trial of any cause, either party may make out a writ-

ten statement of the facts given in evidence on the trial, and submit the same to the opposite party, or his attorney, for inspection," etc. It is also provided by an act of the Twenty-Eighth Legislature, that, "by an order entered during the term, the court may authorize a statement of the facts to be made up in vacation, within twenty days after the adjournment of the term." Laws 1903, p. 32, c. 25. It is true that without such order no statement of facts can be made after an adjournment of the term of the court at which the trial is concluded; but the phrase, "after the trial," denoting the time when the statement may be made, is broad enough to embrace the entry of the judgment *nunc pro tunc* as a part of the trial, justifying the court in making and certifying to the statement of facts after judgment was actually entered. *Hill v. State*, 41 Tex. 235; *S. & E. T. Ry. Co. v. Joachimi*, 58 Tex. 454; *Jenks v. State*, 39 Ind. 1. Article 1490 of Paschal's Digest contains this provision: "After the trial of any cause, when the party has given notice of appeal, or intends to give notice of appeal, it shall be the duty of the parties respectively to make out a clear and explicit statement, or bill of the facts given in evidence on the trial of the cause, and to submit the same to the opposite party, or his attorney, for inspection during the term," etc. In *Hill v. State*, above cited, that provision of the statute was construed and was held to authorize the trial court, upon entering a judgment at a subsequent term, to make up and certify a statement of the facts in the case. Judge Gould delivering the opinion of the court said: "The statute directs the statement of the facts to be made out and signed 'during the term at which the trial was had,' but it also contemplates that judgment be rendered at that term. The trial may well be held incomplete until all the issues of law as well as of fact have been determined and the final judgment entered. Until this is done no appeal can be prosecuted." Article 1365 Rev. St. 1896, prescribes that, any party taking exceptions during the trial shall reduce them to writing and present the bill of exceptions to the judge for his allowance and signature during the term and within 10 days after the conclusion of the trial. In *Railway Company v. Joachimi*, before cited, the exceptions were taken at the time of the trial, but the motion for a rehearing was not acted upon for more than ten days after the judgment had been entered, and the objection was made that the bills of exception were not presented within the time prescribed. This court sustained the bills of exception on the ground that the trial was not concluded until the motion for a new trial was overruled, and Judge Willie for the court said: "The statutory limit is 10 days after the conclusion of the trial. The appellee's counsel construes this to be the date of the rendition of the verdict and

judgment. This may be the ordinary acceptance of the term 'conclusion of a trial,' but we are disposed not to confine it to that time, but to extend it to the date of the entry of the order overruling a motion for a new trial. We consider that so long as the case stands open for the consideration of the court at the term during which the trial occurs, it cannot be considered as concluded."

The construction which the foregoing cases have placed upon the terms of statutes, similar to that under consideration, we think, fully justifies the conclusion we have reached, that the entry of judgment *nunc pro tunc* was a part of the trial of the case, and that after that judgment was entered, the parties had a right to have a statement of facts made up and filed upon which to prosecute their appeal. This conclusion is strengthened by the consideration of the fact that this court has held that an appeal may be prosecuted from a judgment *nunc pro tunc*, although it may be entered at a subsequent term. *Henry v. Boutler* (Tex. Civ. App.) 83 S. W. 1056; *Bassett v. Mills*, 89 Tex. 162, 34 S. W. 93. In the first case it was held that a party might prosecute an appeal, or writ of error, from a judgment *nunc pro tunc* and that the right would date from the actual entry of the judgment and not from the date when the judgment was pronounced at a former term. It is required that the party who appeals must give notice of appeal within the prescribed time and during the term at which the trial was had, and that the appeal must be perfected by giving bond within the time prescribed; but, under our decisions, the parties may give notice of appeal and may execute bond to secure an appeal after actual entry of the judgment at a term subsequent to that at which the trial was had. The trial being held to be concluded when judgment is actually entered and therefore that all of the things which are required to be done in order to secure an appeal at the term at which the judgment is entered can be done at that time, it seems that the holding that a statement of facts which is a necessary part of the appeal might also be made up and signed after the conclusion of the trial by the entry of the judgment *nunc pro tunc*. We believe this to be a fair construction of the statute upon this subject and supported by the authorities we have cited and by the reasoning which those authorities suggest.

We conclude that the Court of Civil Appeals did not err in considering the statement of facts, which leads us to an affirmance of the judgment of that court which remanded the case to the District Court for further trial. It is unnecessary for us to consider the question made by the defendant in error as to the validity of the judgment *nunc pro tunc*.

It is ordered that the judgment of the Court of Civil Appeals be affirmed.

INTERNATIONAL & G. N. R. CO. v. VON HOESEN.

(Supreme Court of Texas. April 25, 1906.)

TRIAL—INSTRUCTIONS—CORRECTION—MASTER AND SERVANT.

An instruction, in an action for injuries to an employé, which authorized a verdict for plaintiff unless it was found that he was guilty "of contributory negligence and was not injured on account of assumed risk," though ambiguous, because allowing the jury to find for plaintiff unless the proof showed that he was not guilty of contributory negligence, and was not injured on account of assumed risk, was not ground for reversal, where the court charged that plaintiff could not recover if he assumed the risk.

Certificate of Dissent from Court of Civil Appeals of Third Supreme Judicial District.

Action by Benjamin Von Hoesen against the International & Great Northern Railroad Company. There was a judgment for plaintiff, which the Court of Civil Appeals reversed by a divided court (91 S. W. 604), and the cause was certified to the Supreme Court. Judgment of the Court of Civil Appeals reversed.

Baker & Thomas and N. A. Stedman, for appellant. Jas. H. Robertson, Jas. D. Williamson, Lovejoy & Malevinsky, and Taylor & Gallagher, for appellee.

BROWN, J. "The Court of Civil Appeals of the Third Supreme Judicial District of Texas, preliminary to certifying the dissent in the disposition of the above-styled and numbered cause in this court, makes the following explanatory statement: The appellee, Von Hoesen, was an engineer in the employ of the appellant, the International & Great Northern Railroad Company. On November 20, 1903, while in the performance of his duty as an engineer, his head came in contact with a post erected near the appellant's track, and he was seriously injured. On May 14, 1904, he filed this suit for damages against the railway company, and upon trial, recovered a verdict and judgment for the sum of \$10,000. The grounds of negligence alleged in his petition are to the effect that while he was looking out of the cab window of the engine that he was then operating, his head came in contact with a stretcher post negligently erected and negligently maintained by appellant in dangerous proximity to its track, of which fact he had no notice, and that in consequence of such negligence, he sustained severe injuries. There is evidence in the record which tends to support this averment of negligence and the fact that he received the injuries described and alleged in his petition. In its answer the appellant charged appellee with contributory negligence, with knowledge of the existence and the proximity of the stretcher post to the railway track, and that the injuries sustained resulted from assumed risk. Upon both the questions of contributory negligence and assumed risk there was some evidence sufficient to require

the issues to be submitted to the jury. As a part of this certificate and as an exhibit to the same, we attach hereto a complete copy of the charge of the trial court, and all of the special charges that were given. The majority of the court agreed to reverse and remand on account of the error of the trial court in giving the sixth paragraph, as numbered in the general charge of the court, which is complained of in appellant's eighth assignment of error.

"The opinion of the majority of the court is as follows: 'The eighth assignment of error complains of the sixth paragraph of the general charge of the court, which is as follows: "Bearing in mind the foregoing instruction and definition, if you believe from the evidence that the plaintiff was injured substantially at the time and place, and in the manner as alleged in his petition, and that defendant maintained said stretcher post in dangerous proximity to defendant's track, and was thereby guilty of negligence, and that plaintiff was injured as a direct and proximate result of such negligence, if any, and you fail to find from the evidence that plaintiff was guilty of contributory negligence, and was not injured on account of assumed risk, then you will find for the plaintiff." It is complained that this instruction authorized the jury to find for the plaintiff, unless it is shown that he was guilty of contributory negligence and was injured on account of the assumed risk. We are of the opinion that the charge is subject to this construction. It is true that the court did, at the request of appellant, by separate charges, instruct the jury as to the issue of contributory negligence and assumed risk; and they were informed that if either of these defenses was established, the plaintiff could not recover. Under the evidence, both issues are in the case, and we cannot say that if the jury had found in favor of defendant as to either of these defenses that such finding would be disturbed. Of course, it is needless to state that if the plaintiff was guilty of contributory negligence, or that the injuries sustained were on account of a risk assumed, he could not recover. Of course, we know that the court did not intend to instruct the jury that in order to defeat a recovery by the plaintiff, both defenses should be established; but as the jury is required to take the law from the court, and is not supposed to look to any other source for information upon that subject, they must be governed by the charge. Now to the mind of an ordinary juror this instruction is calculated to convey the idea that the plaintiff is entitled to recover, unless he is defeated by his contributory negligence, and the injuries sustained were on account of one of the risks assumed. This is not an instance of a mere ambiguity in a charge that is corrected by other portions, or where one erroneous instruction is withdrawn or clearly or unequivocally corrected by a proper instruction; but as we construe this charge, it

breeds a conflict with other instructions which separately presented to the jury the issue of assumed risk and contributory negligence. Both charges are entitled to equal dignity; and we cannot say that the jury was not influenced by the instruction complained of. In turning to the other parts of the charge they discovered that they are informed that if the plaintiff was guilty of contributory negligence, or the injuries were on account of the risk assumed, then to find for the defendant. When they come to this charge which is complained of, they are, in effect, told that the plaintiff is entitled to recover, unless he is guilty of contributory negligence and his injuries were received on account of the assumed risk. We cannot say which of these two conflicting instructions controlled the jury in reaching a verdict.'

"The dissenting opinion of Associate Justice Key is as follows: 'The paragraph of the charge which is held by the majority opinion to contain reversible error, is, to my mind, ambiguous; and the ambiguity is intensified by the use of the word "Not" in the clause which refers to assumed risk. If the language, "and you fail to find," which precedes the reference to contributory negligence, was intended to apply to the issue of assumed risk, then that paragraph of the charge, in so far as it relates to that subject, may be construed as though it read, "If you fail to find that the plaintiff was not injured on account of assumed risk." Requiring the jury to fail to find that the plaintiff was not injured on account of assumed risk, would be equivalent to requiring a finding that he was injured on account of such risk; and, so construed, the charge would be erroneous as against both parties, but not on account of the objection urged in appellant's brief and sustained by the majority opinion. But that is not the obvious or necessary meaning of that part of the charge. If the words "find he" be supplied between the words "and" and "was," in the clause referring to assumed risk, then the charge states the law correctly; and it is not improbable that those words were inadvertently omitted. To my mind, such omission is almost obvious, unless the word "not" was unintentionally placed in that clause. However, it is conceded that this paragraph of the charge is so framed as that a jury of laymen, considering it by itself, would probably be in doubt as to its meaning. But when the well-known rule which requires all the terms of a written instrument to be considered in determining its meaning is applied in this case, the doubt referred to is dispelled, because in another paragraph of the main charge, and in special charges given at appellant's request, it was made plain that appellee was not entitled to recover if he was guilty of contributory negligence, or was injured on account of an assumed risk; and the jury were distinctly told to find a verdict for appellant if either of such facts was shown to exist. Furthermore,

while it is now well settled in this state that a distinct or positive erroneous statement of the law in one paragraph of a charge is not cured by a subsequent paragraph or a special instruction stating the law differently, unless there is a specific correction of the erroneous paragraph, there is a line of cases which holds that when an error in a particular paragraph is not a positive misstatement of the law, but merely an inferential error, such error is cured by a correct statement of the law in another part of the charge, and it would seem that this case is within the class referred to. *Goldberg v. McCracken* (Tex. Sup.) 8 S. W. 676; *Railway v. Corley* (Tex. Civ. App.) 26 S. W. 903; *Railway v. Creasy* (Tex. Civ. App.) 27 S. W. 945; *Bell v. Martin* (Tex. Civ. App.) 28 S. W. 108; *Hargis v. Railway*, 75 Tex. 20, 12 S. W. 953; *Railway v. Chapman*, 57 Tex. 81. For the reasons above stated, the writer is unable to concur with his associates in the holding that appellant has pointed out reversible error in the charge of the court; and therefore respectfully dissents from the action of the court in reversing the case.

"The judgment of this court was rendered during the present term of this court. Motion for rehearing was by appellee filed and has been overruled. Thereupon the appellee made a motion to certify the dissent to your honorable court. The question certified is: 'Did the majority of this court correctly hold that it was reversible error to give the charge first set out in the opinion of the majority?'"

We answer that the majority of the Court of Civil Appeals erred in reversing the judgment of the district court for the reason stated in their opinion. Granting, for the sake of argument, that the charge, for which the majority reversed the judgment, might have misled the jury, if it stood alone, it was but an ambiguity which was explained by other portions of that charge and by charges given at the request of the parties. In the fifth paragraph of the court's general charge the jury were instructed on the law of assumed risk, and the court said: "If you believe from the evidence that the plaintiff was injured on account of a risk ordinarily incident to his employment, or on account of a risk that was open and patent to common observation, or on account of a risk of which he had actual knowledge, or in the exercise of ordinary care must in the discharge of his said duties necessarily have known, then he cannot recover of the defendant." Again, in special charges Nos. 1 and 2, given by the court at the request of the defendant, the jury were again instructed as to the law of assumed risk with the following conclusion in each of said special charges: "Then in that event, if you so find, you are charged that the plaintiff assumed the risks of danger of coming in contact with the said post, and you will find for the defendant."

The plaintiff requested of the court special charge No. 5, which was given and which

reads as follows: "You are instructed that if you believe from the evidence that the plaintiff Benj. Von Hoesen was struck by the stretcher post while looking at the rear end of the train, and if you further believe from the evidence that the defendant was guilty of negligence in maintaining the stretcher post in dangerous proximity, and you further believe from the evidence that the plaintiff was not guilty of contributory negligence and was not injured on account of an assumed risk, as those terms are defined and explained to you in the general charge of the court, and if you further believe that the plaintiff in looking at the rear end of the train was in the discharge of his duty to the defendant, then your verdict should be in favor of the plaintiff." If the jury had in mind the explicit direction, that, if the injury was occasioned by a risk assumed by the defendant, he could not recover, they could not have understood the language, "and was not injured on account of assumed risk you will find for the plaintiff," as directing them to find for the plaintiff if he was injured by reason of some risk that he had assumed.

We deem it unnecessary to discuss the subject further, as the opinions of the majority and of the minority will be published herewith and are sufficient in themselves to explain this subject.

PREWITT v. STATE

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. WEAPONS—CARRYING PISTOL—EVIDENCE—SUFFICIENCY.

In a prosecution for carrying a pistol about the person, evidence *held* sufficient to support a conviction.

2. SAME.

One who has a pistol on his person while sitting in a buggy is guilty of an infraction of the statute forbidding the carrying of a pistol on or about the person.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Weapons, § 9.]

Appeal from Somervell County Court; R. L. Bryan, Judge.

W. B. Prewitt was convicted of carrying a pistol on his person, and appeals. Affirmed.

Featherston & Myers and Leo. Hays, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for carrying on and about his person a pistol.

The state's case was made by the witness Eddy, who states, that "I heard a pistol shot in the distance. I saw defendant put the pistol on his right side. It seemed to me as if defendant put the pistol in his right hand coat pocket; Don't know who fired the pistol he heard. Nor did he know the direction from which defendant came to the Buck Creek schoolhouse, where he saw

defendant have the pistol. He saw deputy sheriff Welsh and justice of the peace Williams approach the buggy where defendant was sitting, and searched defendant, and they failed to find a pistol." Welsh testified that he and justice of the peace Williams searched defendant and failed to find any pistol; that he did not know whether or not defendant had a pistol. If he had one, he failed to find it. The evidence shows that defendant was sitting in a buggy, when witness Eddy saw the pistol in appellant's hand, and he was still sitting in the same buggy at the time he was searched by the officers. Appellant relies upon the case of *Cathey v. State*, 23 Tex. App. 492, 5 S. W. 187. To the same effect is *Sanderson v. State*, 23 Tex. App. 520, 5 S. W. 188. The state relies upon *Woodward's Case*, 5 Tex. App. 296; and *Garrett v. State* (Tex. Cr. App.) 25 S. W. 285. We are of opinion that this case is not brought within the rule laid down in the *Cathey Case*, and hardly within the rule laid down in *Garrett's Case*, *supra*. In the *Cathey Case*, the facts show that appellant had a pistol in the back end of his wagon, near his saddle-bags, and while searching for a bottle of whisky, he took the pistol up, held it in his hand a moment or two, and laid it back by the saddlebags. The court held this was not sufficient evidence to show that he carried it on and about his person. In *Garrett's Case*, the party had the pistol in the buggy. This was held sufficient evidence to support the allegation that he carried it on and about his person. In this case the state's evidence shows that appellant had the pistol in his hand, and witness thought he put it in his right-hand coat pocket. If this was true, and the jury believed it to be true, appellant was guilty. The fact, that the officers failed to find the pistol, does not necessarily militate against or overcome the state's evidence. The officer simply states that he examined appellant, and failed to find the pistol. The details of the examination are not stated. These are left indefinite. In other words, the statement that he examined him and failed to find the pistol, is the statement of the officer. Appellant may have had the pistol as detailed by Eddy, and could have disposed of it before the officers examined him. The buggy was not examined to ascertain whether the pistol was in it, disconnected from the person of appellant. We believe, under *Woodward's Case* this is sufficient evidence to make out a case on the facts as brought up in this record.

A special charge was asked upon the theory that if defendant had the pistol while he was in the buggy at the time testified by Eddy, he should be acquitted. This is not a correct application of the law to the facts. If he had the pistol on his person in the buggy, he would be guilty. This charge does not seek to bring this case within the rule laid down in the *Cathey Case*

One of the other requested charges was to the effect, that, if the jury should fail to find appellant had the pistol, on and about his person, they should acquit; and the third charge was to the effect that they should acquit because the evidence fails to show he had on a pistol. We believe these charges were properly refused.

The judgment is affirmed.

RENEW v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. HOMICIDE—INSTRUCTIONS—PROVOKING DIFFICULTY—EVIDENCE.

The court on a trial for homicide is only authorized to charge on provoking the difficulty, where the evidence shows that accused before or at the time of the difficulty did some act or used some language with the intent and calculated to provoke a difficulty, and that he was assaulted by decedent, and that he then killed decedent.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, §§ 606-609, 628.]

2. SAME.

On a trial for homicide, the evidence showed that an altercation ensued over the possession of a horse by defendant and his brother on one side, and decedent and his brother on the other side; that defendant and his brother started toward their home followed by decedent and his brother; that decedent and his brother took hold of defendant and searched him for a pistol; that defendant on being let loose backed off and opened his knife; that decedent's brother picked up a stick and struck defendant, who fired and killed decedent. Held not to authorize a charge on provoking the difficulty.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 628.]

3. SAME—ABANDONMENT OF DIFFICULTY.

The court was not authorized to charge with regard to an abandonment of the difficulty on the part of defendant.

4. SAME.

An instruction on a trial for homicide on the subject of an abandonment of the difficulty, which required that accused must have abandoned the difficulty in good faith before he was entitled to the right of self-defense, was erroneous; it being immaterial whether accused abandoned the difficulty in good faith or not.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 151.]

5. SAME—ADEQUATE CAUSE—EVIDENCE.

Where, on a trial for homicide, the evidence showed that prior to the homicide accused was assaulted and searched for a pistol by decedent and his brother, and was subsequently assaulted and struck by decedent with a rock, or by his brother with a stick, it was the duty of the court to call the attention of the jury to adequate cause under the statute making an assault causing pain or bloodshed adequate cause.

Appeal from District Court, Denton County; D. E. Barrett, Judge.

Lige Renew was convicted of murder, and he appeals. Reversed.

J. W. Sullivan and Emory C. Smith, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. This conviction is for murder in the second degree, with 13 years in the penitentiary fixed as the punishment; hence this appeal.

The charge on provoking the difficulty is extensively criticized. There is no direct challenge of it on the ground that the testimony was not sufficient to raise the question of provoking the difficulty. However, we believe that the exceptions numerous raised to said charge involve this question incidentally or indirectly, and, especially as the case is to be reversed, we will discuss the legality of said charge in the face of the testimony as disclosed by this record. We would remark here that the question as to when a court is authorized to charge on provoking the difficulty has been so often and so thoroughly discussed that we only deem it necessary to refer to some of the decisions as to the propriety or authority of the court to give a charge on that subject. A court is only authorized to charge on provoking the difficulty, when it is able to lay its hand upon some fact or facts testified to by a witness or witnesses which shows, or tends to show, that defendant, before or at the time of the difficulty, did some act or used some language, or both, calculated to provoke a difficulty, under the circumstances and with the intent to provoke such difficulty; and that on the use of such language or conduct, or both, he was attacked or assaulted by the prosecutor, and then, having thus produced the occasion, he, in turn, assaulted and killed deceased. In such case his right of self-defense is cut off. *Cartwright v. State*, 14 Tex. App. 502; *Abram v. State*, 36 Tex. Cr. R. 46, 35 S. W. 889; *Bearden v. State* (Tex. Cr. App.) 79 S. W. 37; *Dent v. State* (Tex. Cr. App.) 79 S. W. 525. And see *McCandless v. State*, 42 Tex. Cr. R. 58, 57 S. W. 872, where this question is thoroughly discussed in the light of the authorities and the character of charge which should be given, is outlined.

Is there in the record as here presented sufficient testimony to have authorized the court to give a charge on provoking the difficulty? It is not necessary here to discuss the testimony of the defense on this subject, except to remark that said testimony negatives the idea that appellant or his brother, Mose, provoked the difficulty. If there is any such testimony, it must come from the state's witnesses. These, in effect, show that Mose Renow, appellant's brother, who was also present and a party to the difficulty, came to the house where deceased lived early in the morning, about daylight. His mission was to get his horse, which Dolphus Isom was breaking. The testimony of the state is not clear as to whether appellant came there with Mose, but would rather indicate that he came afterwards. The defendant's testimony makes it clear that he did not come with Mose, but after he did. Mose came the evening before to get his horse from Dolphus, who had him for two or three weeks

to break. Dolphus declined to give the horse up at that time, stating he had just gotten him so he could ride him, and he would not surrender the animal unless he got \$2.50. Mose came early the next morning, before the Isoms got up, went into the lot and got the horse, put a hitch rein or halter on the horse, and led him out of the lot. He was discovered by the Isoms about this time, and they came out, and in the altercation over the possession of the animal the animal broke loose and ran back to the lot gate, and the Isoms opened the gate and let him in. About this time, as we gather, appellant (Lige Renow), came up, and said to Mose, if he (Mose) would stick to him, they would take the horse. Mose made no reply. An altercation ensued about the possession of the animal, in which the parties cursed each other. Lige was told that he must not curse there, and he remarked that he would curse anywhere. On request, Dolphus Isom gave Mose his halter, and the Renows appear to have started towards their home, around the horse and cow lot. Shack Isom followed appellant, who was ahead, and Mose and Dolphus came on afterwards, and also Mrs. Isom following. It appears that, when they got near to the corner of the cow lot, Shack said he believed appellant had a pistol, and proposed to search him. Dolphus came up, held his hands, and Shack searched appellant, feeling of his pockets, and stated he did not have a gun on him. They turned appellant loose, and he backed off, opening his knife, and said they could not do that again; and further said, "Come on down here and we will settle it." After he opened the knife, Shack picked up a stick, about three feet long and an inch or two in diameter (used to keep the calves off when milking), and followed, evidently gaining on appellant, who finally turned around, facing Shack, who, at this juncture, struck him with the stick. According to the testimony, appellant then fired at Shack, hitting him, and then shot deceased (Dolphus), inflicting a mortal wound on him. The state's testimony shows by Shack Isom that appellant picked up the pistol from the ground. Appellant's testimony shows that he had the pistol on all the time while the search was being made, but it was in the waistband of his pants, and not in his pockets, and that he got it out of his pants, and did not take it up from the ground. Appellant's testimony also shows in this connection that he was on his way home, going away from the parties at the time, and they were pursuing him; that they caught him first and searched him; that he backed off from them, opened his knife, and told them they could not do that any more; that he then started on his way home; that Shack picked up a stick and struck him with it, and that Dolphus threw rocks at him; that he drew his pistol, wheeled, and shot Shack first, and Dolphus at that time struck him with a rock, and he turned and shot him.

It may be also stated in this connection that appellant accounts for his presence there as follows: That he did not know anything about his brother Mose's difficulty in regard to procuring possession of his horse on the evening before; that he was fixing to get the mules up early the next morning to thresh wheat, and went down in the pasture (which seemed to be a joint pasture, used by both the Renows and Isoms, and which surrounded their lot); that in looking for the mules he came up to the lot about the time of the difficulty in regard to the possession of the horse. This is substantially all the testimony, as we gather from the record, that bears at all upon the question of provoking the difficulty. Evidently Mose Renow's object in going there early in the morning was to get his horse before the Isoms got up. They discovered him, came out, interfered, and succeeded in taking the mare from him, and turned the animal back into the lot. About this time Lige Renow came up, and he participated in the altercation that was in progress between Mose and the Isoms. Of course, it is suggested that Lige must have come up in connection with an understanding with Mose to assist in getting the mare. However, he denies this, as does Mose.

The question is, was anything said or done with the intention on their part and calculated to provoke a difficulty? The record shows that the Renows, as well as the Isoms, cursed and swore, and that Ligeremarked, if Mose would stick to him, they would take the mare. Still they did not take the mare, nor make any effort to do so. There was no difficulty at the gate. They retired towards their home. The Isoms followed. They say that after they took hold of appellant and searched him for a pistol he drew his knife, and told them, if they would come on down there, they would settle it. We fail to see in this connection any right on the part of the Isoms to assault appellant and search him for a pistol. There does not appear to be anything said or done by him at that time to have superinduced this action on their part. Still he submitted to it. When turned loose, appellant retreated, drew his knife, and remarked, if they would come down there, they would settle it, according to the testimony of the Isoms. We could hardly regard this as manifesting an intention of provoking a difficulty, while it might be considered an invitation to a mutual combat. The parties still followed him, and according to all the testimony, when he was going away, they overtook him, and Shack assaulted him with a stick. Appellant then drew his pistol, or, according to the testimony of the Isoms, picked it up from the ground, and began firing. We fail to see from this testimony any such language or conduct on the part of appellant or of his brother, Mose, which, in our view, was intended by them or calculated to provoke the Isoms to attack him. The most that can

be said is that it was a casual difficulty, arising over the possession of a mare, and we do not believe the court was authorized to give a charge on provoking the difficulty.

It is also objected that the court improperly instructed the jury with regard to an abandonment of the difficulty on the part of appellant after he had provoked the same. In the absence of provocation, there could be no abandonment of a difficulty provoked by appellant. But was there any difficulty in which appellant and his brother, Mose, originally engaged and subsequently abandoned? We hold there was not. The first difficulty which occurred between the parties was the assault made by the Isoms on appellant and his being searched by them for a pistol. We do not find anything in the testimony to have authorized this conduct on the part of the Isoms. Appellant is not shown to have engaged in a difficulty with them at this time, but as soon as he was released, backed off, from them, opened his knife, retreated a little distance, they pursuing, and in a very short time they again assaulted him, when the shooting began. From this record this appears to have been a continuous transaction. The second assault with the stick followed immediately upon the heels of the search made for the pistol. We do not believe there is testimony in this record showing that appellant engaged in the difficulty, which he subsequently abandoned. However, the objection made and urged is to the effect, even if it be conceded there was an abandonment of the difficulty, that the court required that appellant should abandon the same in good faith before he could be entitled to the right of self-defense. The charge of the court involves this question of good faith, and is directly in contravention of the opinion of this court in *Thornton v. State*, 65 S. W. 1106. The court there discussed a similar charge, and held "that it is immaterial whether appellant abandoned the difficulty in good faith or not. The question is, did he in fact abandon the difficulty? If he abandoned it, it must have been necessarily in good faith, so far as the appellant was concerned, and it would make no difference whether he intended subsequently to renew the difficulty or not."

We do not understand that any criticism is made of the court's charge on manslaughter. The court gave a general charge on this subject, without referring to the particular fact which very likely operated on the court's mind in giving the charge on this subject, to wit, the fact that prior to the shooting by appellant he was assaulted and searched for the pistol by deceased and his brother, and he was subsequently assaulted and struck by deceased, according to appellant's testimony, with a rock, and by the state's testimony, with a stick, by Shack Isom. The statute makes an assault causing pain or bloodshed adequate cause; and we have held that, where the adequate cause is of a statutory

character, the attention of the jury should be directly called to this in the charge of the court. If on a subsequent trial the testimony is the same, the judge should call the attention of the jury to the statutory adequate cause.

For the errors discussed, the judgment is reversed, and the cause remanded.

HAVARD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

LARCENY—CATTLE THEFT—EVIDENCE.

The mule defendant was charged with stealing had been taken up by defendant's father in his lifetime as an estray in the spring of 1903, and was worked by the father on the farm occupied by him during that year, and was kept there until the father's death in the fall, after which it was traded or sold either by defendant or his mother, or both, in payment of a debt. The father also claimed to have bought the mule after he had taken it up. Held, that defendant, being no party to the original taking of the mule by his father, could not be guilty of larceny thereof, though such taking had been illegal.

[Ed. Note.—For cases in point, see vol. 32, Cent Dig. Larceny, §§ 55-57.]

Appeal from District Court, Angelina County; Jas. I. Perkins, Judge.

M. F. Havard was convicted of theft of a mule, and he appeals. Reversed.

E. J. Mantooth, O'Quinn & Robb, and King & King, for appellant. Howard Martin, Asst. Atty. Gen., for the State

DAVIDSON, P. J. Appellant was convicted of the theft of a mule. Without going into a detailed statement of the testimony, it is sufficient to make the following statement:

The father of appellant died a day or two before Christmas, 1903. The mule in question was known as an estray; at least, it is spoken of by the witnesses as an estray. It was taken up by the father of appellant during his lifetime, perhaps in the spring of 1903, and was worked about the place on the farm during that year, and was kept on the place during the lifetime of the father, and after his death it was traded or sold either by his widow, or appellant and the widow together, in payment of a debt to a mercantile establishment. It is further stated that the deceased father claimed to have bought the mule after he had taken it up. It is shown that the mule was worked on the premises, and was unquestionably in the possession of appellant's father long prior to his death. It is also shown that appellant was away from home a portion of the year 1903. There is some testimony showing that the brother of appellant, whom the witnesses call Rel, also set up claim to the animal. After the death of appellant's father, Watts, present sheriff of Angelina county, went to the residence of the widow, where appellant was living, to collect the debt above mention-

ed. This and another mule and some cotton were finally turned over to Watts and accepted by him in payment of the debt to the company he was representing. There is some discrepancy in the testimony as to whether the widow turned over the property, or it was done by appellant, or that both acted together.

Under this statement, appellant's father had possession of the mule and the actual care, control, and management of it for months before his death. If appellant sold the mule, it not being shown that he had any connection with the original taking, though appellant's father took it fraudulently, appellant could not be convicted of the theft of the mule. The mule left on his father's place was claimed by him under a bill of sale, and, if the bill of sale story was not believed by the jury, then he had the control, possession of, and exercised control over it by virtue of it having been taken up as an estray. Appellant was not connected with the taking; and, if it came into his possession at all, it did so by reason of his father having had it on the place, and left it with his property at his death. Then, taking the case from either standpoint: that the father originally took it up and appropriated it, without having purchased it, appellant was not guilty of theft by selling it after his father's death; or, if the father had purchased it, after taking it up, and appellant sold it, he would not be guilty of theft. If the father had stolen and converted it to his own use, and left it as a part of his estate, appellant did not become a thief, and could not inherit any fraud growing out of the father's original taking of the mule.

There are several errors presented for revision which would require a reversal of the judgment. But, as we view the facts, appellant is not guilty of theft; and therefore we premit a discussion of the other errors assigned.

For the reasons indicated, the judgment is reversed, and the cause remanded.

McROBERTS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 7, 1906.)

1. INTOXICATING LIQUORS—ILLEGAL SALE—EVIDENCE—ADMISSIBILITY.

In a prosecution for violating the local option law by selling certain bitters, evidence that a witness for the state, who claimed to have been intoxicated from the use of the bitters, left home on that day in a state of intoxication and had possession of alcohol, which he drank, and that, if he became intoxicated, he became so from drinking the alcohol, and not the bitters, as well as testimony that the impeaching witness had consumed the bitters in considerable quantities without feeling any effect therefrom, was material and admissible.

2. SAME—INSTRUCTIONS—MISTAKE OF FACT.

Where, in a prosecution for violating the local option law by selling certain bitters, defendant introduced evidence that the bitters

were not intoxicating, that they were sold to him as a nonintoxicant, and that he saw a test made at the time he purchased them, which indicated that they were not intoxicating, an instruction on mistake of fact should have been given on request.

8. SAME—EVIDENCE—INTOXICATING CHARACTER OF LIQUOR SOLD.

In a prosecution for violation of the local option law by selling certain bitters, which defendant claimed were not intoxicating, evidence as to other sales than that charged in the indictment, and as to the effect of the bitters on persons other than the prosecuting witness, was admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Intoxicating Liquors, § 291.]

4. SAME.

In a prosecution for violation of the local option law by selling certain bitters, which defendant claimed were not intoxicating, it was not competent for the state to prove that bitters not shown to be of the variety sold by defendant were intoxicating.

Appeal from Jack County Court; Sil Stark, Judge.

P. H. McRoberts was convicted of violating the local option law, and appeals. Reversed.

H. P. Jones and Nicholson & Fitzgerald, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at confinement in the county jail for 20 days and a fine of \$25; hence this appeal.

Appellant insists that the court erred in refusing to grant him a continuance. The application is based on the absence of the witnesses Foreman, Blair, and Williams, residents of Clay county, and Prewitt, a resident of Jack county. The application shows that process was duly served on the Clay county witnesses, and especially on the witness C. O. Foreman, but had not been returned into court. In regard to this absent testimony it is shown as follows: That the state would prove by the witness Brantly that the Teeko bitters bought by Kelly were drunk in part by him; that he (Brantly) also bought a bottle, and that said bitters were intoxicating; that it intoxicated him; that he did not drink any whisky in connection with said bitters, and he became intoxicated solely from drinking said bitters. Defendant shows that he expected to prove by Foreman that state's witness Brantly left his home on the day he claims to have been intoxicated from Teeko bitters in a state of intoxication. and that he (Brantly) at that time had in his possession alcohol, and had been drinking it, and that, if he became intoxicated on said date, he became so by reason of drinking said alcohol, and not the medicated bitters; further, that appellant can prove by witness Foreman that he had drank said Teeko bitters sold by appellant in quantities that could be practically drank, and said bitters did not intoxicate him in any wise and were not intoxicating.

It occurs to us that, in view of the state's case, this testimony became material. Kelly, the party whom it is alleged the Teeko bitters were sold to, testified directly that the same did not intoxicate him; that he drank about the same quantity that Brantly drank, and he felt no effect from the bitters, but drank some whisky in connection therewith which did make him drunk. Brantly testified that he admitted to appellant that the bitters did not make him drunk, but that it was whisky he got from the Morrow boys that made him drunk. While admitting this on the stand, he swore that such was not true; that he merely told appellant this for fear he would not sell him any more bitters. Appellant also proved by a number of witnesses the admission of Brantly that Teeko bitters did not make him drunk. In view of this testimony, it occurs to us that any evidence that would show Brantly got whisky or alcohol from other sources and drank it, and became drunk therefrom, was admissible in evidence on behalf of appellant.

Appellant also insists that the court committed an error in refusing to give his special requested instruction on mistake of fact. We believe that there was sufficient evidence in the case to have required a charge on this subject. Appellant proved by a number of witnesses that the bitters were not intoxicating, and in addition proved that they were sold to him as a nonintoxicant, and that he saw a test made at the time he purchased the same which indicated that said bitters were nonintoxicants. We think some of the charges asked by appellant on this subject were properly drawn, and should have been given. *Patrick v. State* (Tex. Cr. App.) 78 S. W. 947; *Mayne v. State* (Tex. Cr. App.) 86 S. W. 329; *Uloth v. State* (Tex. Cr. App.) 87 S. W. 822. Furthermore, we do not believe the court was authorized to make the remark in connection with the offering of testimony on this subject, which the bill of exceptions shows he did make.

We understand appellant objected to the introduction of other sales of Teeko bitters and its effect on other witnesses. We think this character of testimony was competent to show whether or not Teeko bitters was intoxicating. *Taylor v. State* (Tex. Cr. App.) 49 S. W. 539. Of course, before such testimony could be introduced, the state should be required to show that it was the same character of bitters involved in this prosecution. As to the drinking of whisky and alcohol in connection with Teeko bitters, if we understand appellant objected to that, we are at a loss to see why, because, if the proof showed that the bitters drunk in reasonable quantities as the human stomach would hold, would not of itself intoxicate, but that the intoxication arose from the use of alcohol, or whisky, in connection therewith, in our opinion it would be a good defense; for the proof must show the fact that the liquor or

beverage alleged to have been sold must of itself be an intoxicant. It was not competent for the state to prove by McGowen that the bitters not shown to be Teeko bitters were intoxicating.

A number of other errors are pointed out, but we do not deem it necessary to discuss them.

For the errors discussed, the judgment is reversed, and the cause remanded.

GLENN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 14, 1906.)

1. ROBBERY—INTENT—BELIEF AS TO OWNERSHIP OF PROPERTY.

Under Pen. Code 1895, art. 856, declaring that if any person, by assault, or violence, or putting in fear, shall fraudulently take from another any property with intent to appropriate it to his own use, he shall be punished, the forcible taking from another of the property of the taker is not robbery, if the taker at the time believed the thing taken to be his own.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Robbery, § 3.]

2. SAME—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to support a conviction of robbery, because not showing that the defendant did not believe the property taken to be his own.

Appeal from District Court, Orange County; W. B. Powell, Judge.

Archie Glenn was convicted of robbery, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of robbery. We do not believe the evidence in this case justifies the conviction.

Briefly stated, the facts are that appellant and the alleged injured party, Anderson, for some length of time had been occupying the same room and sleeping in the same bed. The night preceding the robbery, which occurred early in the morning, they slept together, as usual; nobody being in the room except themselves. Appellant, upon arising, found that \$1.25 had been taken from his coat, or jumper, pocket, and immediately accused Anderson of having stolen it. Anderson denied it. Appellant insisted that he had taken it, as no one else had the opportunity, and that he had seen him take it out of his pocket, or at least had seen him with his hand in his pocket. This brought on a discussion between them. Finally, after having charged him with it some three to five times, and his denying it each time, appellant struck Anderson, and Anderson says appellant tried to put his hands into his pockets. Anderson denied getting the money, and finally appellant picked up a hammer lying on the floor and threatened to strike with it unless his money was returned. Whereupon Anderson gave him five 25-cent pieces. This was the amount and kind of money appellant claimed Anderson took. Anderson says that appellant claimed

his money was one silver dollar and a 25-cent piece. Appellant testified that the money taken was five 25-cent pieces. Anderson admits having \$2 or \$3 in his pocket, in addition to that he gave appellant. Appellant was aware of the fact that he had this money in his pocket. Appellant states that Anderson had three silver dollars in his pocket at the time he paid him the \$1.25. Pete Rogers and Sam Blackshear were witnesses to most that occurred, and testified, especially Rogers, in detail as to the difficulty and the transfer of the \$1.25 from Anderson to appellant, and the accusations that appellant brought against Anderson, and the fact that immediately after this was accomplished each of them went to their respective day's work.

In order to constitute the offense of robbery, in addition to the force or violence that may be used to cause the transfer of the money to the assaulting party, there must be the further question of fraudulent intent, and the appropriation of the money or property taken from the assaulted party. This enters essentially and necessarily as an element into the crime of robbery. Article 856, Pen. Code 1895, provides: "If any person by assault or violence or by putting in fear of life or bodily injury shall fraudulently take from the person or possession of another any property, with intent to appropriate the same to his own use, he shall be punished," etc. It would seem from the very definition of robbery, under our statute, that the fraudulent intent to appropriate the property is an essential element. It would further follow that, in order to constitute robbery, the thing taken must belong to another than the taker, and it would further follow that if the property, though taken from another forcibly, was the property of the taker it is not robbery, although the acts may constitute some other offense, if the taker at the time believed the thing taken was his own. This we understand is a rule sanctioned by the courts of England and America. It is the rule in Texas. *Higgins v. State* (Tex. Cr. App.) 19 S. W. 503; *Barnes v. State*, 9 Tex. App. 128; *Smedly v. State*, 30 Tex. 214. See, also, *Reg. v. Bdaen*, 1 C. & K. 395; *Rex v. Hall*, 3 C. & P. 409; *Brown v. State*, 28 Ark. 126; *People v. Vice*, 21 Cal. 344; *Long v. State*, 12 Ga. 293; *State v. Hollyway*, 41 Iowa, 200. 20 Am. Rep. 586; *Driscoll v. People*, 47 Mich. 413, 11 N. W. 221; *McDaniel v. State*, 8 Smedes & M. (Miss.) 401, 47 Am. Dec. 93; *State v. Carroll*, 160 Mo. 368, 60 S. W. 1087; *People v. Hall*, 6 Parker, Cr. R. (N. Y.) 642; *State v. Carmans*, Tapp. (Ohio) 97; *People v. Hughes*, 11 Utah, 100, 39 Pac. 492; 2 *Russell on Crimes* (9 Am. Ed.) 105; 2 *Roscoe, Crim. Ev.* (8th Ed.) 934.

The evidence, tested by these authorities, does not, in our judgment, sufficiently make out a case. That appellant believed his property had been taken cannot be gainsaid if the witnesses tell the truth. He was rather violent in his assertions and claims in re-

gard to the matter immediately upon discovering the fact that his money was gone. This is testified by the state's witnesses and assaulted party, Anderson. It is testified by Rogers, also a state's witness, as well as Blackshear; and defendant himself testified to the same facts. It is true Anderson denied getting the money. But all of the facts and the matter of the transaction strongly rebut any fraudulent intent, and this is apparent, not only by the publicity and manner and circumstances attending the transaction, but cogently so by reason of the fact that Anderson had other money at the time appellant made him turn over the \$1.25. If it had been robbery, and the assault and violence was for the purpose of fraudulently taking the property not his own, he evidently would have taken the remaining \$3 Anderson had on his person at the time. These matters cogently urge the conclusion that appellant believed Anderson had his money at the time. It may have also entered into the case to some extent that Anderson was afraid of a prosecution by appellant for having stolen his money. Testimony is in the record that he asked appellant if he was going to prosecute him for the theft immediately upon turning over the money. But appellant assured him that he would not; that his money was all he wanted. However, the facts in our judgment are of that character which do not lead to the conclusion that this is a case of robbery. We are not willing that this conviction should stand as a precedent. The evidence is not of that cogency as would authorize the incarceration of appellant in the penitentiary for a term of years.

The judgment is therefore reversed, and the cause remanded.

WATSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 14, 1906.)

CRIMINAL LAW—VERDICT—NECESSARY RECITALS—ASSESSMENT OF PUNISHMENT—AGE OF DEFENDANT.

Under Code Cr. Proc. 1895, art. 1145, providing that, when "it is found by the verdict of the jury," convicting any person of a felony that defendant is not more than 16 years of age, the judgment shall be that defendant be confined in the reformatory, instead of the penitentiary, "provided the jury convicting shall say in their verdict whether the convict shall be sent to the penitentiary or the reformatory," a verdict which directs that defendant be sent to the reformatory, but which fails to state that he is not more than 16 years of age, is fatally defective.

Appeal from District Court, Dallas County; E. B. Muse, Judge.

Joe Watson was convicted of burglary, and appeals. Reversed.

Baskett & Evans, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for burglary. The judgment must be reversed

because the jury failed to find in their verdict the age of defendant.

The evidence of one witness is that he was 15 or 16 years of age; and appellant and his mother testified that he was 15 years of age on the 7th of March, 1905. The question is whether the verdict complies with the requirement of the statute when it fails to state the age of defendant when the punishment is confinement in the reformatory. Article 1145, Code Cr. Proc. 1895, provides: "When upon the trial and conviction of any person in this state of a felony, it is found by the verdict of the jury the defendant is not more than sixteen years of age, and the verdict of conviction is for confinement for five years or less, the judgment and sentence of the court shall be that the defendant be confined in the house of correction and reformatory instead of the penitentiary for the term of his sentence, and that such defendant be conveyed to the house of correction and reformatory by the proper authority and there confined for the period of his sentence, and for such service such officer shall be paid the same fees that he would be allowed for conveying such convicts to the penitentiary: provided, that the age of the defendant shall not be admitted by the attorney representing the state, and it shall be proved by full and sufficient evidence that the defendant is not more than sixteen years of age before the judgment herein provided for shall be entered: provided, the jury convicting shall say in their verdict whether the convict shall be sent to the penitentiary or to the reformatory." This statute has been held in all of the decisions by this court to be mandatory, and seems to require two things to be specified in the verdict where cases of this kind arise: First, that the jury must find by the verdict that defendant is not more than 16 years of age when the punishment assessed is for confinement for 5 years or less; and, second, the jury must state in their verdict whether the convict must be sent to the penitentiary or to the reformatory.

Judgments have always been reversed where the verdict fails to fix the place of punishment—reformatory or penitentiary, as the case may be. That section of the statute has been held to be absolutely mandatory. For as strong reason it occurs to us that the other portion of the statute—that is, the verdict must ascertain the age, as a prerequisite to sending the convict to the reformatory—is equally mandatory. This statute has been amended from time to time, and so amended as to prevent the attorney representing the state from admitting the age of the defendant; but it requires there shall be full and sufficient evidence that the convict is not more than 16 years of age. Until the jury has ascertained the fact that the convict is 16 years of age or less, and that he shall be sent to the reformatory, the verdict is not sufficient. It must be definitely ascertained as a prerequisite to the convict being sent to the

reformatory that he is not over 16 years of age at the time of the trial. This was not done by the verdict in this case, although they did find and specify that he should be sent to the reformatory. This they were not authorized to do, unless they first ascertained the fact that he was not over 16 years of age. The statute requires that the jury must find that fact, as well as the other. We believe this contention of appellant is correct, under the express terms of the statute.

The charge of the court is criticised because it fails to define the term "force," and that in defining the term "entry," and authorizing conviction for entering the house, without defining the term "force," it may have authorized a conviction for burglary by simply entering the house, without the necessary force to constitute it burglary. Upon another trial, we call attention to this, and suggest that the definition of "force" be given.

For the errors indicated, the judgment is reversed, and the cause remanded.

CAIN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 14, 1906.)

1. LARCENY—INFORMATION—ALLEGATIONS AS TO POSSESSION.

An information on a prosecution for larceny properly charged the possession as being in the one who had the custody of the property, although he was not the owner.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 93.]

2. SAME—QUESTION FOR JURY.

On a prosecution for larceny, evidence considered, and held, that the question whether defendant took the property for temporary use, and not to permanently appropriate the same, was for the jury.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 180.]

Appeal from Rockwall County Court; J. H. Chisholm, Judge.

Will Cain was convicted of theft, and he appeals. Reversed.

H. M. Wade, for appellant. Howard Martin, Asst. Atty Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of an overcoat, and his punishment fixed at 60 days' imprisonment in the county jail, and a fine of \$25; hence this appeal.

The allegation in the complaint and information is that the property was in the possession of R. M. Payne. The proof shows that R. M. Payne was the jailer, and the coat in fact belonged to Prof. Ater, who had been adjudged insane, and sent from the jail to the asylum. He and his wife had told Payne (the jailer) to keep possession of the coat until they called for it. The possession properly alleged. Appellant objects and says there is a variance between the allegations and the proof, because the proof showed

merely that the jailer's name was Roscoe Payne, and there was no evidence showing that he had a middle initial of "M." On another trial, this can be obviated, so it is not necessary to discuss it.

Appellant excepted to the refusal of the court to give his special requested charges Nos. 1 and 3. These instructions present the question, that he took the coat for temporary use, and not to permanently appropriate the same. The court failed to give any charge on this subject. The only question is: Was the evidence sufficient to require these requested special instructions? We think so. The evidence showed that the coat was taken by appellant from a valise in the jail, and worn to a negro party in the neighborhood; that appellant left the coat at another negro's, named Matthews, on his way back; that subsequently he told Matthews it was Payne's coat, and he was going to try to buy it from him. About a month or six weeks after he had taken the coat, he told Payne he had taken it; and when Payne told him to bring it back he told him the rats had eaten it up. Payne told him he would have to account for the coat. He then told him he had it at Matthews, and would bring it back; that he merely took it to wear to the party. He did not bring it back; left Payne, and was working some 12 miles from his house. When he was arrested for the theft of this coat, the coat was restored. We think under these circumstances the requested charges, one or both, should have been given by the judge to the jury in order that they might pass upon appellant's defense of taking the coat for a mere temporary use, and with no purpose of permanently appropriating it.

The judgment is reversed, and the cause remanded.

ISHAM v. STATE.

(Court of Criminal Appeals of Texas. Feb. 14, 1906.)

1. HIGHWAYS—OBSTRUCTION—PROSECUTION—EVIDENCE—ADMISSIBILITY.

Where, on a prosecution for obstructing and injuring a public road, it appeared that a witness knew nothing of the establishment of the road of his own knowledge, his testimony that the road was a public road at the time defendant was charged to have obstructed it should have been excluded.

2. SAME—INSTRUCTIONS.

On a prosecution for obstructing a public road, the court instructed that a public road is established by the commissioners' court acting upon a petition, and that thereupon a jury of review is appointed to review and lay out the road and to go over the line of contemplated road and establish the same. Held, that it was error to refuse an instruction that, when the petition is granted, the commissioners' court shall appoint a jury of freeholders to lay out the road, and that it is necessary for the report of the freeholders to contain the boundaries of the road as laid out, and that the field notes of the survey or description of the road are to be included in the report of the jury, and that it was incumbent on the state to show that the same was done.

3. SAME—EVIDENCE—SUFFICIENCY.

On a prosecution for obstructing a public road, evidence held insufficient to show that the obstruction was willful.

Appeal from Rains County Court; J. W. Pierson, Judge.

J. E. Isham was convicted of obstructing and injuring a public road, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for obstructing and injuring an alleged public road. The state offered to prove by Herriage that the road defendant was charged to have obstructed was a public road. This witness testified he was not present and knew nothing of the establishment of the same of his own knowledge, but was then permitted to testify that the road defendant is charged with having obstructed was a public road at the time defendant is charged to have obstructed it. Objection was urged to this, because there was better evidence and the testimony is hearsay. We believe this testimony should have been excluded. The evidence for the state by this witness Herriage shows that the road was a public road, which he only knew from hearsay, as well as the further fact as to where the road was located. He testified that the road was impassable for vehicles at the time appellant should have obstructed it; that he did not know where the lines between Isham's and Brown's premises were, and did not know whether this road was on the line or not. Harbison testified that he notified defendant orally, the day before laying out the road by the reviewers, of the fact that they would lay it out. He testified that appellant stated to him that he did not care particularly where it was located, and consented for the bridge to be constructed where they placed it, and that he consented the road should be laid out as a public road. He states that no written notice was given appellant, and that the fence built by appellant was erected along the middle of this road for about 100 yards. He also states that for a time after defendant obstructed the road it was impassable for travelers, except horsemen. Morehead also testified to the state that the fence complained of is in the roadway as traveled before the heavy rains washed the bridge away and left the road impassable for vehicles; but the public now used the road with vehicles, and it is passable, notwithstanding the fence of defendant (this witness was one of the reviewers who laid out the road); that the road as now traveled is the road laid out by the reviewers, and appellant's fence is from 10 to 15 feet back from his land line, and on his own land at the place alleged to be obstructed. The application was for a second-class road. The report of the reviewers fails to describe any road by metes and bounds, and fails to al-

low any damages to appellant. It does allow \$15 to Brown. Appellant proved by his son that he heard the conversation between his father and Harbison, and that his father did not consent to the establishment of the public road, but of a neighborhood road. Appellant himself testified that he consented that a neighborhood road might be established; that he was not served with notice, either written or verbal, of the fact that the jury of review had been appointed, and would meet to survey and lay out a public road at any time or place through or near his premises. He states that Ingram and Mrs. Brown told him they were going to try to run a public road somewhere about his premises; that where he built his fence is not in the roadway; that when he built his fence the roadway was impassable on account of the water having washed the road; and that he had no intention of interfering with the rights of the public, or of obstructing any road. He denied making the declarations to which Harbison testified, but that he consented for the neighbors to have a passway, where the road is now located, if located at all, and that he would give 12 feet for such purpose. He says he is positive that nobody gave him a written notice, and that no member of the jury of review ever gave him any verbal notice of a meeting of that body for laying out a road, and that he never consented for a public road to be established where it is said to be located. This is a substantial statement of the facts. The application appears to have been made November 9, 1905. At least, such is the date the order recites that the application came on to be heard. The report of the jury of review was made on February 9, 1904. These discrepancies are not explained in any way.

The court charged the jury, among other things: "A public road is established by the commissioners' court, acting upon a petition duly presented to said court, whereupon a jury of review is appointed by said court to review and lay out said road; and it is the duty of said jury of review to go over said line of contemplated road and establish the same." Among others, appellant requested this charge, in substance, that, when the petition is granted by the court, the commissioners' court shall appoint a jury of five freeholders to review and lay out the road, and report to said court under oath; that it is necessary for said report to contain the boundaries of the road as laid out; and that the field notes of such survey or description of the road shall be included in the report of the jury, and, if adopted, it shall be recorded in the minutes. And if the state fails to show that this was done the testimony would not sustain the verdict. We believe the court should have given the requested instruction. The statute makes it necessary to lay out the road and in the report of the jury of review to describe the road by metes and bounds. We are of opin-

ion that, under the facts stated, the evidence is not sufficient to convict. It does not meet that requirement of the law, which is that the obstruction must be willfully made.

The judgment is reversed, and the cause remanded.

SMART v. STATE.

(Court of Criminal Appeals of Texas. Feb. 14, 1906.)

1. CRIMINAL LAW — EVIDENCE — CONVERSATIONS BETWEEN THIRD PERSONS—PREJUDICE.

Where, in a prosecution for violating the local option law, the state relied on an alleged sale of beer by defendant to D., evidence of a conversation between D. and the person for whom he purchased the beer, which occurred out of defendant's presence and which was not relied on to prove the sale to D., was not prejudicial to defendant.

2. INTOXICATING LIQUORS — WRONGFUL SALE — EVIDENCE.

In a prosecution for violating the local option law, evidence that certain others had sought to buy beer from defendant under similar circumstances to those detailed by the prosecutor, and that defendant had refused to sell beer to such witnesses was irrelevant.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 293.]

3. SAME—INSTRUCTIONS.

Where, in a prosecution for violating the local option law, the court confined the jury to considering the count in the information charging a sale to D., a count charging a sale to S. passed out of the case, and the court properly refused to require the jury to specify the count under which they found defendant guilty, if at all, and that, if they had a reasonable doubt as to which party the sale was made, if any, they should acquit.

4. SAME—PURCHASE FOR ANOTHER.

Where defendant was charged with the unlawful sale of intoxicating liquors to D., who was the only person known in the transaction as the purchaser, as between the parties to the sale, it was immaterial that D. purchased the liquor for another, and that the two thereafter consumed the same.

Appeal from Parker County Court; R. L. Stennis, Judge.

Bob Smart was convicted of violating the local option law, and he appeals. Affirmed.

Preston Martin, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, and his punishment fixed at a fine of \$25 and 20 days' confinement in the county jail.

The information contains two counts. The case was submitted under the second count, charging the sale of the intoxicants to W. B. Dutton. Dutton testified that some time last summer, about August, 1904, T. N. Sudduth, came into his (Dutton's) store, which was on the east side of the square, in a building one door north of the pool room belonging to Burrell, where appellant was working. Dutton asked if he could get some beer. Dutton told Sudduth that he would see about it. Sudduth gave him a dollar,

and Dutton left his store, and went into Burrell's poolroom, and asked appellant if his beer had come. Appellant replied, "Yes," and handed him (Dutton) six beer checks, for which Dutton paid him 90 cents of the dollar given him by Sudduth, and requested appellant to order more beer. He took the six beer checks, and went back to his store, and gave them to Sudduth, together with the 10 cents change. The conversation between Sudduth and Dutton was not in the presence and hearing of appellant; nor did he inform appellant that he wanted the beer checks or the beer for Sudduth, and Sudduth was not with him when he received the beer checks. Appellant objected to this testimony, because of the fact that appellant was not aware of the conversation which occurred between Dutton and Sudduth, and these matters occurred out of his presence. If Sudduth had been used as a witness to prove up the sale, and had testified to these facts, this evidence should have been excluded; but the matters with reference to the beer and the checks occurred between Dutton and appellant, and therefore the conversations occurring between Dutton and Sudduth in the absence of defendant, while not material, or perhaps not relevant, were not of such a character as would authorize a reversal of the judgment. While they showed that Sudduth's money was paid for the beer checks, and on which the beer was obtained subsequently, still the conversation could not have affected appellant one way or the other. They were matters, it is true, that occurred between Sudduth and Dutton, and with which, perhaps, appellant had no concern, as it was not brought home to his knowledge, yet it was of such immaterial character that we do not believe it would justify a reversal of the judgment. If Sudduth's statement as to what occurred between himself and Dutton in the absence of appellant was relied upon to prove up the transaction between Dutton and appellant, the testimony would have been material, and, being so, irrelevant and inadmissible, would have required a reversal of the judgment. But, as the transaction occurred between Dutton and appellant, this rule would not apply. So we believe the error is not of such character as to authorize a reversal.

Appellant proposed to prove by witnesses Davis, Winn, and Ray that they had sought to buy beer from appellant under similar circumstances to those detailed in this case. We do not believe this testimony was admissible. Because he may have refused to sell beer to those witnesses is no evidence that he did not make the sale to Dutton.

Appellant asked the court to instruct the jury, if they believed defendant sold the beer or intoxicating liquor, etc., the jury will say under which count he is guilty of making an unlawful sale, whether to Sudduth or Dutton; and if they entertain a reasonable doubt as to which party the sale was

made, if any sale was made, they would acquit. This charge was refused, and we believe properly. The court confined the jury to a consideration of the count charging a sale to Dutton, and therefore the first count passed out. Further, we would say that, under our decisions, it would make no difference under the facts that Dutton may have been purchasing intoxicants for Sudduth. Sudduth was not known in the transaction; and the matters occurring in regard to the transfer of the beer checks, which called for the beer, and on which the beer was subsequently obtained, was between Dutton and appellant.

Exception was reserved to the following clause in the charge: "You are further instructed that the purchase by W. B. Dutton, if any, for himself, or for one T. N. Sudduth, would as a matter of law constitute a sale to W. B. Dutton." This is in accord with the various decisions of this court on that state of case. The facts bearing upon this show that Dutton went into appellant's place of business, got the beer checks, and that he and Sudduth went in later on and drank the beer, which was called for, and handed out the beer checks. Under our decisions this would constitute a sale to either or both. Such has been the rule since *Yakel's Case*, 30 Tex. App. 391, 17 S. W. 943, 20 S. W. 205; *Starling v. State*, 34 Tex. Cr. R. 296, 30 S. W. 445; *Bruce v. State*, 39 Tex. Cr. R. 29, 44 S. W. 852; *Horsky v. State* (Tex. Cr. App.) 36 S. W. 443; *Vincent v. State* (Tex. Cr. App.) 55 S. W. 820.

There is no such error in the record as requires a reversal, and the judgment is accordingly affirmed.

PRICE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 14, 1906.)

1. MALICIOUS MISCHIEF—INDICTMENT.

An indictment for willful injury to real estate, forbidden by Pen. Code 1895, art. 791, which alleges that the accused removed a house of the value of \$100, was not defective for failure to allege the value of the real estate.

2. SAME — NATURE OF OFFENSE — TITLE TO PROPERTY.

A purchaser of land is the holder of the legal title thereto after a judgment of foreclosure of the vendor's lien thereon, but before sale under the foreclosure, so that his act in removing a building therefrom is not a violation of the statute prohibiting willful injury to real estate.

Appeal from Eastland County Court; Chas. D. Spann, Judge.

C. P. Price was convicted of injuring real estate, and appeals. Reversed.

J. R. Stubblefield, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of injuring real estate, and his punishment fixed at a fine of \$20, and appeals. The evidence shows that prosecutor, Connor, sold

appellant a tract of land, being a quarter of section 19, block No. 97, survey of the Houston & Texas Central Railway Co., in Eastland county. The sale was made for \$600. Appellant executed his six notes, each for \$100, and due annually, extending over a period of six years. After buying the land, appellant built a house on it, worth about \$100, and occupied it for several years, not paying anything on the purchase money. Prosecutor, Connor, sued him on the notes, and procured a judgment of foreclosure about the 24th of February, 1905. About the 25th of February, appellant still occupying the premises, knocked down the house, and removed it to another piece of land near by, which he had leased. For this act he was prosecuted and convicted. This is a sufficient statement of the facts to discuss the legal questions.

Appellant moved to quash the information on the ground that no value was fixed to the land. The information was rather peculiar in this respect, and alleges the injury to consist in knocking down and removing the lumber, sash and doors, etc., of which the house was composed; that said house was attached to and constituted a part of said real estate, and was of the value of \$100. Article 791, Pen. Code 1895, under which this prosecution was brought appears to require some value to be stated of the property alleged to be injured, in order to grade the punishment. See *Todd v. State*, 39 Tex. Cr. R. 232, 45 S. W. 596. Here the real injury done to the land was to the house alleged to constitute at the time a part of the realty. Its value is alleged, and we believe this was sufficient. A number of errors are assigned, which raise some very nice questions. But under the view we take, it is only necessary to consider one question. The court in charging the jury, and throughout the trial on the proof offered, treated the land as the property of prosecutor, Earl Connor. Under the evidence this was not correct. The legal title was in appellant. Connor held an equity; that is, a vendor's lien. He might, under some of our decisions, have treated this equity as the legal title, and have sued for the land and recovered the same. On the contrary he (Connor) treated appellant as having the legal title, and simply foreclosed on the land. Under this state of affairs, it could not be said that the legal title was in prosecutor. In *Adams v. State*, 81 S. W. 963, 10 Tex. Ct. Rep. 879, we held that the injury provided for in the statute referred to the land of another; and the statute says nothing about injuring the land on which one has a lien. The court's charge on this subject assumed a contrary doctrine to that above stated; and instructed the jury, in effect, that if Earl Connor sold the land to appellant, and reserved a vendor's lien thereon, and foreclosed the same, that the title was in him (Connor). The view insisted on by appellant was embraced in special requested

instructions, and presented to the court, which the court refused to give. This was to the effect that, if the jury believed that Earl Connor conveyed the land described in the information to defendant, and that notes were given in payment of the same, and vendor's lien retained, and there was judgment of foreclosure in favor of prosecutor against appellant on said notes, foreclosing his lien on the land, that the legal title was in appellant, and prosecutor only had an equity, and in such case, appellant before sale, would have the right to remove said house, without violating said statute. This charge should have been given as the law of the case.

Because the court announced a contrary view in his instructions to the jury, and refused to give the requested charge, the judgment is reversed, and the cause remanded.

TEXAS & P. RY. CO. v. ZINK.

(Court of Civil Appeals of Texas. Feb. 17, 1908.)

APPEAL — REVERSIBLE ERROR — ARGUMENT OF COUNSEL.

That counsel for plaintiff, in an action against a railway company for insulting conduct of its conductor to a female passenger, personally abused the conductor while arguing to the jury, did not warrant a reversal, where the jury were not thereby prejudiced.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4135; vol. 46, Cent. Dig. Trial, § 308.]

Appeal from District Court, Van Zandt County; R. W. Simpson, Judge.

Action by Dr. Eli Zink against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Freeman, H. M. Cate, and J. A. Germany, for appellant. Kearby & Kearby, for appellee.

RAINEY, C. J. The appellee brought this suit to recover damages of appellant for the rude and insulting conduct of appellant's conductor to appellee's wife while she was a passenger on one of appellant's trains. Judgment was rendered against the railway company, and it appeals.

Plaintiff's wife purchased a ticket over defendant's road for herself, and with her two children, five and seven years of age, took passage on one of defendant's passenger trains, having no tickets for the children. What occurred then is shown by her testimony which is in substance as follows: "That the conductor's manner was rude and that he spoke in a loud voice. When he called for tickets for her two little children, she explained to him that they had come up with her a day or two before, and no fare was demanded, and that she thought none would be required; therefore, had not purchased tickets for them. That the conductor's reply was: 'You ought to be paying for those

children. You ought not to try to beat your way with these children at all. They are old enough to be paying fare.' That she replied she did not know it, as she thought 10 years was the age limit, and that she was sorry. That the conductor then replied: 'You did it just the same. I guess you are in the habit of beating the railroad.' That she thereupon told him she did not know she was doing wrong, and he replied: 'You didn't know? You didn't know you was violating the laws of the United States, did you? You didn't know you had laid yourself liable to prosecution? I guess you are in the habit of beating your way.' That she told him, 'No,' and he replied: 'If I were to claim I didn't know, and go out here and steal a horse, would that be violating the law?' That she replied it certainly would, and that he replied: 'Well, this is just as bad now as stealing a horse.' He then turned to plaintiff's wife, and said: 'Give me a nickel for that boy.' That she had no money, and so informed him, when he told her not to try to beat her way on the railroad any more. That other people were in the car, all strangers to her, and that she noticed one man turn around towards her, but that she was so ashamed and humiliated she could look no one in the face. That she was so ashamed, humiliated, and mortified that she was made sick all day, couldn't eat any dinner and cried nearly all day."

The only proposition submitted by appellant is: "The language used by plaintiff's counsel in his concluding argument to the jury, as shown by defendant's bill of exceptions, was unwarranted, being inflammatory, vindictive, and uncalled for, and could have been used only with the intent of arousing the prejudices of the jury, enhancing the damage, and preventing the jury from calmly and dispassionately passing upon the evidence, and is of such a character as to entitle the appellant to a reversal of this case." Counsel for plaintiff in his concluding argument to the jury, in discussing the testimony of the conductor, a witness for defendant, used the following language: "Yes, he is a very mild man here in the courtroom, but put him down there on that railroad, with his cap and brass buttons on, and he is a Jay Gould or a Roosevelt. They are insignificant compared to him. He is a mild-mannered fellow, yes, a very mild-mannered fellow. He is a meek and lowly Jesus Christ down here. He knows, his counsel had told him, that he had got his foot in it, that he had laid himself liable to lose his job. Got the company into trouble. You had just as well tell the truth at once, as far as you can, but make it as light as you can. What is his name (referring to the conductor)? Had you thought about it? His name is Kane. I do not know what relation he is to the Cain that killed his brother in the past. Don't know how the relationship stands between them, and, when you look at it from the

witness stand here, I do not doubt but what you are impressed with the idea that he was somewhat related to that original Cain that murdered his brother, because we are told that there was a mark placed upon that Cain, so that all the world might know him wherever he went. If that man upon the witness stand here called Kane was not branded by the very act of God Almighty Himself, so that all men might know him, and watch him, then I am deceived in the looks of the man and his conduct to this good woman upon this occasion." This language, probably, ought not to have been used. It was somewhat severe on the conductor, but it does not seem to have inflamed or prejudiced the minds of the jury against the railway company. The language used by the conductor was grossly insulting, especially to a refined woman, and from the size of the verdict the minds of the jury were evidently not inflamed or prejudiced by the remarks of counsel.

The judgment is affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. BRYANT.*

(Court of Civil Appeals of Texas, Feb. 24, 1903.)

1. CARRIERS—INJURIES TO PASSENGERS—CON- TRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where, in an action against a railway for injuries resulting from defendant's failure to stop its train a reasonable length of time to enable plaintiff, a passenger, to get off, the evidence showed that, after the train stopped, plaintiff stood on the platform negotiating with a newsboy for a paper, and made no effort to get off until the train was in motion, and that none of defendant's servants knew of plaintiff's delay in getting off the train, if he did so delay, the refusal of a special charge that if defendant's employees stopped the train a reasonably sufficient time for a passenger situated as was plaintiff to alight therefrom, and plaintiff delayed getting off, and such delay, if any, was unknown to defendant, plaintiff's contract relation with defendant ceased at the expiration of such reasonable time. If any, and defendant could become liable only through failure of its servants to exercise ordinary care, was reversible error.

2. TRIAL—INSTRUCTIONS—SPECIAL CHARGES COVERED BY MAIN CHARGE.

The refusal of special charges is not error, where the same, in so far as they embrace correct propositions of law, are sufficiently expressed in and covered by the court's main charge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

Appeal from District Court, Henderson County; B. H. Gardner, Judge.

Action by A. T. Bryant against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed.

Trost & Neblett and Lewis Carpenter, for appellant. Faulk & Faulk and Johnson & Edwards, for appellee.

TALBOT, J. Appellee Bryant brought this suit to recover damages on account of per-

sonal injuries alleged to have been received by him through the negligence of appellant, while alighting from one of appellant's passenger trains at Chandler, Tex. It was alleged in substance, that on December 15, 1903, appellee was a passenger on one of appellant's passenger trains going from Tyler, Tex., to Chandler, Tex.; that when the train reached Chandler it stopped, and appellee proceeded, with reasonable care and diligence, to alight therefrom, but that appellant's servants in charge of and operating said train negligently failed to stop the same a reasonably sufficient length of time to enable appellee to debark with safety; that as appellee was in the act of alighting from the train it was negligently put in motion, whereby he was thrown and caused to fall to the ground and injured. Appellant pleaded the general issue, and contributory negligence. A jury trial resulted in a verdict and judgment for appellee in the sum of \$1,500, from which this appeal is prosecuted.

Complaint is made of the court's action in refusing to give appellant's requested instruction which reads as follows: "If you believe from the evidence that the employees of defendant stopped the train at Chandler a reasonably sufficient time for a passenger situated as was plaintiff to depart therefrom, and if you should further believe that the plaintiff delayed getting off said train from any cause, and that this delay, if any, was unknown to defendant, then you are charged that his contract relation with defendant ceased at the expiration of such reasonable time, if any, and the defendant could become liable only through failure of its servants to exercise ordinary care against inflicting injury upon plaintiff." The refusal to give this charge was error for which the judgment must be reversed and the cause remanded for a new trial. The special charge was evidently predicated upon the testimony of the witness T. J. Dobbs, and presented a theory of the appellant and phase of the case not covered in our opinion by any other charge given to the jury. That witness testified, among other things, as follows: "I was living at Chandler in 1903. Am living there now. I recollect the incident of Dr. Bryant falling off the train there and breaking his leg. I wanted a paper, and was hunting for a news boy to buy a paper; the butcher, they call him. I finally found him at the east end of the smoker. The ladies' car was just east of that. When I arrived at that point, the train was standing still, and I bought a paper. The butcher was standing between the smoker and the ladies' car with a bunch of papers under his arm. He was up between the coaches. I noticed Dr. Bryant up there. When I first saw him he was standing right facing the butcher. Their faces seemed tolerably close together. It struck me that Dr. Bryant was trying to buy a paper. They were talking, and had their

*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

faces right close together, looking one another in the face. I did not hear a word that was said. He was standing still. The brakeman was standing at the foot of the steps, and the butcher up in between the cars. Dr. Bryant was standing about the middle of the platform. I said to the butcher, 'Give me a paper,' and the brakeman said, 'Give me your nickel and I will buy you a paper,' and reached up to the butcher, and the butcher handed him a paper; and when I got my paper I stepped back a few steps and opened my paper, and when the train started I was standing there. As it started I raised my head to see if Dr. Bryant had gotten off the train, and I saw him standing with his grips. I didn't know whether he had gotten on the train to go away, or whether he was trying to get off the train. The train was in motion when I first looked up. He was then making some effort to get off; was starting down the steps. I saw him when he fell. The car had moved 15 or 20 feet, possibly, when Dr. Bryant stepped off." There was also testimony tending to show that none of appellant's servants knew of appellee's delay in getting off the train, if he did delay in getting off the same. As applied to this evidence the special charge refused contained a correct proposition of law and should have been given. In the case of *Railway Company v. Martin* (Tex. Civ. App.) 63 S. W. 1089, under a very similar state of facts, a charge practically identical with the one here refused was approved and the refusal thereof by the trial court constituted one of the errors for which the case was reversed.

The other assignments of error have been examined. They relate to and complain of certain paragraphs or portions of the court's main charge and special charges requested and refused. We believe it would serve no useful purpose to enter into a discussion of these charges. It is sufficient to say with respect to the court's general charge that when taken and construed as a whole no reversible error appears; and as to the special charges here referred to, it may be said that in so far as they embrace correct propositions of the law they were sufficiently expressed in and covered by the court's main charge.

For the error indicated, the judgment is reversed, and the cause remanded.

BURLEW v. SCHILLER et al.

(Court of Civil Appeals of Texas, Dec. 21, 1905. Rehearing Denied Feb. 27, 1906.)

INTOXICATING LIQUORS—CIVIL DAMAGE ACTS—RIGHT TO SUE—WIFE OF DRUNKARD.

As there is no constitutional provision vesting in the husband the exclusive right to sue for community property, or depriving the Legislature from conferring that privilege upon the wife, the wife of an habitual drunkard may maintain an action under the statute on a liquor dealer's bond for the act of the dealer in selling

liquor to her husband, regardless of whether the judgment recovered in such action would be her separate or community property.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 433.]

Error from District Court, Williamson County; V. L. Brooks, Judge.

Action by Rhoda Burlew against J. A. Schiller and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

Dan S. Chessher and D. W. Wilcox, for plaintiff in error. Posey & Sheffield, W. W. Nelms, and Cooper Sansom, for defendants in error.

FISHER, C. J. This is a suit by Rhoda Burlew, a married woman, against J. A. Schiller, as principal and the other defendants as sureties on a liquor dealer's bond. Plaintiff in error in her first amended original petition, being the one upon which she went to trial, alleges that she is the wife of Steve Burlew and has continuously lived with him as such wife since the time of their marriage in 1888, and that her said husband has refused and still refuses to join her in this suit, and she was forced to bring it alone; that the defendant Schiller was engaged in business at Granger, Tex., as a retail liquor dealer, and that said Schiller as principal and the other defendants as sureties, had executed the bond required by the statutes of this state, and that said bond had been duly approved by the county judge of Williamson county, and duly recorded, as required by law; that said bond, among other things, provides that said Schiller, as principal, or his agents or employes, will not sell nor permit to be sold, in his house or place of business, nor give nor permit to be given, any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, to any habitual drunkard, or to any person after having been notified in writing through the sheriff or other peace officer, by the wife, mother, daughter, or sister of the person, not to sell to such persons; that she, on or about October 14, 1900, caused a written notice to be served upon said Schiller by D. McLaughlin, a constable, notifying said Schiller not to sell, etc., to her said husband; that on September 1, 1900 and for several months prior thereto, and for several months thereafter, and on the dates of the alleged violations of said bond, the said Steve Burlew had been and was an habitual drunkard, in that he had habitually become intoxicated by the voluntary use of intoxicating liquors, and which said fact was well known to said Schiller; that the conditions of said bond were violated on eight separate and distinct occasions by the said Schiller selling, giving, and permitting to be sold and given to her said husband, Steve Burlew, intoxicating liquors; wherefore, she asked judgment for \$4,000 against all the defendants. The defendants answered by general and

special exceptions and by general denial. All of said exceptions, except the third, were overruled by the court. Defendants' third special exception, which was sustained by the court, was to the effect that defendants excepted to that portion of appellant's petition which attempts to allege a cause of action against defendants for violation of a liquor dealer's bond by selling liquor to an habitual drunkard, because any judgment recovered by reason of said alleged cause of action would be community estate between appellant and her husband, and she could not, under the law, maintain or prosecute such cause of action without being joined in the suit by her husband. After the court had sustained said special exception, the case was tried on the other phase of the same, that is, on the allegations of written notice, and the jury returned a verdict for the defendants in error. Plaintiff in error then in due time filed her motion for a new trial, which motion was overruled by the court, and she has perfected her writ of error to this court.

Plaintiff in error's only assignment of error is a complaint of the action of the trial court in sustaining defendants' third special exception. There is no constitutional provision that vests exclusively in the husband the right to sue for community property, or that would deprive the Legislature of conferring such privilege upon the wife in certain classes of cases, if they see fit to so do. The statute in question expressly confers upon the wife the privilege to sue, and by any person of persons aggrieved by a violation of the provisions of the bond. It has been held that the wife is a party intended to be protected by the act, and is a party aggrieved that comes within the spirit, meaning and letter of the law. In the view that we take of the case, it is unnecessary for us to decide whether the penalty allowed and recoverable by the statute in a suit by the wife would be separate or community property, for, in either event, under the law, she would be entitled to sue. The statute expressly confers upon her the right, as one of the parties aggrieved, to bring a suit; and there being no constitutional provision that would interfere with the privilege of the Legislature to confer this right upon the wife, there is no reason to doubt that she would be entitled to sue in any case where the right is expressly by this statute conferred upon her as the wife, or where she is the party aggrieved by the conduct complained of. That she would be a party aggrieved by the sale of liquor to her husband who is an habitual drunkard, and would be of the class contemplated by the statute who would be entitled to sue for the penalties that arise by reason of such sale, there can be no doubt. The right to sue being expressly conferred by the act, the question as to the right to the proceeds that arise from a judgment ob-

tained in a suit based on the statute, is a matter not to be considered in determining whether the wife could sue. The judgment so recovered may be separate or community property, which, as said before, it is unnecessary to determine; the right being expressly conferred by the act, we hold that the wife was entitled to sue for the penalties involved. *Speer, Law of Married Women, § 289. Wright v. Tipton, 92 Tex. 169, 46 S. W. 629; Tarkington v. Brunett (Tex. Civ. App.) 51 S. W. 274; Tipton v. Thompson (Tex. Civ. App.) 50 S. W. 641; Hahn v. Goings (Tex. Civ. App.) 56 S. W. 217.* The trial judge in sustaining the demurrer, for whose opinion we have a high regard, was evidently controlled by what was said by the court in *Wartelsky v. McGee (Tex. Civ. App.) 30 S. W. 69*, which seemingly supports the ruling of the court below. But as we construe that decision, that court in passing upon the question, evidently lost sight of or did not consider the power of the Legislature to confer the special right upon the wife to sue in cases of this class.

For the error of the trial court in sustaining the demurrer, the judgment is reversed, and the cause remanded.

Reversed and remanded.

HAYWOOD v. SCARBOROUGH et al.
(Court of Civil Appeals of Texas. Jan. 28, 1906.)

1. APPEAL—RECORD—MATTERS PRESENTED.

Under Rev. St. 1895, art. 1833, authorizing an appeal from an interlocutory order of the district court appointing a receiver, an appeal from an order appointing a receiver, without notice to appellant, must be presented upon the petition and order of appointment alone.

2. RECEIVERS—APPOINTMENT—GROUNDS.

Under Rev. St. 1895, art. 1465, authorizing the appointment of a receiver in an action between persons jointly interested in property, where it is shown that the property is in danger of being lost, removed, or materially injured, and article 1403 applying the rules of equity to the appointment of receivers, it was error to appoint a receiver on a petition alleging that defendant was trying to sell property in which plaintiffs were interested, that he was insolvent, and that a sale by him would, on account of his apparent title, convey a good title to an innocent purchaser, where there was no allegation that the property was in danger of being lost, removed, or materially injured, and an injunction order to prevent the sale or removal of the property was prayed for and granted.

3. SAME — EX PARTE APPOINTMENT — REQUISITES.

In order to justify the appointment of a receiver without notice to the adverse party, the facts showing such a pressing emergency and the existence of such circumstances as to render an immediate appointment without notice necessary for the protection of the rights of the applicant should be disclosed.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, § 57.]

Appeal from District Court, Jasper County; W. B. Powell, Judge.

Action by L. P. Scarborough and others

against R. J. Haywood. From an order appointing a receiver, defendant appeals. Reversed.

Robertson & Whitaker, for appellant.
Lanier & Martin, for appellees.

REESSE, J. This is an appeal from an order of the district judge in chambers appointing a receiver upon application of appellees and without notice to appellant. Appellees, L. P. Scarborough and others, filed their petition in the district court of Jasper county, alleging in substance that they were part owners with appellant, Haywood, of a certain tract of land, and also certain personal property, consisting of a brick machine, disintegrator, boilers, engine, pumps, oil pipes, wheel scrapers, steel scrapers, wagons, mules, etc., all in the possession of appellant, and that appellant had bought the property at a trustee's sale for the joint account of himself and appellees, but had repudiated the trust and is asserting sole ownership in himself. Appellees prayed for injunction and the appointment of a receiver, and upon this prayer, upon presentation of the petition to the district judge in chambers, an order was made, without notice to appellant, granting an injunction restraining appellant from selling, disposing of, or otherwise interfering with the property described in the petition, and from interfering with the receiver in the same order appointed, and the rights of the appellees. By the same order a receiver was appointed with authority to take care of the property until the final determination of the suit. This being an appeal from an order appointing a receiver (article 1383, Rev. St. 1895) made without notice to appellant, of necessity must be presented here upon the petition and the order appointing the receiver alone.

It is contended by appellant: First, that the allegations of the petition do not authorize the appointment of a receiver; second, that no necessity is shown for such action without notice to appellant, defendant in the suit. The allegations of the petition upon which the injunction was granted and receiver appointed are in substance that appellant is trying to sell and dispose of the property, and, should he succeed, threatens to and will apply the proceeds to his individual use and benefit; that he is insolvent and unable to respond to appellees in damages should he sell said property to an innocent purchaser for value without notice of appellees' interest

therein (the apparent title thereof being in appellant), which he will do unless enjoined and restrained by this or some other court; and that such purchaser will remove the property elsewhere, and appellees will suffer a total loss of their interest in said property, if such sale is made.

The statute authorizes the appointment of a receiver in an action between persons jointly owning or interested in any property, or fund, on the application of the plaintiff, "where it is shown that the property or fund is in danger of being lost, removed, or materially injured." Article 1465, subd. 1, Rev. St. 1895. It is further provided that, "in all matters relating to the appointment of receivers, the rules of equity shall govern where the same are not inconsistent with the provisions of this chapter and the general laws of this state." Rev. St. 1895, art. 1493.

The petition does not disclose that the property in question "is in danger of being lost, removed or materially injured." It is alleged, it is true, that, if the receiver should sell the property, the purchaser would remove it, and also that if sold to an innocent purchaser, appellant having the legal title, appellees' interest therein would be lost to them, but such sale is effectually prevented by the injunction prayed for and granted, and all danger of loss or of removal is thus prevented. It is clear that neither under the particular provisions of the statute referred to nor the general usages of equity was there any necessity for the appointment of the receiver. The writ of injunction operates as a complete protection of the rights of the appellees from any of the dangers, actual or threatened, referred to in the petition.

If, under the allegations of the petition, it had been proper to appoint a receiver at all, clearly no case is made justifying such action without notice to appellant. In order to justify the appointment of a receiver, without notice to the adverse party, not only must a proper case be made for the appointment, but, in addition, the facts should be disclosed showing such pressing emergency and the existence of such circumstances as to render an immediate appointment without notice necessary for the protection of the rights of the applicant. No such emergency or necessity is disclosed by the petition.

The order appointing the receiver is set aside and annulled, and it is ordered that the receiver be discharged and the property restored to the possession of appellant.

WINANS v. McCABE.*

(Court of Civil Appeals of Texas. Dec. 6, 1905. Rehearing Denied Jan. 24, 1906.)

1. PUBLIC LANDS—APPLICATION TO PURCHASE—CONTEST—EVIDENCE.

Evidence examined, and held to show that at the time of plaintiff's application to purchase certain public lands, defendant had acquired a superior right thereto.

2. APPEAL—HARMLESS ERROR.

Where, in a controversy between different applicants for a section of public land, the evidence showed defendant's superior right to such land, the exclusion in evidence of plaintiff's application, if erroneous, was harmless.

3. SAME—OBJECTIONS TO EVIDENCE.

In an action between applicants for the purchase of public lands, where plaintiff on the trial objected to the admission in evidence of the whole of a certificate of the Commissioner of the Land Office issued to defendant, he could not, on appeal, urge that a portion of such certificate should be excluded.

Appeal from District Court, Coke County; J. W. Timmins, Judge.

Action by E. H. Winans against F. S. McCabe. Judgment for defendant, and plaintiff appeals. Affirmed.

Brightman & Upton and B. W. Rimes, for appellant. Hill & Lee, for appellee.

FISHER, C. J. This is an action of trespass to try title for 1,191 acres, brought by the appellant against the appellee on the 22d day of September, 1903. The land is described in the petition as being section 16 in block W, located by virtue of certificate No. 2/1553, issued to the Texas & Pacific Railway Company. There is a prayer in the alternative that if the plaintiff is not entitled to recover the whole of the 1,191 acres, then he prays for judgment for all of the section of land in excess of 533 $\frac{3}{4}$ acres, to wit, 657 $\frac{1}{2}$ acres. There was a trial before the court without a jury, and judgment rendered against the appellant in appellee's favor.

We find the following facts:

It is agreed that both plaintiff and defendant were the legal owners of the land claimed by them as their home section, and described by them in their application to purchase the land in controversy, and that they both resided on their respective home sections at the time they made application to purchase the land in suit, and have continued their residence since said time; and it was also agreed that the land in controversy was within a five miles radius of the home sections of both plaintiff and defendant, that both were over 21 years of age at the time that they applied to purchase the land in controversy, and qualified to purchase the same under the law, and that at the time the plaintiff made his application to purchase said land he paid to the county clerk of Coke county one-fortieth of the purchase money, and that the same was transmitted to the State Treasurer by the clerk: and it was agreed that at the time the defendant made his obligation to the state,

he paid to the State Treasurer one-fortieth of the purchase money for the land in suit.

Plaintiff introduced in evidence a certified copy of the original field notes of the survey in controversy, dated April 2, 1879, which showed that the survey contained 533 $\frac{4}{10}$ acres. He also introduced certified copy of the corrected field notes of the land in controversy from the Land Office, dated May 3, 1893, which showed that the section of land in controversy contained 1,191 acres, and introduced a certificate from the Commissioner of the Land Office to the effect that it appeared from the documents, papers, and files of his office that according to the corrected field notes, dated May 3, 1893, the survey contained 1,191 acres, and was approved and passed as correct on the map of Coke county for that quantity August 11, 1893. Plaintiff introduced the original classification and appraisal of school land in Coke county sent to him by the Commissioner of the Land Office and filed in the county clerk's office on the 3d day of May, 1901, which showed that the section in controversy was classified as dry grazing land and appraised at \$1 per acre, and that it contained 1,191 acres. Plaintiff introduced his application to purchase the land in controversy, which was dated September 22, 1903, as additional lands to his home section, which application was in the terms required by law; and also introduced his obligation to the state for the unpaid purchase money. The application was for the purchase of the entire section, containing 1,191 acres, and the obligation corresponded with the application in this respect. The application was filed in the office of the county clerk of Coke county on September 22, 1903, was duly recorded and filed in the General Land Office September 24, 1903, and was marked "Rejected" September 28, 1903, by the Commissioner of the Land Office. It is agreed that the plaintiff made the payments required by law on his application.

The appellee's evidence is as follows:

An application to purchase the land in suit, dated February 8, 1901, which describes the land as section No. 16, block W, certificate 2/1553, grantee, Texas & Pacific R. R. Co., containing 533 $\frac{3}{4}$ acres, price per acre \$1, and classified as dry grazing land. The application contained the proper affidavit required, which application had attached to it two obligations, payable to the state of Texas which described the land as all of section 16, block No. W, certificate No. 2/1553, Texas & Pacific R. R. Co. in Coke county, Tex. The first note or obligation attached to the application was payable to the state of Texas in the sum of \$519.12, and it is agreed that this was the note that was originally made and accompanied the application of February 8, 1901. The second obligation was the same as the first, with the exception that it was for the sum of \$1,161.23. This obligation was pasted to the application, and it is agreed that this last obligation was not executed by the ap-

*Writ of error denied by Supreme Court February 8, 1906.

pellee, McCabe, and filed in the Land Office until March 11, 1901, at which date it was filed in the office, and was indorsed on the back of the application by the commissioner: "Awarded, 3/23/01." We construe this word, together with the figures just stated, to mean that the excess in the survey was awarded to appellee on the 23d day of March, 1901. There was next introduced in evidence the certificate of award sent appellee by the Commissioner of the Land Office, which is as follows: "Austin, Texas, 3/23/01. F. S. McCabe, Robert Lee, Texas. This is to notify you that the following described land has been awarded to you, as per your application to purchase under act approved April 16th, 1895, as amended by act of May 19th, 1897. This sale dates to you 2/11/01 [which expression we construe to mean that the sale of the excess would be considered by the commissioner as dating back to the 11th day of February, 1901.] Section 16, block W, certificate 2/1553, Texas & Pacific R. R. Co., 533% acres Coke County." There was next introduced in evidence the following letter from the Commissioner of the Land Office, of date March 1, 1901, to appellee McCabe: "You are advised that your application for section 16 and 78 in block W, T. & P. R. R. Co., in Coke county, filed in this office 2/11/01 stands suspended, for the reason that section 16 contains 1,191 acres. Hence we will have to ask that you make a new obligation if you want all of the survey, for \$1,181.23, and send an additional \$16.09 to the state treasurer as first payment, or make a new application and obligation, and apply in multiples of 80 acres, as you have applied for 533%. We cannot sell that amount to you unless we sell all of the unsold part of the survey. If you make obligation for the whole amount as above stated, date the same with your application, which is February 8th, 1901. You will also be required to file affidavit that you are over twenty-one years of age. When you write us in regard to the matter, please refer to your suspended application." There was next introduced a letter of date March 6, 1901, to the Commissioner of the Land Office from appellee McCabe, in reply to the above letter, as follows: "Enclosed find new obligation of me to purchase the land therein fully described in the obligation, for I want to purchase all of section 16. Also find my affidavit to the effect that I am over twenty-one years of age. And further I desire to state to you that I this day mailed to the state treasurer, the \$16.09, that you stated would be necessary to complete the first payment thereon. See your letter to me dated March 1st, 1901, and suspended application. Hoping that this may be sufficient, but in case there is anything lacking, please write me at once at Robert Lee, Texas, and I will at once respond to same."

Appellee next introduced a letter of January 30, 1903, from the Commissioner of the Land Office to the State Treasurer, as fol-

lows: "You are advised that as per corrected field notes, section 16, block W, T. & P. R. R. Co. certificate 2/1553, Coke county, originally sold to F. S. McCabe for 533% acres, now contains 1191 acres, and you are authorized to accept payment in accordance with this increased acreage." Appellee introduced in evidence a certificate of the Commissioner of the Land Office that there appeared from the papers, documents, and records of his office the following facts: That section 16 was classified as dry grazing land and valued at \$2 an acre, under the school land act of April, 1887, and was on the market for sale at that classification and valuation until after the passage of the school land act of April, 1895, and that after that time, and prior to the amendment of said act in 1897, the section was classified as dry grazing land at \$1 an acre, and that such was its classification and valuation until the same was awarded to the appellee, McCabe, on his application filed in the General Land Office February 11, 1901. It was further certified by the Commissioner that it appears from the files and records of his office that all of section 16, the land in controversy, containing 1,191 acres, as per the corrected field notes of May 2, 1903, was sold and awarded to the appellee, McCabe, and that his purchase is in good standing in the Land Office. Appellee introduced a letter of date January 3, 1903, from the Commissioner of the Land Office, to the following effect: That the Commissioner had examined into the purchase of section 16 by appellee, and he informs the appellee that the sale should have originally been for 1,191 acres, instead of 533% acres, which the letter states was awarded to appellee, and concludes with this statement: "You will please write to the state treasurer and ask him what amount is necessary for you to pay in order to place the 1191 acres in good standing, if it is not so now under Articles 4274 and 4275, Revised Statutes of 1895. The purchaser of this section was entitled to purchase the entire tract, which it seems you applied for originally, but of course not knowing how much was in the entire tract, you only gave your obligation for the original survey, but later sent your obligation including its excess."

The appellee next offered in evidence the following certificate of the Commissioner of the Land Office: "I, John J. Terrell, Commissioner of the General Land Office of the state of Texas, do hereby certify that the papers, documents and records of said office show the following facts: (1) That F. S. McCabe did on February 11th, 1901, file in said office an application for the purchase of all of section 16, block W, T. & P. Ry. Co., certificate 2/1553, in Coke county, and describing same as containing 533% acres and classed as dry grazing and offering \$1 per acre therefor. (2) That on March 1st, 1901, the said F. S. McCabe was notified by said office that the said survey contained 1,191

acres and that he must make an obligation for \$1,161.23 and remit to the State Treasurer \$16.09 more money as balance of first payment if he wanted the entire survey. (3) That on March 1st, 1901, the acreage of the said section 16 was changed on the classification and appraisal sale record of school lands from 533% acres to 1,191 acres, as per the approved corrected field notes on file in said office. (4) That on March 11th, 1901, the said McCabe filed in said office a new obligation for the entire 1,191 acres and informed the said office by letter dated March 6th, 1901, and received in said office March 11th, 1901, that he wanted the entire survey and had remitted to the State Treasurer the balance of \$16.09 on first payment for same. (5) That on March 12th, 1901, the State Treasurer was advised of the acceptance of the said application for the said section 16; but in that advice the acreage was given as 533% A. (6) That on March 20th, 1901, the State Treasurer filed in this office his receipt for first payment in accordance with the notice to him of March 12th, and that the award of said section to the said McCabe was formally issued March 23d, 1901. (7) That the award or sale of the said section 16 to the said F. S. McCabe was hereafter entered in the book of final entry or index, as being all of the section and containing 1,191 acres, and the wrapper containing the application, receipts and other papers pertaining to said award or sale was indorsed as being made for 1,191 acres. (8) That on January 29th, 1903, this award or sale of section 16 was investigated and the State Treasurer was advised, on January 30th, 1903, that the survey contained 1,191 acres instead of 533% acres, and that he was authorized to accept payment accordingly. (9) That on January 30th, 1903, the said F. S. McCabe was advised as to the increase or excess in the survey and to confer with the State Treasurer as to the amount necessary to cover the excess. (10) That on March 30th, 1903, the State Treasurer filed in this office his receipt for \$16.45 as payment on the principal and \$5.65 as balance of interest on the said purchase of section 16 by the said F. S. McCabe. (11) That the said award or sale of said section 16 to the said F. S. McCabe is now in good standing in his name on the records of said office for 1,191 acres."

Appellee introduced in evidence the certified copy from the Land Office of the classification and appraisalment of the land in controversy under the act of 1895, which showed that the survey in controversy was placed on the market as containing 533% acres, as dry grazing land, valued at \$1 per acre; and in this connection offered in evidence the classification and appraisalment on file in the county clerk's office of Coke county, showing that all of section 16 was originally classified and placed on the market as containing 533% acres. There are some other facts in the record, but they merely tend to

show that the Commissioner of the Land Office and the State Treasurer recognized the title of appellee to the full 1,191 acres, and that he had made his obligations and made payment, as required, for that amount, after being notified that the survey contained the excess, as shown by the evidence. And it appears from the facts that the original intention of the appellee was to purchase all of the entire section No. 16, and his obligation states that it is for all of section 16. As soon as he was informed of the excess in the survey, he took the steps required, under the instructions of the Commissioner of the Land Office, to purchase the same; and we conclude, as matter of fact, that prior to May, 1901, when the appellant claims that he had made the application which was rejected, the appellee had acquired a superior right to the land.

Appellant's first assignment of error is to the effect that the court erred in not permitting him to introduce in evidence an application to purchase the land in controversy, of date May 3, 1901. It is unnecessary to set out the terms of this application, but we think, conceding that there was an excess, and admitting the theory of appellant to be correct, that the excess had not been previously purchased by appellee, we think the ruling of the court in excluding the application is justified by the case of *Willoughby v. Long*, 96 Tex. 194, 71 S. W. 545. But, however, in view of our findings of fact, the admission in evidence of this application would not have aided the plaintiff's case, because, under the facts as stated in the record, we have reached the conclusion that the appellee acquired a superior right over appellant to all of the entire section, prior to the date of this application.

We overrule appellant's second assignment of error. We are inclined to the opinion that that part of the certificate that is objected to was properly admitted in evidence. The word "remarks" was intended by the Commissioner to explain some words contained in the certificate, which would possibly have been meaningless, unless the explanation was given. We cannot say to what extent the trial court considered the explanation made by the Commissioner under the head of "remarks," but it was clearly admissible for the purpose of indicating that the Commissioner, in framing his certificate, did not intend to certify that the land in controversy was on the market. The word "remarks" referred to McCabe, which indicated, in view of the statement, that McCabe was the purchaser of the survey in controversy. And, if this was true, it could be considered by the court for what it was worth, as indicating that it was not the purpose of the Commissioner to certify that the land in controversy was on the market for sale.

The third assignment of error is overruled. Objection is there urged to the admis-

sion of the entire certificate of the Commissioner of the Land Office. That certificate embraces a number of facts which, it is claimed, appear from the records and files of the Land Office. While it is more than likely, if we were called upon to so decide, we would hold that some of the facts certified were not matters that could be properly embraced in the certificate, it is clear that a part of the facts stated could have been taken from and appeared of record in the Land Office. The Commissioner is empowered by law to give a certificate of any fact that appears of record in his office. Now, the objection is to the whole of this certificate. A part of it being admissible, the appellant is in no position to urge the objection in this court that it should be excluded. But if the entire certificate had been excluded, the ruling would not have benefited the appellant, because there is enough uncontradicted evidence in the record, independent of the certificate, to establish the appellee's superior right to the land.

We overrule the appellant's fourth and fifth assignments of error. The land was properly on the market for sale as \$1 an acre, and was properly sold to the appellee. His original purpose and intention was to acquire title to the entire section, and as soon as the excess was discovered he took steps promptly to purchase same prior to the time that appellant attempted to acquire any right. The land was awarded to the appellee, and the authorities who are required to sell and to receive the purchase price have recognized the existence of his superior right, which is in good standing in both the departments that have jurisdiction over that matter. The small amount which was not paid by appellee is too trifling to be noticed; but, however, his obligation is treated by the treasurer as being for the full purchase price.

We find no error in the record, and the judgment is affirmed.

Affirmed.

BRYSON & HARTGROVE et al. v. BOYCE et al.*

(Court of Civil Appeals of Texas. Jan. 24, 1906.)

1. EVIDENCE—BEST AND SECONDARY EVIDENCE—FOUNDATION.

Where an unrecorded contract for the sale of land was made in duplicate, parol evidence of the terms thereof was inadmissible because of the alleged loss of one of the duplicates, without an effort being made to account for the nonproduction of the other.

2. VENDOR AND PURCHASER—UNRECORDED CONTRACT—PENDENTE LITE PURCHASER.

Where plaintiff, in a suit involving the title to certain land contracted to be conveyed by the defendant in such action to another by an unrecorded contract, had no notice thereof at the time the suit was brought, the purchaser

under such contract would be regarded as a purchaser pendente lite.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lis Pendens, § 31.]

3. LIS PENDENS—PURCHASERS PENDENTE LITE.

Where a writ of error was sued out within the period provided by law, lis pendens continued, and a deed to the property in controversy made between the date of the judgment and the suing out of the writ of error rendered the grantees purchasers pendente lite.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lis Pendens, § 30.]

4. SAME—DISMISSAL OF ACTION—CROSS-BILL—PENDENCY.

Where in an action to quiet title defendant's grantor defended and filed a cross-bill claiming title to the land, the fact that plaintiff's suit was dismissed for want of prosecution did not preclude the cross-bill from operating as a lis pendens during the time plaintiff was entitled to, and did, prosecute a writ of error from a judgment on such cross-bill.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Lis Pendens, §§ 28-32.]

5. JUDGMENT—VACATION—JURISDICTION.

Where a judgment was void for want of service on one of the defendants, it was proper for the court to set the same aside, although it appeared that such defendant had no further interest in the land in controversy.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 686.]

6. SAME—COLLATERAL ATTACK.

Where the record of a judgment on a cross-bill showed that it was rendered on the same day that the cross-bill was filed, so that service could not have been had and that the persons against whom the judgment was rendered did not appear, it was subject to collateral attack.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 926, 927.]

7. LANDLORD AND TENANT—ADVERSE POSSESSION BY TENANT—NOTICE.

Where a tenant purchased the leased land at tax sale, it was necessary to set the statute of limitations running in its favor under such claim that it should repudiate its tenancy by notice to the landlord.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 204-209.]

8. APPEAL—ASSIGNMENTS OF ERROR—EXCLUSION OF EVIDENCE.

An assignment of error to the exclusion of evidence, which failed to state the objections interposed thereto, will not be considered on appeal.

9. EVIDENCE—BEST AND SECONDARY EVIDENCE—NOTICE TO PRODUCE.

A notice to produce letters written by R. to "B. and M." was insufficient to require the production of letters written by R. to M.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 645.]

10. APPEAL—HARMLESS ERROR.

Where, in an action to recover certain land, the court found that plaintiff, about the date stated in a letter, learned through correspondence with R. that the land had been sold for taxes and purchased by a tenant, defendant was not harmed by the court's refusal to require the production of letters under a notice for the purpose of proving the same fact.

11. QUIETING TITLE—RELIEF TO PLAINTIFF—RENTS AND PROFITS.

Where, in an action to quiet title, plaintiff was adjudged the owner of the land and recovered a judgment for the title and possession against defendants, judgment was also properly

*Writ of error denied by Supreme Court May 9, 1906.

rendered in her favor for the rental value of the land during defendants' possession, as provided by Rev. St. 1895, art. 5273.

Appeal from District Court, Concho County; John W. Goodwin, Judge.

Action by Mary F. Boyce and others against Bryson & Hartgrove and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The following statement of the nature and result of the suit contained in appellees' brief being substantially complete and accurate, is adopted: "The land in controversy was patented to R. P. Boyce, husband of appellee Mary F. Boyce, Dec. 29, 1875; who leased the same to appellant, the Concho Cattle Company of Texas, in 1887 for a period of five years. R. P. Boyce died in 1890, and in 1895, appellee Mary F. Boyce, by written instrument, leased the land to appellant the Concho Cattle Company for a period of five years, in consideration, among other things, that said appellant pay all taxes thereon for the entire period of said lease; that on the date of said lease, said appellee and her two children, Robert P. Boyce and Mrs. Roberta C. Lankford, were the sole owners of said land, and said appellee became the sole owner of same in 1898, by acquiring the interest therein of her said children. In 1897, during the existence of said lease, the land was sold for taxes under judgment rendered in the district court of Concho county, at the March term, 1897, at the suit of the state against unknown owners and appellant, the Concho Cattle Company of Texas, became the purchaser. On October 29, 1900, appellees Mary F. Boyce and H. Masterson (the latter holding the legal title to the land by warranty deed from his co-appellee), filed their suit in said court against appellant the Concho Cattle Company to vacate, annul, and cancel said tax judgment, sale, and deed, to remove cloud and for the possession of the land. At the April term, 1901 of said district court, said cause was called for trial, on the 11th day of April, and said appellant on said date appeared and filed therein its original answer and cross-bill, and appellees failing to appear were nonsuited and judgment rendered against them in favor of said appellant, on its cross-bill, on the date same was filed, the judgment reciting the nonappearance of appellees. At the suit of appellee Mary F. Boyce against her co-appellee H. Masterson, judgment was rendered in favor of the former in said district court on the 31st day of March, 1902, divesting all title to the land in controversy out of said Masterson, and vesting same in said Mary F. Boyce; and on same date appellee Mary F. Boyce filed her petition for writ of error in said cause No. 378, in which she had been nonsuited, and in which appellant the Concho Cattle Company recovered judgment against her on its said cross-bill. That said judgment was reversed and cause remanded as to appellee Mary F.

Boyce by the Court of Civil Appeals for the Third Supreme Judicial District of Texas on the 22d day of October, 1902. 70 S. W. 356. On the 31st day of March, 1903, appellee Mary F. Boyce filed in said cause No. 378 her first amended original petition, the only difference in the amended and original petitions being that in the latter she appears as warrantor for her coplaintiff Masterson, and in the former she appears alone, alleging that she holds the legal title to the land; but in all other respects the form of action, the purpose of the suit, the subject-matter of the suit, the parties plaintiff and defendant, remained the same. On the 31st day of March, 1903, appellant the Concho Cattle Company filed in said cause No. 378, its first amended original answer, alleging as in the original, title in itself, and specially pleading its title under said tax judgment. And on said last date, judgment was rendered in said cause No. 378 in favor of appellee Mary F. Boyce against appellant the Concho Cattle Company, vacating and annulling said tax judgment and sale thereunder, and canceling the sheriff's deed and for recovery of the land, etc. That after the Concho Cattle Company had recovered judgment on its cross-bill in cause No. 378, as above stated, and before appellee Mary F. Boyce filed her petition in said cause for writ of error, as above stated, said company made a deed of conveyance of the land in controversy to appellants Bryson & Hartgrove, which deed bears date June 14, 1901. Appellees Mary F. Boyce and H. Masterson filed this suit in the district court of Concho county against appellants Bryson & Hartgrove and the Concho Cattle Company of Texas, on the 26th day of September, 1904, for the recovery of said land, specially pleading all the matters hereinbefore set out. Appellants Bryson & Hartgrove filed in said cause their first amended original answer on the 8th day of April, 1905, and appellant the Concho Cattle Company filed its answer on same date, adopting the answer of its co-appellants, and on same date appellees filed their first supplemental petition; and on same date appellants Bryson & Hartgrove filed their first supplemental answer; and on same date said cause was tried by the court without a jury, resulting in a judgment in favor of appellees against appellants. From this judgment appellants have appealed, and only appellants Bryson & Hartgrove have filed brief in said cause."

T. C. Wilkinson, for appellants. C. O. Harris and M. C. Smith, for appellees.

EIDSON, J. (after stating the facts). Appellants' first assignment of error complains of the exclusion by the court below of the testimony of certain witnesses offered by them to prove the existence and contents of an alleged lost unrecorded executory contract of sale made by the Concho Cattle Company to them of the land in controversy in June,

1900. The testimony was excluded upon objections by appellees on the grounds that same was immaterial, and that proper diligence to procure the original contract had not been shown as a basis for the admission of secondary evidence. The court below appended to the bill of exceptions taken to its action in excluding this testimony, a statement to the effect that the evidence showed the contract to have been executed in duplicate, and that the Concho Cattle Company, one of the defendants in this case, or its president, received one copy, and no effort was made to account for the nonproduction of that duplicate original; that said company is a party to this suit, and Bryson & Hartgrove claim the land under it. The action of the court in excluding said testimony was correct, because there was no proper predicate shown for the admission of said testimony. The court, in further explanation of its said action, also appended to said bill of exceptions a statement to the effect that the evidence shows that the conveyance of the land in question to Bryson & Hartgrove was after the judgment in the suit to set aside the tax sale, but before the time for suing out a writ of error had expired; that the evidence also showed that for several months before defendants received the deed to the land in question, the suit to set aside the tax sale had been filed and was pending; that the evidence further showed that the only title the Concho Cattle Company had to the land in question was the tax judgment and deed, to set aside which, the suit had been filed before defendants had obtained their deed; that if the Concho Cattle Company had any other title, it is based upon their judgment against Masterson in the suit brought against the Concho Cattle Company by Masterson and Mrs. Boyce. It also appears from the record that the cross-bill of the Concho Cattle Company had been filed in said suit brought by appellees to set aside the tax judgment and sale under which said Cattle Company claimed the land in controversy and judgment obtained by it on said cross-bill for said land prior to the execution by it of the conveyance under which appellants claimed the land, and that said suit instituted by said cross-bill was pending at the date of the execution and delivery of said conveyance. It does not expressly appear from the record whether or not the executory contract set up by appellants and sought to be proven was recorded, but it inferentially appears that it was not, and there is no testimony tending to show that appellees had actual notice of said contract. Indeed, the testimony negatives the fact of such notice until the trial of this cause. The authorities hold that one claiming under an unrecorded deed at the time suit is commenced involving title to the land conveyed by the deed, of which unrecorded deed the litigant has no notice, is placed in the category of a pendente lite purchaser. Bennett

on *Lis Pendens*, 342; 13 Am. & Eng. Ency. Law, 907; Freeman on Judgments (3d Ed.) § 201; Hoyt v. Jones, 31 Wis. 389-403. It not appearing that the instrument sought to be proven by the testimony of these witnesses was recorded, or that appellees had actual notice of the same at the commencement of the suit, the exclusion of proof of its execution and contents was not error.

Appellants, by their second and third assignments of error, complain of the conclusions of law of the court below in holding that the suit of Mrs. Boyce and Masterson was pending on June 14, 1901, when Bryson & Hartgrove purchased the land in controversy, and that they were *lis pendens* purchasers from the Concho Cattle Company and stand in the shoes of the Concho Cattle Company, and that the judgment in favor of said Concho Cattle Company and against H. Masterson on the cross-bill of said company, being without service or notice or appearance of said Masterson, was, as to said company, void, and also void as to said Bryson & Hartgrove, who were *lis pendens* purchasers; and that for the same reason (*lis pendens*) the judgment in favor of Mark F. Boyce and against the Concho Cattle Company, setting aside said tax judgment and recovering said land, was valid and binding on Bryson & Hartgrove.

Appellants, under these assignments, claim that appellees' suit to set aside the tax sale of the land to the Concho Cattle Company, was not prosecuted with reasonable diligence, in that appellees failed to appear when the case was called for trial, and permitted the same to be dismissed for want of prosecution; and on this account the suit ceased to be operative as a *lis pendens*. The writ of error having been sued out within the period provided by law, *lis pendens* continued; and the deed under which appellants claim having been made and delivered between the date of the judgment and the suing out of the writ of error, appellants were purchasers pendente lite. *Randall v. Snyder*, 64 Tex. 350; *Harle v. Langdon's Heirs*, 60 Tex. 564. If it be conceded that the judgment dismissing appellees' suit for want of prosecution put an end to that suit, the action of Concho Cattle Company, under whom appellants claim, instituted by its cross-bill, which involved the title to the land in controversy, was pending at the time of the execution and delivery of the conveyance under which appellants claim; and hence, they were pendente lite purchasers as to that action. *Harris v. Schlinke*, 95 Tex. 90, 65 S. W. 172; *Bennett on Lis Pendens*, 379. It was unnecessary, in order to constitute the cross-action of the Concho Cattle Company a *lis pendens* as to it and parties holding under it, to have service of such cross-action upon appellees, said company being plaintiff in said cross-action. *Smith v. Olsen*, 92 Tex. 183, 46 S. W. 631; *Bennett on Lis Pendens*, 379. The action of the Concho Cattle Com-

pany by its cross-bill being lis pendens at the time of appellants' purchase from it, appellee Mary F. Boyce's amendments of her pleadings in said cross-action did not destroy its character as lis pendens.

Appellants' fourth and fifth assignments of error are not well taken. The action of the court complained of could not injuriously affect appellants. The judgment of the Concho Cattle Company against H. Masterson being void for want of service of citation upon him; there was no error in the action of the court in so holding, and decreeing that same be set aside and vacated, although it appeared from appellees' pleadings that H. Masterson no longer had any interest in the land in controversy. It was relief that might be properly given under the pleadings and evidence to appellee Mary F. Boyce. The record shows that judgment was rendered on the same day that the cross-bill was filed; therefore, service could not have been had. The record also shows that appellees did not appear. The judgment could, therefore, be attacked collaterally at any time. *Roller v. Ried*, 87 Tex. 76, 28 S. W. 1060.

Appellants' sixth and seventh assignments of errors are overruled. It was necessary for the Concho Cattle Company, in order to set the statute of limitations running in its favor, to repudiate its tenancy under appellee Mary F. Boyce, and give her notice thereof; and the testimony in the record does not disclose that this was done at a time that would be sufficient to bar said appellees' right to recover the land. *Udell v. Peak*, 70 Tex. 351, 7 S. W. 786; *Flanagan v. Pearson*, 61 Tex. 302; *Carter v. La Grange*, 60 Tex. 638. Appellants being pendente lite purchasers as to the action brought by the cross-bill of the Concho Cattle Company, could only be entitled to such rights as the Concho Cattle Company acquired under the final judgment in that suit; and such judgment being against it, the fact that H. Masterson was not made a party to said cross-action would not be of any avail to appellants.

Appellants' eighth assignment of error does not state the objections interposed to the evidence excluded, and on that account, is not required to be considered by us. But, in our opinion, there was no error in the action of the court complained of in said assignment. The notice to produce letters written by Ratchford to Mary F. Boyce and H. Masterson did not require the production of letters written by Ratchford to H. Masterson. And further, if the action of the court in excluding said testimony was error, it was harmless, as the court in its findings of fact found that appellee Mary F. Boyce, about the date stated in the letter, learned through correspondence with Ratchford that the land had been sold for taxes and bought in by the cattle company.

Appellants' ninth assignment of error is overruled. As above stated, the record in the suit in which the Concho Cattle Company

obtained judgment on its cross-bill against Mary F. Boyce and H. Masterson affirmatively shows that no service was had on them or either of them.

Appellants' tenth assignment of error is not well taken. The testimony, the admission of which is complained of in this assignment, was admissible in this suit to prove that both the legal and equitable title to the land in controversy was in Mrs. Boyce at its institution. And the action of the Concho Cattle Company by its cross-bill involving the title to said land, being lis pendens at the time of appellants' purchase, they were affected thereby as pendente lite purchasers, independent of the character of title under which appellee Mary F. Boyce was defending against said action of the Concho Cattle Company.

For reasons already stated, we overrule appellants' eleventh assignment of error.

Appellants' twelfth assignment of error complains of the action of the court below in rendering judgment in favor of appellee Mary F. Boyce against appellants for the sum of \$64, as rents on the land in controversy. There was no error in this action of the court. Appellee Mary F. Boyce, being the owner of the land, and having recovered judgment for the title and possession thereof against appellants, was entitled to the reasonable rental value thereof while in their possession; and the court having found as a fact that such value was five cents per acre per annum for the years 1902, 1903, and 1904, was authorized to render judgment in said appellee's favor for said amount. *Rev. St. 1895, art. 5273.*

There being no reversible error pointed out in the record, the judgment of the court below is affirmed.

ATCHISON, T. & S. F. RY. CO. et al. v. NATION & SLAVENS.*

(Court of Civil Appeals of Texas, Jan. 8, 1906. Rehearing Denied Jan. 31, 1906.)

1. CARRIERS — CONNECTING CARRIERS — ACTIONS—INSTRUCTIONS.

In an action against connecting carriers for injuries to a shipment of cattle, a charge that it was the duty of defendants to exercise ordinary care in transporting the cattle, and if defendant's or either of them, were guilty of negligent delays or negligent handling, "such defendant so guilty of negligence would be liable for the injury caused by its negligence," especially when considered with a further charge expressly stating that each defendant was liable only for any negligence and unreasonable delay occurring on its own line, was not subject to the objection of directing the jury to find against defendants damages resulting from the combined negligence of themselves and their co-defendants.

2. SAME.

Nor was the charge, in view of evidence of a settlement made by one of the defendants for the damage done by it alone, subject to the objection of authorizing a recovery of double damages by authorizing a recovery for the entire damage from defendants who had not settled.

*Writ of error denied by Supreme Court March 1, 1906.

3. SAME—EVIDENCE—SETTLEMENT BY CARRIER.

Where a shipment of cattle over the lines of connecting carriers was an interstate shipment, and the liability of each carrier was limited by contract to the damage occurring on its own line, so that their liability was several and not joint, evidence of the amount paid by one of the carriers in compromise of a claim for damages resulting from its negligence was inadmissible in an action against the other carriers for injuries to the cattle caused by their negligence.

4. SAME—LIABILITY OF CARRIER—ACT OF GOD—CONCURRING NEGLIGENCE OF CARRIER.

Where the negligence of a carrier, intrusted with a shipment of cattle, exposes the cattle to inclement weather, the carrier is liable for the resulting damage, although the weather also contributed to such damage.

5. SAME—CONNECTING CARRIERS—ACTIONS—APPORTIONMENT OF DAMAGES.

In an action against connecting carriers for injury to cattle transported by them under contracts limiting the liability of each carrier to its own line, it was not necessary for the court to require the jury to first find the whole amount of damage sustained along the entire route from the initial to the terminal point of transportation, and to then estimate the damage caused by each carrier and divide the entire sum found against all in proportion to the several amounts found against each.

6. DAMAGES—EVIDENCE—MARKET VALUE.

On the issue of the value of property at a certain place, at which there is no market value, proof of the market value at other places, together with the cost of transportation to the place in question, is admissible.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Nation & Slavens against the Atchison, Topeka & Santa Fé Railway Company and others. From a judgment for plaintiffs, certain defendants appeal. Affirmed.

J. W. Terry and Turney & Burges, for appellants. S. P. Weisiger, W. M. Peticolas, and Beall & Kemp, for appellees.

NEILL, J. This is a suit for damages to two trainloads of cattle, shipped by appellees from Marfa, Tex., to Bazaar, Kan., over the lines of the Galveston, Harrisburg & San Antonio Railway Company, the Texas & Pacific Railway Company, the Pecos River Railway Company, the Pecos Valley & Northeastern Railway Company, the Pecos & Northern Texas Railway Company, the Southern Kansas Railway Company of Texas and the Atchison, Topeka & Santa Fé Railway Company. All the railroad companies were joined in the suit as defendants, appellees alleging that they were partners and prayed for a joint and several recovery against them; but, in the alternative, that if any or all of defendants should be found not to be partners, that they have judgment against each defendant for such portion of the damages as was caused by it. The defendants each answered by general denial, and set up that the cattle were shipped under contracts limiting the liability of each company to the damage done on its own line; and the defendants Galveston, Harrisburg & San An-

tonio Railway Company, the Texas & Pacific Railway Company, the Pecos Valley & Northeastern Railway Company, and the Atchison, Topeka & Santa Fé Railway Company, each denied under oath the existence of any partnership among or joint liability between the defendants. There being no evidence tending to show a partnership such an issue was not submitted to the jury. Upon the trial, before all the evidence was introduced, appellees agreed with the Texas & Pacific Railway Company upon a compromise of their claim as against it, the compromise being solely for such damages and exclusive of any that may have been incurred through the negligence of any or either of the other defendants, as accrued while the cattle were on its road. Such compromise being effected, a judgment of nonsuit in furtherance of the agreement was entered as to this the said railway company. Upon trial of the case, which was before a jury, after all the evidence was introduced, the court directed a verdict in favor of the Galveston, Harrisburg & San Antonio Railway Company. And the case being submitted upon the law and evidence as to the other defendants, a verdict was returned in favor of appellees against the Pecos River Railway Company for \$223; against the Pecos Valley & Northeastern Railway Company for \$223; against the Atchison, Topeka & Santa Fé Railway Company for \$446, and in favor of the Pecos & Northern Texas Railway Company. From the judgment rendered against them respectively upon the verdict for the several amounts found, the defendants against whom it was rendered have appealed to this court.

Conclusions of Fact.

The testimony incorporated in the record is exceedingly voluminous, and, as we have neither the time nor space to enter upon a discussion of it, and show in detail the specific facts sifted from the immense mass of testimony from which we have deduced our conclusions, we deem it expedient as well as sufficient to state here in a general way the conclusions of fact which we have reached, and, when we come to consider the several assignments, then state specifically such facts as may be pertinent thereto.

It is uncontroverted that on April the 28th, 1903, the appellees shipped from Marfa, Tex., 1,128 head of range cattle to be transported thence over the several lines of railway of defendant companies to Bazaar, Kan., the companies being connecting carriers and the Galveston, Harrisburg & San Antonio Railway the initial, and the Atchison, Topeka & Santa Fé Railway Company the terminal carrier. The cattle were shipped and carried over the several roads in two separate trains, 516 head in the first, and 612 in the second. In the contract of affreightment the liability of each defendant company was limited to such damages as might occur on its own line of railway, excluding any damage to the

cattle that might occur on the line of any road of its connecting carriers.

The evidence is reasonably sufficient to warrant the jury in concluding that the cattle were in a reasonably fit condition for shipment and carriage from Marfa to their destination; and, that by negligent delay and rough handling by the respective railway companies against whom the several amounts of the damages found were separately assessed, the cattle were damaged by each of said companies alone in the amount assessed against it, which damage was reasonably shown by the evidence to be separate and distinct from any damage done to the cattle while in charge of or on the line of railway of any other defendant company.

There was no evidence tending in the least to show that any damage was caused the cattle by the Galveston, Harrisburg & San Antonio Railway Company from the time it received the cattle until it delivered them to its connecting carrier, the Texas & Pacific Railway Company, at Sierra Blanca, Tex.; and the jury were warranted in concluding from the evidence that no damage was done the cattle by the Pecos & Northern Texas Railway Company.

Conclusions of Law.

1. The court instructed the jury: "That if you believe from the evidence that said cattle, or any of same, were injured by being down and trampled upon by other cattle, then, and in that event, you cannot find any judgment against the lines between Pecos and Bazaar, by reason of the cattle being delayed and being down between Marfa and Pecos, Tex., or at Marfa, nor any judgment for the ill effect, if any, which accrued to such cattle in either train by reason of the same having been delayed at Marfa, if they were delayed, or by reason of any being down and trampled between Marfa and Pecos; but if you believe from the evidence, that said cattle, or any of same, were injured by delays, if any, at Marfa, or between Marfa and Pecos City, or by reason of rough handling, if any, between Marfa and Pecos City, yet you are further instructed that as to such cattle, if any, so injured as were delivered by the Texas & Pacific Railway Company at Pecos City to the Pecos River Railway Company, it became the duty of the said Pecos River Railway Company, and its connecting carriers beyond, handling said shipments, to exercise ordinary care to transport same with reasonable dispatch and to exercise ordinary care in the handling of same, and if such defendants, or either of them, was guilty of negligent delays in the transportation of same or negligent handling, proximately resulting in injury, such defendant, if any, so guilty of negligence, would be liable for the injury caused by its negligence, although the result may have been more disastrous than they would have been had the cattle

been in good condition when delivered by the Texas & Pacific at Pecos City."

The first assignment of error complains of this portion of the charge, the propositions asserted and insisted upon under it by appellants being as follows: "(1) This suit having been brought under the statute which permits a joinder of all carriers handling the shipment, the assessment of the entire damages en route and the apportionment thereof by the jury among the defendants, the court erred in peremptorily instructing the jury to find against these appellants or any of them, damages resulting from the combined negligence of the Texas & Pacific Railway Company or of the Galveston, Harrisburg & San Antonio Railway Company, and of these appellants or any of them, and the court should have instructed the jury that these appellants, and the Texas & Pacific Railway Company, and the Galveston, Harrisburg & San Antonio Railway Company were jointly liable for the damages resulting from their combined negligence and to find such damages and apportion the same under the statute. (2) The plaintiffs having settled with the Texas & Pacific Railway Company, and dismissed the suit as to it, the presumption is that that portion of the damages resulting from the concurring negligence of the Texas & Pacific Railway Company, and the subsequent carriers, properly chargeable to the Texas & Pacific Railway Company was paid by it, and the effect of the court's charge being to inflict the entire damage on the subsequent carriers, resulted in allowing the plaintiffs to recover twice for the same damages."

It is apparent, from reading the paragraph of the charge quoted, that it does not peremptorily instruct the jury to find against appellants, or any of them, damages resulting from the combined negligence of the Texas & Pacific or the Galveston, Harrisburg & San Antonio Railway Company, and appellants or either of them; but that it, as clearly as can be expressed in the English language, restricts the jury in its findings against each of appellants to "the injury caused by its negligence." If emphasis can possibly be given the restriction expressed in the paragraph of the charge referred to, it is accentuated in this paragraph of the charge: "And you are further instructed that you must not find against any of the defendants for any of the damages occurring to, or any loss by death of said cattle by reason of any unreasonable delays, if any, or negligent handling, if any, or from any other causes, if any, arising while said cattle were being transported over the line of defendant, the Galveston, Harrisburg & Antonio Railway Company, or over the line of the said Texas & Pacific Railway Company and before said cattle were delivered to the Pecos River Railway Company at Pecos City, for none of said defendants can be held liable for any damage of any character arising to said cattle, if any, by reason of negligent delays, if any, or negligent han-

ding, if any, or any other cause, before the said cattle were actually delivered by the Texas & Pacific Railway Company to the Pecos River Railway Company at Pecos City, Tex., * * * for, under the law, each defendant is only liable for negligence and unreasonable delays, if any, or negligent handling, if any, occurring on its own line of railway and not for delays or negligent handling of other defendants occurring on their line of railway. You are further instructed that you cannot find in favor of the plaintiffs against any of the defendants for any cattle that may have been dead at the time of the delivery by the Texas & Pacific Railway Company, to the Pecos River Railroad Company, at Pecos City, nor against any of the defendants for any damage that may have been caused to said cattle by reason of anything that transpired before such delivery at Pecos City."

As is observed in the well-prepared brief of appellees in their counter proposition under this assignment: "All through the court's charge runs the direct statement, that the lines from Pecos to Bazaar could in no event be held liable for any damages done the cattle by the lines from Marfa to Pecos. The evident purpose and the correct construction of the charge complained of is that, although the appealing defendants may have received some cattle at Pecos which had been affected by their previous transportation, this fact would not relieve said defendants from using ordinary care to avoid further injury to them, and if they did, by the lack of ordinary care, further injure them, they would be liable for such further injury, but in no event could they be liable for any part of the injury inflicted, if any, on said cattle before the appealing defendants received them at Pecos." Rev. St. Tex. 1895, art. 1301; T. & P. Ry. Co. v. Slaughter, 84 S. W. 1085, 12 Tex. Ct. Rep. 99; G. C. & S. F. Ry. Co. v. Lee, 65 S. W. 55, 3 Tex. Ct. Rep. 154; I. & G. N. Ry. Co. v. Young (Tex. Civ. App.) 72 S. W. 68; T. & P. Ry. Co. et al. v. Dawson, 78 S. W. 236, 9 Tex. Ct. Rep. 63; P. & N. T. Ry. Co. v. Williams, 78 S. W. 5, 9 Tex. Ct. Rep. 17, 18, 19; Ft. Worth & D. C. Ry. Co. v. Alexander, 81 S. W. 1015, 10 Tex. Ct. Rep. 777, 778; T. & P. Ry. Co. v. Murtishaw, 78 S. W. 953, 9 Tex. Ct. Rep. 194; St. L. & S. Ry. Co. v. Ferguson, 64 S. W. 797, 3 Tex. Ct. Rep. 62; Parsons on Contracts, vol. 1 (9th Ed.) § 29.

The charge cannot possibly be construed as allowing a recovery of double damages. For such damages as may have accrued by reason of anything done or omitted by the Texas & Pacific Railway Company (regardless of what may have been the amount paid by it in settlement therefor), were expressly excluded by the charge and the jury limited in its findings against each several appellant to such damages only as were caused by it, excluding also any damage that may have been occasioned by any other one or more of the defendants. When the paragraphs of the charge quoted

are considered in connection with the testimony of the attorney of the Texas & Pacific Railway who made the settlement with appellees, which is to the effect that such settlement was exclusively for the Texas & Pacific Railway Company and covered such damages as was claimed by plaintiffs against it, and was exclusively for injuries claimed to have been done to cattle while in charge of said railway, the assurance is rendered doubly sure that the jury could not have included in their verdict any of the damages comprehended in such settlement.

2. There was no error in the court's excluding the evidence offered by appellants to show that the amount paid in the compromise by the Texas & Pacific Railway Company was \$450. The jury had before them all the evidence as to what damage was done on the Texas & Pacific Railroad and what damage was done on the lines of the several appellants. And as the amount paid on the compromise settlement was no criterion as to the quantum of damages caused by the Texas & Pacific Railway, for such damage may have been more or less than agreed upon in the settlement, and, if more, the admission in evidence of the amount paid might have prejudiced plaintiffs, and, if less, detrimental to appellants. As to what the damage caused by the Texas & Pacific Railway Company actually was, if necessary to be determined at all, could have been estimated by the jury from the evidence before them and then excluded as requested by the charge in estimating the damages caused by the several appellants. But we can perceive no reason why the amount of such damage should have been considered at all. For clearly under the law as given in charge, and from the evidence, the estimate of the amount of such damage could not in any way influence the jury or affect its verdict. The jury simply had to consider the condition of the cattle when received by each appellant railway and determine the difference in their value, if any, caused by the negligence of such railway, at the time they were received by it and when delivered to its connecting carrier, or, as to the terminal carrier, the difference in their value when received and when delivered by it to appellees at destination. It is true the jury could consider the damage done by the preceding carrier or carriers in determining the condition of the cattle when received by the succeeding carrier for the purpose of estimating the damage, if any, done by it. But further than to show the condition of the cattle when received by each appellant, it is wholly immaterial what amount of damage was done by its preceding carrier or carriers. But we cannot perceive upon what principle the amount of damages for which one connecting carrier is liable can be estimated from evidence of the amount for which a preceding carrier had paid on a compromise for damages done by it. As has been seen from our

statement of the case and conclusions of fact, the liability of each defendant was limited by contract to the damage occurring on its own line. Therefore, it being an interstate shipment, one of defendants could not under the contract be held liable for any other damage than occurred on its own line of railroad, and such damage as it could be held responsible for was separate and distinct from the damage caused by any or all of its other connecting carriers. And to that extent such damage was several, not joint nor did it extend to any other connecting carrier.

3. The third assignment complains of the following portion of the charge: "And you are further instructed that the defendants would not be liable for injurious results occasioned solely by extreme cold weather, if any there were, nor for ill effects, if any, accruing to the cattle solely by reason of heavy, cold rainfall, while the cattle were in transit, if you find there was any such heavy, cold rainfall, the effect of which might injure the cattle; but you are further instructed in this connection that if you believe from the evidence that there was cold weather or heavy or cold rainfall while said cattle were in transit, and believe from the evidence that said cattle or some were injuriously affected thereby, but believe from the evidence that there were negligent delays or negligent handling of said cattle by the defendant companies or any of them, after the delivery by the Texas & Pacific at Pecos, and that by reason of such negligence, if any, the cattle were the more exposed to or suffered the more from such cold weather or rainfall, if any, or you believe that such cold weather or rainfall, if any, concurring with negligent delay, if any, or negligent handling, if any, after said cattle were delivered by the Texas & Pacific, caused injury to the cattle, and you believe that such negligent delays, if any, or negligent handling, if any, was the proximate cause of the injury so received, that is to say, that, but for such negligent delays, if any, or such negligent handling, if any, or both, if any, the injury caused, if any, by such rainfall or cold, if any, would not have occurred, then, and in that event, you can take into consideration such rainfall or cold, if any, in arriving at the injury, if any, so occasioned to the cattle and the damage sustained thereby by plaintiffs, if any." We can perceive no error in this part of the charge. Under it the jury could not consider in estimating the damages, if any, caused by extreme cold weather, unless the negligence of appellants exposed the cattle to such weather and concurred with it in producing the injuries causing their damage. The rule is well settled that if the negligence of a common carrier concurs with the act of God in causing damage to the property entrusted to it for transportation, it is liable for the damage caused by such concurring negligence, although it may have been

contributed to by the vis major. It will be observed, from the part of the charge complained of, that no negligence in the delay or handling of the cattle before they were delivered by the Texas & Pacific Railroad at Pecos to its connecting carrier could be considered by the jury as concurring with extreme cold weather in causing the damage. In other words, if such negligence concurred in producing the damage, such damage was excluded and could not be considered in estimating the damage that any of appellants was liable for. Each appellant, under the charge, was only liable for such damage from cold weather as was occasioned by its negligence concurring therewith.

4. Our conclusion of fact, that there was no evidence tending to show any liability on the part of the Galveston, Harrisburg & San Antonio Railway Company for damages to the cattle, disposes of the fourth assignment of error which complains of the court's peremptorily instructing a verdict in favor of such company. We cannot appreciate the force of appellants' contention that the jury should have been required by the charge of the court to first find the whole amount of damage sustained along the entire route from the initial to the terminal point of transportation, and estimate the damage caused by each defendant and then divide the entire sum found against all among them in proportion to the several amounts found against each. The whole is equal to all of its parts and the sum of all of its parts is equal to the whole. Suppose the jury had been required to find the entire amount of damage done by all the defendants, then the amount caused by each and then assess against each the amount that it had caused; and, that under this method it had been determined that the sum of the damages caused by all of the defendants exceeded the sum assessed against all of the appellants, how would any of them have been benefited by it? For whatever the total sum of the damages may have been, no one of appellants could be held liable for more than the damage found to have been done by it. So the result would have been the same, and such is the judgment appealed from.

5. The testimony sought by appellants to be elicited from John Mitchell, the exclusion of which is made the basis of this assignment, is *res inter alios acta* and therefore irrelevant to any issue in this case.

6. The sixth, seventh, and eighth assignments of error complain of testimony introduced by appellees to show the value of the cattle when delivered at Bazaar, Kan. The undisputed evidence shows that the animals were not shipped there for market, and that they had no market value there. The rule is well settled that where the question is what was the value of property at a particular place, and there was no market value there, proof may be given of such value at other places with the cost of transportation

in order to enable the jury to deduce the value at the place in question. *Suth. on Damages* (2d Ed.) § 445. The testimony complained of falls within this rule and, under it, was clearly admissible.

7. What we have said in considering prior assignments of error disposes of appellants' ninth and tenth assignments, adversely to them.

There is no error in the judgment, and it is affirmed.

EULE v. DORN.*

(Court of Civil Appeals of Texas. Feb. 3, 1906.)

1. BILLS AND NOTES—PLEADING—PAYMENT.

In an action on certain notes, defendant pleaded that they were secured by a lien on defendant's rice crop, and that plaintiff agreed that if defendant would ship the rice to certain mills, instead of selling it at home, plaintiff would guaranty that the price received should be at least \$3.25 per sack, and that plaintiff would become liable to defendant for the difference between the proceeds of the sale at not less than the guaranteed price and the amount of the defendant's debt, and that the value of the rice so shipped, at \$3.25 per sack, amounted to more than the notes sued on. *Held*, that such allegations constituted a sufficient plea of payment as against a general demurrer.

2. COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—SET-OFF.

Where, in an action on certain notes, defendant pleaded in bar of plaintiff's right to recover in special paragraphs of the answer the delivery of certain rice under a contract with plaintiff, but did not seek to recover any amount on such contract in such paragraphs, the fact that the value of the rice so delivered exceeded \$1,000 did not defeat the jurisdiction of the county court to determine the question whether such agreement had been made and the rice delivered thereunder.

3. BILLS AND NOTES—RENEWAL—CONSIDERATION.

In an action on certain notes, an answer alleging that one of the notes was given in renewal of a note for a like amount, which had been satisfied under an agreement for the delivery and sale of rice, and that the renewal note was therefore void for want of consideration, was not subject to exception.

4. COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where, in a suit on certain notes, defendant pleaded payment by delivery of certain rice under plaintiff's guaranty that the same should sell for not less than \$3.25 per sack and his agreement to pay the balance of such proceeds after the extinguishment of the notes therefrom, and further alleged that the value of the rice so delivered exceeded the amount due on the notes by a sum within the jurisdiction of the county court, and sought to recover such excess as a counterclaim, such counterclaim was not beyond the jurisdiction of the court, though the total value of the rice exceeded the jurisdictional amount.

Appeal from Harris County Court; Blake Dupree, Judge.

Action by A. E. Dorn against William Eule. From a judgment for plaintiff, defendant appeals. Reversed.

Rehearing denied.

Baker, Botts, Parker & Garwood, and W. H. Kimbrough, for appellant. Lane & Higgins, for appellee.

*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

PLEASANTS, J. This suit was brought by appellee to recover the amount due upon two promissory notes executed by appellant. The first note declared upon was of date May 28, 1903, for the sum of \$500, and payable to appellee on October 15, 1903. There is a credit upon this note of \$225.62, entered on June 11, 1904. The second note was executed on April 14, 1904, and payable to appellee, in the sum of \$565.65, on September 1, 1904. Each of said notes bears interest at 10 per cent. from date, and contains the usual stipulation for the payment of 10 per cent. attorney's fees in event it is not paid at maturity and is placed in the hands of an attorney for collection. Each also recites that a lien is thereby given to secure its payment upon 500 sacks of rough rice out of the crop raised by the maker during the year in which the note was executed. The prayer of the petition is for recovery of the principal, interest, and attorney's fees due upon each of the notes and for foreclosure of said lien upon the rice above described.

The defendant answered by general and special demurrer, general denial, and several special pleas. The first special plea, which constitutes the fourth paragraph of the answer, is as follows: "Answering specially, if required to answer, defendant says that the notes sued on and mentioned in plaintiff's petition, have been wholly paid and discharged, according to their full terms, tenor and purport, and that they were so paid and discharged by the shipment by defendant from Katy, Tex., to Bayou City Rice Mills, at Houston, Tex., at the instigation and request of plaintiff, and upon his express representation and guaranty that the same should bring the defendant the net price of at least \$3.25 per sack, the following quantities of rough rice, to wit: On September 16, 1903, one car load, containing 190 bags of rice, which was received by said Bayou City Rice Mills on September 19, 1903; on September 22, 1903, one car load, containing 190 bags of rice, which was received by the Bayou City Rice Mills on September 25th following, and on September 23, 1903, one car load, containing 162 bags of rice, which was received by the Bayou City Rice Mills on September 27th, following—which said rice, at the minimum price so guaranteed by said plaintiff, amounted to more than the amount of defendant's indebtedness to said plaintiff, and said plaintiff agreed that the price of said rice should be applied to the payment of said indebtedness, so far as necessary to extinguish said indebtedness, and promised and agreed to pay to this defendant the remainder of the proceeds of said rice."

The fifth paragraph of the answer is as follows: "Further answering specially, if required to answer, defendant says that the note described in paragraph No. 2 in plaintiff's petition was given in lieu of a certain note dated July 20, 1903, for the principal sum of \$500, executed by this defendant, pay-

able to the order of the plaintiff herein, with interest at 10 per cent. per annum, and containing other provisions not necessary herein to mention, and that said note of July 20, 1903, had long prior to the execution of said note of April 14, 1904, been wholly paid off and discharged, according to the full terms, purport, tenor, and effect thereof by the shipment of rice by this defendant to the Bayou City Rice Mills, at the instigation and request of said plaintiff, and under his express guaranty that the same shall bring not less than \$3.25 per sack, and be applied to the payment of said note and other notes owing by plaintiff to defendant, so far as same should be necessary to extinguish said indebtedness, and plaintiff alleges that said rice, at said minimum price, was more than sufficient to pay off all of defendant's indebtedness to plaintiff, as is more fully shown in the preceding paragraph of this answer, the allegations of which are here now repeated as a part of this paragraph. And defendant alleges that said note of July 20, 1903, having been, in the manner above alleged, fully paid off and discharged, the execution and delivery of said note of April 14, 1904, in substitution and lieu thereof, was wholly and entirely voluntary on the part of this defendant, and that no consideration whatever was paid therefor by the plaintiff, or any other person, or received by this defendant from said plaintiff, or any other person. Wherefore defendant says that said note of April 14, 1904, described in said second paragraph of plaintiff's petition, is entirely void, and is wholly insufficient to sustain this suit."

The sixth and seventh paragraphs of the answer contain several unnecessary and insufficient averments, but the following facts are therein set out as constituting a defense to plaintiff's suit, and a counterclaim upon which judgment is sought against plaintiff: It is alleged, in substance, that in April, 1903, plaintiff agreed with defendant to let him have whatever money he might need in the cultivation of his rice crop during said year, and for such amounts as defendant might borrow from plaintiff he was to execute his notes to be paid out of the proceeds of said crop; that in pursuance of this agreement defendant borrowed from plaintiff \$500 on May 28, 1903, \$500 on July 20, 1903, and \$500 on September 16, 1903, for each of which amounts he executed his note to plaintiff, payable in the fall of that year; that after his crop of rice, which amounted to about 1,000 sacks, had been gathered, he had an offer to buy and could have sold it at Katy Station, near his home, at from \$3.25 to \$3.50 per sack, which was its market value, but upon plaintiff's guaranty that if he would ship the rice to the Bayou City Mills at Houston, Tex., and permit it to be milled and sold by said mills, and the proceeds applied to the payment of the indebtednesses due plaintiff, he would receive net for such rice not less than \$3.25 per sack, he declined to sell at

Katy, but, relying upon plaintiff's said guaranty, shipped 542 sacks of his rice to said mills as set out in his first special plea; that the value of said rice, at the price guaranteed by plaintiff, was \$1,761.05, but that said mills reported to him in January, 1904, that it had been sold for the sum of \$942.35, and, deducting charges and commissions due the mills, there only remained of said proceeds the sum of \$761, which amount was turned over to plaintiff and credited on the indebtedness due him by the defendant. "Defendant further avers that upon the receipt of said returns showing less than the price of \$3.25 per sack as the proceeds of said rice, the price which said plaintiff guaranteed that it should bring, defendant called upon said plaintiff, and informed him that said returns were entirely unsatisfactory, and reminded him of his express guaranty that said rice should bring a price of not less than \$3.25 per sack, and then and there demanded of said plaintiff that he should make said guaranty good, and demanded a settlement with him upon that basis, but plaintiff refused to so settle and from time to time continued to urge the defendant to bear a part of the loss which said returns showed on account of said rice failing to bring the price stipulated in said guaranty. Defendant at first refused to bear any part of said loss or to settle upon any other basis than the full amount of said guaranty, but plaintiff continued to urge defendant, and finally defendant was overpersuaded by said plaintiff, and did agree to release him in part from said guaranty, and for this purpose defendant did on or about the 14th day of April, 1904, make, execute, and deliver to said plaintiff the note of April 14, 1904, in lieu of the note of July 20, 1903, which had been delivered on or about the day of its date, and plaintiff thereupon canceled and delivered to defendant said note of July 20, 1903, indorsed across the face thereof: 'Paid by new note April 14, 1904. A. E. Dorn.' But defendant avers that said note of July 20, 1903, had been wholly paid and discharged as hereinbefore set forth, and the execution and delivery of said new note dated April 14, 1904, described in paragraph No. 2 of plaintiff's petition, which is one of the notes herein sued on, was wholly without consideration, and is void; and defendant alleges that by virtue of the facts hereinbefore alleged he is entitled to have the two notes herein sued on and the third note, due bill, or obligation, mentioned in the sixth paragraph of this answer, executed by defendant in favor of plaintiff, treated as wholly paid off, and discharged by said shipments of rice as heretofore set out and to have said notes and obligations canceled and surrendered up to him as fully paid and discharged, and he is further entitled to have judgment against the plaintiff for the balance of \$1,761.05, the value of said shipments of rice, computed at the guaranteed price of \$3.25 per sack, after deducting the

amount of said notes, with interest computed to said 27th day of September, 1903, the date on which the last of said three shipments of rice was received by said Bayou City Rice Mills, and defendant is further entitled to recover lawful interest of said plaintiff after said date on said balance, or if said plaintiff is unable to produce said third note, duebill, or obligation, to be canceled and surrendered up to this defendant, then that the defendant ought to have judgment against the plaintiff for the balance of \$1,761.05, after deducting the amount of said note of May 28, 1903, and said note of July 20, 1903, with interest computed to said 27th day of September, 1903, and interest on said balance at the legal rate from said last-mentioned date, and defendant therefore prays for judgment accordingly and for all such other relief, both legal and equitable and both general and special, as to the court may seem, meet and proper."

To these paragraphs of the answer the trial court sustained exceptions, on the ground that the counterclaim therein set up against plaintiff was for an amount beyond the jurisdiction of the court. The cause was tried by a jury, and a verdict and judgment rendered in favor of plaintiff for the amount claimed by him, with foreclosure of lien upon 285 sacks of rice which had been levied on under attachment. Most of the assignments of error contained in appellant's brief present in different form the one question of whether the trial court erred in sustaining the exceptions to defendant's answer, before set out, and it is therefore unnecessary to consider the assignments in detail.

We do not think the fourth or fifth paragraphs of the answer should be regarded as a plea of set-off or counterclaim. While the fourth paragraph sets up a contract liability of plaintiff to the defendant no recovery is sought thereon, but it is in effect averred that plaintiff had agreed that his liability to defendant on said contract should operate as an extinction of defendant's indebtedness to him, and this agreement is pleaded as a settlement or payment of plaintiff's demand. The averments are that the rice was shipped to the Bayou City Mills at the request of plaintiff, and upon his guaranty that it would bring not less than \$3.25 per sack, and that plaintiff agreed that the price of said rice should be applied to the payment of defendant's indebtedness to him so far as necessary to extinguish such indebtedness, and that he would pay to the defendant the remainder of the proceeds of said rice. We think, at least as against a general demurrer, this was a sufficient plea of payment. Allowing every intendment in favor of the pleader, the averments must be construed to mean that plaintiff agreed that if defendant shipped the rice to the Bayou City Mills, his indebtedness to plaintiff would thereby become extinguished, and plaintiff would become liable to defendant for the difference between the proceeds of

the sale of the rice, at not less than the guaranteed price, and the amount of defendant's indebtedness. We think these averments contain all the essentials of a plea of payment. It is immaterial that the rice was not delivered to plaintiff. If he agreed that its delivery to the mills would be accepted by him as a payment of defendant's indebtedness, such delivery would have that effect. If the allegations of this plea are true, it is clear that plaintiff's claim against defendant has been satisfied, and he is not entitled to recover thereon, unless the agreement pleaded was subsequently set aside or defendant waived his rights thereunder. The fact that the alleged value of the rice delivered under the agreement exceeded the sum of \$1,000 did not defeat the jurisdiction of the court to determine the question of whether the agreement had been made and the rice delivered thereunder. In such investigation, the court would not have been adjudicating a claim beyond its jurisdiction, since no recovery of any amount was sought by defendant, and the facts alleged were only set up in bar of plaintiff's right to recover.

The fifth paragraph of the answer repeats the facts set up in the fourth, and alleges further that the note of date April 14, 1904, was given in lieu of another note for like amount which had been satisfied and discharged by the agreement before alleged, and therefore said note of April 14, 1904, was void for want of consideration. We think it clear that neither of these pleas were subject to the exception which was sustained by the trial court.

The sixth and seventh paragraphs of the answer do not seek to have the court adjudicate a claim beyond its jurisdiction. The only recovery sought is for the difference between plaintiff's claim and the guaranteed price of the rice shipped by defendant under his agreement with plaintiff, and this difference is an amount within the jurisdiction of the court. There is no attempt here, as in the case of *Williamson v. Lumber Co.* (Tex. Civ. App.) 82 S. W. 340, to have the court adjudicate a claim for an amount beyond its jurisdiction, and when said claim has been established to offset a portion of it against plaintiff's demand, and thereby reduce the sum for which judgment is sought to an amount within the jurisdiction of the court, but the averments are that plaintiff's claim had been paid by the delivery of the rice under the agreement alleged, and that defendant is entitled to recover the balance due him under said agreement, which balance was an amount within the jurisdiction of the court. We think the cases of *Dalby v. Murphy*, 25 Tex. 354, and *Gimbel v. Gomprecht*, 89 Tex. 497, 35 S. W. 470, sustain our conclusion that the trial erred in sustaining the exceptions to the answer.

None of the assignments of error, except those presenting the question above considered, present any material error, and it is un-

necessary to discuss them. For the error above indicated, the judgment of the court below is reversed, and the cause remanded.
Reversed and remanded.

DAVIS v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. Jan. 13, 1906. Rehearing Denied Feb. 3, 1906.)

1. RAILROADS—ALLOWING CHILDREN ON TRAINS—DUTY OF EMPLOYEES TO USE ORDINARY CARE.

Where for two or three years small boys of immature years had habitually frequented a railroad yard and had persistently ridden on freight trains there, to the knowledge of the railway employes, it was the duty of the employes to use ordinary care to prevent injuring the boys, though they had attempted to stop the custom.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 880-883.]

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a boy between eight and nine years old, and of fair intelligence for his years, was of sufficient discretion to appreciate the danger of riding on freight cars in a railroad yard and guilty of contributory negligence, precluding a recovery for an injury received in consequence of jumping from a train there, was for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 917-920.]

3. SAME—NEGLIGENCE—QUESTION FOR JURY.

Evidence, in an action against a railway company for injuries received by a boy between eight and nine years old while riding on freight cars in a railroad yard, examined, and *held* that the question of actionable negligence on the part of the company in failing to use ordinary care to prevent him from getting on the train, and in failing to discover him while riding on the cars and avoiding injuring him, was for the jury.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 917-920.]

Appeal from District Court, Titus County; P. A. Turner, Judge.

Action by Harry Davis, by W. E. Davis, as next friend, against the St. Louis Southwestern Railway Company of Texas. From a judgment for defendant, plaintiff appeals. Reversed.

Pounders & Burford and Johnson & Edwards, for appellant. Glass, Estes & King and E. B. Perkins, for appellee.

RAINEY, C. J. This suit was brought by W. E. Davis, as next friend, for the use and benefit of Harry Davis, to recover damages from the appellee for personal injuries sustained by Harry Davis through the alleged negligence of appellee's employes. Defendant answered by general denial, and specially that if plaintiff was hurt he ought not to recover, because his own negligence caused and contributed to cause his injuries. "That he negligently and recklessly, and in known violation of defendant's rules, got on one of defendant's cars while the same was in motion, and negligently attempted to change his posi-

tion on said car, and negligently got in between the ends of two of the cars in its train while the same was in motion, and either negligently got off or fell off, without fault or negligence of the defendant." A verdict was directed for the defendant, which direction was complied with and judgment rendered accordingly. This action of the court is complained of, and whether or not the evidence was such as to warrant the court's action is the question for our decision.

There is evidence to the effect that appellee's yards and switches in Mt. Pleasant extended for a half mile or more north and south, and the depot and superintendent's office were situated beside these tracks. The residence portion of the town is about equally divided by these tracks, which tracks cross two or three streets; the principal one being south of and quite near the depot, and said street being much frequented and traveled by people living east of the railroad. Children living to the east commonly used this crossing in going to school. It was near this crossing that Harry Davis got upon the moving car by which he was injured. There was testimony by parties living near the tracks that almost every day for several years they could see quite a crowd of small boys, from 9 to 15 years, riding on the side of freight and passenger trains. They would hang on wherever they could get hold of the cars, on the steps of passenger trains, and on the back of the coal boxes of engines; they would hold with their hands to handholds, and let their feet rest on the trucks. That the railroad employes never interfered with the boys. There was testimony to the effect that the employes, whenever they saw the boys, would drive them away, and at times when the employes' backs were turned the boys would return and jump upon the cars. That the company at various times had instituted prosecutions against some of the boys for jumping upon and thus riding upon the trains. There was testimony which showed that the company had used means to prevent the boys from persisting in riding upon the freight cars, and it was shown that the porter of the passenger train had consented for the boys to get on and ride the passenger coaches around the Y. There was evidence that Harry Davis was between eight and nine years old at the time of the accident, and was a boy of fair intelligence for one of his years. He lived with his father east of the railroad, and the crossing above referred to was commonly used by Harry and other children in going to and from town and school. He and several other boys about his age, on the afternoon in question, were beside the company's track, near the street crossing and about 40 feet south of it. They were there about 30 minutes prior to the accident, near the track and the street and in plain view of the yards and switches and those operating the cars in that part of the yard. A portion of this time they had been standing around beside

the track, and a portion of the time sitting down on a bench in front of the yardmaster's office, a small room a few feet from the track. When they had been there some time, one of appellee's freight trains which was then switching in the yards was backed along the track and across the street near which these children were standing, and all the cars except two were uncoupled from the train and left there, and then the engine with the two cars started south, toward the main line. Just as the engine and cars started to move Harry Davis and Claude Turner, a boy a little older than Harry, got upon one of the cars; Claude Turner catching hold of the door of the car, with his feet on the rods underneath, and Harry Davis catching hold of the handhold on the side of the car and resting his feet on the stirrup underneath, and each of them thus holding to the side of the car, on the outside of the track, the right side going south, the side of the track next to the yardmaster's office. The boys thought the cars would be pulled out on the main line and would then be stopped or returned, but the engine and cars were being taken to the coal chute, situated some distance south and to reach which some trestles had to be crossed. When Harry Davis saw that the cars were not going to stop at the switch stand, that their speed was increasing, that they would cross these trestles, he became frightened, and, in undertaking to get off the car, fell and was injured. The train crew consisted of three brakemen, and engineer, fireman, and conductor. The conductor testified that, just before Harry Davis was injured, he "told all the little fellows to get away, that they must not be on the cars," but could not tell that they went away, but they disappeared from the place. He further testified, in reference to the movements of the train just prior to going to the coal chute, as follows: First, it had come in onto the house track and got some cars on that track; these cars had been taken down to the switch and shoved in on the main line. This was before the accident, but not before he had seen the boys there. All the time he saw Claude Turner trying to catch the car they were fixing to pull out from the house track. The train was in on the house track to get some cars, and they were fixing to pull out, when he saw Claude Turner. The boys were then at or about the crossing. Claude Turner was on the east side of the house track, and some of the other boys were on the other side of the train. There were some five or six little boys. After he took Claude Turner from the train, they pulled down about a hundred yards and shoved the cars in on the main line, and then came back to the house track and shoved some cars onto that track, and cut off two of the cars, and with them started to the chute. After he took Claude Turner from the train, he (the witness) walked over to the main line and got on top of the train and was on top when it came back on house

track. When the two cars were cut off he was on the second, and walked forward to the engine and rode on the engine to the chute. He also stated that: "When I said the boys started to town, I mean they started this way, toward town, and I did not see them any more. I did not observe where they went, or whether they all came in this direction, or whether some went east and some went west. The boys were something in the neighborhood of Harry's size. There were four or five of them about his age and size." Harry Davis, in speaking of the occurrence, says: "None of the trainmen or workmen down there did anything or said anything to us boys with reference to riding."

The evidence in this case, we think, was not such as justified the court in instructing a verdict for defendant. There was testimony that for two or three years small boys of immature years habitually frequented the yards and would persistently hang onto and ride on the freight trains when moving, and this was known to the employes of defendant, though the employes made some effort to stop the custom. Under the evidence, it was the duty of the train crew to use ordinary care to prevent injuring any of the boys, and it was a question for the jury to determine whether or not Davis was of sufficient age and discretion to appreciate the danger, and whether or not, under the circumstances, persons of ordinary prudence would have apprehended danger to the boys, and, if so, whether the employes used ordinary care to prevent the boys from getting upon the train, and to discover them while hanging onto and riding upon the moving cars and avoided injuring Davis. *Railway Co. v. Abernathy* (Tex. Civ. App.) 68 S. W. 539; *Ollis v. Railway Co.* (Tex. Civ. App.) 73 S. W. 30.

The judgment is reversed, and cause remanded.

TEXAS & P. RY. CO. v. HUBER et al. (Supreme Court of Texas. May 2, 1906.)

1. COURTS—CONSTRUCTION OF FEDERAL STATUTES—DECISIONS OF UNITED STATES SUPREME COURT.

The court of a state in determining the question whether a cause is removable to the federal court, is controlled by the decision of the federal Supreme Court.

[Ed. Note.—For cases in point, see vol. 13, Cent. Ed. Courts, §§ 329, 332.]

2. REMOVAL OF CAUSES—GROUNDS—STATUTES.

Under Act Cong. Aug. 13, 1888, c. 866 §§ 1, 2, 25 Stat. 434 [U. S. Comp. St. 1901, pp. 508, 509], conferring on the Circuit Courts of the United States jurisdiction of suits arising under the laws of the United States and providing that suits arising under such laws may be removed to the Circuit Courts, etc., an action against an employer and an employé for negligence of the employé in the performance of his duties, the employé and plaintiff being residents of the same state, is not removable to the federal court on the joint petition of the employer and employé, averring

that the employer is a corporation existing under the acts of Congress; the petition of plaintiff in the state court raising no question as to restrictions placed on the liability of the employer or its servants, or as to granting immunity not allowed by the laws of the state or the general rules of the common law.

Certified Questions from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by M. E. Huber, for herself and as the next friend for Georgia Huber, an infant, against the Texas & Pacific Railway Company and another. There was a judgment for plaintiff, which the Court of Civil Appeals reversed, and the cause was certified on a question to the Supreme Court. Question answered.

T. J. Freeman and Hall, Flippen & McCormick, for appellant. M. M. Parks, W. T. Strange, and Cockrell & Gray, for appellees.

GAINES, C. J. This case comes to us upon a question certified by the Chief Justice of the Fourth supreme judicial district. The statement and question as certified are as follows:

"The cause was filed originally on April 12, 1902, against the Texas & Pacific Railway Company and R. J. Oliphant, its engineer, for damages against both for alleged personal injuries to Lawrence Huber through the negligence of the engineer. In due time the defendants joined in a petition and bond in due form for removal of the cause to the federal court, the ground for removal being the fact that the Texas & Pacific Railway Company, defendant, was a corporation organized and existing under acts of Congress. The district court held the application regular, but denied it upon the ground that the cause was not removable. The ruling was excepted to. Thereupon the defendants filed a transcript of the proceedings in the proper Circuit Court of the United States, where plaintiffs filed their motion to remand in due time but which appears not to have been acted upon until January 14, 1904, when it was overruled, whereupon plaintiffs took a nonsuit, and a judgment entry was made accordingly in the minutes of that court. The motion to remand asserted four grounds: (1) That it appeared from plaintiffs' petition that R. J. Oliphant is a codefendant of the Texas & Pacific Railway Company in the cause, that said Oliphant is a resident of the state of Texas, and was at the time of the institution of the suit, that the cause of action against said defendants is a joint cause of action and there is no diverse citizenship between plaintiffs and the said Oliphant. (2) That there is no order of the state court removing this cause to the Circuit Court and the same should be stricken from the docket. (3) That there is no federal question involved between the plaintiffs and defendants. (4) That the application does not

show any diverse citizenship as to the defendant Oliphant and the plaintiffs.

"When the application for removal was denied by the state court, and such ruling duly excepted to, the state court proceeded to a trial and judgment was rendered for plaintiffs which judgment on appeal was reversed by the Court of Civil Appeals (75 S. W. 547) at Dallas and the cause remanded. This cause was thus remanded and on the docket of the state court when the nonsuit was taken in the federal court. On January 28, 1904, after the nonsuit plaintiffs filed in the district court of the state a second amended original petition in the original cause asking judgment against both the original defendants on the same cause of action. On February 4, 1904, defendants in limine filed a motion in the cause in the said state court, to dismiss the cause because of the proceedings and judgment in the said federal court which was exhibited. This motion was overruled and exception taken to the ruling and the court proceeded with the case. Defendants then filed amended pleadings, without waiving the point that the court was without jurisdiction, because of the nonsuit, to proceed with the cause, and a trial resulted in a judgment against the appellant, the Texas & Pacific Railway Company, which is here on appeal and now pending on motion for rehearing. There being a difference of opinion between the members of the court on the question certified, the respective opinions filed will accompany this certificate.

"Question: Did the district court rule correctly in refusing to sustain the motion to dismiss the cause?"

We are of opinion, that the question should be answered in the affirmative. The decision of the question calls for a construction of the Act of Congress approved August 13, 1888, which was amendatory of the judiciary act of the previous year. We quote so much of the latter act as bears upon the question: "That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state. And when in any suit men-

tioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district," etc. 25 Stat. 434, c. 866, § 2 [U. S. Comp. St. 1901, p. 509]. Since it appears from these provisions, that in cases falling under them, only those are removable "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section," it is appropriate to quote so much of that section as defines the original jurisdiction of the Circuit Courts, in so far as they are applicable to or throw light upon the question under consideration. The first section of the amendatory act of 1888 reads as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," etc. 25 Stat. 434 [U. S. Comp. St. 1901, p. 508]. In determining the question certified we must be guided and controlled by the decisions of the Supreme Court of the United States. That there was no separable controversy in this case is settled by the decision of that court in the case of *Chesapeake & Ohio R. R. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. Even had such controversy existed, it would have made no difference since the ground of removal was, that it involved a question arising under the Constitution and laws of the United States. *Chicago, Rock Island, etc., Ry. Co. v. Martin*, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055.

It is now definitely settled that in a case against two defendants, in which the plaintiff and one of them are citizens of the same state and the other defendant is a citizen of another state, the case is not removable upon the sole application of the latter defendant. *Cochran v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. —. In that case the ruling was very pronounced, for the reason, that the party who invoked the jurisdiction of the Circuit Court of the United States by the application to remove the cause to that court, succeeded by certiorari in setting aside the judgment there rendered against him upon the ground that the cause was illegally removed. In the case of *Chicago, Rock Island, etc., Ry. Co. v. Martin*, supra, it was held, that as to the right to

remove, where there was more than one defendant, the same rule applied as to a removal under the first clause of section 1 of the act, in cases arising under the Constitution and laws of the United States, as to a removal on the ground of diverse citizenship, as provided for in the second clause. In his opinion in that case, Chief Justice Fuller says: "And in view of the language of the statute we think the proper conclusion is that all the defendants must join in the application under either clause." For the reason that a party to a suit, which involves a federal question, has, in case the question is decided against him, recourse to the Supreme Court of the United States, it would seem that there is less ground for giving him the right to remove his case to the United States court, than there is for one who has no such recourse. The decisions referred to seem to settle the question that the railway company could not properly have removed this case by its separate application; but the question remains, does the joinder of its codefendant in the petition for removal make a different case. The language of Chief Justice Fuller just quoted, "that all the defendants must join in the application under either clause," seems to imply, that if the two, or more, as the case may be, join in the petition to remove the case, it will be sufficient. The word "join," does not appear in the statute, but as applied to this matter is of frequent use in the decisions; and it seems to us the term, without some qualification, is misleading. We can understand what is meant by a joinder of all the defendants when each of them has a right to remove. It was upon this theory that *Railway Company v. Martin* was decided. That was a case of a joint tort, and was brought by the plaintiff, as administratrix of a decedent's estate against the Chicago, Rock Island & Pacific Railway Company, and against the receivers of the Union Pacific Railway Company, to recover damages for the death of the intestate. The receivers who had been appointed by a federal court sought to remove the case on the ground that it was a case arising under the laws of the United States. The Chicago, Rock Island & Pacific Railway Company was not a corporation of Kansas, so that as between it and the plaintiff, there was a diversity of citizenship. The report of the case does not show the citizenship of the plaintiff, but, from the fact that the opinion states that the Chicago, Rock Island & Pacific Railway Company was not a corporation of Kansas, we think it is to be inferred that the plaintiff was a citizen of that state. It had not at that time been decided, that the mere fact, that the defendant in a case is a receiver appointed by a United States court does not make a case arising under the laws of the United States as used in the United States statutes previously quoted; but the opinion proceeds expressly upon the assumption, that as to the defendant receivers, if

sued alone they would have had a right to remove. It seems, therefore, as discussed in the opinion, to be a case in which all the defendants had a right to remove—the railway company on the ground of diverse citizenship, and the receivers on the ground that as to them it was a case arising under the laws of the United States. Therefore the language previously quoted from the opinion, in so far as it implies that the case would have been removable had all the defendants joined in the application, is to be construed in the light of the fact that the case was treated as one in which all the defendants were entitled to remove. The court having reached the conclusion that all defendants in such a case must join in order to remove it in any event. We are of the opinion, therefore, that in the remark quoted, it was not intended to imply, that where only one of two or more defendants could have removed a case, if sued alone, there being another or other defendants who had no right of removal, that such right would exist provided all should join in the application.

But there is another standpoint from which as we think this question should be viewed. Both the first and second clauses of section 2 of the act of 1888, as they are commonly designated—that is to say, the one applicable to cases arising under the Constitution and laws of the United States, and the other to cases of diverse citizenship—provide in effect, as a condition precedent to removal, that the case should be one “of which the circuit courts of the United States are given original jurisdiction.” The codefendant of the railway company was a citizen of the same state as the plaintiff in this suit, and it is clear that he could not have been sued alone in the United States court for damages resulting from his negligence, without allegations by the plaintiff in his declaration, showing that it was a case arising under the Constitution or laws of the United States. Could he have been so sued by joining with him a defendant as to whom such allegations were made? We think not. The case of *Independent School District v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 35 L. R. A. 364, in our opinion, throws light upon this question. In that case *Rew* brought suit against the school district in the Circuit Court of the United States upon certain of its bonds and upon the coupons originally attached to such bonds. The bonds were payable to the order of one *Treadway*, but the coupons calling for more than \$2,000 in amount were payable to bearer. Under the statute of August 13, 1888, the United States Circuit Courts were deprived of jurisdiction of a suit to recover any chose in action except a foreign bill of exchange by any assignee, unless the suit could have been maintained against the payee, but the court was permitted to entertain jurisdiction of a subsequent holder of such chose in action if made by a corporation, and if payable to bearer, and if the holder and the defendant

were citizens of different states. The question of jurisdiction having been raised, the trial court held, that for the reason, that *Rew* the original payee could not have sued in the United States court upon the bonds, it was without jurisdiction of that part of the cause of action, but that it had jurisdiction of the coupons, and gave judgment upon them for the plaintiff. The defendant carried the case to the Circuit Court of Appeals of the United States, where the judgment was affirmed. The question as to the correctness of the ruling of the trial judge upon the question of jurisdiction was not before the Court of Appeals and was not commented upon nor decided. But it seems to us that the decision of the trial court was correct upon both points. We fail to see how a plaintiff can give jurisdiction over a cause of action over which of itself the United States court has no jurisdiction by injecting into it another cause of action which that court has power to hear and determine, and we also fail to see how a federal court can acquire jurisdiction over a defendant, over whom it would have none, by joining him in the suit with one over which the court has jurisdiction.

It seems to have been urged in the Court of Civil Appeals that the bare fact, that *Olliphant*, the codefendant of the Texas & Pacific Railway Company, was its engineer, and that the negligence with which he is charged is alleged to have occurred in the discharge of his duties, makes a case arising under the laws of the United States as to him. We find it difficult to reconcile the rule established in “*The Removal Cases*,” 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 819, that the mere allegation that a corporation, created by virtue of an act of Congress of the United States, makes a case arising under the laws of the United States with that line of decisions, which hold that in order to make such a case it must appear from the allegations of the plaintiff’s petition that there is a substantial dispute as to the construction of some law of the United States upon which the decision of the case depends. Whether the *Removal Cases* were correctly decided or not, we are bound to take them as established law, but to apply the rule to the servant of a corporation created by the laws of the United States, is to go one step further and we are of the opinion that the doctrine should not be extended. The doctrine in the *Removal Cases* is rested upon the case of *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204. The question of jurisdiction there involved was whether the act of Congress which chartered the bank and attempted to give it power to bring suits in the Circuit Court of the United States was in accordance with the Constitution of the United States. It was held that it was. Since the Constitution declared that “the judicial power shall extend to all cases in law and equity arising under the Constitution and laws of the United States,” and some others not necessary to be mentioned,

Chief Justice Marshall, who wrote the opinion, in discussing the question whether a suit by the United States Bank which was chartered by act of Congress was a case arising under the law, says: "The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is the law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?" It was upon the propositions there laid down that "The Removal Cases" were decided. But do they apply to the servant of a corporation, chartered by act of Congress, merely because he is a servant of such a corporation? To ask the question, it seems to us, is to answer it in the negative. There might be a case, in which the charter of a corporation of the United States placed some restriction upon the liability of the corporation, or of its servants, for certain acts, or granted some immunity not allowed by the laws of the state, or the general rules of the common law, which would go to the foundation of the action. Such might make a case arising under the laws of the United States. But as we understand the statement, upon which the question here presented is based, the original petition of the plaintiff in the state court made no such question.

Let our answer be certified, as indicated in this opinion.

GROSSMAN v. HOUSTON, O. L. & M. P. RY. CO.

(Supreme Court of Texas. April 25, 1906.)

1. EMINENT DOMAIN—REMEDIES OF PROPERTY OWNERS—LIMITATIONS.

Where a railroad was constructed in a street and was thereafter sold to another corporation which used it by operating engines of greater weight and hauling trains of greater length than had previously been run and instead of carrying passengers used the road for the transportation of freight both day and night, increasing the discomfort and annoyance of an owner of abutting property, his cause of action for damages did not arise until the change in the use to which the road was put.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 785.]

2. SAME—OCCUPATION OF STREET—ELEMENTS OF DAMAGE—PERSONAL INCONVENIENCE.

The personal inconvenience and discomfort occasioned to the owner of abutting property by the operation of a railroad in the street gives rise to no cause of action.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 257.]

3. SAME—DEPRECIATION IN VALUE OF PROPERTY.

Under Const. art 1, § 17, declaring that no person's property shall be taken for public use without compensation, an owner of a lot which is caused to depreciate in value by the operation of a railroad in the street is entitled to recover damages.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 235, 257.]

Error from Court of Civil Appeals of First Supreme Judicial District.

Action by Julius Grossman against the Houston, Oak Lawn & Magnolia Park Railway Company. A judgment for plaintiff was reversed by the Court of Civil Appeals (89 S. W. 312), and plaintiff brings error. Reversed with directions to enter judgment for plaintiff.

Brashear & Dannenbaum, for plaintiff in error. J. A. Read and Wilson & Jackson, for defendant in error.

BROWN, J. Grossman owns and resides upon a lot on Commerce street in the city of Houston, which he had occupied with his family for about 10 years before the institution of this suit on the 24th day of December, 1902. The residence of the family was situated near to the line of the street, and the street is about 60 feet wide. In 1889, the Houston, Belt & Magnolia Park Railway Company was organized under the general railroad laws of this state, and, early in the year 1891, with the consent of the city council of the city of Houston, that company built and completed its line of road upon Commerce street, in front of the property now owned by Grossman; and that company operated the line of road over the said street from 1891 until the date of the sale by a receiver under the judgment of the court in the year 1901, when the Houston, Oak Lawn & Magnolia Park Railway Company purchased the same. Prior to the purchase of the said road by the defendant in error, it was operated by the company which built it, and the receiver which controlled it; its principal business was transporting passengers to and from points in or near to the city of Houston; its heaviest business being the transportation of passengers to and from a local park. Its business was very heavy during the summer time, and the dummy engines which it used emitted coal smoke and cinders just as such engines would naturally do, and said engines were equipped with shrill whistles, the sound of which was disagreeable. The train of cars which passed along the road would cause a sensible vibration, noticeable by those who inhabited the adjoining property. The track was lawfully and properly constructed on said street, which caused no damage to Grossman's property. After the purchase of the road by the defendant in error, it began to operate it by using engines of greater weight and hauling trains of greater length than had been run over the road prior to that time. Instead of carrying passengers

over the line of road, as had been formally done, the present owner used it chiefly for the transportation of freight; and the road is used day and night. The discomfort and annoyance to those occupying the abutting property have been greatly increased, the market value of such property reduced, and the plaintiff in error has, from the use of the road by the present company, suffered damage in the sum of \$500 for reduction in the value of his lot, \$100 for discomfort suffered by his wife, and \$25 for like injury to himself. At the trial in the district court, judgment was rendered for Grossman for the sums above stated, from which judgment appeal was taken to the Court of Civil Appeals, and that court reversed the judgment of the district court, and rendered judgment in favor of the railway company, upon the ground that the claim for damages was barred by the statute of limitation of two years.

Under articles 4426 and 4438 of the Revised Statutes of 1895, the Houston, Belt & Magnolia Park Railway Company had the right, with the permission of the city council of the city of Houston, to construct its railroad track upon Commerce street; and, the track being properly built and the trains thereon properly operated, Grossman, the abutting property owner, had no cause of action against that company. *Gulf, W. T. & P. Ry. Co. v. Goldman* (Tex. Civ. App.) 28 S. W. 267; *City of Houston v. Parr* (Tex. Civ. App.) 47 S. W. 393; *Water Works v. Kennedy*, 70 Tex. 236, 8 S. W. 36; *Backhouse v. Bonomi*, 9 H. L. Cas., 512. Applications for writs of error were made to this court in *Railway Company v. Goldman*, and the *City of Houston v. Parr*, each presenting the question of limitation as is presented in this case, and the applications were refused.

In the case of *Railway Company v. Goldman*, supra, the right of way had been acquired from Goldman, and the railroad constructed, but in constructing the embankment, a ditch was left, in which water accumulated, causing sickness in the family and a consequent depreciation in the value of the land. Suit being brought to recover for the depreciation of the land, and for damages on account of the sickness more than two years after the construction of the railroad, the latter pleaded the statute of limitations, but the Court of Civil Appeals held that the statute did not apply, announcing its conclusion in these words: "The defendant had the right to use the earth, acquired as a right of way, in the construction of its embankment, being held to the exercise of due care and skill to avoid inflicting injury upon others. By the mere use of the earth and leaving of the ditch, it took no part of appellee's estate for which it had not compensated him. It simply created a condition of things, which, afterwards, operating with other agencies, wrought consequential damage to appellant, arising at intervals. Thus the sickness in the family resulted, and, from unwholesome conditions surrounding it,

the farm became less valuable. While that deterioration in value after it took place was permanent, it must be borne in mind that the value of the estate was not at once partially destroyed by the act of the defendant, but was lessened as a consequence of the unhealthful situation eventually produced." The same doctrine was forcibly illustrated in the case of *Water Works v. Kennedy*, supra, in which the court said: "When an act is in itself lawful as to the person who bases an action on injuries subsequently accruing from, and consequent upon the act, it is held that the cause of action does not accrue until the injury is sustained." The court then cites *Backhouse v. Bonomi*, and comments upon and approves it, which fully sustains the proposition. But the court distinguishes the case then under consideration by showing that it does not come within the rule announced, because the act complained of was unlawful; therefore, the cause of action arose at the time the act was done.

The Court of Civil Appeals cites and relies upon *Lyles v. T. & N. O. Ry. Co.*, 73 Tex. 95, 11 S. W. 782, in support of its judgment. In that case the court said: "It is not a case in which no actual injury was done when the tracks were laid and in which no action would lie until some consequential injury resulted, but is a case in which a cause of action existed, and on which the measure of relief was just as broad as the lapse of years could make it." The distinction between the *Lyles* Case and the case now before us is quite clear, and the rule applied in that case is not applicable to the facts of this. The damages sued for in this case did not arise until within two years prior to the institution of this suit, and did not arise out of the act of constructing the railroad track in the street, but from the use that was subsequently made of that track and is strictly in the line of the case of *Railway Company v. Goldman*, before cited. The Court of Civil Appeals erred in holding that the claim for damages was barred by the statute of limitations. The personal inconvenience and discomfort to Grossman and his wife caused by the lawful and proper operation of the trains on the road does not give a right of action for damages against the railroad company. *Railway Co. v. Shaw*, 92 S. W. 30, 15 Tex. Ct. Rep. 129. But the depreciation of the value of Grossman's lot is a damage to his property for which he may recover under article 1, § 17, of the Constitution.

It is ordered that the judgment of the Court of Civil Appeals be reversed, and that this court will now enter judgment upon the findings of the trial court that the plaintiff in error, Grossman, have and recover of and from the railway company the sum of \$500 for damages to his property, and all costs of the district court; that the railway company have and recover of and from Grossman all costs of the Court of Civil Appeals, and of this court.

EASTIN & KNOX v. TEXAS & P. RY. CO.
et al.

(Supreme Court of Texas. May 2, 1906.)

1. REMOVAL OF CAUSES—CITIZENSHIP—JOINDER OF PARTIES.

Joinder of a citizen defendant against whom no cause of action is alleged with a non-citizen entitled to remove the cause to the federal courts presents no obstacle to a removal by the latter.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 79.]

2. SAME—PETITION.

Where a cause of action is stated against a citizen defendant alleged to have been fraudulently joined with a noncitizen in order to prevent a removal of the cause by the latter to the federal courts, the petition, in order to entitle the latter to remove, must allege the facts which show that such citizen defendant was joined for the fraudulent purpose of preventing a removal.

3. CARRIERS—CONNECTING LINES—REFUSAL OF AGENT TO SHIP BY SHORTEST ROUTE—JOINT TORT-FEASORS.

Where the agent of a railway company wrongfully refused to ship plaintiff's cattle by the shortest and most expeditious route, and by duress compelled plaintiffs to sign a bill of lading under which the cattle were shipped by a longer route, during which they were damaged, the railroad company and the agent were joint tort-feasors, and were suable separately or jointly at plaintiff's election.

4. REMOVAL OF CAUSES—CITIZEN DEFENDANT—PETITION—JOINDER.

Where a noncitizen defendant was joined with a citizen defendant, and both were jointly and severally liable on the cause of action alleged, the fact that the citizen defendant joined in the petition by his codefendant to remove the cause to the federal court did not confer federal jurisdiction on the ground of diverse citizenship.

5. APPEAL—INTERMEDIATE APPEAL—DETERMINATION OF CAUSE—FURTHER APPEAL—EXTENT OF REVIEW.

Where a judgment was reversed by the Court of Civil Appeals on the ground that the court erred in denying a petition to remove the cause to the federal courts, without acting on the other assignments of error, such assignments would not be reviewed on a writ of error issued by the Supreme Court until they had been acted on by the Court of Civil Appeals.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by Eastin & Knox against the Texas & Pacific Railway Company and others. A judgment in favor of plaintiffs was reversed (89 S. W. 440), and plaintiffs bring error. Reversed.

Thos. D. Sporer, for plaintiffs in error.
H. C. Shropshire and West, Chapman & West, for defendants in error.

GAINES, C. J. This suit was brought in the district court of Parker county, Tex., by the plaintiffs in error against the Texas & Pacific Railway Company, a corporation chartered by virtue of an act of the Congress of the United States, and J. M. Tucker, its agent, a resident of the state of Texas, to recover damages alleged to have resulted from the shipment of cattle from Strawn, Tex., a station on the line of the defendant company, destined to Tulsa, Indian Terri-

tory, a station on the line of the St. Louis & San Francisco Railway Company. It was alleged in the petition that the cattle were brought to Strawn and were delivered to Tucker, as the agent of the defendant company; to be shipped by the shortest and most expeditious route to the point named; that after the cattle had been about loaded on the cars, Tucker then presented a bill of lading for the transportation of the cattle to Paris, Tex., and thence over the lines of the St. Louis & San Francisco Railway Company to Monette, Mo., and thence to Tulsa. It was alleged that the plaintiffs declined to sign the bill of lading, and demanded that the cattle should be carried over the Texas & Pacific Railroad to Ft. Worth, or to Sherman and thence over the Red River, Texas & Southern Railroad to its connection with the St. Louis & San Francisco Railroad, and thence by that railroad to the point of destination, and that this was the shortest and most expeditious route; but that Tucker, the agent, positively refused to do this, and that under certain circumstances alleged they were compelled to sign as demanded. The circumstances alleged were sufficient in our opinion to show that in signing the bill of lading the plaintiffs acted under duress. It was further averred, in substance, that by reason of the longer haul, the cattle were damaged, and for this damage the suit was brought.

In due time defendant the Texas & Pacific Railway Company filed a petition for the removal of the cause to the Circuit Court of the United States. In this petition its codefendant joined. The defendant company in the first place claimed the right of removal by virtue of its incorporation under an act of the Congress of the United States and, according to the decisions of the Supreme Court of the United States, would clearly have had that right, had it been the sole defendant. It was also alleged in the petition for removal that the defendant Tucker was fraudulently joined as a defendant for the purpose of preventing a removal to the United States Court. Since our opinion the decision of the case in this court depends upon the question of a fraudulent joinder, we copy the allegations in the petition for removal in reference to that matter as follows: "This petitioner says that plaintiffs aver that J. M. Tucker, in shipping the cattle, acted for and was the agent of the Texas & Pacific Railway Company. This petitioner says: That the said Tucker was its local station agent, and acted for it as agent, and not in any other capacity, and was not and is not a proper party to this suit. The plaintiffs do not, in their petition, state any cause of action against him. They improperly and wrongfully joined him with this petitioner in this case for the sole and only purpose of preventing this petitioner, the Texas & Pacific Railway Company, from removing this case to the United States Circuit Court, which said joinder of said J. M. Tucker was done

fraudulently for the purpose of preventing said removal and is a fraud on the jurisdiction of the United States Circuit Court for the Northern District of Texas. That this suit against this defendant, the Texas & Pacific Railway Company, is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States, approved March 3, 1871, entitled 'An act to incorporate the Texas & Pacific Railway Company, and to aid in the construction of its road, and for other purposes,' and acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874." 16 Stat. 573, c. 122, as amended by 17 Stat. 59, c. 132, 17 Stat. 598, c. 257, and 18 Stat. 197, c. 406. We think it clear, that the joinder of a party in a suit of this character, against whom no cause of action is alleged, presents no obstacle to a removal, by a codefendant, who, if sued alone, would be entitled to remove the case. But as we understand the rulings of the Supreme Court of the United States, where a cause of action is stated against a defendant, who is claimed to be made a party, in order to defeat a removal the petition must allege the facts which show the fraudulent purpose. For example if, in this case, the petition had alleged that the allegation in plaintiffs' petition, that Tucker was the agent of the defendant company in shipping the cattle, was not true and was fraudulently inserted in order to prevent a removal of the cause, it would have carried the case to the United States Court, where, upon a denial of the fraud by the plaintiffs and a motion to remand, the issue would have been tried and determined. Louisville, etc., R. R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; Chesapeake Ry. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121. But the petition for removal in this case contains no allegation of any fact whatever from which the conclusion can be reached that defendant Tucker was fraudulently joined as a defendant. The statement of a conclusion of law is not sufficient. Therefore, if the petition of the plaintiff states a case which shows a cause of action against the defendant Tucker, which case could be properly joined with the action against the defendant company, the petition for removal was not sufficient to deprive the state court of its jurisdiction. It seems to us therefore the questions to be determined are: Does the plaintiff's petition state a cause of action against defendant Tucker? and was the plaintiff entitled to sue both defendants in the same suit? The first is the important question in the case here presented.

Where the agent is empowered to perform a duty for his principal, and neglects to perform it, and damage accrues from the failure,

the agent is not responsible, though the principal may be. Labadie v. Hawley, 61 Tex. 177, 48 Am. Rep. 278. But where the agent acting for his principal does a wrongful act and damage results to a third person, both are responsible. Baker v. Wasson, 53 Tex. 150. That there was a liability in the case made by the plaintiff's petition, we have no doubt. The wrongful act was done by Tucker, the agent, and for his act not only was he liable but his principal was liable because it was done in the prosecution of the company's business. They were joint tort-feasors, and were suable separately or jointly at the election of the plaintiff. That defendant Tucker could not give the United States Circuit Court jurisdiction of the case by joining in the petition of its codefendant we have this day decided in the case of the Texas & Pacific Railway Company against Huber.

The Court of Civil Appeals, as they had the right to do, in the exercise of a sound discretion, when they reached the conclusion that the jurisdiction had been taken away, declined to pass upon the merits of the appeal. Until they have acted upon the other assignments of error in that court, we cannot determine the case. Oriental Investment Co. v. Barclay, 93 Tex. 425, 55 S. W. 1111.

Therefore the judgment of the Court of Civil Appeals will be reversed, and the cause remanded to that court for a decision of the other questions presented by the appeal.

LANE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 14, 1906.)

1. CRIMINAL LAW — EVIDENCE — DISTINCT TRANSACTIONS.

In a prosecution for violating the local option law, evidence of a distinct transaction indicating an evasion of the liquor law by defendant was not admissible to show system, where such transaction was not similar in the manner of its occurrence to the one for which defendant was indicted.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 833, 834.]

2. INTOXICATING LIQUORS—CRIMINAL PROSECUTIONS—EVIDENCE.

In a prosecution for violating the local option law, evidence that defendant paid an internal revenue license subsequent to the transaction for which he was indicted, was inadmissible.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, 298.]

3. SAME—INSTRUCTIONS.

In a prosecution for violating the local option law, the evidence showed that defendant attended a reunion with a wagon containing whisky which belonged to him. Prosecuting witness came to the wagon, looked in, saw the whisky in a box, took two bottles from the box and threw \$2 under the wagon. Defendant was not present at the time, and there was no evidence that he knew what prosecuting witness did, or that he got the money. The court charged that a sale is a transfer of property for a reasonable consideration, and that in determining whether a sale was made, the jury would

view the parties in the light of buyer and seller, as defined in the charge, etc. *Held*, that the court should have given a special charge requested by defendant to the effect that the jury must acquit defendant unless there was a contract between him and prosecuting witness by which he sold and delivered liquor to the witness, and that it was not sufficient that the witness got the liquor, and left the money there unless there was a prior agreement that the sale should be made in that form.

4. SAME—SUFFICIENCY OF EVIDENCE.

In a prosecution for violating the local option law, the evidence showed that defendant attended a reunion with a wagon containing whisky which belonged to him. Prosecuting witness came to the wagon, looked in, saw the whisky in a box, took two bottles from the box, and threw \$2 under the wagon. Defendant was not present at the time of this occurrence, and there was no evidence showing that he knew what prosecuting witness did or that he got the money. *Held*, that the evidence was insufficient to sustain a conviction.

Appeal from Young County Court; Jo. W. Akin, Judge.

S. W. Lane was convicted of violating the local option law, and appeals. Reversed.

Jno. C. Kay and C. W. Johnson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, the punishment fixed at a fine of \$25, and 20 days in jail.

The evidence here shows that the alleged sale of the intoxicating liquor was at a reunion in Young county, which was held from the 16th to 18th of August, inclusive. Appellant and his father-in-law and partner (H. M. Jones) kept a restaurant at said reunion grounds, and in connection therewith sold cold drinks, ice cream, and lemonade. A covered wagon was near their stand, and the testimony showed that this wagon belonged to Jones; that in said wagon was some dozen or more bottles of whisky, marked Hill & Hill. It is also shown that some five or six days prior to the reunion appellant ordered shipped to him by express \$88 worth of Hill & Hill whisky, which he received. It is also reasonably shown that the whisky in said wagon belonged to appellant, and was the same whisky received by him through the express company. The evidence as to the particular sale charged to have been made to Steen was to the effect, following: That Steen came by the wagon, looked in, saw some dozen bottles of Hill & Hill whisky, in the box, and he took two pint bottles from the box, and threw \$2 under the wagon; and that neither appellant nor his partner were present at the time, but were in the restaurant. There was no testimony showing that appellant saw what prosecutor did with reference to taking the whisky or throwing the money under the wagon, or that appellant or his partner got said money.

There are bills of exception to testimony introduced by the state against appellant.

The state introduced evidence to the effect that another party, to wit, one Stone, had a whisky transaction with appellant during said reunion. This was introduced by the state evidently to show system. The facts in connection therewith were as follows: "That Stone asked defendant on one night during said reunion, 'if anything was doing?' defendant said, 'May be so,' and then walked off about 50 yards or more. Stone followed, saw him put a pint bottle of whisky in the grass, and he came up, got it, and drank it; that he afterwards offered to pay appellant for the same, but appellant refused to receive the money." This looks like a suspicious transaction, but was not similar to the transaction proven in this case. So we do not think it was admissible.

The state also introduced a money transaction between appellant and the bank, in which he borrowed \$35, and in that connection remarked, "that the internal revenue man was in town." Even if this testimony showed that he used that money to pay the internal revenue license, it was subsequent to the alleged sale, and we do not think it was admissible.

The court gave only a general charge on the subject of sale, as follows: "A sale within the meaning of the law, is a transfer of property having some value for a reasonable consideration in money or other things of value. The person parting with the property and receiving the consideration is in law called the seller, and the person parting with the price and receiving the goods or property is called the buyer, and in determining whether a sale has been made the jury will view the parties in the light of buyer and seller as above explained, and from that standpoint determine whether any property has been parted with, and if so was it for a valuable consideration. A sale may be shown by direct proof or it may be shown by facts and circumstances." Then follows a charge on circumstantial evidence necessary to show a sale. While the court's charge in general terms may have been correct, we do not believe it was full enough or applicable to the questions raised by appellant. Appellant asked certain charges, which we believe did present the questions upon which he relied, and this should have been given. The special charges on this subject requested and refused were, as follows: "The jury must believe from the evidence beyond a reasonable doubt that the defendant and the witness Steen made a contract, by which defendant sold and delivered to said Steen intoxicating liquor, or you must acquit defendant. And it is not sufficient that said Steen got two bottles of whisky, and left \$2, unless there was a prior agreement that the sale should be made in that form, and the sale in this charge is the same as defined in the main charge." In view of the testimony we believe the special requested charge should have been given.

Moreover, we would state that we do not believe the testimony is sufficient to sustain the verdict. There is no testimony showing that appellant knew of what was done with reference to the whisky by the alleged purchaser, much less is there any testimony showing that he got the money the alleged purchaser says he threw under the wagon. Unless there was some prior understanding, that the sale should be made between the parties in that manner, or there was some testimony at least tending to show appellant received the money, knowing or having reason to believe it was for whisky taken from the wagon by appellant, he could not be convicted of a sale of whisky.

For the errors discussed, the judgment is reversed, and the cause remanded.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. Jan. 24, 1906. Rehearing Denied Feb. 14, 1906.)

1. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

In a criminal case the admission of the testimony of a woman, other than the one with whom defendant was living as his wife, that witness had been married to defendant prior to his marriage with the other, and never divorced, was not prejudicial error, on the ground that the first marriage was a fact in evidence tending to incriminate defendant, where the former marriage was established by other evidence.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3138.]

2. SAME.

In a criminal case there was no reversible error in permitting a woman, other than the one with whom defendant was living as his wife, to testify to a prior marriage with witness, and to the fact that she had never been divorced, where the testimony was given in the absence of the jury, and was never introduced before the jury.

3. WITNESSES—COMPETENCY—HUSBAND AND WIFE—ILLEGAL MARRIAGE.

Where a marriage was illegal, no matter how confidential the relationship between the parties, and however much the woman may have regarded the man as her husband, the state had a right on a prosecution against him to introduce her testimony against him.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 178.]

4. CRIMINAL LAW—APPEAL—REVIEW—RECORD.

Where, on appeal in a criminal case, a bill of exceptions showed that defendant objected to certain testimony unless the matters inquired about occurred in a certain county, the objection could not be reviewed where the bill did not show that anything occurred.

5. HOMICIDE—MURDER—EVIDENCE—ADMISSIBILITY.

In a prosecution for murder, it appeared that defendant had killed deceased by beating, whipping, etc., and a woman with whom defendant was living testified that on more than one occasion she had procured the whip and taken it to defendant, who whipped deceased with it, but that she had no desire to have deceased injured, but did so because she feared defendant. *Held*, that there was no objection to such testimony.

6. CRIMINAL LAW—EVIDENCE—DECLARATIONS BY PERSON INJURED.

Where, on a prosecution for murder, it appeared that defendant had beaten to death a girl occupying a place in his family, it was

proper to exclude testimony of the woman with whom defendant was living in answer to a question as to whether deceased told her that deceased's mother beat her over the head with a stick of wood.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 937, 941, 947.]

7. SAME—DECLARATIONS BY THIRD PERSON.

It was proper to refuse to permit the woman to answer a question as to whether the mother of the girl did not say that when she got the girl off in the country she was going to kill her.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 950.]

8. SAME—DEMONSTRATIVE EVIDENCE.

Where, on a prosecution for murder, it appeared that defendant had killed deceased by beating her to death, and there was evidence that he had chained deceased to a tree, there was no error in admitting in evidence a chain identified as the one in question.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 891.]

9. SAME—PHOTOGRAPHS OF DECEASED.

On a prosecution for murder, it is proper to admit in evidence photographs of deceased taken after death, where they represent to a measurably true degree the condition of the body of deceased.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 893.]

10. SAME—CONDUCT OF TRIAL.

In a criminal case there was no error in the court calling a witness to the judge's bench and having a conversation with him in the presence, but not in the hearing, of the jury.

11. SAME—WITNESSES—ATTENDANCE—EXCUSING WITNESSES.

Where, in a criminal case, defendant announced ready for trial with the understanding that a physician summoned as a witness could not be present on account of the serious illness of his wife, and during the trial the physician came into court, and was held from 9 o'clock in the morning until 3 o'clock in the afternoon of that day, and was several times tendered as a witness to defendant, who refused to use him or to excuse him, and he was then excused by the court until 9 o'clock the following morning, when he was offered to defendant immediately after the state had opened the argument of the case, and before defendant had made any argument, there was no error.

12. SAME—CROWDING OF COURTROOM.

The fact that spectators at the trial of a criminal case were permitted to lean on the jury box and crowd the courtroom was not error.

13. CRIMINAL LAW—APPEAL—REVIEW—NECESSITY FOR EXCEPTIONS.

In a criminal case, an instruction is no ground for reversal in the absence of a bill of exceptions to the same.

Appeal from District Court, Williamson County; V. L. Brooks, Judge.

Tom Young, alias Jack Wade, was convicted of murder in the first degree, and he appeals. Affirmed.

Sandbo & Shelton and J. F. Taulbee, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death.

The facts in substance show, that deceased, who was a girl 16 or 17 years of age, at the instance of her mother, or on account of mis-

treatment on the part of her mother, decided to live with appellant and his wife. The indictment charges that appellant did unlawfully kill deceased by beating, bruising, and wounding her with a blacksnake whip, and stick, and a hoe, and a hoe handle, and a rock, and a plank, and a board, and a rope, and by kicking her with his foot, and by stamping her with his foot, and by choking her with his hands. These allegations are amply proved by the evidence; and the facts show a systematic and continued infliction of unprecedented cruelty towards a helpless girl on the part of appellant. The extent of the cruelties were such that finally there was scarcely a place on her body that did not evidence either a scar or a sore. The beating commenced in Falls and Bell counties, and terminated at a little village called Florence, in Williamson county. At Florence deceased was taken in charge by some kindly neighbors, and appellant was arrested. A short while after this, deceased died from the wounds so cruelly and systematically inflicted by appellant.

Bill of exceptions No. 1 shows that when May Benton Young was placed upon the stand by the state, defendant's counsel requested the court to have the jury retired, for the reason they had objections to said witness testifying which they wished and thought it proper the court should hear and determine out of the presence of the jury. During the absence of the jury said May Benton Young testified that she had been married to defendant on March 13, 1903, but that defendant subsequently told her that prior to said date he had another living wife. Thereupon witnesses Mrs. Peter Bedell, Maud Nixon Young, and Houston P. Young testified to the marriage of appellant to Maud Nixon Young. White, the justice of the peace, who married Maud Nixon Young to appellant also testified to said facts, and in addition to this, the marriage license was introduced. The objection of appellant to this testimony was, because the theory of the state is that this woman is the wife of defendant. The court thereupon stated that he would hear the evidence as to who was the defendant's wife, and would exclude from the consideration of the jury any evidence that was not admissible. The bill of exceptions presenting this matter shows that Maud Nixon Young was never divorced from appellant at all; and therefore, in contemplation of law, May Benton Young, with whom he was living at the time of the homicide was not in law his wife. The evidence is ample to support this proposition, outside of the testimony of Maud Nixon Young, his first wife. Furthermore, all of this testimony was introduced to the court in the absence of the jury, and was never introduced before the jury and even conceding appellant's contention, that Maud Nixon Young was his wife and testified to the fact of her marriage with him, because said statement would be a fact in the

evidence tending to incriminate appellant, would not be well taken, since the predicate showing that Maud Nixon Young was the wife of appellant and not May Benton Young, is doubly established by the testimony as disclosed by this bill. Therefore, we hold that the court did not err in permitting May Benton Young to testify; and we further hold that the mere fact that Maud Nixon Young testified before the court, in the absence of the jury, on the question of the first marriage, would not be reversible error, even conceding that said fact was error. However, this question was decided against appellant's contention in *Moore v. State* (Tex. Cr. App.) 75 S. W. 497, 67 L. R. A. 499.

Bill No. 2 shows that while May Benton Young, the supposed second wife of appellant, was testifying, the following question was asked by defendant: "Up to the time you were arrested and brought down here in regard to this matter, I will ask if you did not believe yourself to be the wife of defendant, and if the relations between yourself and the defendant were not as man and wife, and that you lived and cohabited together, and that you had a child by him, and if your relations were not of that confidential nature as exist between a man and his wife, up to the time you were both arrested charged with this offense?" To which question, the witness answered, "Yes, sir." Thereupon defendant objected to the witness testifying against defendant, because at the time of the commission of the alleged offense, the witness was the wife of defendant, living with him as his wife, and believing herself to be legally married to him; and that the confidential relations existing between herself and the defendant were such as exist between a man and wife. The court overruled said objections. Thereupon the witness testified that defendant whipped deceased with a hoe handle, with a blacksnake whip, and a plank. In discussing the first bill, we held that May Benton Young was not the wife of appellant, since at that time he had a wife living, to whom he had been legally married, in Travis county. It follows that the second marriage was an illegal marriage, and however confidential the relationship may have been between appellant and May Benton Young, and however much she may have regarded him as her husband, yet this could not prevent the state proving that she knew about a crime appellant committed, as, in contemplation of law, she was not his wife.

Bill No. 3 shows that the state asked May Benton Young, the following questions: "Q. Where did you go? A. After we left with the girl we came on from Killeen, and from there to Temple, and then to Belton, and from there to Mr. Berry's farm. Q. Now did anything unusual or out of the way take place? A. Yes, sir. Q. Where was it that it took place? A. This side of Killeen." This bill is defective, in that it does not state what was said took place. Appellant's objection is

that he objected to anything occurring in Bell county, or outside of Williamson county. The witness does not testify to anything against appellant, except that something unusual occurred.

Bill No. 4 shows that appellant objected to certain testimony introduced by the state through the witness May Benton Young, on the ground that they objected to the same, unless the matters inquired about occurred in Williamson county, but the bill does not show that anything occurred. Therefore, we cannot review this matter.

By bill No. 5 it is shown that May Benton Young was asked by the state: "You have said that on one or more occasions you went to the wagon and got the whip and took it to defendant, and that he whipped deceased? A. Yes, sir. Q. Why did you do that? A. He told me to. Q. I will ask you to state if in anything and everything you did and took part in, in carrying things to him with which he whipped deceased, you had any desire or intent to have her injured." Appellant objected to anything that witness might have thought or feared from defendant, which objection was overruled by the court. Witness answered: "No, sir; I did not want her hurt. I did it because I was afraid not to. I was afraid because he had beat and whipped me." This bill is allowed with this explanation "that the other evidence in the case recited the issue of whether or not witness May Benton was an accomplice of the defendant." We see no legal objection to this testimony.

The eighth bill complains that the court erred in refusing to permit appellant to ask May Benton Young the following: "I will ask you whether or not Alma [deceased] told you that her mother beat her over the head with a stick of wood." To which question appellant expected the witness to answer, "Yes." This testimony was objected by the state on the ground that it was error. The holding of the court was correct.

In bill No. 9 appellant propounded the following question to May Benton Young: "I will ask you if old Mrs. Hinton, the mother of the dead girl, kept a quirt with a rod of iron in the end of it for the purpose of whipping that girl?" This testimony was objected to on the ground of immateriality, remoteness, and a conclusion of the witness. We see no error in the court's excluding it.

Bill No. 10 shows that appellant asked May Benton Young this question: "On an occasion first before the Hintons' left you, I will ask you if the mother of this girl did not say that when she got her off in the country that, 'God damn her, she was going to kill her.'" The ground of the state's objection is not stated in the bill. But we are at a loss to know upon what theory this testimony was admissible. At best it could but constitute a threat of a mother, and there is nothing in the bill, nor the record, suggesting even remotely that her mother had anything to do with the killing.

Bill No. 12 complains that the state introduced in evidence a chain mentioned in May Benton Young's testimony. Said chain was about 4½ feet long, and weighed about five pounds. Objection to the introduction of said chain was, that it is not alleged as a means by which any of the assaults were committed. May Benton's testimony, referred to by the bill, shows that appellant chained deceased to a tree, and beat her; and this chain was identified as the chain with which he had chained her. There was no error in this.

Bill No. 13 shows that appellant objected to the introduction by the state of photographs taken of deceased after her death; the grounds of objection being that the pictures were not true representations of the girl, and were not taken until after certain operations had been performed upon her by the attending physicians. These objections are not certified by the court as facts. If the pictures were true representations, or measurably true representations, of the condition of the body of deceased after death, we know of no rule of law that would exclude their admission as testimony. If they were not true, or measurably, true, representations at least, they should not have been introduced; but in the shape the bill is presented to us there is nothing therein showing that the same were not correct photographs, except appellant's objections. The grounds of objection are not certificates of the judge that such were facts.

Bill No. 15 complains that, after the witness Carroll Thomas had left the witness stand, the court called said witness to the judge's bench, where he had a conversation with said witness, in the presence but not in the hearing of the jury. We know of no law that precludes this action on the part of the court.

Bill No. 16 shows that after appellant had introduced all of his witnesses, he requested the sheriff to call the witness Dr. O. B. Atkinson. Whereupon the court informed counsel that said witness had been excused until 9 o'clock the following morning, and that he would permit the state to open the argument before the return of said witness, if defendant had no further evidence to introduce. Appended to this bill is a long explanation by the court, showing, in substance, that Dr. Atkinson was summoned as a witness, but the defendant announced ready for trial with the understanding that Dr. Atkinson could not be present on account of the very serious illness of his wife. After said statement, defendant continued to announce ready for trial. However, during the trial of the case, Dr. Atkinson came into courtroom and was sworn as a witness at the request of both parties. He then stated to the court that his wife was very sick, having given birth to a child at 5 o'clock that morning, and requested that he be not com-

pelled to remain at Georgetown. State's counsel thereupon indicated to the court that he did not intend to use Dr. Atkinson and if defendant desired to use him to do so at that time. This defendant declined to do, and also declined to excuse him. Thereupon the court held Dr. Atkinson at the courthouse from 9 o'clock in the morning until 3:30 o'clock in the afternoon of the same day. At this time Dr. Atkinson showed the court, by satisfactory evidence, that his wife was desperately sick, and that his presence at Florence was imperatively demanded for that reason. The court thereupon again caused the witness to be tendered to defendant at the conclusion of the testimony of the witness Carroll Thomas. Defendant again refused to use him, and refused to state whether or not he intended to use him, and also refused to excuse him. Some time after this, Dr. Atkinson was present in court, and he was tendered to counsel for defendant by the court, and counsel for defendant was also then told that he could not only use him, but any other witness he desired, before beginning the argument of the case. The witness was tendered appellant immediately after the state had opened the argument of the case, and before appellants' counsel had made their argument. This bill not only shows no error, but manifests a degree of obstinacy on the part of appellant's counsel.

There are various errors urged in appellant's motion for new trial. Most of them have been discussed in the above bill. Among others, appellant complains in his motion that spectators were permitted to lean on the jury box and crowd the courtroom. Appellant also complains that the spectators at the time of the verdict indulged in certain conduct not disclosed in motion nor bill. If the spectators interfered with the trial of this case, the record does not show that fact; nor has any bill indicated anything of the kind. The bare allegation in the motion is not sufficient.

Appellant also complains of the argument of the assistant district attorney. There is no bill presenting this matter. He also objects that state's counsel was permitted to discuss the rape of deceased by defendant, because he was not charged with this offense; and in not instructing the jury to disregard said argument. There is no bill presenting this matter.

Appellant in motion for new trial objects to the following portion of the court's charge: "Certain evidence has been permitted to be introduced before you, which it is claimed by the state, shows that the defendant assaulted deceased for the purpose of having, or that defendant did in fact have, sexual intercourse with said deceased. You are at liberty to consider said evidence for what, if anything, you consider it worth, in determining the motive with which defendant committed the offense charged in the indictment,

if you find that he committed such offense at all. But you have not the right to consider said evidence for any other purpose whatsoever in determining either the question of his guilt or innocence of the offense charged, or in determining the amount or character of his punishment, if any, or for any other purpose." As we understand it, the evidence shows that appellant beat, bruised, and ultimately killed deceased in the mode and manner above detailed, and in the course of his beatings had carnal intercourse with her on one occasion. It seems that the trial court permitted the introduction of this testimony (there being no bill reserved to the same) upon the theory that it furnished a motive for the killing; that deceased would not submit willingly to appellant's carnal desires, and that furnished the motive for the brutal manner in which she was beaten. As we understand it, the above charge limited said testimony to proving said motive. If it be conceded there was error in the same, it could not have injured appellant, since there was no bill to the introduction of the testimony.

We have never had a record in this court that equalled the unparalleled ferocity and brutality manifested in this one. The jury have seen fit to give appellant the death penalty. The trial court has charged on every legitimate phase raised by the evidence. The above exception is the only objection urged to the charge. We think the evidence disclosed by this record amply warranted the verdict of the jury, and the judgment is affirmed.

MERONEY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 14, 1906.)

INTOXICATING LIQUORS — ILLEGAL SALE — PROSECUTION—DEFENSES—MISTAKE.

The fact that defendant arranged with another to pay his liquor license tax, and the other failed to do so, was no defense to a prosecution for selling without a license.

Appeal from Dallas County Court; H. F. Lively, Judge.

Mack Meroney was convicted of violating the occupation tax law, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction was for violating the occupation tax law in not procuring license to pursue the occupation of a retail liquor dealer, the punishment being fixed at a fine of \$450, the amount of the state and county tax.

The facts show conclusively that appellant was pursuing the occupation of selling spirituous, vinous, and malt liquors without a license, at the time of the alleged offense, as charged in the indictment. It is further-

shown that he had not paid his liquor license tax as required by law. Appellant's defense was that he believed other parties had paid his tax and secured a license for him to pursue this occupation. The court in his charge submitted the issue of mistake of fact to the jury. However, we do not believe this defense could be urged here; but, at all event, appellant secured the benefit of it. The fact that he made arrangements with a wholesale liquor dealer to pay his tax, which had not been paid, would not absolve appellant from a prosecution if he pursued said occupation without paying said tax. The statutes of this state require that, after the tax is paid, the license must be posted in a conspicuous place in the house. The statute authorizing prosecutions for failing to pay the tax, authorized appellant to have the prosecution dismissed upon the payment of the tax. None of these facts appear in this record.

No error appearing, the judgment is affirmed.

CAMP v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

FENCES — REMOVAL OF DIVIDING FENCE — CRIMINAL RESPONSIBILITY.

Under Pen. Code 1895, arts. 796, 797, providing that it shall be unlawful for any joint owner of any dividing fence to remove the same, except by mutual consent or after giving notice, etc., the removal by defendant of his fence to another location, so as not to separate it from the fence of the adjoining proprietor, was not an offense.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fences, § 63.]

Appeal from Jones County Court; Jno. B. Thomas, Judge.

Morgan Camp was convicted of violation of Pen. Code 1895, arts. 796, 797, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The information sought to charge appellant with violating articles 796, 797, Pen. Code 1895.

The alleged joint owner is named Newberry. His testimony is to the effect that he and appellant had a joint or division fence; that appellant tore down this fence and rebuilt. The new fence was about 16 feet north of where the old fence stood. Newberry further states: "The moving of this fence did not throw my inclosure outside, but some time in March, 1905, a gate in the northeast corner of my inclosure, which defendant was accustomed to go through, was left open, and then left down, which did throw the stock in my inclosure. I did not prosecute defendant in this case until then. I made the complaint against him on the 17th of March, 1905. The fence alluded to was moved in May, 1904." There is some discrepancy between the testimony for the state and that introduced by appel-

lant, but they both agree upon the fact that the removal of the fence did not separate Newberry's fence from appellant; that they were still connected after the rebuilding of the dividing fence between them.

This evidence does not show a violation of the articles under which the prosecution was brought. Those articles were never intended to prevent the joint owner from moving his fence from one point to another, so as to conform to his own wishes in regard to where his fence should run, provided he did not withdraw his fence and separate it from the adjoining fence. This statute was intended to prevent joint owners from separating their fences without proper notice, when by the separation or withdrawal of the fence injury would accrue to the party from whose fence it was withdrawn; that is, it would leave his premises uninclosed by reason of the separation or withdrawal of the fence.

Because the evidence does not show a violation of the law, the judgment is reversed, and the cause remanded.

BOYD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

INTOXICATING LIQUORS—SALE—EVIDENCE.

Where defendant, on being informed that there was whisky in an express office consigned to him, told his informant that he could have it if he could get it, and the informant wrote out an order, signing defendant's name, and sold it to the one who got the whisky, there was no sale of liquor by defendant to the informant.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 160.]

Appeal from Taylor County Court; D. G. Hill, Judge.

L. A. Boyd was convicted of a violation of the local option law, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with selling intoxicating liquor to D. J. Hill in violation of the local option law.

Witness Wade went to Hill, and asked him if he had any whisky, and received a negative reply. However, he stated he thought he could find some one who had whisky. He left Wade, and soon returned with an order for some whisky, which was addressed to the express agent, and signed "L. A. Boyd." Wade gave Hill \$1.25 or \$1.30. Hill presented the order to the express agent at Abilene, and got a quart of whisky. Hill testified in regard to the conversation with Wade, and, further, that he fell in with a relative of his by the name of Vaughan, and they together went to appellant and asked him if he had any whisky in the express office. Appellant stated that he did not. They then informed him that there was a C. O. D. package in the express office for

him, and asked him if they could have it. Appellant stated, if there was any there, he did not know anything about it, and that it must be a mistake. They repeated the statement that it was there, and asked him if they could have it. His reply was: "It is none of mine. You can have it, if you can get it." Hill then testifies: "He did not give a written order at the time, and did not go to the express office and authorize the express agent to deliver it to us. Vaughan, who was with me, turned around, and we were walking off, and Vaughan wrote the order and signed defendant's name to it. I took the order to the depot, and gave it to Ed Wade, and Ed gave me \$1.30, and I took the order and got the whisky. I was acting for Ed Wade, who wanted the whisky." Maxwell testified that he went to the office of the county attorney with the defendant. Defendant's purpose was to correct a statement he had previously made to the county attorney "the day before about a whisky matter. He stated, in the presence of the county attorney, when I was there, that the boys had asked him about the whisky in the office that was there in his name, and he told them that they could have it if they could get it. He did not say that he gave D. J. Hill an order for the whisky." The state here rested the case, and appellant testified, among other matters, that Vaughan and Hill came to him and asked him if he had any whisky in the express office. He informed them he had not, and had ordered none; that if there was any whisky there it must belong to somebody else. They informed him then there was some whisky there in his [appellant's] name, and wanted to know if they could have it, to which he replied: "I told them I did not have any there, that I knew about; but, if they could get any out, so far as I was concerned they could have it. I had not ordered any whisky. I did not on that day give anybody a written order to anybody to get my whisky out of the express office. I did not go about the office, or so verbally authorize the agent." This is a sufficient statement of the facts to show that appellant did not sell any whisky to Hill.

The judgment is reversed, and the cause remanded.

CRAFILL v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1903.)

1. INTOXICATING LIQUORS—SALES ON ELECTION DAY—INDICTMENT.

In a prosecution for keeping open a saloon on an election day, an indictment charging that a public election was held in a certain school district in a county and city named, and that the accused did then and there open and keep open in the city named a barroom, was sufficiently definite in its allegation as to the location of the barroom.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 227.]

2. CRIMINAL LAW—APPEAL—RECORD.

The exclusion of an offer to prove certain facts is not ground for reversal, where the bill of exceptions fails to show the purpose for which the testimony was sought.

3. INTOXICATING LIQUORS — KEEPING OPEN SALOON ON ELECTION DAY.

To constitute a violation of the law prohibiting the keeping open of saloons on election days, it is not necessary that the opening of the saloon shall be willful.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 179.]

4. SAME—EVIDENCE.

Evidence examined, and held sufficient to support a conviction of keeping open a saloon on an election day.

Appeal from Nolan County Court; A. B. Yantis, Judge.

E. Cranfill was convicted of keeping open a saloon on an election day, and appeals. Affirmed.

J. F. Eidson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for keeping open a saloon on an election day.

The indictment is criticised because it is not specific in its allegation as to the location of the barroom. That portion of the indictment is as follows: " * * * In the county of Nolan and state of Texas did then and there unlawfully on the 7th day of May, 1904, a public election was held under authority of law in Sweetwater independent school district, in said county, and in said city of Sweetwater, for the purpose of electing seven trustees for the said independent school district of Sweetwater, and E. Cranfill, during the day on which said election was held as aforesaid, did then and there unlawfully and willfully open and keep open in said city of Sweetwater a barroom," etc. We believe these allegations are sufficiently definite to show that the election was held in the independent school district of Sweetwater, and that said city of Sweetwater is in said independent school district, and that the barroom was open in said city of Sweetwater.

The state introduced several witnesses, among them, the president of the board of trustees, the sheriff, and maybe one or two other witnesses, to make its case. Appellant then proposed to prove by the sheriff and the presiding officer of the election that they, and especially the sheriff, informed appellant that he could keep open the back door of his saloon, if he would close the front door, and that it would not be a violation of the law, and he (the sheriff) would protect him against a prosecution. This is the substance, without going into a detailed statement of the rejected testimony. The bill fails to recite the purpose for which this testimony was sought. It could not be used to show that he had not violated the law. It is not within the power of the officers to authorize any one to violate this law. The question is not suggested by appellant, either in bill of

exceptions, motion for new trial, or special charges, that these witnesses were accomplices; nor was it proposed to introduce this evidence to show that these witnesses were accomplices. If the bill of exceptions had shown that this was the purpose of the rejected testimony, it would have been error to refuse to admit it. But the bill of exceptions, as before stated, does not state the object or purpose of offering the testimony. In the brief it is suggested that it was admissible to show that the saloon was not kept open "willfully," or with the intention of violating the law. But this was not stated in the bill of exceptions. Had it been so stated for this purpose, it would not have been admissible for such purpose.

Appellant requested an instruction, which was refused, defining "willfully," and, further, that, if the jury should find the saloon was not opened willfully, they should acquit. The court did not err in refusing this instruction. It is not necessary under our law that the opening of the saloon shall be willful. The statute prohibits the opening or keeping open of such place on the day of the election, without using "willfully."

In regard to the sufficiency of the evidence, it is found to be ample to warrant the finding of the jury that appellant violated the law under which he was indicted. About 10 o'clock in the morning he was notified that an election would be held and he would be required to close. Up to that time it seems that none of the saloons were aware of the fact that an election would be held on that day. As before stated, the saloon men were notified by the sheriff and presiding officer of the election to close, and all did so, at least so far as the front doors were concerned. From that time on the rear door of appellant's saloon was kept open, and it seems to have been very fully patronized during the day; 30 or 40 people being in there at one time. We think the evidence is sufficient to show that he violated the law.

There being no sufficient legal errors to reverse the judgment, and the evidence being sufficient, the judgment is affirmed.

SPENCER v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

GAMING—PRIVATE RESIDENCE.

A conviction cannot be had for gaming, the place of play being the private residence of defendant, occupied at the time by himself and family, on evidence of playing at one time only, and without proof that the place was commonly resorted to for purpose of gaming.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 183.]

Appeal from Knox County Court; W. M. Moore, Judge.

James Spencer appeals from a conviction. Reversed.

Chas. E. Coombes, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction is for gaming; the fine being fixed at \$10.

The facts shown by the main prosecuting witness are as follows: "On February 22, 1905, I saw defendant and another person, whom I have since learned was Oscar Tynes, playing at a game of cards in a tent in the town of Knox City, Knox county. They had money up on the table. One of them had a dollar, and the other had several pieces of small change. The tent in which defendant and Tynes was playing was a private residence, occupied by defendant and his family. It was a tent, with a wooden frame, covered over with duck. Defendant and his wife were living in this tent, and had been living there since last fall."

The indictment contains two counts. The first count alleges the playing to be at a private residence, and the second that the game was played in a tent; the same being commonly resorted to for the purpose of gaming. The court submitted both counts to the jury. The evidence shows that the tent in question was the private residence of appellant, and occupied by himself and family at the time the game was played. *Hipp v. State*, 75 S. W. 28, 8 Tex. Ct. Rep. 111, 62 L. R. A. 973. Being his private residence, the evidence is inadequate to support the conviction, because there is only testimony of the one playing, and there is a total lack of evidence that the tent was commonly resorted to for the purpose of gaming. This being true, the evidence is not sufficient.

The judgment is accordingly reversed, and the cause remanded.

GREEN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

STATUTES — CONSTITUTIONALITY — GENERAL STATUTES—SPECIAL OR LOCAL STATUTES.

The statute regulating the practice of pharmacy, and applying only to druggists or pharmacists plying their vocation in towns of 1,000 inhabitants or more, applying to all persons as a class under the same conditions, is a general and not a special statute, and not unconstitutional.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 90.]

Appeal from Willbarger County Court; J. A. Nabers, Judge.

W. W. Green was convicted of unlawfully compounding a prescription, and appeals. Affirmed.

R. W. Hall, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of unlawfully compounding a prescription, and his punishment fixed at a fine of \$50.

Appellant insists that the statute which regulates the practice of pharmacy is violative of both our federal and state Constitu-

tions; that the same is unconstitutional for the reason that its operation applies only to druggists or pharmacists plying their vocation in towns of 1,000 inhabitants or more, and does not apply to the same class of persons pursuing their vocations in towns of less than 1,000. The specific insistence of appellant seems to be that the law is a special or local one within the meaning of the constitutional inhibition, and not a general statute. We do not think appellant's insistence is correct. The statute applies to all persons as a class under the same conditions and environments, and, so applying, is a general and not a special statute. Being a general statute, there can be no question as to its constitutionality. *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343; *Ex parte Massey* (decided at Tyler term) 92 S. W. 1083, 1086. We accordingly hold that the statute is constitutional.

No error appearing in the record, the judgment is affirmed.

HANDY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

GAMING—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to sustain a conviction of gaming.

Appeal from Shackelford County Court; I. M. Chism, Judge.

Henry Handy was convicted of gaming, and appeals. Reversed.

Thomas L. Blanton, for appellant. Walter L. Morris, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This conviction is for gaming, the punishment being fixed at a fine of \$10.

Appellant insists that the indictment is defective, because it does not allege that money or something of value was bet or wagered by defendant. This is not necessary. The indictment does allege the defendant bet and wagered. *Long v. State* (Tex. App.) 2 S. W. 541. The controlling question is the sufficiency of the evidence. The game of cards was played at a private residence, and the evidence wholly fails to show that it was commonly resorted to for that purpose. The game for which appellant was prosecuted was the first game proved by the state that had been played at said residence. One or more games were subsequently played, but no complicity on the part of appellant is shown in said games; and the casual playing at a private residence, such as the record in this case discloses, would not establish the fact that the residence was commonly used for the purpose of gaming, even if the subsequent playing was admissible to prove that the house was commonly resorted to for that purpose.

The evidence not being sufficient, the judgment is reversed, and the cause remanded.

McCOLLUM v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

GAMING—PRIVATE RESIDENCE.

Where a house was occupied only by two boys, 17 and 15 years of age, the rest of the family having moved away, this was not sufficient to authorize gaming there as at a private residence occupied by a family.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 183.]

Appeal from Floyd County Court; A. B. Duncan, Judge.

Alvy McCollum was convicted of gaming, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of gaming, and fined \$10.

Prosecuting witness testified that he was with appellant at Hight's house, some time in February, 1904. "One night in said month all of us boys had gathered there to dance and have a supper. Defendant and various other boys [including the two Hight boys and witness] got there about 8:30 o'clock, stayed until after supper, and left about midnight. Saw defendant Jim Bryant sitting at a table with a deck of cards, and the cards were being shuffled and fooled with about a minute and a half, and I, or Annis Bell, or both, spoke up and said that there had better not be any card-playing there, as we would report them, and they quit and put up the cards." Witness says that he does not know that they played any game with cards. Another witness swears that on said occasion he played a game of cards with defendant. The state introduced one of the Hight boys, who testified: "I live about 3½ miles south of Lockney, at my father's place, in Floyd county, and lived there in February, 1904. There was no one there, except my brother Lonnie and myself during February. My father had gone, and moved the rest of the family to Borden county, some time before that, to his other place in that county. There had been a family by the name of Jones living in the home; but they had moved away about Christmas, before the time that defendant and the boys were there. The house was not occupied by a family, but by myself and my brother. I was 17 years of age, and he 15." We take it that these facts do not make out an offense within the statute. The place had been a private residence, but was not such at the time of the playing. The mere fact that the two boys lived at the former home of the father, which had been abandoned by the father, he moving to another county, and no family living in the residence at the time of the playing, would not authorize appellant to play at said place as being a private residence occupied by a family.

We do not deem it necessary to review the other questions in the record, since they do not present any error authorizing a reversal.

No error appearing, the judgment is affirmed.

HARRIS et al. v. BOGLE.

(Supreme Court of Tennessee. Feb. 13, 1906.
On Rehearing Feb. 24, 1906.)

1. JURY—RIGHT TO JURY TRIAL—TIME FOR DEMANDING JURY.

Shannon's Code, § 6283, in relation to chancery practice, provides that if the demand for a jury is made in the pleadings the cause shall be tried at the first term before a jury summoned instantter in the same way that jury causes are tried at law. Section 6284 provides that if the demand is only made after the cause is ready for hearing the trial shall be before a jury summoned instantter upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions and other proceedings as the court may order. Section 5739 provides that the chancellors may make such rules as they may deem proper relative to chancery practice, not inconsistent with the provisions of the Code. *Held*, that a rule of a chancery court that application for a jury must be made by petition in open court upon the first day of the trial term should be construed as meaning that the jury shall be demanded on the first day of the term at which the cause shall be tried, and not at the first term at which it is triable, as otherwise it would be in conflict with section 6284.

On Rehearing.

2. SAME.

Shannon's Code, § 6284, provides in relation to chancery practice that if a demand for a jury is only made after the cause is ready for hearing the trial will be had before a jury summoned instantter upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions, and other proceedings in the cause as the court may order. Section 6283 provides that if the demand is made in the pleadings the cause shall be tried at the first term before a jury summoned instantter, in the same way that jury causes are tried at law. General Chancery Rule 2, § 4, and Shannon's Code, § 6274, allow to each party four months in which to take original evidence and two months for rebutting the evidence. *Held*, that if a jury is not demanded in the pleadings filed by either party the case falls within the operation of section 6374, and Chancery Rule 2, § 4, and a jury cannot be demanded by either party until the rights of the other have been fully enjoyed under section 6274, and rule 2, § 4.

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Suit by W. O. Harris and others against W. G. Bogle. From a decree in favor of complainants, defendant appeals. Affirmed. Petition for rehearing denied.

Jno. M. Grant, for appellant. S. N. Harwood, for appellees.

NEIL, J. The first question to be determined on this appeal depends upon the construction and validity of rule 35, of the chancery court of Davidson county. That rule, so far as it is necessary to quote, for the purposes of the present inquiry, reads as follows:

"Rule 35. Application for a jury must be made by petition in open court upon the first day of the trial term."

The cause was put at issue by the filing of an answer during the April term, 1904. The jury was demanded by defendant on the 1st

day of the October term, 1905. The chancellor declined to grant the application, and his action is defended here under the rule above quoted.

It is insisted by the defendant that a proper construction of the rule would authorize an application for the jury at any term of the court at which the case might be tried. The complainants insist that the true construction is the first term at which the case is triable. This was the view adopted by the learned Court of Chancery Appeals.

It is also insisted by the defendant that under the sections of the Code, which authorize trials by jury in chancery, an application can be made at any time during any term after the cause is at issue, and that the rule above quoted is in any event contrary to the sections of the Code referred to, and is void.

The Code sections upon the subject are as follows:

"6282. Either party may have jury. Either party to a suit in chancery is entitled, upon application, to a jury to try and determine any material fact in dispute, and all the issues of fact in any case shall be submitted to one jury.

"6283. At first term, when.—If the demand is made in the pleadings, the cause shall be tried at the first term before a jury summoned instantter, in the same way that jury causes are tried at law.

"6284. When cause is ready for hearing.—If the demand is only made after the cause is ready for hearing, the trial will be before a jury summoned instantter upon the like evidence as a suit at law, together with such parts of the bill, answers, depositions, and other proceedings in the cause, as the court may order.

"6285. Issues.—The issues shall be made up by the parties under the direction of the court, and set forth briefly and clearly the true questions of fact to be tried.

"6286. Trial.—The trial shall be conducted like other jury trials at law, the finding of the jury having the same force and effect, and the court having the same power and control over the finding, as on such trials at law.

"6287. Witnesses.—The parties in all jury trials in chancery (may) summon witnesses and enforce their attendance, as at law."

The sections of the Code which authorize the chancellors to make rules are the following:

"5739. Majority may make rules.—The chancellors of this state, or a majority of them, may make such rules as they may deem beneficial and proper to regulate the practice of the chancery courts, not inconsistent with the provisions of this Code; and the rules thus agreed upon shall be obligatory on all the chancery courts.

"5740. If not, each chancellor may.—In the absence of any such action by the chancellors as a body, each chancellor may make rules and regulations of practice for the pur-

pose of expediting business in his own chancery division."

It is observed that the sections last quoted forbid the making of any rules which are inconsistent with the provisions of the Code.

The rule above quoted has no application to the case contemplated in Code, § 6283. If there be any conflict it must be with the provisions of section 6284. This provides for the making of an application "after the cause is ready for hearing." That section does not, in terms, give the right to demand a jury at any time after the cause is ready for hearing. This omission left the matter open to regulation by rule of the court under the sections of the Code above quoted upon that subject.

The validity of such rules was elaborately considered by this court in the case of *Cheatham v. Pearce*, 89 Tenn. 670-691 et seq., 15 S. W. 1080. See, also, the case of *Stadler v. Hertz*, 13 Lea, 818, 819.

In the case last cited, the rule which the court considered and held valid contained the provision that no jury should be allowed in the court, unless the demand therefor should be made on or before the second day of the term on the motion docket or at the bar of the court. The rule which was held valid in *Cheatham v. Pearce*, was "that application for a jury must be made within the first three days of the trial term."

The following sections of the Code throw light upon the subject.

"6138. Issue and trial.—If the plaintiff do not except to the answer within the time prescribed by law, the issue shall be regarded as made in the same way as if replication had been filed, and the cause shall stand for trial at the first term of the court after answer filed; and, if at that or any other term the cause is continued, it shall stand for hearing at the next term.

"6210. Notice of answer filed; twenty days exception.—When an answer has been filed, the clerk and master shall notify the complainant's solicitor of the fact, by letter or otherwise, and he may, within twenty days, file exceptions thereto.

"6211. If no exception, cause at issue; trial at first term.—If the plaintiff fail to except to the answer within said time, the cause shall be at issue, and stand for trial at the first term after the answer is filed.

"6244. Causes at issue without replication, and stand for trial at first term.—All causes are at issue, without replication filed, if the plaintiff fail to except to the answer of the defendant within the time prescribed by law, and shall stand for trial at the first term of the court after answer filed, and at every term thereafter, if not then heard."

The first trial term is the term at which the issue is thus made up.

Does the rule mean that the jury must be demanded at this term? If so it must be held void as in conflict with section 6284 of Shannon's Code. That section plainly con-

templates that a jury may be demanded "after the cause is ready for hearing." That this does not mean merely after the cause is at issue is shown by the provision further on in the section that upon such demand being made the cause may be heard, among other things, on "depositions, and other proceedings in the cause." This indicates that the Legislature had in mind a case which had been sufficiently long at issue to permit the parties to take evidence in the form of depositions; indeed the ordinary occurrence in practice wherein it appears the cause has been put at issue and the parties have prepared it either partially or wholly by the taking and filing of depositions, documentary evidence, etc. These provisions cannot be harmonized with a rule requiring the demand of a jury on the first day of the first term at which the cause could be tried, that is on the first day of the term at which the cause is put at issue. For example, the present cause was put at issue on June 4, 1904, which was during the April term of the court. The construction insisted upon would require that the jury should have been demanded on the first Monday in April, 1904, which was the first day of the first term at which the cause was put at issue, and at which it was triable; that is that it should have been demanded months before issue made, and before it was possible that there could be any depositions on file in the cause.

The rule should be so construed as to bring it into harmony, if possible, with the Code section last referred to. This harmony is effected by construing it to mean that the jury shall be demanded on the first day of the term at which the cause shall be tried.

The learned Court of Chancery Appeals was in error in its citation of the case of *Cheatham v. Pearce*, supra, as supporting its construction. An examination of that case will disclose that the bill was filed July 22, 1889, against C. S. Pearce and Thomas Ryan, as partners, and also against C. B. & C. D. Pearce (89 Tenn. 672, 15 S. W. 1080); that a plea in abatement and an answer to so much of the bill as was not covered by the plea, were filed by Pearce & Ryan, September 2, 1889 (89 Tenn. 673, 675, 15 S. W. 1081, 1082); that on the same day C. B. & C. D. Pearce filed a plea in abatement (89 Tenn. 676, 15 S. W. 1082), to the whole bill (89 Tenn. 680, 15 S. W. 1083); that on November 27, 1889, a replication was filed by the complainant to both pleas (89 Tenn. 682, 15 S. W. 1083), which was during the October term, 1889. Thus the cause was put at issue during that term. A jury was demanded in the replications, but this was held ineffective, because not called to the attention of the chancellor. On this special phase of the matter the court said (page 696 of 89 Tenn., page 1086 of 15 S. W.): "We believe no case can be found in our reports where the chancellor has ever ordered a jury trial at the application of one of the parties unless the application was made to the chancellor by motion in open court;

and a demand for a jury in a replication or other pleading is not a compliance with the practice."¹ The application which the court had under examination and which it considered and treated as the only formal application for a jury trial in the cause was the one which was made on May 27, 1890 (89 Tenn. 683, 15 S. W. 1083), which was during the April term, 1890, at which term the cause was in fact tried (89 Tenn. 686, 15 S. W. 1084), and of this application, the court said: "It is true that complainant did apply to the chancellor in open court for a jury, but unfortunately, the application was not made 'within the first three days of the trial term' as required by the rule of April 10, 1889, and therefore was made too late." 89 Tenn. 696, 697, 15 S. W. 1086, 1087.

It is thus seen that the court's view of the matter, as expressed in the opinion referred to, was that the term intended was the term at which the cause was actually tried, and that the decision was that the jury must under the rule be demanded within the first three days of that term; not within the first three days of the term at which the cause was first triable.

The same result is reached on a careful examination of *Stadler v. Hertz*, supra. When the application for a jury was made the cause had been at issue about a year, and no evidence had been filed by the complainants. When forced into trial after this lapse of time they demanded a jury in order that they might escape the effect of their failure to take proof at an earlier date. Speaking to this subject the court said: "Nor do we think that the court below was in error in refusing a jury to complainants. For the purpose of saving costs and time, and to have all jury cases tried about the same time, and for the convenience of the court as recited therein, a rule of court was published and entered upon the minutes of the court, declaring that no jury will hereafter be allowed in this court, unless the demand therefor be made on or before the second day of the term, by motion on the motion docket, or at the bar of the court. This we think a reasonable regulation, preventing surprise to the adverse party and affording opportunity to obtain a jury. The motion in this case was made more than a week after the beginning of the term, and on the same day on which the cause was heard and the decree entered."

It is apparent that the court entertained the view that the application would have been in time if made on or before the second day of the term at which the cause was tried. It follows, therefore, that the application in the present case was within time, under a true construction of the rule, having

been made on the first day of the term at which the cause was tried.

However, the jury was properly denied to the complainant, because he had waived the right by applying at the previous term for and obtaining a reference of the cause to the master. The hearing had at the October term was on the report of the master. By such successful application for a reference the complainant waived the right to a jury trial. He could not have such a trial upon the report of the master. *Martin v. Martin*, 24 S. C. 446; *Rivas v. Summers*, 33 Fla. 539, 15 South. 319; *Baird v. City of New York*, 74 N. Y. 382.

On the ground last stated the decree of the Court of Chancery Appeals is affirmed, with costs.

On Petition to Rehear.

Complainants' petition is overruled, but in considering the points made therein it has occurred to us that in order to prevent a misconception, we should make some additional observations upon one phase of the subject discussed in the original opinion.

It is first to be noted that the system of appearance and trial terms pertaining to courts of law has no place in our chancery practice; hence the cases which complainants' counsel cite concerning trial terms at law have no bearing. In chancery the issue is made up, not at appearance terms, but chiefly at rules. Each day of the term is a rule day, and the first Monday of every month during vacation. *Shannon's Code*, § 6233. While subpoenas to answer may in some instances be made directly returnable to terms of court (*Shannon's Code*, § 6160), they are, in general, to be made returnable to rule days (section 6159); also publication notices (section 6164; *Fellows v. Cook*, 10 Heisk. 81, 82, 83). When the terms of court continue long enough such process, if issued more than five days before the term, may be made returnable to any Monday of the term, and if executed five days before such return day, the defendant must cause his appearance to be entered, and make defense, or obtain time therefor within the three succeeding days and the cause will stand to be proceeded in at that term (*Chancery Rule 11*; *Shannon's Code*, p. 1783), if such process be executed within five days before such return day, then it is to be returned to the succeeding Monday, and the defendant is allowed the three succeeding days thereafter to cause his appearance to be entered, and make defense or obtain time therefor, and the cause will stand to be proceeded in at that term (*Id.* § 2).

Large powers are vested in the chancellor and in the master to facilitate the preparation of causes during vacation. Sections 6220-6245.

A rule may be made in the master's office during vacation requiring either party to take any step necessary to the progress of the

¹The court was not considering a case falling under section 6233, under which the application is made in the bill or answer. The replication was treated as a mere similitur (89 Tenn. 696, 15 S. W. 1086).

cause. Section 6199. If this step be not taken the chancellor can at the next term make the rule peremptory, requiring compliance with it on penalty of dismissal. Section 6200.

Upon being summoned to answer, the defendant may make defense by demurrer, plea, or answer, but upon such demurrer or plea being overruled, he must answer by the next rule day, if no time be granted by the court. Section 6205. The next rule day during the term of the court would be the next day.

Upon answer being filed, whether in vacation or in term time, it is the duty of the clerk and master at once to set the cause for hearing, and transfer it from the rule docket to the trial docket. Section 6243.

The cause is then ready for the taking of testimony, and it is the duty of the parties to proceed. Section 6273, rule 1, § 6; Shannon's Code, p. 1777.

The general chancery rule (rule 2, § 4), and the Code (Shannon's Code, § 6274), allow to each party four months in which to take original evidence and two months for rebutting evidence. This does not mean, however, that six months must elapse after a cause in chancery is at issue before either party can force the other to trial. *Rather v. Williams*, 94 Tenn. 543, 29 S. W. 898.

In the case cited, the complainant obtained a trial at the expiration of three months and five days from the date when the cause was put at issue. He accomplished this by taking his own evidence promptly and notifying his adversary that he had closed his case. The state of the pleadings was such that the defendant had no original evidence to offer. Two months elapsed between the date of the notice to him, and the day when the cause was called for trial. Of course he could have introduced his rebutting evidence within this time, if he had any. But he did not show that he had any such evidence. He stood simply upon the rule, claiming that a trial could not be demanded as a matter of right until six months had expired. The court held this position was untenable.

Although some delay necessarily results where the parties avail themselves of the benefits of rule 2, § 4, and of Code, § 6274, however much its operation may be restricted by the diligence of either party, it must be remembered that the rule does not apply where a jury trial is demanded, in the pleadings under section 6282. The necessity for its use, the time to take and file evidence, is superseded by the presence of the witnesses themselves before the court and jury.

The next section (6284) quoted in the original opinion, contemplates a case where the demand is not made until after the cause is at issue. It applies equally to cases in which no evidence has been filed, to those in which some evidence may be on file, and to

those in which all the evidence is on file in the form of depositions or documentary evidence.

In the first of these the evidence is supplied by the testimony of witnesses introduced on the trial; in the second, the depositions and documentary evidence are supplemented by oral evidence; in the third the evidence is already complete.

But in determining the meaning of this section, it should be construed in connection with the one immediately preceding it, and also with section 6274, and Chancery Rule 2, § 4. Holding all of these provisions under one view, we think the following conclusion is obvious and inevitable.

If a jury is not demanded in the pleadings filed by either party, under section 6282, then the case falls within the operation of section 6374, and Chancery Rule 2, § 4, and a jury cannot be demanded by either party, under section 6283, until the rights of the other have been fully enjoyed under section 6274, and the said rule 2, § 4.

But, as has been already pointed out, that time is by no means necessarily six months from the day the cause was put at issue. It has been seen by the example which the case of *Rather v. Williams*, supra, furnishes, that the complainant may sometimes, by diligence on his own part, reduce the time by about one-half. Cases may be conceived where the reduction would be even greater.

Thus it may often happen, where the terms of court are long, particularly in the cities of the state, that issue will be made, proof taken, and the cause stand for trial, all within the period of a single term.

Now what are the rights of the parties in respect of a jury trial in a situation such as this? We think it clear that, after the cause has thus become ready for hearing, either party would have the right at any time thereafter, during that term, under section 6283, to demand a jury trial.

Rule 35 could have no application to such a state of facts, because, if so construed, it would be brought into conflict with the statute. Or, to state the point in a different way, in so far as the general language in which the rule is couched would extend its operation to cases in such a situation it must be held void. But its operation would be free and unembarrassed at any subsequent term. What is said in the original opinion, therefore, upon the subject, must be understood as qualified and explained here.

The defendant's petition to rehear is also overruled. The point made in this petition is that defendant did not apply for the reference, but it was made upon the chancellor's own motion. This is the form of the matter, but not the substance. What happened was that the chancellor himself suggested the order of reference, and granted it, in order to enable the defendant to get in his proof. He accepted and acted on it. The principle

is the same. *Kelly v. Smith*, 1 Blatchf. 290, Fed. Cas. No. 7,875; *Atkinson v. Whitehead*, 77 N. C. 418; *Grant v. Hughes*, 96 N. C. 177, 2 S. E. 839.

TENNESSEE CENT. RY. CO. v. DOAK.
(Supreme Court of Tennessee. Dec. 2, 1905.)

PARENT AND CHILD—ACTION FOR INJURY TO MINOR CHILD.

An action by a parent for injury to a minor child cannot be maintained; Shannon's Code, § 4504, providing that such an action shall be brought in the name of the child, and section 4503, authorizing an action by the parent merely for the expenses and loss of services resulting from the injury.

Error to Circuit Court, Overton County; Cardell Hull, Judge.

Action by Dave Doak against the Tennessee Central Railway Company. Judgment for plaintiff. Defendant brings error. Reversed and dismissed.

Conatser & Case and J. H. Bowman, for plaintiff in error. A. H. Roberts, for defendant in error.

SHIELDS, J. This action was begun before a justice of the peace of Overton county by Dave Doak against the Tennessee Central Railroad Company to recover damages in the sum of \$495 for injuries sustained by his daughter, Fanny Doak, then 12 years of age, while alighting from one of the company's trains at a station. The daughter is not a party. There was judgment in the circuit court, to which the case had been appealed, against the plaintiff in error for \$150, and it has brought the case to this court by proper proceeding and assigned errors.

This judgment must be reversed. An action to recover damages for wrongful and negligent injuries to an infant under 21 years of age must be brought in his or her own name. Code 1858, § 2804; Shannon's Code, § 4504.

The father, or, in case of his death or desertion of his family, the mother, can only sustain an action for the expenses and actual loss of service resulting from an injury to a minor child in the parent's service or living in the family. Code 1858, § 2803; Shannon's Code, § 4503.

This action is brought by the father only, and is for damages sustained by the infant child. It is not a suit for expenses or loss of service resulting from an injury to the child, nor is there any proof in the record to sustain such an action.

The judgment is reversed, and, as no recovery can be had upon another trial, the suit will be here dismissed.

OSBORNE v. STATE.
(Supreme Court of Tennessee. Jan. 9, 1906.)

LARCENY—PROPERTY SUBJECT—PISTOLS.

A pistol has value, and is property which may be the subject of larceny, though its sale

within the state is prohibited by Shannon's Code, § 6650.

[Ed. Note.—For case in point, see vol. 32, Cent. Dig. Larceny, § 11; vol. 42, Cent. Dig. Robbery, § 4.]

Appeal from Circuit Court, Rutherford County; Jno. E. Richardson, Judge.

Walter Osborne was convicted of larceny, and he appeals. Affirmed.

Z. T. Cason, for appellant. Chas. T. Cates, Atty. Gen., for the State.

SHIELDS, J. The plaintiff in error was indicted and convicted in the circuit court of Rutherford county of the offense of larceny. The property stolen is described in the indictment as "one pistol, of the value of fifteen dollars." The case is here by appeal in the nature of a writ of error, and the error assigned is the action of the trial judge in charging the jury that a pistol may be the subject of larceny in Tennessee.

The contention is that a pistol is not personal property and had no market value in this state, and therefore is not the subject of larceny. It is predicated upon the statute (Shannon's Code, § 6650) making it a misdemeanor for any person to sell or offer to sell, or bring into the state for the purpose of selling, giving away, or otherwise disposing of, pistols of any kind other than army or navy pistols.

This contention is not sound. The statute does not prohibit one from owning a pistol. The fact that the sale of pistols is prohibited does probably have the effect to prevent them from having a market value in Tennessee, but it does not destroy their actual value. The owner of a pistol, while he cannot carry or sell it in Tennessee, may keep it in his residence or place of business for his protection, or send it from the state for sale. While it appears from the proof that there is no market in Tennessee for pistols of the character of the one stolen, it also appears that this one is worth \$15. It is not necessary that personal property have a market value in order to be the subject of larceny. It is sufficient that it be valuable to the owner, and the extent of the value only affects the grade of the crime. *Rex v. Clark*, 2 Leach, C. C. 1036; *State v. Allen*, R. M. Charit. (Ga.) 518; *Commonwealth v. Riggs*, 14 Gray (Mass.) 376, 77 Am. Dec. 383; *Commonwealth v. Lawless*, 103 Mass. 425; *Wolverton v. Commonwealth*, 75 Va. 909.

It is also well settled that a chattel kept for an unlawful purpose, such as intoxicating liquors kept for sale in violation of law, or gambling paraphernalia, the possession of which is prohibited, may be the subject of larceny. *State v. May*, 20 Iowa, 305; *Commonwealth v. Coffee*, 9 Gray (Mass.) 189; *Kreiter v. Nichols*, 28 Mich. 496; *Bales v. State*, 3 W. Va. 685.

There is no error in the judgment of the trial court, and it is affirmed.

ROBINSON v. BLANKINSHIP et al.

(Supreme Court of Tennessee. April 23, 1906.)

DEEDS — CONSTRUCTION AND EFFECT — REMAINDER TO HEIRS OF GRANTOR—RULE IN SHELLEY'S CASE.

A deed to the grantee for life, with remainder to the grantor if he should survive the grantee, otherwise to the heirs of the grantor, gives these heirs no estate by purchase, but leaves in the grantor a reversion, which he is capable of transferring by a subsequent deed.

Appeal from Chancery Court, Gibson County; John S. Cooper, Chancellor.

Action by J. E. Robinson, as administrator, against Mrs. M. A. Blankinship and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. M. McCaul, for appellants. Ed Smith, for appellee.

BEARD, C. J. The present case involves as its only question the constructions of the concluding clause in the habendum of a deed made by J. M. Blankinship to his wife, M. A. Blankinship, on the 5th of March, 1888, conveying to her certain real estate. The whole of the habendum is as follows: "To have and to hold unto the said M. A. Blankinship during her natural life (or so long as she may remain a widow in the event I should die before she does), together with all the appurtenances thereunto belonging, with remainder to me in event she should die before I do, and, should she survive me, then at her death or marriage to my heirs at law."

In 1895 the grantor in this deed made a second deed to his wife, by which he undertook to convey to her the property covered by that deed in fee simple, subject alone to the right upon the part of the grantor to occupy the same and receive the rent thereof during her natural life. After the execution and delivery of this second deed, the husband died leaving surviving him Mrs. M. A. Blankinship and two children, one a son and the other a daughter. The son died, leaving one heir, a boy. The daughter married. Subject to the death of the husband, Mrs. Blankinship made a mortgage on this property for the purpose of securing a note executed by her to the intestate of the present complainant, the proceeds of this note being used for the purpose of satisfying a mortgage on the same property made by her deceased husband in his lifetime. The holder of the note, it being unpaid, filed the present bill to foreclose that mortgage and appropriate its proceeds to the satisfaction of this claim. The daughter of J. M. Blankinship, the grantor of the two deeds first mentioned, with her husband and the grandson of the grantor, as well as the mortgagor, Mrs. Blankinship, were made parties defendant to the cause.

The heirs of J. M. Blankinship insist that they take as purchasers under the terms of the reservation in the habendum clause of the deed of 1888, which has been hereinbefore set out.

It will be seen that an estate during her natural life, or as long as she remained a widow, should she survive her husband, was given by that deed to Mrs. Blankinship, this grant covering only a part of the grantor's fee-simple title. Upon the termination of the life estate, the grantor surviving, as a reversioner he would have been entitled at once to enter upon the possession of the property, or if he was dead at that time, then his heirs, occupying the place of the grantor, could have asserted the same right. The interest which the grantor had after the grant of the life estate to his wife, determinable upon her marrying again should she become his widow, was technically an estate in reversion, remaining in him and his heirs upon the execution of his deed, and the nature of that estate could not be changed by calling it a remainder. So that if after the creation of this life estate determinable at an earlier period by the marriage of the wife of the grantor, should she survive as his widow, he had simply reserved a remainder to himself without more, the law fixing the character of the estate which remained in him as a reversion, would have let him into the possession upon the determination of the estate granted as a reversion, rather than as remainderman. So it was, the grant of 1885 being in the terms assumed, there is no doubt that the later deed would have carried to Mrs. Blankinship the title in fee to the property, subject alone to the life estate which the grantor reserved to himself. Now is the estate, which, as has been seen, was a reversion and not a remainder in the grantor, altered or affected by the terms of the deed, so far as his heirs are concerned?

As it is well settled that there are no heirs to a living person, if these defendants take under the clause of the deed which they insist created an estate in them, then they must take as contingent remaindermen. But they cannot take in that character, for upon the authority of many English cases, the earliest of these referred to being one found in Lord Coke's Report, the rule as stated in the text of volume 24, p. 398, of the American & English Encyclopedia of Law, is as follows: "An exception to contingent remainders is where the remainder is limited to the heirs of the grantor. This exception rests on the principle that, while such a limitation is designated as a remainder, it is not a remainder at all, but is an estate which continues in the grantor as the reversion in fee."

This rule thus announced is stated by Mr. Washburn in the second volume on Real Property (top page 525) as the well-settled common-law rule. He says, treating of the subject of contingent remainders, that "there are what seems to be exceptions to the fourth clause of such remainders. Prominent among these are limitations coming within the rule in Shelley's Case. This rule will be more fully explained hereafter, but as

showing how far it forms the exception above referred to, it is proper to state that it is accepted as one of the dogmas of common law, that if one makes a limitation to another for life, with a remainder over immediately or mediately to his heirs, or heirs of his body, the heirs do not take remainders at all, but the word "heirs" is regarded as defining or limiting the estate which the first taker has and his heirs take by descent and not by purchase. So, if a man by his will gives an estate to the devisee for life, with a remainder over to his own heirs, they do not, at common law, take as remaindermen by the will, but by descent as reversioners and heirs; that being regarded as the better title." To the same effect are 4 Kent, p. 506, and *Hoover's Lessee v. Gregory*, 10 Yerg. 451.

From the earliest period of the judicial history of this state, the rule in *Shelley's Case* was recognized and applied by this court, and it required the act of 1851-52 to abolish it. The operation of that act, however, by its terms is confined to a case where a remainder is limited to the heirs, or to the heirs of the body of a person, to whom a life estate in the same premises is given. There has never been a statute passed in this state affecting the other common-law rule which in a case like the present, where the testator or grantor disposing of a life estate, in terms, seeks to create a remainder in his own heirs, lets these heirs in upon the termination of the life estate, as reversioners rather than as remainder men. As reversioners their estate comes to them by descent and not by purchase, there being nothing in the context in the instrument to indicate that the grantor used the term "heirs" in the sense of children. This being so, the fee-simple title in the property in controversy was in the grantor, the ancestor of these heirs, and he had the full right to dispose of it as he did in his second deed. It follows, that the mortgage made by Mrs. Blankinship conveyed the whole title to the mortgagee, and these defendants setting up a claim under the deed of 1888 are without interest in the same.

The decree of foreclosure pronounced by the chancellor was without error, and the same is in all things confirmed.

MEMPHIS ST. RY. CO. v. GIARDINO.
(Supreme Court of Tennessee. April 25, 1906.)
1. ACTION—EQUITABLE DEFENSES—ACTION AT LAW.

Fraud in procuring a release may be set up as against a plea of accord and satisfaction in an action at law.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Actions, § 153.]

2. RELEASE—ESTOPPEL—LACHES.

Where one injured through the negligence of another, executed a release, and retained the money paid him for two years, he was estopped from attacking the release on the ground of

fraud, though he sued to recover an additional amount.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Release, §§ 87, 88.]

3. SAME—RESCISSION—FRAUD—TENDER.

Where, in an action for injuries, the defense was a release and the replication attacked it for fraud, it was necessary for plaintiff to tender the amount paid him with his replication.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 83; vol. 42, Cent. Dig. Release, § 45.]

Appeal from Circuit Court, Shelby County; A. B. Pittman, Judge.

Action by J. Giardino against Memphis Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed, and action dismissed.

Ewing & Williamson, for appellant. W. H. Cox and John E. Bell, for appellee.

WILKES, J. This is an action for damages for personal injuries. There was a trial before the court and a jury; and a verdict and judgment for \$750.

It appears that the plaintiff entered into an agreement of accord and satisfaction with the company before the bringing of the suit. This agreement was made on the same day the accident occurred, and about an hour or two after it happened; and this suit was commenced on the same day by plaintiff's taking the pauper oath, about five or six hours after the accident, and four or five hours after the agreement for settlement had been made. There is evidence tending to show that both when the agreement of settlement was made and when the oath was taken the plaintiff was in an unconscious condition.

Plaintiff insists that the release on the settlement was procured with undue haste, and the defendant that the suit was brought with undue haste; and upon these features of the case, we heartily agree with both counsel.

The defendant, among other pleas, set up the accord and satisfaction, to which the plaintiff replied that it was fraudulently procured, and was void. This replication was amended; and as finally put to the court, and passed on by it, was as follows:

"Comes now the plaintiff and by leave of the court files this, his amended replication to defendant's plea of settlement, and for amendment says:

"First. That at the time of said settlement he was in a semiconscious condition, suffering severe pain and agony, with his mind clouded from the effects of the injury; and that the defendant took advantage of his condition to procure the same.

"Second. That his injury was severe, and to compensate him would take several thousand dollars, and that the amount which was paid to him, or to another for him, to wit, \$50, was so grossly inadequate as to shock the mind and conscience, and for that reason should be held for naught.

"Third. That the plaintiff at the time of said settlement, in addition to his physical and mental disability, was an illiterate foreigner, who spoke the English language with great difficulty and imperfectly, and who understood the English language so little that he did not understand the import of said settlement; that he was not upon equal terms with the defendant, and did not understand and know his rights in the premises, and this the plaintiff is ready to verify."

The defendant moved to strike out this replication. This motion appears to have been made September 26, before the evidence was heard. It was strenuously insisted upon, and as warmly contested, and much argument was indulged in, the defendant insisting that the replication was insufficient, and that the suit should be dismissed, because the \$50 paid on the accord and satisfaction were not paid or tendered into court, and for other reasons; and the plaintiff insisting that no payment or tender was necessary, because the agreement was procured by fraud, and when the plaintiff was unconscious, and that it was absolutely void.

The court overruled the motion to strike out at that time, saying that if at a later stage it should appear that he had made a mistake, or that the failure to pay back the \$50 was fatal to plaintiff's effort to recover, he would so charge the jury.

Thereupon witnesses were examined. The next morning the trial judge decided that there must be a tender of the money with the replication to make it good, and reargument of the question was resumed by counsel for plaintiff, he still insisting that no tender or payment was necessary or could be required.

Counsel for the company at this stage of the proceeding moved for peremptory instructions on the pleadings and plaintiff's evidence that the suit be dismissed.

The court thereupon said he had not finally decided the question of the necessity of payment or tender, but only expressed his opinion, and that he would hear the motion for peremptory instructions at the proper time.

Thereupon argument was resumed upon the question of the necessity of tender or payment, and quite a number of authorities were cited. Counsel for the defendant company insisted on his motion for peremptory instructions, and the court held that he could not give peremptory instructions until plaintiff had closed his evidence.

Thereupon counsel for plaintiff paid into court the \$50, and interest, to which the counsel for defendant objected, on the ground that the plaintiff had ratified the settlement, by not tendering or paying it into court with his replication. The objections of defendant's counsel were overruled, and the \$50 and interest being paid into court, the examination of plaintiff's witnesses was proceeded with.

After plaintiff had introduced all his evidence defendant's counsel renewed his motion for peremptory instructions which the court

declined to give, and counsel excepted; and defendant thereupon produced its evidence, and at the conclusion of its evidence again moved the court to give peremptory instructions, and based his motion upon the grounds that the plaintiff accepted the compromise and retained the money for two years with full knowledge of all the facts, and did not repudiate it, and acted with his eyes open, and on such advice as he sought for himself. The court again refused to give the peremptory instructions.

It is assigned as error, among other things, as follows:

"(1) The court erred in overruling the defendant's motion to strike the plaintiff's replication and amended replication from the files because there was no tender made of the money received by the plaintiff.

"(2) The court erred in allowing the plaintiff to amend his replication so as to tender this money back in the progress of the trial, and after the plaintiff had refused to tender it at the beginning of the trial, and before any of the evidence had been adduced.

"(3) The court erred in refusing to grant a peremptory instruction in favor of the defendant because (1) there was no tender made of the money received by the plaintiff in settlement of his claim; (2) the plaintiff received the money and retained it with full knowledge of all of the facts, and thereby elected to stand on the adjustment and settlement that had been made; and (3) the plaintiff could not ratify the bringing of the suit which was instituted while he was unconscious, and without legal authority."

It was an open question in this state until the case of *Brundige v. Railway*, 112 Tenn. 526, 81 S. W. 1248, whether fraud in procuring an accord and satisfaction and release could be set up in a court of law, and whether the settlement must not first be set aside in a chancery court before the plaintiff could proceed upon the original cause of action. It was held that it might be set up in an action at law as a defense against an accord and satisfaction procured by fraud. In that case, the consideration for the accord and satisfaction was paid into court along with the replication setting up its fraudulent procurement. No special question arose as to the necessity of such payment or of a tender in such cases, as the payment was voluntarily made, as stated.

Counsel for defendant asked the court to charge:

"If you find from the evidence that the agreement pleaded as a defense to this suit is void, under the charge of the court and the facts as proven, then the court charges you that it was the duty of the plaintiff, upon the discovery of the fraud, to repudiate it, and if you find that the plaintiff, with full knowledge of the facts, and having gotten such advice as he deemed proper in the premises, made an election to stand on the settlement and accept it as such, then, however

void it may have been in the beginning, it will now constitute a defense to this suit."

And the refusal of the trial judge to charge this request is also assigned as error, and the matter presented by this assignment may very properly be considered along with the question of the necessity for tender or repayment of the consideration received.

In ordinary cases when it is sought to be relieved from contracts and agreements procured by fraud, the law has been laid down by this court in quite a number of cases as to what condition will be imposed upon the party seeking to rescind.

In *Talbott v. Manard*, 10 Tenn. 60, 59 S. W. 340, it is said:

"But if it were granted that we are wrong in these conclusions, yet there is another well-recognized rule of equity practice, which repels complainants in their effort to rescind, and that is, that nothing can induce a court of equity to exercise its extraordinary power in decreeing rescission of contracts, save conscience, good faith, and reasonable diligence. When one with full knowledge of the fraud of which he complains sleeps on his rights, he will be repelled. *Knuckolls v. Lea*, 10 Humph. 577; *Ruohs v. Bank*, 94 Tenn. 57, 28 S. W. 303; *Woodfolk v. Marley*, 98 Tenn. 467, 40 S. W. 479."

In *Landreth Co. v. Schevenel*, 102 Tenn. 486, 52 S. W. 148, it is said:

"There is still another principle applicable to the denial of relief to the complainants in this case. This compromise and settlement was made March 1, 1898. This bill was not filed until January 12, 1899. The complainants must have known long before this bill was filed that this firm had ceased to do business, and had gone out of existence, and yet they waited to see whether or not these notes would be paid. It is incumbent, in such case, that the party seeking repudiation shall do so at once upon learning the ground upon which the repudiation is ultimately based. It is a settled rule that the right to rescind a contract for fraud must be exercised immediately upon its discovery, and that any delay in doing so, and the continued employment, use, and occupation of property received under a contract, will be deemed an election to confirm it." *Schiffer v. Dietz*, 83 N. Y. 300.

"A party who desires to rescind, in whole or in part, a transaction of this kind, must, upon the discovery of the fraud, repudiate it, and cannot, after acquiescing in its ratification, avail himself of such defense. *Kerns v. Perry* (Tenn. Ch.) 48 S. W. 729; *Woodfolk v. Marley*, 98 Tenn. 467, 40 S. W. 479; *Grymes v. Sanders*, 93 U. S. 62, 22 L. Ed. 798."

A leading case, holding the same doctrine is *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; and cases there cited.

As to the necessity for paying or tendering back the consideration received on a fraudulent agreement in order to rescind, the au-

thorities are practically agreed. 24 Ency. Law (2d Ed.) 646, and cases cited; *Town's Adm'r v. Waldo*, 62 Vt. 118, 20 Atl. 325; *Hart v. Gould*, 62 Mich. 262, 28 N. W. 831; *Wells v. Neff*, 14 Or. 66, 12 Pac. 84, 88; *Crippen v. Hope*, 38 Mich. 344.

In *E. Tenn. Va., & Ga. R. R. Co. v. Hayes*, 83 Ga. 558, 10 S. E. 350, it is said:

"In an action to recover damages for personal injuries it appearing that the parties had, before the action was brought, agreed upon a settlement under which plaintiff received a sum of money in satisfaction of his injuries, and in which he released all right of action for further damages, he could not successfully reply by showing that the agreement of release was obtained by defendant's fraud, without also showing that before commencing suit, he had tendered to the defendant the sum received with demand of return of what defendant had received from him, thus rescinding the settlement."

In *Gibson v. R. R. Co.*, 164 Pa. 142, 30 Atl. 808, 44 Am. St. Rep. 586, it is said:

"A passenger injured in a railroad accident, after he had been operated upon by the railroad company's physician, executed a release, and received a money consideration therefor. He afterwards claimed that the release had been executed while he was still under the influence of anesthetics, and that he had no consciousness of the act. * * *

"The evidence showed that after he had been completely restored to a sound mental condition he knew that he had the money, and he also had knowledge of the main facts of the settlement."

The court held "that his conduct constituted an affirmation of the release."

In the opinion it is said:

"He cannot both affirm and disaffirm; cannot affirm for what he got, and disaffirm for the difference between that and what he hoped to get."

In *Lane v. Dayton Coal & Iron Co.*, 101 Tenn. 581, 48 S. W. 1094, it was held that not even an infant could sue for damages while she retained a valuable consideration given her in settlement of her claim, and it was not sufficient for her to offer to return or account for such consideration by crediting it on whatever recovery she might make in her suit; and, in substance, that there could be no repudiation without repayment or tender of the consideration received.

We are of opinion that it is the law of Tennessee that in an action to disaffirm a contract or agreement on the ground of fraud that party seeking to disaffirm and repudiate must do so promptly, and pay or tender back the consideration received as a condition precedent to his right to recover.

Counsel for plaintiff cites us some authorities in other states, which he says hold that such tender or payment is not necessary when the contract or agreement is absolutely void, and not merely voidable. We have not access to these authorities; but we think they

are not in line with our Tennessee holding.

There is, perhaps, some difficulty as to when the tender or repayment should be made.

In cases when it is sought to rescind a contract on the ground of fraud, it is the rule that the tender or payment should be made when the fraud is pleaded and relied, as that is the evidence and legal act of disaffirmance and repudiation.

In case when there has been an accord and satisfaction, and it is relied on, and fraud in obtaining it is set up by replication, the tender or payment should be made when the replication repudiating the settlement is set up and relied on.

It is said, however, that it may be done afterwards, as was done in this case; and, inasmuch as no damage accrues by not paying the money into court earlier, it may be paid at any time during the trial, or may be credited on the recovery.

That it may not be credited on the recovery is expressly held in *Lane v. Dayton Coal Co.*, 101 Tenn. 581, 48 S. W. 1094, supra.

But we think that the correct principle is that it must be paid or tendered so soon as the accord and satisfaction is sought, by the pleadings, to be avoided and repudiated; and that it is a condition precedent to the right of the plaintiff to proceed with his suit that he make such tender or payment when he asks the court to set aside the agreement.

The principle is the same in both cases, that the tender or payment must be made so soon as the plaintiff asks the court to set aside the agreement; and he cannot be permitted to proceed with the original consideration in his hands, and test the judgment of the court whether he shall receive more. It is not a question of damage to the defendant, but of the right of the plaintiff to proceed.

Holding these principles in view, we are of opinion that plaintiff in this case, by holding on to the \$50 paid him, from the day of its payment until he was compelled by the court to pay it into court, a space of about two years, ratified and affirmed the settlement, even though he sued to recover an additional amount; and that by failing and refusing to pay it into court along with his replication, he still further affirmed the settlement, and estopped himself from claiming more.

We are of opinion that the return made by him of the money into court came too late; and that he should not have been allowed to proceed with his suit in the absence of such tender; and that in failing to make such tender or payment, and standing upon his original contract, and retaining the consideration, as he did, he is estopped and precluded from any recovery; and the peremptory instruction asked for should have been given.

This case is to be distinguished from the case of *Railroad v. Acuff*, 92 Tenn. 28, 20 S. W. 348, in several essential features.

In that case, the court said:

"There are three sufficient answers to this assignment, viz.:

"First, the plea did not aver that the defendant had paid any money to the administrator, the plaintiff to the suit.

"Second, if a tender had been necessary in the first instance, the defendant waived it by joining issue on the replication.

"Third, when attention was first called to the fact that the tender had not been made, plaintiff's counsel paid into court as a tender the sum received by the widow, with interest, and before the jury retired to consider their verdict, moved the court to be allowed to so amend the replication as to make a formal tender of the money."

In the present case, the three controlling features in that are wanting.

There the plea did not aver the payment of any money in compromise; in the present case, the fact of payment is averred and conceded.

There the defendant waived the necessity of tender by joining issue on the replication. Here the defendant moved to strike it out, because of the failure to tender the money.

There attention was first called to the failure to tender the money after the trial had concluded, but before the jury had retired. Here attention is called to the fact before the suit was proceeded with, and as soon as fraud was alleged, and it was moved that the suit be dismissed.

There the defendant made the tender so soon as he was called upon to do so. Here he not only failed to make the tender upon the first notice, but he refused to do so over the persistent demands of the defendant, and then only when compelled to do so by the trial judge, and in order that his suit might not be dismissed.

The judgment of the court below will be reversed; and the suit dismissed at the cost of plaintiff in this court and in the court below.

BARNARD & LEAS MFG. CO. v. SMITH et al.

(Supreme Court of Arkansas. Feb. 10, 1906.)

1. SALES — CONTRACT — CONSTRUCTION — BREACH — DAMAGES.

Where a contract for the sale of mill machinery provided that the purchaser should pay all the freight and express charges and deliver the machinery from the cars to the mill, and that the seller should not be liable for any damages in starting the mill, demonstrating results or for defective material other than to make good any defects, the buyer was not entitled to recover on a claim for defects in the machinery, for freight and hauling charges paid by it on the machinery, nor for loss involved in running the machinery.

2. APPEAL AND ERROR—AFFIRMANCE BY DIVIDED COURT.

Where the members of the appellate court are evenly divided in opinion as to the sufficiency of the evidence to support the lower court's finding of fact, the finding remains in full force.

3. SALES—FAILURE TO PAY PRICE—REMEDIES UNDER CONTRACT—LIEN.

Where a contract for the sale of machinery provided that the notes for the price should be secured by deed of trust on the machinery, mill, mill building, and connected real estate of the buyer, the seller was entitled on refusal of the buyer to perform the contract to a lien on the property which was to have been included in the deed of trust.

Appeal from Izard Chancery Court; Geo. T. Humphries, Chancellor.

Action by the Barnard & Leas Manufacturing Company against M. J. Smith and another. From a judgment for defendants, plaintiff appeals. Reversed.

A. W. Lyon and H. C. Young, for appellant.
J. B. Baker and Jno. B. McCaleb, for appellees.

BATTLE, J. Barnard & Leas Manufacturing Company instituted a suit against M. J. Smith and E. F. Smith, in the Izard chancery court. Its complaint is as follows:

"The plaintiff, the Barnard & Leas Manufacturing Company, a corporation duly organized under the laws of the state of Illinois, and doing business as manufacturers of mill machinery and builders of mills at the city of Moline, in the county of Rock Island, in the state aforesaid, for its cause of action against the defendants, M. J. Smith and E. F. Smith, state: That on the 11th day of March 1903, the plaintiff entered into a contract with the defendants, which contract was reduced to writing and signed by the parties. A copy of said contract is herewith filed as an exhibit hereto marked 'A,' and plaintiff asks that said contract be taken as part of this complaint.

"Plaintiff states that under the provisions of said contract the plaintiff agreed to furnish the defendants the following described machinery, to wit:

1 double stand Willford Moline Roller Mills
9x24 Cor. Drive E.

2 double stand Willford Moline Roller Mills
9x24 Smoothe, Drive E.

1 No. 15 Plansifter Scalper, 4, Sec., with 4 sieves.

1 No. 1 Horn. Adj. Bran Duster.
8 Elevator Heads for 16x4½ pulley.
8 Elevator Boots for 16x4½ pulley.
672 Ft. 4 in. by 8 ply cotton belt.
504 3½x8 Improved Empire Cups, tin.
1000 Reliance Elevator Bolts, ½x¾.
105 ft. 7 in. Single Leather Belt.
8 Boot shafts for 16x4½ Pulley.
8 Elevator Boot Pulleys, 16x4½.
8 Elevator Head Pulleys, 16x4½, Bore 1½/16.

60 ft. 4 inch by 4 ply Rubber.
5 Second Hand Round Reels, 28x7, with new cloth.

1 G. T. Smith Centrifugal, with new cloth.

"All of the above six reels are now in warehouse at Springfield, Mo., and shall be in good condition, cleaned, and made to present a new appearance.

1 Pulley 24x4x11½/16 Bran Duster.
1 Pulley 11x3x11½/16 Bran Sifter Scalper.
1 Pulley 20x4x11½/16 7 Centrifugal Reel.
16 ft. No. 62 link belt.

"To be placed in, connected and used with, the flouring mill owned and being operated by the defendants, near the town of Melbourne, Izard county, Ark., situated on the following described parcel of land:

"Part of the N. W. ¼ of the N. E. ¼ of section 12, and part of the S. W. ¼ of the S. E. ¼ of section 1, township 16, north, range 9 west, beginning north 48 degrees, 4 chains and 6½ links from W. T. Kendrick's lot on W. O. 14 inches, thence 48 degrees, 8 chains and 80 links with meridian variations, thence N. 32¼ and west 4 chains and 63 links to the center of Mill Creek, thence beginning at the beginning Cor. at W. O., thence N. 40¼ and W. 3 chains and 85 links to the center of Mill Creek to intersect the line at the N. E. corner of said land.

"The plaintiff states that the price of said machinery is two thousand dollars, but it was agreed by and between the parties, that in part payment for said machinery the plaintiff would accept from the defendants 1 No. 2 plan sifter, then in the mill of the defendants to be delivered free on board of cars, sound, and in good condition, and that by reason of said last-named agreement the sum of three hundred and fifty dollars, the reasonable value of said plan sifter was abated, leaving amount to be paid by the defendants to plaintiff the sum of sixteen hundred and fifty (\$1,650.00) dollars.

"The plaintiff further states that the defendants were by the terms of said contract to pay all freight charges on said machinery, to furnish all mill wright and other labor necessary to place said machinery in complete operation. The plaintiff was, if required to do so, to furnish a foreman, millwright, or expert miller, while sitting or starting said machinery, at \$4.00 per day, with board and traveling expenses to said mill from Springfield, Mo., and return.

"The defendants; in addition to delivering the plan sifter above mentioned, were to pay to the plaintiff the sum of sixteen hundred and fifty (\$1,650.00) dollars, in installments as follows: Fifty dollars cash on closing contract; two hundred and fifty dollars cash upon receipt by defendants of bills of lading for machinery; three hundred dollars cash when mill should be completed and demonstrated to be as guaranteed. Five hundred and twenty-five dollars eight months after shipment of machinery; and five hundred and twenty-five dollars in eighteen months after shipment of machinery. It was further agreed the two deferred payments of five hundred and twenty-five dollars each should be evidenced by the promissory notes of the defendants. Said notes to bear interest at the rate of 7 per cent. per annum from date, and were to be secured by a first deed of trust on the machinery, mill, mill building, of the defendants, and the real estate upon which it is situated.

"It was further agreed that in case the defendants failed to make settlement as set out

in said contract the whole of the purchase price of said machinery should immediately become due and payable, and the plaintiff might enter upon the premises and remove said machinery without being liable as trespassers or for damages to the premises.

"The plaintiff further states that in pursuance of the contract above set out all of the machinery above mentioned as sold by plaintiff to defendants, was in due time shipped to the defendants, addressed at Gulon, Arkansas, the station on the St. Louis Iron Mountain & Southern Railroad, designated by the defendants as most convenient for them to receive the same. That proper bills of lading were by due course of mail delivered to the defendants; that said machinery arrived at said station within a reasonable time, and in good condition, as required by the terms of the contract. That said machinery was accepted by the defendants, and the larger and most valuable part thereof were removed and put in their millhouse some twelve miles distant from the said railroad station. The plaintiff states that notwithstanding the exact compliance with the terms of the contract upon the part of the plaintiff by furnishing and shipping of each and every article of said machinery in strict accordance with the terms of the contract, the plaintiff's readiness and willingness to furnish a foreman, millwright, or expert miller to place said machinery and demonstrate the capacity of the said mill upon request of defendants as stipulated in contract, the defendants hold possession of the machinery aforesaid, have failed and refused to deliver the plan sifter of the value of \$350.00 to the plaintiff; have failed and refused to pay the sum of two hundred and fifty dollars upon receipt of bills of lading for the machinery; have failed and refused to furnish the millwright and other labor to place said machinery so that its capacity can be demonstrated; have failed and refused to execute the notes and deed of trust for the two deferred payments; and have failed and refused to comply with any of the stipulations of their said contract with the plaintiff.

"The plaintiff states that by reason of defendant's failure to comply with any part of their contract the sum of sixteen hundred and fifty dollars, which the defendants agreed to pay in money and secure by deed of trust, together with the sum of three hundred and fifty dollars, the reasonable value of the plan sifter, which defendants agreed to deliver to plaintiff, in all the sum of two thousand dollars, has become due under the terms of the contract.

"The plaintiff is informed, believes, and is advised to say that by reason of the contract between the parties above set out, the compliance with the terms thereof on the part of the plaintiff, the acceptance and removal of the machinery by the defendants, their retaining possession thereof, their agreement in writing to execute a deed of trust upon the

property as above set out, their refusal to perform any part of their contract, constitutes an equitable lien in favor of the plaintiff on the property, machinery, mill, mill building, and real estate hereinbefore described. Wherefore, the plaintiff prays judgment against the defendants, M. J. Smith and E. F. Smith, for the sum of three hundred and fifty dollars, the reasonable value of the plan sifter, which defendants refuse to deliver to the plaintiff, according to their contract, and the further sum of sixteen hundred and fifty dollars, the amount to be paid in money and now due altogether the sum of two thousand dollars, with 7 per cent. interest thereon. That plaintiff's lien on the machinery, mill, mill building, and real estate, hereinbefore described, be declared and foreclosed; that defendant's equity of redemption in and to said property be forever barred, and if the amounts aforesaid be not paid within a time fixed by the court that said property be sold at such time and upon such terms as the court may direct, and finally for all proper relief.

"Felix M. Hanley, Attorney for Plaintiff."

The defendants answered as follows:

"They admit * * * that the defendants entered into a contract with plaintiff on the 11th day of March, 1903, by which defendants purchased from plaintiff the machinery set out in plaintiff's complaint, but said defendants deny that the price of said machinery was or is the sum of two thousand dollars, as alleged in plaintiff's complaint, and defendants aver that it was agreed that defendants should pay plaintiff the sum of sixteen hundred and fifty dollars for said machinery and a certain plan sifter then in the mill of and belonging to the defendants at Melbourne, Ark., valued at the sum of one hundred and fifty dollars.

"Further answering, defendants deny that they are liable on the contract set out in plaintiff's complaint, or that plaintiff is entitled to have a lien on property of defendants mentioned in plaintiff's complaint, by reason of said contract, because they say that it was agreed by and between said plaintiff and defendants in said written contract, that the plaintiff should furnish to the defendants, with the other machinery which they agreed to furnish, five second-hand round reels 25x7 with new cloth, and one G. T. Smith centrifugal with new cloth, and that all of said reels should be in good condition, cleaned, and made to present a new appearance, all of which will more fully appear by reference to the copy of the contract exhibited with plaintiff's complaint. And defendants aver that plaintiff failed and refused to comply with its contract in this regard, and say that the reels furnished by plaintiff were not in good condition and did not present a new appearance, but defendants allege and charge the facts to be that the reels furnished by plaintiff were in bad condition, were greasy and soiled, and had

the appearance of being old and showed long use, and that some of said reels were broken, and could not have been used without repair, and that none of said reels and cloths were in a condition to be used without cleaning and repairing, and for this reason, defendants refused to accept said machinery as soon as they became informed of the condition of the same, and that they promptly informed plaintiff of their objections, and refused to receive the same, and requested plaintiff to furnish the machinery as it had agreed, and in the condition agreed in said written contract, which plaintiff has refused and failed to do.

"Wherefore, defendants say that they are not liable on the contracts sued on in this case, and that by reason of said breach of said contract by said plaintiff, it has acquired no lien on said property of defendants, and they therefore pray that the complaint of plaintiff be dismissed, for their costs and for other relief."

In a counterclaim, defendants claim that they were damaged, by reason of the failure of plaintiff to comply with its contract, in the aggregate sum of \$1,543.50, and asked for a judgment against it for that amount.

Defendants did not ask for a rescission of the contract or offer to restore the property purchased by them, but on the contrary seek to recover damages of the plaintiff by reason of the alleged violation of their contract.

Upon hearing the cause upon the evidence adduced the court found that the plaintiff was not entitled to recover on its complaint, because the evidence shows that plaintiff failed to furnish the six reels in the condition it agreed to do, and dismissed the complaint.

And the court found upon the counterclaim that defendants had been damaged by the failure of plaintiff to comply with its contract as follows:

To amount paid for freight.....	\$129 20
For amount paid for hauling machinery.....	72 00
For cash paid on machinery.....	50 00
Damage on loss of running machinery	240 00
Total	\$491 20

And rendered judgment against plaintiff in favor of defendants for \$491.20.

The defendants were not entitled to recover these damages by reason of the following provisions of their contract with plaintiff:

"The second party [defendants] to pay all freights and express charges on machinery and connections from Moline and factory where made; second party to deliver the same from cars to mill floors.

"The first party [plaintiff] agrees to ship said machinery as near the 1st day of April, A. D. 1903, as possible, barring strikes, accidents, or other causes of delay beyond its reasonable control. First party shall not be held liable for any pecuniary damages either for delays in shipment or in starting said mill, demonstrating results, or for defective

material, other than to make good within a reasonable time said defects."

The only question presented by the complaint and answer is: Where the six reels in good condition, cleaned, and made to present a new appearance when shipped to the defendants? The evidence upon this issue is conflicting. The writer and Mr. Justice McCulloch are of the opinion that the preponderance of it shows that they were shipped in such condition, except, probably, they needed revarnishing, which cost about \$12. The other two judges, members of this court, who are present, are of the contrary opinion. This leaves the finding of the chancellor upon this question in full force, the court being equally divided, and relieves the defendants of the obligation to pay for the six reels, which, if according to the contract, would have been worth \$300.

In part payment for the machinery, the defendants agreed to deliver to plaintiff, free and on board of cars, in sound and good condition a No. 2 plan sifter, then in defendant's mill, worth \$150, which they failed and refused to do. In addition to this, they agreed to pay to plaintiff \$1,650 for the machinery, and 7 per cent. per annum interest on \$1,050 of this amount, from the time defendant's mill was completed. Defendants paid \$50, leaving \$1,600, and the value of the plan sifter, \$150 less \$300, the value of the six reels, interest at the rate of 7 per cent. per annum on \$1,050 of this amount, and 6 per cent. per annum on the remainder, from the commencement of this suit (it not appearing from the evidence when defendant's mill was completed) still due and owing to the plaintiff, for the payment of which it is entitled to a lien on the machinery, mill, mill building, of the defendants, and the real estate upon which it is situate, and to the foreclosure thereof.

The decree of the trial court, except as to the reels, is therefore reversed, and the cause is remanded, with instructions to the court to render a decree in accordance with this opinion.

PETER ANDERSON & CO. v. DIAZ.

(Supreme Court of Arkansas. Feb. 10, 1906.)

1. INTOXICATING LIQUORS—SALOON KEEPERS—INJURIES TO PATRON—STATUTORY LIABILITY.

A statute requiring saloon keepers to give a bond conditioned to pay all damages that may be occasioned by reason of liquor sold at a saloon did not impose a liability for personal injuries sustained by a patron, while in the saloon, by the joint malicious act of an employé therein and a third person.

2. MASTER AND SERVANT—INJURIES TO THIRD PERSONS—ACTS OF SERVANT—MISCONDUCT—SCOPE OF EMPLOYMENT.

Where a bartender in a saloon in which plaintiff, a patron, was sleeping, assisted another in setting fire to plaintiff's foot, causing serious injuries, such act was not within the scope of

the bartender's employment, and the saloon keeper was, therefore, not liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1217-1225, 1229.]

8. INTOXICATING LIQUORS—SALOON KEEPERS—DUTY TO PATRONS.

A saloon keeper does not hold himself out to the public as the protector of his patrons, and is not bound to the same degree of care to protect them from injuries as is required of an innkeeper and a common carrier.

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Action by Marcus Diaz against Peter Anderson & Co. From a judgment for plaintiff, defendant appeals. Reversed.

Appellant was a corporation carrying on a retail liquor business in Batesville, Ark. Arthur Anderson was in its employ, as bartender. The appellee for his cause of action alleges: "That on the 12th day of January, 1903, the plaintiff was an occupant and patron of the defendant corporation's place of business in its saloon at Batesville, Ark., and that while in the said house he became somewhat intoxicated, and had lain down and was asleep in said defendant's house. That while so asleep he was assaulted by one A. Ramsey Weaver, who was a patron of the said company, and Arthur Anderson, who was at the time in the service of the said saloon company as bartender, in a most brutal, wanton, malicious, and cruel manner, by pouring alcohol on the plaintiff's foot and setting fire to the same, by reason of which the plaintiff's foot was severely burned before he could extinguish the fire. That the said Arthur Anderson furnished the alcohol to the said Ramsey Weaver from defendant company's saloon, and aided, assisted, and abetted the said Ramsey Weaver in putting the same upon the foot of the plaintiff, and also himself poured some of the alcohol on plaintiff's foot. That by reason of said assault this plaintiff was severely burned and suffered, and has suffered since said time, and continues to suffer, the most excruciating and painful agony to which human beings are subjected." The damages were laid at \$5,000, for which judgment was asked. The answer denied the allegations of the complaint. There was proof to support the allegations of the complaint. There was no proof and no claim that appellant was negligent in employing or retaining its bartender, Arthur Anderson. The cause was submitted to the jury upon the proof and instructions, and they returned a verdict for \$1,000, and judgment was entered accordingly, which this appeal seeks to reverse.

J. H. Harrod and W. A. Oldfield, for appellant. L. F. Reeder, Ernest Neill, and Yancey & Casey, for appellees.

WOOD, J. (after stating the facts). Was appellant liable? The decision in *Gage v. Harvey*, 66 Ark. 68, 48 S. W. 898, 43 L. R. A. 143, 74 Am. St. Rep. 70, shows that there is no statutory liability. The sale of liquor at appellant's place of business was not the

proximate cause of the injury. Nor was appellant liable according to any of the rules of the common law. *Black on Intoxicating Liq.* § 281; *Cruise v. Aden*, 127 Ill. 231, 20 N. E. 78, 3 L. R. A. 827; *Struble v. Nodwift*, 11 Ind. 64. The cruel act of its agent, Arthur Anderson, was clearly beyond the line of his employment. The master is not liable for the acts of his servant that are beyond the scope of his employment. *Cooley on Torts*, p. 627. "Where a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests," the master will not be liable for his acts. *McManus v. Prickett*, 1 East, 106. The "test" says the Supreme Court of Nebraska, of the master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business. *Davis v. Houghtellin*, 83 Neb. 582, 50 N. W. 765, 14 L. R. A. 737.

Appellee mistakes the law in saying "that there is no distinction between the duty that the proprietors of a saloon owe their patrons," and that which a common carrier owes its passengers, or an innkeeper his guests. There is a difference as wide as the poles. The saloonkeeper does not hold himself out to the public as the protector of those who may be patrons of his saloon. His business the rather advertises him the other way. But the common carrier and the innkeeper hold themselves forth as providing for the comfort and safety of all who may seek their services, a "refuge through their portals." It is strictly their duty and their business to exercise the proper care to look after, and to protect their passengers and guests from insult and injury. *Britton v. Atlanta City Ry. Co.*, 88 N. C. 536, 43 Am. Rep. 749. Not so with the saloonkeeper. The doctrine announced above is supported by the cases cited in appellant's brief and by the following: *Story v. Ashton*, L. R. 4 Q. B. 476; *Stone v. Hills*, 45 Conn. 47, 29 Am. Rep. 635; *Wood, Law Master & Servant*, 546; *Whittaker's Smith on Neg.* p. 199; *Wharton's Law of Neg.* § 168; *Thompson on Neg.*; numerous cases cited in notes to these.

The judgment is reversed, and the cause is dismissed.

HLASS v. FULFORD.

(Supreme Court of Arkansas. Feb. 10, 1906.)

1. APPEAL—DISCRETION OF TRIAL COURT—PRESUMPTIONS—SEPARATION OF WITNESSES.

Where it does not affirmatively appear on appeal that the trial court abused its discretion in permitting one witness to remain in the courtroom during the progress of the trial while the others were excluded, the presumption is that he was allowed to remain for a good cause.

2. LANDLORD AND TENANT—ACTION FOR BREACH OF LEASE—VARIANCE.

In an action for breach of a contract of lease between plaintiff and defendant, evidence of a written contract signed by plaintiff and

defendant, and also by a third person, not mentioned in the body of the contract, did not constitute a variance from the contract sued on.

Appeal from Circuit Court, Pope County; R. B. Wilson, Special Judge.

Action by G. W. Fulford against Joe Hlass. From a judgment in favor of plaintiff, defendant appeals. Reversed.

R. W. Holland and Sellers & Sellers, for appellant. J. T. Bullock, for appellee.

BATTLE, J. G. W. Fulford filed a complaint and brought an action before a justice of the peace against Joe Hlass, and alleged that he entered into a contract with the defendant, on the 22d day of March, 1902, and agreed to cultivate 36 acres of defendant's land, and to plant 20 acres thereof in cotton, and the remainder in corn, and that defendant should have one-half of the cotton and corn when raised and gathered, the cotton to be delivered at the gin, and the corn at defendant's crib. Defendant agreed to furnish plaintiff team and tools needed to cultivate the land, and one hand to assist in gathering the corn, and to furnish supplies and alleged that the defendant complied with his agreement until the crops were partly made, when he refused to furnish the team or supplies, to plaintiff's damage in the sum of \$225.

Defendant answered and admitted the contract, but denied that he had failed to comply with it, and alleged that plaintiff had violated it; and pleaded a counterclaim and set-off.

The plaintiff recovered a judgment, and the defendant appealed to the circuit court.

In the trial in the circuit court the witnesses, on motion of the defendant were excluded from the courtroom during the progress of the trial, except James Fulford, who, was on motion of plaintiff, allowed to remain in the courtroom. The record does not show that there was or was not any reason for excepting him. To the action of the court the defendant excepted.

The plaintiff offered to read as evidence, in the trial, the following contract:

"Russellville, Ark. March 22, 1902.

"This agreement made and entered into by and between J. Hlass and G. W. Fulford witnesseth that the said Hlass has rented to the said Fulford his farm of 36 acres on Norristown Mountain in Pope county, Ark. for the year 1902; 20 acres to be cultivated in cotton and the remainder in corn, all to be cultivated in a husbandlike manner by the said Fulford and the said Fulford agrees to pay one-half of the crop, the corn to be put in the crib, and the cotton to be delivered at the gin. The said Hlass agrees to furnish teams, tools and one hand to gather the corn; the tools and teams to be used by the said Fulford in his own crop on other land, and he to use his own team also in both crops. The said Fulford to give possession the 1st day of January, 1903, without

further notice. The said Hlass to furnish supplies to said Fulford to live upon while cultivating the crop, and to take his pay out of the proceeds of Fulford's share of the same.

"[Signed]

Joseph Hlass.

his
"G. W. X Fulford.
mark

his
"J. M. X Caldwell.
mark

"Attest:

"R. W. Holland."

The defendant objected to the reading of this contract as evidence, because it differed from the contract sued on. The objection was overruled; the contract was read and the defendant excepted.

The evidence adduced tended to show that plaintiff planted a crop under his contract, and while it was growing and before maturity, he abandoned it, but as to whether he was forced to do so by the defendant failing to perform his part of the contract it is conflicting.

The undisputed testimony shows that the crop was not in a condition to gather on the 24th of November, 1902, when this action was commenced.

At the instance of the defendant the court instructed the jury as follows:

"If you find that by reason of defendant's failure to comply with his contract plaintiff was prevented from making and gathering crop, and this suit was begun before the crop was gathered, and before it was in condition to be gathered, his measure of damages would be the value of his work up to the time of his abandonment." This instruction seems to have been conceded by the parties to be the law of the case.

There was no evidence adduced to prove the value of his work.

The court gave many instructions orally, but they were substantially covered by instructions given in writing.

The jury, after allowing the defendant's claim for \$60, returned a verdict in favor of plaintiff for \$5.

As it does not affirmatively appear that the court abused its discretion in allowing James Fulford to be present and remain in the courtroom during the progress of the trial, the presumption is, he was, for good cause, allowed to remain.

There is no variance between the contract sued on and the contract read as evidence. Caldwell, although his name was signed to the contract, was not a party to it. He did not agree to do anything. The contract was between the plaintiff and defendant.

As the oral instructions were substantially covered by instructions in writing, the manner of giving them could not have been prejudicial.

There was no evidence to sustain the verdict of the jury.

Reverse, and remand for a new trial.

LITTLE ROCK RY. & ELECTRIC CO. v. NEWMAN.

(Supreme Court of Arkansas. Feb. 10, 1906.)

1. STREET RAILROADS — OPERATION — COLLISION WITH ANIMALS.

In an action against a street railroad for the killing of a hog, the burden is on plaintiff to show that the hog was killed through the negligence of defendant.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1576; vol. 44, Cent. Dig. Street Railroads, §§ 227, 228.]

2. SAME — CONTRIBUTORY NEGLIGENCE OF OWNER.

Where, in an action against a street railroad for the killing of a hog, it appeared that the hog was outside of the stock limit, it was not contributory negligence to allow it to run at large.

3. EVIDENCE—RES GESTÆ.

In an action against a street railroad for the killing of a hog, it was proper to admit evidence that the motorman remarked at the time "that the hog jumped on the track right in front of the car."

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 308, 367.]

4. STREET RAILROADS — KILLING ANIMALS — LIABILITY.

In an action against a street railroad company for the killing of a hog, plaintiff was not entitled to recover in the absence of evidence that the hog went on the track in front of the motorman in time for him to have stopped the car before striking it, had he seen it and used all the means in his power to that end.

5. SAME—OPERATION—DAMAGES TO PROPERTY —STATUTES—APPLICATION TO STREET RAILROADS.

Kirby's Dig. § 6773, making railroads responsible for all damages to property caused by the running of trains, is not applicable to street railroads.

6. SAME—INSTRUCTIONS.

In an action against a street railroad for the killing of a hog, defendant requested the court to charge that, in order to find for plaintiff, the jury must find that the hog went on the track and was seen by the motorman when the car was a sufficient distance away to have permitted him, by the exercise of ordinary care and prudence, to stop the car before striking the hog, and that, if the motorman exercised ordinary and reasonable care to avoid the accident after he discovered the danger of the hog and was unable to do so, the jury should find for defendant. *Held*, that the instruction was properly refused.

7. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

An instruction that, in order to find for plaintiff, the jury must find that the hog went upon the track and was seen by the motorman of the car, or could have been seen by him in the use of ordinary care in operating the car, when the car was a sufficient distance away to have permitted him, by the exercise of ordinary care, to stop the car before striking the hog, there being no evidence tending to show that the motorman could have seen the hog when a sufficient distance away to have permitted him to stop the car, was erroneous.

8. SAME — INSTRUCTIONS — COMMENT ON AMOUNT INVOLVED.

In an action against a street railway for the killing of a hog, it was error, after submitting the case to the jury, to instruct them that the amount was small, and that it cost the county more to try the case than was involved to either of the litigants, and that it was the desire of the court that the jury decide the case if they could do so without giving up their honest convictions.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Mrs. S. W. Newman against the Little Rock Railway & Electric Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The first instruction requested by defendant was as follows: "You are instructed to find for the defendant."

The fourth was as follows: "You are instructed that before you can find for the plaintiff you must find from the evidence that the hog went upon the track and was seen by the motorman of the car when the car was a sufficient distance away to have permitted him, by the exercise of ordinary care and prudence, to stop the car before striking the hog. If you find from the evidence that the motorman exercised ordinary and reasonable care to avoid the accident after he discovered the danger to the hog, and was unable to do so, then your verdict will be for the defendant."

The sixth was as follows: "If you find from the evidence that plaintiff was guilty of negligence in failing to properly care for and guard her hogs, and that such negligence directly contributed to cause the injury complained of, your verdict should be for the defendant, unless you further find that defendant's employes in charge of the car became aware of the danger to the hog in time to have avoided injuring it by the exercise of proper care, and failed to use such care."

The fourth, as modified, was as follows: "You are instructed that before you can find for the plaintiff you must find from the evidence that the hog went upon the track and was seen by the motorman of the car, or could have been seen by him in the use of ordinary care in operating the car, when the car was a sufficient distance away to have permitted him, by the exercise of ordinary care and prudence, to stop the car before striking the hog. If you find from the evidence that the motorman exercised ordinary and reasonable care to avoid the accident after he discovered the danger to the hog, and was unable to do so, then your verdict will be for the defendant."

The instruction given after the case was submitted was as follows: "Gentlemen, this is a case peculiarly within the province of the jury to decide. The facts are as fully before you as they can be put before any jury. The law is plain and simple. The amount is small. It costs the county more to try this case than is involved to either of the litigants, and it is the earnest desire of the court that you decide this case, if you can, without giving up your honest and conscientious conviction."

Rose, Hemingway, Cantrell & Loughborough, for appellants. A. J. Newman, for appellee.

WOOD, J. This appeal seeks to reverse a judgment against appellant recovered by

appellee for the alleged negligent killing of a certain hog.

The proof showed that the hog was killed by one of appellant's cars. And there was evidence from which the jury might have found that the motorman in charge of the car was negligent; but there is no evidence that the negligence of the motorman was the proximate cause of the injury. There is no proof that the motorman saw or could have seen the hog in time, by the use of ordinary care, to have prevented striking it. There was proof that the track was straight, and that the motorman might have seen a hog, had it been on the track in front of him. But there is no proof that the hog came on the track in front of the motorman in time for him to have stopped the car before striking it, had he seen it and used all the means in his power to that end. On the contrary, it was in evidence that the motorman remarked at the time: "That the hog jumped on the track right in front of the car." This was objected to, but the declaration was a part of the res gestæ and proper testimony. *Railway v. McGinty* (Ark.) 88 S. W. 1001. This was the only evidence as to how the hog got on the track. The hog was outside the "stock limit," and it was not, therefore, contributory negligence for it to be running at large. *Railway v. Finley*, 37 Ark. 562; *Railway v. Morrison*, 69 Ark. 289, 62 S. W. 1045.

The burden was upon the appellee to show that the hog was killed through the negligence of the appellant. She has failed to do this; for under the proof in this record there is nothing to show that the hog would not have been killed, even if the motorman had been keeping the proper lookout and had used every means known on a properly equipped car to avoid it. Section 6773, Kirby's Dig., making all railroads responsible for all damages to property caused by the running of trains in this state, is not applicable to street railways. They do not run trains in the sense in which the term was intended by the lawmakers. The whole Act February 3, 1875, shows that the Legislature did not have in mind street railways. This court since *Railway v. Payne*, 33 Ark. 816, 34 Am. Rep. 55, has often held under this statute that, where stock is killed by the running of trains, there is a presumption that such killing was through the negligence of the company operating such trains. *Railway v. Russell*, 64 Ark. 236, 41 S. W. 807; *Railway v. Bragg*, 66 Ark. 248, 50 S. W. 273; *Railway v. Wilson*, 66 Ark. 414, 50 S. W. 995; *Railway v. Costello*, 68 Ark. 82, 56 S. W. 270. But no such presumption prevails in the case of street railways. In such cases it is not a question of presumption, but a matter of proof. *Hot Springs Street Ry. Co. v. Hildreth*, 72 Ark. 572, 82 S. W. 245. Doubtless the presumption that is indulged under the statute applicable to railroads running trains was invoked below, as it has been here to

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uphold this verdict which is otherwise without proof to support it. The court should have given the first instruction asked by appellant.

The court did not err in refusing requests 4 and 6. The fourth, as modified, was objectionable because it was abstract; there being no evidence to support it.

The instruction given to the jury after the case had been submitted (reporter set out in note) was in bad form, if not erroneous and prejudicial. *Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425. But it is unnecessary to determine whether it was reversible error. We assume it will not be repeated on another trial.

For the error indicated, the judgment is reversed, and the cause is remanded for new trial.

GOLDMAN v. GOODRUM.

(Supreme Court of Arkansas. Feb. 10, 1906.)

1. INTOXICATING LIQUORS—LICENSE—CANCELLATION—EFFECT.

An appeal from a judgment canceling a liquor license did not supersede the judgment so as to authorize the licensee to sell liquor pending such appeal.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 118.]

2. SAME—SALE OF LIQUOR—RECOVERY OF PRICE.

The sale of intoxicating liquors after judgment canceling the seller's license pending appeal being illegal, the seller was not entitled to maintain an action against the buyer for the price.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 474.]

Appeal from Circuit Court, Lonoke County; Geo. M. Chapline, Judge.

Action by Henry Goldman against Jack Goodrum, as administrator, etc. From a judgment for defendant, plaintiff appeals. Affirmed.

George Sibley, for appellant. T. C. Trimble, Joe T. Robinson and T. C. Trimble, Jr., for appellee.

MCCULLOCH, J. Appellant seeks to recover the amount of an account for intoxicating liquors sold in quantities not less than a quart. He was by the county court of Lonoke county granted a license to sell liquor, but on the appeal of certain citizens, who remonstrated against granting the license, the circuit court canceled his license, and he appealed to this court.

The record in the case at bar does not disclose whether or not the appeal was ever perfected, and if so, what disposition was finally made of the case. Subsequent to the judgment of the circuit court canceling the license, the liquor in question was sold by appellant. He contends that there is no proof in the record that his license had been canceled, but that the trial court took judicial notice of that fact, the judgment of can-

cellation being a part of the record of that court. The record does not bear out that contention, for the bill of exceptions does contain a copy of the judgment of the circuit court canceling the license. An appeal to this court from the judgment canceling the license did not supersede the judgment, and any sale of liquor thereafter made by appellant was unlawful. A sale of intoxicating liquor without license being a violation of law, a suit to recover the price of the liquor sold cannot be maintained. The contract is illegal and void, and cannot be enforced. 17 Am. & Eng. Law, p. 305; Black on Intox. Lq. § 249; Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 848, 36 L. Ed. 759.

Miller v. Ammon, supra, was a suit brought by a dealer in liquor, in violation of an ordinance passed by the city council of the city of Chicago, to recover the price of a large quantity of beer sold, and Mr. Justice Brewer, speaking for the court said: "By the ordinance, a sale without a license is prohibited under penalty. There is in its language nothing which indicates an intent to limit its scope to the exaction of a penalty, or to grant that a sale may be lawful as between the parties, though unlawful as against its prohibition; nor, when we consider the subject-matter of the legislation, is there anything to justify a presumed intent on the part of the lawmakers to relieve the wrongdoer from the ordinary consequences of a forbidden act. By common consent, the liquor traffic is freighted with peril to the general welfare, and the necessity of careful regulation is universally conceded. Compliance with those regulations by all engaging in the traffic is imperative; and it cannot be presumed, in the absence of express language, that the lawmakers intended that contracts forbidden by the regulations should be as valid as though there were no such regulations, and that disobedience should be attended with no other consequence than the liability to the penalty. There is therefore nothing in the language of the ordinance or the subject-matter of the regulations which excepts this case from the ordinary rule that an act done in disobedience to the law creates no right of action which a court of justice will enforce."

Judgment affirmed.

ROSE et al. v. CHRISTINETT.

(Supreme Court of Arkansas. Feb. 10, 1906.)

1. JUSTICES OF THE PEACE—APPEAL—JURISDICTION.

The jurisdiction of justices of the peace in actions for damages to personal property being limited to \$100, and the jurisdiction of the circuit court on appeal from a justice's judgment in such actions being only such as the justice had, the circuit court had no jurisdiction to entertain an amended complaint filed after appeal from a justice's judgment in favor of plaintiff, in which the value of the property

sought to be recovered was fixed at an amount in excess of the justice's jurisdiction.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Justices of the Peace, § 674.]

2. SAME—REMITTITUR AFTER JUDGMENT.

Where the circuit court on appeal from a justice of the peace had no jurisdiction of an amended complaint filed after appeal, in which the amount demanded was increased beyond the justice's jurisdiction, such defect in jurisdiction could not be cured by a remittitur entered after judgment reducing the amount to an amount within the justice's jurisdiction.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action by Lizette Christinett against Gaskill-Mundy Carnival Company and others. From a judgment in favor of plaintiff on appeal from a justice of the peace, defendant J. M. Rose and others appeal. Reversed.

Charles T. Coleman, for appellants. Maloney & Maloney, for appellee.

McCULLOCH, J. The plaintiff, Lizette Christinett, brought an action of replevin before a justice of the peace of Pulaski county against the Gaskill-Mundy Carnival Company and Frank W. Gaskill to recover possession of a contrivance called "Cycle Dazzle Track" or its value alleged to be \$100 and damages in the sum of \$25 for detention of the same. An order of delivery was issued and served and the defendants gave bond to retain possession of the property. Judgment was rendered by the justice of the peace in favor of the plaintiff for recovery of said property or its value \$100 and damages in the sum of \$25, and the defendant appealed to the circuit court. In the circuit court the plaintiff, by leave of court and over the objection of the defendants, filed an amended complaint, in which she alleged the value of the article sued for to be \$175, that it had been damaged by defendants in the sum of \$113.46, and that plaintiff had sustained damages in the sum of \$1,537.50 for the detention thereof. A trial was had upon the amended complaint, which resulted in a verdict in favor of the plaintiff for the recovery of the property or its value \$61.54, damages to same in sum of \$113.46, and damages for detention in the sum of \$320, and judgment was rendered accordingly. The defendant filed a motion for new trial, and also a motion to dismiss the cause, on the alleged ground that the cause of action was not within the jurisdiction of the court. Thereupon the plaintiff was permitted to remit the judgment for damages to the property down to \$100, and also the damages for detention down to \$40, and both the motions of defendants were overruled and they appealed to this court.

Jurisdiction of courts is defined to be "the power to hear and determine a cause." 1 Freeman on Judgments, § 118. The jurisdiction of justices of the peace in actions for damages to personal property is limited to \$100 in amount, and on appeal to the circuit

court the jurisdiction of that court is limited to that amount, because the circuit court thereby acquires only such jurisdiction as the justice of the peace had. *Railway Company v. Manees*, 44 Ark. 100; *Whitesides v. Kershaw*, 44 Ark. 377; *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437. It is urged, however, that as the court had jurisdiction originally, the defect in jurisdiction by reason of the excessive amount claimed in the amended complaint, was cured by the remittitur entered after judgment. The cause of action set forth in the amended complaint was for an amount in excess of the jurisdiction of the court, and the court, therefore, had not "the power to hear and determine the cause." It matters not that the court rendered judgment only for an amount which was within its jurisdiction. If the amount stated in the complaint was above the jurisdictional amount, the judgment was void, because of the lack of power in the court to render it. In the case of *Railway Company v. Manees*, supra, suit was brought before a justice of the peace to recover damages to personal property laid in the sum of \$125, and in a trial of the circuit court on appeal that court rendered judgment for \$100, which sum is within the jurisdiction of the justice; but this court held that the court was without jurisdiction, and vacated the judgment and dismissed the cause.

In the first place the court erred in allowing an amendment which raised the amount in controversy beyond its jurisdiction, and the final judgment of the court was void because it was rendered upon a cause of action which it did not have jurisdiction to hear and determine. The court should either have rejected the amendment or dismissed the cause for want of jurisdiction. It could not proceed to judgment upon the cause of action stated in the amendment. The remittitur after judgment did not give force to the void judgment. Works on Courts & Jurisdiction, p. 67; *Pritchard v. Bartholomew*, 45 Ind. 219; *Bickett v. Garner*, 21 Ohio St. 659; *Cross v. Eaton*, 48 Mich. 184, 12 N. W. 35. Where an amount in excess of the jurisdiction of the court is stated in the original complaint, and judgment therefor prayed, jurisdiction cannot be afterwards conferred by amendment reducing the amount; but where jurisdiction is rightfully conferred, as in this case, by the original statement of a cause of action of which the court had jurisdiction, the allowance of an amendment increasing the amount beyond the jurisdiction is an error, which may be corrected by rejection or withdrawal of the amendment, leaving the cause resting upon the statements of the original complaint. The distinction lies in the fact that in the one case the court never acquired jurisdiction at all, and none is conferred by an amendment reducing the amount claimed, and in the other, the court acquired jurisdiction upon the cause of action originally stated, and the rejection

or withdrawal of an improper amendment preserves the jurisdiction.

The judgment is therefore reversed, and the cause remanded, with leave to the plaintiff to withdraw the amendment and proceed to trial upon the original complaint; otherwise, the cause be dismissed.

It is so ordered.

TURNER et al. v. WILLIAMSON.

(Supreme Court of Arkansas. Feb. 10, 1906.)

APPEAL — PERSONS ENTITLED — PARTY AGGRIEVED.

Const. art. 7, § 33, provides that appeals from all judgments of county courts may be taken to the circuit court under such restrictions and regulations as may be prescribed by law, and Kirby's Dig. § 1487, authorizes appeals as a matter of right from the county to the circuit court by "the aggrieved party filing an affidavit," etc. Held that, where a county court had jurisdiction to grant a competing ferry license, the operator of another ferry who had obtained a previous license, but who had not made himself a party to the proceedings for the granting of the license complained of before judgment, was not a party aggrieved, and was therefore not entitled to appeal therefrom.

Appeal from Circuit Court, Izard County; J. W. Meeks, Judge.

Proceedings by W. E. Turner and another for the establishment of a ferry, in which J. W. Williamson intervened after judgment in favor of petitioners, and appealed to the circuit court, where the motion to dismiss such appeal was denied, and petitioners' ferry license vacated, from which they appeal. Reversed.

On April 6, 1905, appellants obtained from the county court of Stone county a license to operate a public ferry at Sylamore, Ark., across White river between Stone and Izard counties; and on April 10, 1905, they obtained a license from the county court of Izard county to operate the same ferry. On the same day (April 10, 1905) appellee, Williamson, also obtained a license from the Izard county court to operate a ferry across White river at Sylamore. Appellee was not a party to the proceedings in the county court wherein the license was granted to appellants but at the July term of the court he filed an affidavit for appeal to the circuit court from the order granting license to appellants, and caused said affidavit and a transcript of the record to be filed in the office of the clerk of the circuit court where the cause was docketed. When the cause was reached for hearing in the circuit court, appellants filed a motion to dismiss the appeal on the ground that appellee, Williamson, was not a party to the proceedings, and therefore had no right to appeal from the order. The motion was overruled and exceptions were saved by appellants. The cause was then heard by the court upon oral testimony and judgment was rendered declaring the license issued to appellants void, for the

reason that the ferry was operated within one mile of Williamson's ferry which had been previously established and because Williamson's previous license did not expire until April 11, 1905, one day after the date of appellants' license.

F. M. Hanley, Jno. B. McCaleb, and Bradshaw, Phaton & Helen, for appellants. J. B. Baker and Horton & South, for appellee.

MCCULLOCH, J. (after stating the facts). Did Williamson have the right of appeal from the order of the county court granting ferry license to appellants? Section 33, art. 7, of the Constitution provides that "appeals from all judgments of county courts * * * may be taken to the circuit court under such restrictions and regulations as may be prescribed by law." The statute provides that "appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court at any time within six months after the rendition of same * * * by the party aggrieved filing an affidavit, etc." Kirby's Dig. § 1487. The question then arises, who, in the meaning of the statute, is "the party aggrieved" at the judgment appealed from? Is it any person who objects to its enforcement and who manifests that objection by appearing within six months and filing an affidavit for appeal, or is it necessarily a party to the judgment against whom the court has decided? This court has held that in proceedings to set in force the three-mile prohibition law one who had not appeared before judgment and applied to be made a party could not appeal from the judgment (Holmes v. Morgan, 52 Ark. 99, 12 S. W. 201; Holford v. Kirkland, 71 Ark. 84, 71 S. W. 264), and that one not a party to the proceeding in the county court wherein a contract is made for building a county jail and the bond of the contractor approved cannot appeal from the judgment (Armstrong v. Truitt, 53 Ark. 287, 13 S. W. 934). It has also held, prior to the adoption of the present Constitution, that citizens who have not made themselves parties to a proceeding in which an allowance against the county is sought, cannot appeal from the judgment of allowance. Chicot Co. v. Tilghman, 26 Ark. 461; Austin v. Crawford Co., 30 Ark. 578. In Johnson v. Williams, 28 Ark. 479, an effort was made by the heirs of a decedent to appeal from a judgment of the probate court allowing a claim against the estate of such decedent, and the right to appeal was denied because the heirs were not parties to the proceedings; and in Arnett v. McCain, 47 Ark. 411, 1 S. W. 873, the right of heirs to appeal from an order of the

probate court directing the administrator to sell lands of the ancestor for payment of debts was denied on the same ground.

Learned counsel for appellee rely upon the case of Ouachita Baptist College v. Scott, 64 Ark. 349, 42 S. W. 536, as sustaining the right of appeal without having been a party to the proceedings. In that case an appeal was taken by the heirs of a testator from a judgment of the probate court admitting the last will and testament to probate in common form without notice to the heirs, and the court held that the appeal could be taken by the heirs who had not been made parties to the proceedings. The decision was put on the ground that adversary rights were involved in the judgment admitting the will to probate, that no other method was under the law afforded the heirs of contesting the will, and that the conclusion reached met the requirements of the constitutional provision which declares that "any person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive, in his person, property or character." There is, however, a broad distinction between the rights involved in that case and in the case at bar. In that case private rights were involved and were adversely adjudicated by admitting the will to probate and no other remedy was open under the law than by allowing an appeal. The appellants, in that case, were "entitled to their day in court," and in no other way could they secure it. But in the case at bar no adverse private rights were directly adjudicated. The granting of a ferry license is not the adjudication of private right, though such rights may incidentally grow out of the license granted. The county court in granting a ferry license, does so for the benefit of the public though the individual who obtains the license receives an incidental benefit and private rights grow up under it. It is true that in granting a license to Turner and Thomas the court indirectly and incidentally created competition for Williamson in his business as ferry keeper, but the judgment granting the license was not such a direct adjudication of his rights as made him "the party aggrieved." The county court had the power, under certain conditions named in the statute, to grant more than one ferry license at the same place and because it did so, it cannot be said that the judgment was an adjudication of the rights of the party who first obtained license, unless he made himself a party before rendition of the judgment.

The judgment of the circuit court is therefore reversed, and the appeal from the county court of Izard county dismissed.

STATE v. TEMPLE.

(Supreme Court of Missouri, Division No. 2
March 6, 1906.)

1. INFORMATION—VERIFICATION—INFORMATION AND BELIEF.

Under the express provisions of Rev. St. 1899, §§ 2477, 2479, an information by the prosecuting attorney may be verified on information and belief.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 167, 168.]

2. SAME—OBJECTIONS—WAIVER.

An objection that an information was not verified on the prosecuting attorney's knowledge was waived where the objection was not raised by a motion to quash.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 632.]

3. CRIMINAL LAW—RECORD—SWEARING JURY.

Where the record of a criminal trial contained an entry after naming the 12 jurors, followed by a recital that they were "twelve good lawful men of the body of the county, * * * duly tried, impaneled and sworn to try the cause," etc., such entry was sufficient to show that the jury was actually sworn to try the case.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 2760, 3024.]

4. SAME—PRESENCE OF DEFENDANT—APPEAL—PRESUMPTIONS.

Where the record of a criminal trial recited that defendant was present and was arraigned in open court; that he entered his plea of not guilty; that his motion for continuance and change of venue were taken up and overruled; that thereupon the jury was selected, sworn, and on the same day returned their verdict—it sufficiently appeared that defendant was present when the verdict was received, under Rev. St. 1899, § 2610, providing that, when it appears that defendant was present at the commencement or any other stage of the trial, it shall be presumed on appeal, in the absence of evidence to the contrary, that he was present during the whole trial.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3027.]

5. SAME—IRONS—IMPROPER USE.

Where accused was not manacled while his trial was actually in progress, he was not prejudiced by the fact that he was brought into court manacled from the jail, and was manacled again in the presence of some of the jurors preparatory to his being returned to the jail during an intermission.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1484.]

6. HOMICIDE—ASSAULT WITH INTENT TO KILL.

Rev. St. 1899, § 1847, provides that every person who shall on purpose and of malice aforethought shoot at another with a deadly weapon or by any other means or force likely to produce death, or great bodily harm, with intent to kill, maim, ravish, or rob such person, or in an attempt to commit any other felony, etc., shall be punished by imprisonment. *Held*, that an information charging that defendant unlawfully, feloniously, on purpose, and of his malice aforethought, in and upon one G. did make an assault, and did then and there, feloniously, on purpose, and of his malice aforethought, shoot and strike him, the said G., in and upon the face and head with a certain revolving pistol then and there loaded with leaden balls, which defendant then and there in his hand held with intent the said G., on purpose and of his malice aforethought, to kill and murder, etc., sufficiently stated the offense defined by such section.

7. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

An instruction that accused is presumed to be innocent of the offense charged, which presumption continues throughout the case until overcome by evidence showing him guilty beyond a reasonable doubt, and that, if the jury had a reasonable doubt of defendant's guilt, they must acquit him, but that such a doubt must be a substantial doubt founded on evidence, and not a mere possibility of defendant's innocence, was correct.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1904-1922.]

8. SAME—CONTINUANCE—DISCRETION.

The granting of a continuance in a criminal case rests largely within the discretion of the trial court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1311.]

9. SAME—ABSENCE OF WITNESS—DILIGENCE.

An application for a continuance of a criminal case for absence of a material witness, merely alleging that defendant had used due and proper diligence to locate the witness, but had been unable to do so until the present time, was defective for failure to state what diligence, if any, had been so used.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1359.]

10. SAME—PROBABLE EFFECT OF TESTIMONY.

In a prosecution for assault with intent to kill, defendant, though represented by able counsel, made no effort to disclose on cross-examination of the state's witness that an alleged absent witness was present at the time of the assault, nor that the persons assaulted or any one else began the difficulty by assaulting defendant so as to compel him to shoot in self-defense, and defendant offered no testimony on his own behalf. *Held*, that the denial of a continuance, in order to enable defendant to procure a witness whom defendant alleged was present at the time of the assault, and would testify to such facts, was not an abuse of discretion.

Appeal from Circuit Court, Buchanan County; B. J. Casteel, Judge.

Sol Temple was convicted of assault with intent to kill, and he appeals. Affirmed.

Houston & Buckner and Jno. C. Moore, for appellant. The Attorney General and Rush C. Lake, for the State.

GANTT, J. This is a prosecution begun by the prosecuting attorney of Buchanan county, Mo., by filing an information in the criminal court of that county charging that the defendant, with unlawfully, feloniously, on purpose, and of his malice aforethought, made an assault and shot and struck William P. Gibson, with a certain revolver loaded with gunpowder and leaden balls, on the 14th day of May, 1904. The defendant was duly arraigned and entered his plea of not guilty. On the 4th day of August, 1904, he made an application for a continuance, which was heard and overruled, and thereupon he made an application for a change of venue, which was denied on the ground that due notice had not been given to the prosecuting attorney. A jury was impaneled to try the case, and after hearing the evidence found the defendant guilty, and assessed his punishment at 10 years in the penitentiary. In due time the

defendant filed his motions for new trial and in arrest of judgment, which were considered by the court and overruled. On the 18th day of August the defendant was sentenced in accordance with the verdict, from which sentence and judgment, the defendant has appealed to this court. There is practically no controversy as to the evidence in the case.

The testimony discloses the following facts: On the 14th day of May, 1904, in the afternoon, a man by the name of Wilkerson called upon Gibson, who was a police sergeant in the city of St. Joseph, to come to a livery barn with him and see whether or not a team in the barn, and which had been placed there by the defendant, answered the description of a team which had been advertised as having been stolen at Savannah, Mo., and of which the St. Joseph police officers had a description. In company with Wilkerson, the prosecuting witness, Gibson, went to a saloon in the neighborhood of the barn and asked the defendant, Temple, to show him the team, explaining to Temple that he (Gibson) was a police officer. Temple accompanied them to the barn, and on the way, at Wilkerson's request, Officer Grable joined them. Defendant, Temple, stepped into the stall of one of the horses and was engaged in untying it, when Gibson remarked, "Why this is not the team." And Temple, who was slow in backing out the horse, was addressed by Wilkerson, who said: "It takes you a long time to untie those horses. Why don't you get those horses out? It takes you a hell of a long time to untie those horses. Why don't you bring them out of there?" At about that time Wilkerson saw the defendant draw his gun (which was a 44-caliber self-acting revolver), and, throwing his arm over the neck of the horse, which was between the defendant and Gibson, Temple fired the revolver; the ball striking Gibson in the face, and so close was the revolver to Gibson that the powder burned his face. The defendant then turned his revolver upon Officer Grable, and the officer states in response to the question: "Q. What did you do? A. Well, just as soon as he shot Gibson, he threw the gun right in my face, and I was standing like this, with my hands in my pockets, and just as he drew it in my face I clinched it. Q. Is this the gun that was used there? A. Yes, sir; this is the gun. Now, as he drew it, I caught it like that. I grabbed it just in that shape and clinched it with my thumb behind the hammer, and then holding it in this way, and then several times he would wrench it around and take hold with both hands and try to pull it off, but I clinched it here, and the old Nick himself could not pull it off." With the help of bystanders, Temple was finally subdued. The testimony shows that no charge was made against Temple. The request was made that he produce for inspection the horses he had for sale, and while in the pretended act of complying with Gibson's request he opened fire, shot Gibson and attempted to shoot

Officer Grable. No testimony was offered by the defense. The facts in the case upon which this appeal is prosecuted will be noted in connection with the several propositions advanced by the counsel for the defendant to secure a reversal of the judgment.

1. The information is assailed because it was verified solely on the information and belief of the prosecuting attorney, and does not purport to be based upon his actual knowledge. Our statute (sections 2477, 2479, Rev. St. 1899) permits the verification of an information by the prosecuting attorney upon his information and belief, and the cases cited from other jurisdictions are not controlling authority on this point. Moreover, the information in this case was not challenged by motion to quash, and the defendant waived this point by not making his objection to the information on that ground prior to the trial of the case. *State v. Brown*, 181 Mo. 192, loc. cit. 226, 79 S. W. 1111.

2. It is objected that the record does not affirmatively show that the jury was sworn to try the case. This exception is based upon a misapprehension of what the record discloses. The entry of the record on this point is as follows: After naming the 12 jurors by name, it proceeds "twelve good, lawful men of the body of the county, who are duly tried, impaneled, and sworn to try the cause," etc. This form was held sufficient in *State v. Schoenwald*, 81 Mo. 159. In the case just cited Judge Scott, speaking for this court, said: "The books state the form of the oath to be administered in criminal trials. But it does not appear that the oath as administered should be entered on record. * * * And, as the approved forms of entries in capital cases do not require that the oath should be formally entered of record, we consider that on the record as made out there is no error." This assignment of error must be considered untenable.

3. There is no merit in the point made that the record does not show the defendant present during the trial and at the time the verdict was received. The whole trial occurred on the 4th day of August, 1904. The record of that day's proceedings shows that the defendant was present and arraigned in open court and entered his plea of not guilty, and that his motions for continuance and change of venue were taken up and overruled, and that the prosecuting attorney and the defendant made their challenges, and thereupon the jury as selected, were duly sworn, and on the same day the jury returned their verdict in the cause. It is unquestionably true that a defendant in a felony case must be present at every stage of the trial. But by section 2610, Rev. St. 1899, it is provided "that when the record in the appellate court shows that the defendant was present at the commencement, or any other stage of the trial, it shall be presumed in the absence of all other evidence in the record to the contrary, that he was present during the whole trial." Section

2610, supra, was designed and has the effect to change the burden of proof as to the presence of the defendant at every stage of the trial. The decisions of this court prior to its enactment and the adjudication of the various other courts in this country, in the absence of such a statute, cannot control. The facts in this record indicate the wisdom of the statute. It will be observed that the defendant not only does not claim that as a matter of fact he was absent when the jury returned their verdict, but in his own affidavit in support of his motion for new trial he states that at the convening of the afternoon session on the 4th day of August, 1904, he was brought into the courtroom for further proceedings in the custody of two officers who were guarding him. It was the purpose of the statute to avoid granting of new trials and reversal of judgments in criminal cases simply because by the inattention of the clerk of the courts, in writing the record of criminal cases, the presence of the defendant at each stage of the trial was not noted on the record. The statute makes it the imperative duty of the several judges to superintend the making up of the records in their courts, and the prosecuting attorneys should see to it that the entries in criminal proceedings should recite the presence of the defendant at the various stages of the trial and avoid appeals upon such grounds as this. But because this was so often neglected, and judgments had been reversed by this court for the failure of the record to affirmatively show the presence of the defendant, this statute was enacted. As nothing to the contrary appears in this record, and, as already seen, the record does show the defendant was present at the impaneling of the jury, the presumption must be indulged that he was present when the verdict was received. *State v. Barrington* (not yet officially reported) 98 S. W.

4. It is assigned as error that the court erred in permitting the defendant to be manacled and shackled in the presence of the jury, and for this reason a new trial should be granted. The facts upon which this assignment of error is predicated appear from the affidavit filed by the defendant and others in his behalf, as well as those filed by the sheriff and his deputies, and are as follows: Upon the convening of the court at the afternoon session on the day on which defendant was tried the defendant was brought to the courtroom, with handcuffs on him, which were removed by the officer before the cause was resumed, and at the noon hour, when the recess for dinner was taken, the officers placed the handcuffs upon him to remove him to the jail, and this was done in the presence of at least some of the jurors who were trying the case. As a reason for securing the prisoner in this manner, the sheriff makes affidavit that at the time and prior to that date he had received information to the effect that the defendant was a desperate criminal;

that he had broken jail at Pond Creek, Okl., on two different occasions when confined for crimes; that on one of these occasions the defendant, as the sheriff was informed, when in the courtroom, drew two revolvers, which had been secretly supplied him, and covered the officers with the same, backed out of the courtroom, mounted a horse in waiting outside, and made his escape; that the defendant had told one of the jailers that he had once broken jail by the use of a false pistol, which he had made out of tin, and by means of which he intimidated his jailer and made his escape; that these reports having reached the sheriff caused him to caution his deputies to be very careful with defendant; that he, the sheriff, had been present often during the trial of the defendant, and the defendant had never been handcuffed during the trial. The deputy sheriff, Frank Johnson, made affidavit that he had charge of the defendant; that in taking prisoners to and from the jail to the courtroom it was customary to handcuff all male prisoners; that the jail is separate and apart from the courthouse, and is reached by traversing some 50 feet Fifth street, one of the main thoroughfares of the city of St. Joseph; and that it is necessary to pass through dark, crowded corridors of the courthouse and up a stairway, in all covering a distance of over 200 feet, as in all other cases the defendant was freed from his handcuffs when seated in the courtroom, and the handcuffs replaced when the defendant was taken and removed from the courtroom after adjournment of the court; that defendant was reported to be a dangerous criminal, and the sheriff was advised that the defendant had made his escape from the courtroom while on trial at Pond Creek, Okl.; that at the said August term the defendant was on trial for an assault with an intent to kill two public officers of the city, and was also held on the charge of stealing two horses; that the defendant was a magnificent specimen of physical manhood, of vicious temperament, and on trial for a vicious assault; that in spite of his knowledge of these facts affiant endeavored in every way possible to handle and safely keep the defendant in an unobtrusive way, and to do nothing indicative of any unusual care or watchfulness on affiant's part, and that there was nothing out of the ordinary in guarding a male prisoner. In *State v. Kring*, 64 Mo. 591, Judge Napton, speaking for this court, in reviewing the judgment of the St. Louis Court of Appeals in the same case (1 Mo. App. 438), said: "The English authorities sustain the conclusion of the Court of Appeals as well as the other causes cited in the brief for counsel for the defendant, to which may be added *People v. Harrington*, 42 Cal. 165, 10 Am. Rep. 296. From all these cases it seems very clear that, without some good reason authorizing the criminal court to depart from the general practice in England and in this country, the shackles of the prisoner when brought be-

fore the jury for trial should be removed. We have no doubt of the power of the criminal court at the commencement, or during the progress of the trial, to make such orders as may be necessary to secure a quiet and safe one, but the facts stated by the court in this case as shown by the record, that the prisoner had assaulted a person in court about three months before the trial at which he was tried, would hardly authorize the court to assume that on this trial for life he would be guilty of similar outrages. There must be some reason based on the conduct of the prisoner at the time of the trial to authorize so important a right to be forfeited. When a court allows a prisoner to be brought before a jury with his hands chained in irons and refuses on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused as being, in the opinion of the judge, a dangerous man, and one not to be trusted even under the surveillance of the officers. Besides, the condition of the prisoner in shackles may to some extent deprive him of the free and calm use of all of his faculties." In the Kring Case the facts upon which the foregoing information was predicated were these: "The defendant was brought to the bar of the court, and, having announced through his counsel his readiness for trial, the court thereupon ordered the trial to proceed. Defendant being ironed with handcuffs, or manacles, upon his hands and wrists, his counsel then and there made a motion to the court to have the same removed, which the court refused to do, overruling the motion. The court stated that an assault made by the accused on J. G. Broemser, husband of deceased, in open court, when the accused was last here, was the reason why." Judge Bakewell, for the Court of Appeals, reviewed the common law on this subject, and said: "In the Case of Laver, 18 Howell's St. Tr. 94, who was tried for high treason in 1722, the distinction was taken and it was held that the prisoner might be brought ironed to the bar for arraignment, but that his shackles must be stricken off at the trial. 'My lord,' said the prisoner, in the report of that case, 'I hope I shall have these chains taken off, that I may have the free use of that reason and understanding which God hath given me,' to which the Lord Chief Justice replies: 'As to the chains you complain of, it must be left to those to whom the custody of you is committed to take care that you may not make your escape. When you come to your trial, then your chains may be taken off.' To which the counsel for the prisoner said: 'Your lordship has limited it as an indulgence extended to him when he comes to his trial that his irons should be taken off, but I humbly insist upon it that, by law, he ought not to be called upon even to plead until his fetters are off. My Lord Coke (3 Inst. 35) is clearly of that opinion in his Pleas to the Crown; and it is admitted on

all hands that, when he comes to be tried, his shackles must be off, and upon debate it was so determined in Cranburner's Case, 13 Howell, 222. The only reason for putting of irons at all on a prisoner is to keep him in safe custody, and the reason why they are taken off in the course of proceedings against him in a court of justice seems to be that his mind should not be disturbed by any uneasiness his body or limbs should be under.' The Lord Chief Justice said: 'No doubt, when he comes upon his trial, the authority is that he is not to be in vinculis during his trial, but should be so far free that he should have the use of his reason and all advantages to clear his innocence. Here he is only called upon to plead by advice of his counsel he is not to be tried now. When he comes to be tried, if he makes that complaint, the court will take care that he should be in a condition proper to make his defense; but when he is only called on to plead, and his counsel by him to advise him what to plead, why are his chains to be taken off this minute, and be put on again the next?' In Waite's Case, 1 Leach, 43, when the defendant had pleaded not guilty, and was put upon his trial, the court ordered his fetters to be knocked off. Giving full effect to the doctrine announced in Kring's Case, and the common-law authorities, it is obvious that accepting the defendant's own account he has not brought himself into a like situation with that described in either of those cases. Adopting his own version, the shackles were removed from him as soon as he was brought within the bar of the court. In State v. Craft, 164 Mo. 631, 65 S. W. 280, it was said by Burgess, J., for this court: "At common law, when a prisoner was brought in to the court for trial upon his plea of not guilty to indictment for a criminal offense, he was entitled to make his appearance free from all shackles or bonds. State v. Kring, 64 Mo. 591; State v. Kring, 1 Mo. App. 438; People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296. And, to justify shackles on the prisoner during the trial, there must exist some good reason bottomed upon his conduct at the time of the trial. Otherwise in this country, when the prisoner is brought before the jury for trial, the shackles should be removed." In State v. Temple (handed down to-day) 92 S. W. 494, this same error is urged, and, speaking for this court, Judge Burgess said: "It has been held by this court, following the common-law rule, that, when a prisoner is brought into court for trial upon his plea of not guilty to an indictment for the criminal offense, he is entitled to make his appearance free from all shackles or bonds, and to justify the keeping of shackles upon the prisoner during the trial there must arise during the trial some good reason therefor based upon the conduct of the prisoner, in the absence of which such action would be improper and would deprive the defendant of a substantial legal right to his prejudice. But there

is no pretense that the prisoner in this case was shackled during the trial. On the contrary, it clearly appears that he was not in any way deprived of the free and calm use of all of his faculties. We do not, however, intend to be understood as holding that any explanation was due from the officer in charge of the defendant for placing shackles upon him in taking him to and from the courthouse during the trial." All of which is applicable to the facts of this case and conclusively establish that the defendant has no ground of complaint on account of the action of the officer in handcuffing him while bringing him to, and taking him from, the court. *State v. Duncan*, 116 Mo. 308, 22 S. W. 699; *State v. Rudolph*, 187 Mo., loc. cit. 89, 85 S. W. 584.

5. It is next insisted that the information is bad. The information was drawn to charge an offense under section 1847, Rev. St. 1899; it charges that the defendant, unlawfully, feloniously, on purpose, and of his malice aforethought, in and upon one William P. Gibson did make an assault, and did then and there feloniously, on purpose and of his malice aforethought, shoot and strike him, the said William P. Gibson, in and upon the face and head with a certain revolving pistol then and there loaded with leaden balls, which he, the said defendant, then and there in his hand had and held, with intent then and there him, the said Gibson, on purpose and of his malice aforethought, feloniously, to kill, and murder, etc. The information charges every element of the offense denounced in section 1846, and is not obnoxious to the objection made by defendant, and is in accordance with the precedents of this court since the case of *State v. Comfort*, 5 Mo. 357; *State v. Chanler*, 24 Mo. 871, 69 Am. Dec. 432; *State v. Jones*, 86 Mo. 623; *State v. Wood*, 124 Mo. 412, 27 S. W. 1114; *State v. Hendrickson*, 165 Mo. 262, 65 S. W. 550.

6. The first instruction given by the court of its own motion is challenged. That instruction is in these words: "The defendant is presumed to be innocent of the offense with which he stands charged, and this presumption continues throughout the case until overcome by evidence showing him guilty beyond a reasonable doubt; and, if you have a reasonable doubt of the guilt of the defendant, you must acquit him, but such a doubt to justify an acquittal must be a substantial doubt founded on the evidence, and not a mere possibility of the defendant's innocence." Defendant assails this instruction on the authority of *State v. Blue*, 136 Mo. 41, 37 S. W. 796, but a reading of the instruction in that case will show that it differs materially from the instruction in this case. In the *Blue Case* the instruction required "the doubt to be consistent with the evidence." There is no such requirement in this case. The objection is not well taken. It is substantially the same as the instruction on reasonable doubt, approved by this court

in *State v. Blunt*, 91 Mo. 503, 4 S. W. 394; *State v. Sacre*, 141 Mo. 64, 41 S. W. 905; *State v. Duncan*, 142 Mo. 456, 44 S. W. 268; *State v. Adair*, 160 Mo. 391, 61 S. W. 187. We must be allowed again to commend to the trial courts the instruction in *State v. Nueslein*, 25 Mo. 111, which has always received the approval of this court.

7. The objection urged against the second instruction is that it eliminates the necessity of proof that the criminal act was done "purposely" and "with malice aforethought." A reference to the instruction itself will show that the jury was required to find that the defendant, "on purpose, willfully, and with malice aforethought, made an assault on the witness Gibson and shot him in the face and head, with the intention of killing him." The court correctly defined "willfully," "malice," and "malice aforethought," and the instruction must be held sufficient.

8. The last assignment of error is that the court erred in overruling the defendant's application for continuance. The rule in this state is firmly established that the granting of a continuance is a matter resting largely with the trial court's discretion, and nothing short of an abuse of such discretion will justify an interference by this court. The affidavit assigned as a reason why the defendant could not safely proceed to trial that one Charles Drake, who was a competent, material witness for defendant, was absent. It is alleged "that the said witness resides in Lyle, Grant county, Okl., and that he expected to prove that Charles Drake was present with the defendant on the day and date named in the information, and at the time of the assault complained of in the information, and that he believes that he can prove by said witness that defendant was assaulted by several police officers without provocation or just cause, and that by reason of said assault was compelled and did retreat as far as he could go, whereupon said officers struck and beat defendant with heavy clubs in and about the head, and that thereupon defendant in defense of his own life shot and wounded one of the said officers; that said witness disappeared on the day and date named in the information and immediately after the assault therein complained of, and that defendant used due and proper diligence to locate said witness, but had been unable to do so until the present time, but he is now informed that said witness is now residing, and may be found in Lyle, Grant county, Okl."

So far as mere matter of form is concerned, the affidavit substantially complies with the requirements of the statutes (section 2600), with the exception that it does not state what diligence, if any, had been used by the defendant to locate the alleged absent witness, Charles Drake. It is not averred that defendant had received a letter from the said witness, or any other person living at Lyle, Okl., that the said Drake was now living there, nor was the court informed

as to the nature of the information that justified the defendant in believing that said Drake could be found in Lyle, Grant county, Okl. In *State v. Worrell*, 25 Mo., loc. cit. 256, it was said: "Even if the circuit court may have seemingly exercised its discretion without proper caution at first (which we do not pretend to say was the case here), yet when the whole case is presented before this court, and the absent witness, from what is alleged in the affidavit, may be supposed not to be able to change the result, if produced and present, and, indeed, ought not to change the result, there can be no injury done to the defendant by ruling him to trial, and in such cases this court will not reverse." In *State v. Kindred*, 148 Mo. 281, 49 S. W. 848, in passing upon the question of whether error had been committed in denying a continuance, it was said: "In the meantime he alleges that the defendant on or about the 1st of May left Mercer county, and was then in Oklahoma territory. The affidavit does not disclose the address of the witness in Oklahoma. It does not appear that he has become a resident of that territory, nor that he went there with a view of a permanent residence. For aught that appears to the contrary the witness might have had no intention of settling in said territory. Being without the jurisdiction of our courts, he might feel under no obligation to tarry there until a commission should issue a notice to be served. It was entirely problematical where and when this witness could be found." And it was said: "Looking, now, over the whole evidence, that of the defendant and the other eyewitnesses, we can see there is not the least probability that the testimony of the absent witness, if given as indicated, would have affected the result, nor would it have changed the verdict and no injury resulted by refusing the continuance." So we can now look at the whole evidence in this case and the affidavit for continuance, and say there is not the slightest probability that if the said witness Drake had appeared, and had testified as indicated in this affidavit, or if his deposition had been taken in Oklahoma to that effect, that it would have had the slightest effect on the result of the trial. It is significant that, although defendant was represented by able and industrious counsel, no effort was made to disclose on the cross-examination of the state's witnesses that this man Drake was present at the livery stable when the defendant shot Sergeant Gibson, nor was the slightest attempt made to show that Gibson, or Officer Grable, or any one else, begun the difficulty by assaulting the defendant, or beating him over the head with clubs, so that he was compelled to shoot Gibson in self-defense. In the face of the testimony of the Officers Gibson and Grable, and of the witnesses Wilkerson, Luchsinger, and Wakefield, all residents of Buchanan county, there is not the slightest probability that the jury would

have accepted the unsupported testimony of the peripatetic witness Drake, and found that the defendant shot the officer in self-defense. There was no abuse of discretion in refusing to delay a trial of so much importance with no better showing of diligence than is disclosed on this record. The evidence in this case shows that a deadly assault was made upon an officer of the law without the slightest provocation. The defendant has had a fair and impartial trial, and should congratulate himself that the victim of his assault did not die from the wounds he inflicted upon him.

The judgment of the criminal court of Buchanan county is affirmed.

BURGESS, P. J., and FOX, J., concur.

CARR v. MISSOURI PAC. RY. CO.
(Supreme Court of Missouri, Division No. 2,
March 6, 1906.)

1. RAILROADS — INJURY TO PERSON NEAR TRACK—CARE REQUIRED AS TO LICENSEE.

A railroad company owes to a licensee walking on its right of way no greater duty than not to negligently or wantonly injure him.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1236.]

2. SAME — NEGLIGENCE — INJURY FROM DISLODGED BRAKESHOE.

Where a licensee walking near a railroad track was struck and injured by a brakeshoe, which flew from a passing train, the railroad company was guilty of no negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1252, 1253.]

3. APPEAL—GROUNDS FOR REVERSAL—ERRORS AFFECTING PARTY NOT ENTITLED TO SUCCEED.

Erroneous instructions are no ground for the reversal of a judgment for defendant, if plaintiff was not, from any point of view, entitled to recover.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4227.]

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Action by William Carr against the Missouri Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

P. Wm. Provenchere, for appellant. Martin L. Clardy and Henry G. Herbel, for respondent.

BURGESS, J. This is an action for damages in the sum of \$10,000 for personal injuries alleged to have been sustained by plaintiff by reason of the negligence of defendant. The petition alleges that the public and plaintiff were for a long time accustomed to use as a footway, with the knowledge and consent of defendant, a certain part of its roadbed in the city of Webster Groves, in St. Louis county; that plaintiff, while walking upon that part of defendant's right of way or roadbed, was struck by a piece of brakeshoe flying from a car of a passing

train of defendant; that the said brakeshoe was part of an appliance used for operating the train, and was in a defective and dangerous condition, liable to break in the operation of the train, and a part thereof to fly off and injure persons along the road, all of which defendant knew, or by ordinary care might have known; that defendant negligently permitted the brakeshoe to be on the train in such defective and dangerous condition, and the brakeshoe, being in a defective and dangerous condition, broke, and a part of it flew from the train and struck and injured plaintiff. The defenses were a general denial and plea of contributory negligence. Plaintiff replied, denying all new matter set up in the answer.

The facts are substantially as follows: Plaintiff resides in St. Louis county, just outside the limits of Webster Groves, near the roadway of defendant. Tuxedo Station, near which the accident is alleged to have occurred, is on the outskirts of the town. On Sunday morning, April 20, 1902, plaintiff started to church, and while on the way walked along the north side of the northern most of defendant's two tracks, running in an easterly and westerly direction at that point. The track next to and north of which he was walking was what was known as the "west-bound track," and the track south of it, which was the one on which the train was moving at the time of the accident, was known as the "east-bound track." Plaintiff was walking 16 or 17 feet north of the train, from which he claims the brakeshoe flew and struck him. He testified that the train was the "fast mail," and his witness, Murphy, who was walking a short distance behind him the time he was struck, also testified that it was the "fast mail," and gave its number as No. 10. This was the regular fast mail train which was due at Lake Junction, a short distance west of Tuxedo, at 6:58 a. m. There was another train, No. 8, which arrived at Lake Junction at 6:45 a. m., or 13 minutes before the fast mail was due there. Plaintiff was accompanied by a young lady, who was walking immediately behind him. When Carr got within about 200 feet of Tuxedo Station, this fast mail train, No. 10, passed him on the east-bound track; there being the west-bound track between him and the passing train, or a space of at least 17 feet. As he saw it approaching, he stopped and looked at the train while it was passing and was struck by some dark object which flew from the train, but which he could not distinguish. The lady who was walking immediately behind him, seeing him reel and about to fall, caught him and helped him to his home. She testified that she picked up a part of a brakeshoe at the place where he was struck at the time, but, after carrying it a short distance, dropped it and assisted Mr. Carr home. Murphy, his other witness, who was a section hand in defendant's employ, hap-

pened to be walking west several hundred feet behind Carr and the lady, saw the fast mail, No. 10, approaching, and, as it was going by Carr, saw him reel, and the lady take hold of him to hold him up. He went to them and assisted Carr, who was a next-door neighbor of his, to his home. He then, within 20 minutes thereafter, went back to the scene of the accident and found a piece of a brakeshoe about at the place where he saw Carr stagger and throw it down the embankment. Mrs. Carr, his sister-in-law, who was with Carr at the time of the accident, went back to the scene of accident about an hour and a half thereafter, and states that she found this brakeshoe at about the place where she had dropped it, although Murphy testified that he had thrown it down the embankment. The tracks of the defendant are laid on a high embankment along there, and there is a road known as Marshall avenue, which runs parallel with the railroad tracks a short distance west of plaintiff's home, and south of defendant's right of way there was a public road running to Tuxedo Station, which Carr could have used if he had wished to avoid the railroad tracks. Instead of doing that, he walked along the north side of the west-bound track, towards Tuxedo, and the church he was going to attend, as it was a more direct route and the walking better. His only object in using defendant's right of way was his own convenience. It was shown by quite a number of witnesses who testified for plaintiff that people in that vicinity used the defendant's right of way and tracks for that purpose quite generally. The defendant proved, and its proof was not controverted by the plaintiff, that it inspected this train at Sedalia and at Pacific, Mo., before it reached St. Louis; that it was in good condition, and no brakeshoes were missing; that immediately upon its arrival in St. Louis that morning it was thoroughly inspected, and no brakeshoes were found missing therefrom; that, shortly after this regular inspection was made at St. Louis, a message was received by the superintendent's office, which was near the place where the train was standing, to the effect that it was claimed that a man had been struck by a brakeshoe which came from that train, near Tuxedo, that morning; and that it was thereupon again inspected by three or four inspectors, all of whom testified that, after a thorough inspection thereof, they found there was no brakeshoe missing therefrom.

At the conclusion of the evidence the plaintiff asked the court to instruct the jury as follows:

"(1) If the jury believe from the evidence that on April 20, 1902, the plaintiff, while walking on the right of way and roadbed of defendant in the city of Webster Groves, in St. Louis county, Madison, was struck and sustained injury by a piece of an iron brakeshoe which was flung against him with force

from a car of a moving passenger train, by reason of the movement of the train, which train was then and there one of the regular trains of the defendant engaged in carrying passengers, and that the said brakeshoe was an appliance of said train, and was then and there made use of and employed by defendant in operating said train, and if the jury find from the evidence that said brakeshoe was in a defective and dangerous condition and was liable to break and to be in whole or in part flung off while being used as aforesaid, and was liable to inflict injury on persons along the road with whom it came in contact, and if the jury find from the evidence that all of said matters were known to the defendant at and before said time, or [might] would have been known to it by *ordinary care on its part in time to have remedied such defective and dangerous condition before said time in the exercise of ordinary care* on its part, and if the jury further find from the evidence that plaintiff did not in any manner contribute to bring about the contact between himself and said piece of said iron brakeshoe, then the jury will return a verdict for the plaintiff, provided they further find from the evidence that the place where plaintiff was injured was not fenced, and had for years, with the [tacit] knowledge and consent of defendant, been habitually used by the public as a public footway and footpath. 'Ordinary care,' as used in this instruction, is such as a person of ordinary prudence and caution, according to the usual and general experience of mankind, would exercise in the same situation and circumstances as those of the defendant, whose conduct in that regard is in question in this case." Which instruction, as offered, the court refused to give. And the court of its own motion changed said instruction by striking out the words between brackets and inserting the words in italics and said instruction, as so changed, the court gave; and to each and all of which rulings and actions of the court in refusing said instruction as offered, and in so changing said instruction, and giving the same so changed, the plaintiff duly excepted at the time.

"(2) The court instructs the jury that the answer of defendant sets up contributory negligence on the part of plaintiff as a defense to this action, and is in the nature of a plea of confession and avoidance, and impliedly admits some negligence on the part of defendant in the transaction involved in this case, and the jury are authorized so to find." Which instruction the court refused, and to the action and ruling of the court in refusing to give said instruction plaintiff duly excepted at the time.

"(3) If the jury find for the plaintiff, they will assess his damages at such sum as under the evidence they believe will compensate him for the pain and suffering endured, if any, by reason of the matters aforesaid, for

the expense, if any, incurred by him thereby, for the loss of time, if any, resulting to him therefrom and for the impaired power, if any, of plaintiff to earn a livelihood by reason thereof, not exceeding however the sum of \$10,000." Which instruction as offered the court modified of its own motion, by striking out the words "not exceeding however the sum of \$10,000," and said instruction, so modified, the court gave.

Over the objection and exception of plaintiff, the court also gave the following instructions: "(1) The court instructs the jury that, if you believe from the evidence that the plaintiff's injuries were the result of mere accident, and not of negligence on the part of the defendant, your verdict will be for the defendant. (2) The court instructs the jury that defendant was not required to anticipate or guard against unusual or extraordinary occurrences resulting from the operation of its trains, and unless you believe from the evidence that plaintiff's injury resulted from a cause which men of ordinary prudence, engaged in the operation of railroads, would have naturally and reasonably anticipated, under the circumstances in evidence, your verdict will be for the defendant. (3) The court instructs the jury that, unless you believe from the evidence that the piece of brakeshoe, by which plaintiff claims to have been struck, was a part of the train that was passing plaintiff at the time he was struck by said shoe, your verdict will be for the defendant."

Under the facts disclosed by the record, it may be conceded, which is not, in fact, controverted by the defendant, that it is no defense to this action that plaintiff, at the time of his injury, was walking along on the roadbed of defendant. That plaintiff was tacitly a licensee, and exercising the privileges of such in using defendant's right of way and track as a footway, is, we think, shown by the evidence, and, this being the case, the question arises as to what duty defendant owed plaintiff as such licensee. Plaintiff contends that the defendant company owed a duty to the public to conduct its business in a manner safe to the public and to all persons traveling upon foot at the place where the injury occurred, because the tracks and right of way at that place had been used as footways by the public, with the knowledge and tacit consent of the defendant, and that, if plaintiff, while so using such tracks or right of way, was injured through the defendant company's negligence, in having and using on a passing train, and in the operation thereof, an appliance that it knew, or by the exercise of ordinary care might have known, was defective and liable to fly off and injure persons along the route of the train, the company is liable.

In *Brown v. Hannibal & St. Joseph R. R. Co.*, 50 Mo. 461, 11 Am. Rep. 420, the plaintiff was injured by one of defendant's trains.

while she was attempting to cross defendant's track and right of way under the following circumstances. The plaintiff, Mrs. Brown, was in Cameron, and wanted to cross a street over which the defendant's track was laid; but she discovered that the crossing was obstructed by a train of cars standing upon the track, so that she could not pass at that place. She then turned and crossed the track at a place where there was no public crossing, but there was a path across the track at that point, which was occasionally used by the people, although it did not appear that the company had ever authorized anybody to cross at that place. When plaintiff went on the track, there was an engine and tender standing thereon about six feet distant, and while she was in the act of crossing the engine moved and the tender struck her, the wheels passing over and crushing one of her legs. She testified that no signal was given of the moving train, and she did not notice the train, until struck by the tender. The evidence with regard to the ringing of the bell before the engine started was conflicting. The court held that, though a person be injured while unlawfully on a railroad track, or contributes to his injury by his own carelessness and negligence, yet, if the injury might have been avoided by the use of ordinary care and caution by the railroad company, it is liable for damages for the injury. But in that case the injury occurred at a crossing in a town, and which might have been avoided by the exercise of ordinary care on the part of the defendant's servants in the movement and operation of the engine and train, and has no bearing on this case, so far as the cause of the alleged injury is concerned. *Lewis v. St. Louis & I. M. R. R. Co.*, 59 Mo. 495, 21 Am. Rep. 385, was an action for damages for personal injuries sustained by a brakeman on defendant's road, and caused by a defect in defendant's track. It was held by the court that it is the duty of railroad companies to keep their road and works and all portions of the track in such repair, and so watched and tended, as to insure the safety of all who may be lawfully upon them, whether passengers or servants or others, and that, if they fail to do so, they are guilty of a breach of duty, and liable for the consequences. That case, like the former, differs very materially from the case at bar, and is not in point. Another case relied upon by plaintiff is that of *Hicks v. Pac. Ry. Co.*, 64 Mo. 430. In that case it was held that, even supposing the child injured was a trespasser, the liability of the railroad company to him for injuries would not be restricted to those which were wanton, but would embrace all such as resulted from the want of ordinary care, and that the care and caution required of railroad companies in running their trains are commensurate with the danger to persons and property incident to that mode of con-

veyance. The plaintiff in that case was standing on the platform adjoining the railroad track at Lee's Summit, when a freight train came in on the main track, and a piece of timber with which one of the cars was loaded, and which projected from 20 inches to 2 feet over the side of the car, struck and injured plaintiff. There is no analogy between that case and the case at bar. It is common knowledge that a timber or other hard substance projecting some two feet from the side of a moving railroad car endangers the safety of persons who might be standing near the track. In this case the situation is wholly different. The plaintiff was on the defendant's right of way enjoying the privilege merely of a licensee in walking thereon, and the company owed him no other or greater duty than not to negligently or wantonly injure him. The evidence in no way shows that the injury was the result of negligence on the part of the company.

It makes no difference whether the instructions were right or wrong, if the plaintiff was not, from any point of view, entitled to recover. As was said by Marshall, J., in speaking for the court, in *Moore v. Lindell Ry. Co.*, 176 Mo. 528, 75 S. W. 672: "If there is no evidence of a willful, reckless, or wanton disregard of human life on the part of the operatives of the train, there is nothing for a jury to pass upon, and the court should sustain a demurrer to the evidence. If, instead of so doing, the trial court submits the case to the jury and gives improper and erroneous instructions, and the jury find for the defendant, the verdict will not be disturbed, notwithstanding such misdirection, because it is in consonance with the true law, and is for the right party, and because the plaintiff would not be entitled to a verdict at all upon such a showing"—citing *Hill v. Wilkins*, 4 Mo. loc. cit. 88; *Orth v. Dorschlein*, 32 Mo. 366; *Kelly v. Railroad*, 88 Mo. 534; *Ellerbe v. Bank*, 109 Mo. 445, 19 S. W. 241; *Homuth v. Railroad*, 129 Mo. loc. cit. 642, 31 S. W. 903; *Haven v. Railroad*, 155 Mo. loc. cit. 223, 224, 55 S. W. 1035. The courts make a distinction between a person who comes upon a railroad's premises at the invitation of the railway company, or for some purpose connected with its business, and a person who goes upon such premises for his own convenience or pleasure. In the one case there is a duty to protect the person thus going upon the property of another from injury, while on his premises; while, as to the other, there is no such duty. This distinction is nowhere more clearly stated than in the case of *Sweeny v. Ry.*, 10 Allen (Mass.) 372, 87 Am. Dec. 644, in the language following: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests.

There can be no fault, or negligence, or breach of duty, where there is no act of service, or contract, which a party is bound to perform or fulfill. All the cases in the books, in which a party is sought to be charged on the ground that he has caused a way or other place to be incumbered, or suffered it to be in a dangerous condition, whereby accident and injury have been occasioned to another, turn on the principle that negligence consists in doing or omitting to do an act by which a legal duty or obligation has been violated. Thus, a trespasser, who comes on the land of another without right, cannot maintain an action, if he runs against a barrier or falls into an excavation there situated. The owner of the land is not bound to protect or provide safeguards for wrongdoers. So a licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaption of the place for use by customers or passengers which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon." Further on it is added: "A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident." So in *Moore v. Railway*, 84 Mo. 487, it is said: "These facts would seem to bring this case within the rule founded in justice and necessity, and illustrated in many adjudged cases, that where one is not a mere licensee, but engaged, with the consent of the railway company, in a transaction of common interest to both, and is injured by a failure of the company to maintain its grounds and crossings and depot in a reasonably safe condition, the railway would be liable. *Holmes v. N. E. Ry. Co.*, 4 Ex. L. R. 254; 1 *Thompson on Negligence*, 313; *Bennett v. Ry. Co.*, 102 U. S. 577, 28 L. Ed. 235. On the other hand, no duty is imposed by law upon the owner to keep his premises in a condition to prevent injury to those who come there solely for their own convenience or pleasure, or those who are not either expressly invited to enter or induced to come upon them by the purposes for which the premises are appropriated and occupied, or by some preparation or adaption of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter. *Straub v. Soderer*, 53 Mo. 88. In other

words, a mere passive acquiescence by an owner or occupier in a certain use of his lands by others involves no liability, but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to one injured thereby." The same rule is announced in *Morgan v. Railway* (C. C.) 7 Fed. 79, wherein it is said: "Nothing more than a mere license or permission to the plaintiff to cross where he did was shown; that the defendant owed the plaintiff no duty, and could not be liable for negligence. It was conceded on the argument that this ruling was correct, if the plaintiff was crossing the defendant's premises by a license merely and not by invitation. Indeed, the doctrine that a naked license or permission to enter or pass over premises will not create a duty or impose an obligation on the part of the owner towards the licensee to provide against danger or accident is so elementary that it cannot be questioned." The case of *Sweeny v. Railway*, supra, was followed by this court in *Wencker v. Railway*, 169 Mo. 592, 70 S. W. 145; also in *Woolwine's Adm'r v. Chesapeake Ry.* (W. Va.) 15 S. E. 81; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412, 20 Am. Rep. 331; *Severy v. Nickerson*, 120 Mass. 307, 21 Am. Rep. 514; *Davis v. Central Congregational Society*, 129 Mass. 371, 37 Am. Rep. 368. In *Cusick v. Adams*, 115 N. Y. 55, 21 N. E. 673, 12 Am. St. Rep. 772, the same principle is announced and stated to be of universal application.

There was no evidence whatever tending to show any negligence on the part of defendant tending to contribute to plaintiff's injury. It was clearly an accident, a circumstance, which could not, in the very nature of things, have been anticipated by defendant, and it should not be held to respond in damages therefor. The verdict of the jury was in consonance with the evidence and the justice and law of the case.

The judgment is affirmed. All concur.

STATE v. STUART.

(Supreme Court of Missouri, Division No. 2.
March 6, 1906.)

1. BIGAMY—WHAT CONSTITUTES—STATUTORY PROVISION—CONSTITUTIONALITY.

Rev. St. 1899, § 2169, reading: "Co-habiting in This State Bigamy, When. Every person, having a husband or wife living, who shall marry another person, without this state, in any case where such marriage would be punishable, if contracted or solemnized within this state, and shall afterwards cohabit with such person within this state, shall be adjudged guilty of bigamy, and punished in the same manner as if such second marriage had taken place within this state"—is valid and constitutional, although the offense therein denounced would not have constituted bigamy as that term was and is used to designate the offense defined in Rev. St. 1899, § 2167, providing that every person having a husband or wife living, who

shall marry another person, whether married or single, etc., shall on conviction be adjudged guilty of bigamy, etc.

2. SAME—INDICTMENT—SUFFICIENCY.

Under Rev. St. 1899, § 2169, an indictment alleging that at the time of his second marriage in Illinois defendant had a lawful wife to wit (naming her) living, averring the unlawful second marriage in Illinois, and charging that defendant afterwards, to wit, on the 16th of December, 1903, and from that day until the 18th day of May, 1905, unlawfully and feloniously in the city of St. Louis, within this state, did abide, and live with (naming her) the said second wife—substantially complied with the statute, and was sufficient.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bigamy, §§ 19-22.]

Appeal from St. Louis Circuit Court; C. Orrick Bishop, Judge.

James W. Stuart was indicted for a violation of Rev. St. Mo. 1899, § 2169. From a judgment quashing the indictment, the state appeals. Reversed.

The Attorney General, N. T. Gentry, and Grant Gillespie, for the State. Jas. M. Rollins, for respondent.

GANTT, J. At the June term, 1905, the grand jury of the city of St. Louis returned an indictment against the defendant, charging him with the violation of section 2169, Rev. St. of Missouri, 1889. On July 20, 1906, the day prior to the one on which the case was set for trial, defendant filed a motion to quash the indictment, alleging, among other things, that said section of the statute, upon which the indictment was based, was unconstitutional. The motion to quash was sustained by the trial court, and the state tendered a bill of exceptions, which was signed and filed, and an appeal taken by the state.

The indictment is in the following words: "State of Missouri, City of St. Louis—ss.: Circuit Court, City of St. Louis, June Term, 1905. The grand jurors of the state of Missouri, within and for the body of the city of St. Louis, now here in court, duly impaneled, sworn, and charged, upon their oath present that James W. Stuart, alias George W. Stewart, on the fifteenth day of December, one thousand nine hundred and three, in the county of Alexander, in the state of Illinois, unlawfully and feloniously did marry and take to wife one Wilmer Jones, and to her, the said Wilmer Jones, then and there was married, without the state of Missouri, he, the said James W. Stuart, alias George W. Stewart, then and there still having a lawful wife living, to wit, Loney Wells Stuart; and that the said James W. Stuart, alias George W. Stewart, afterwards, to wit, on the sixteenth day of December, one thousand nine hundred and three, within the state of Missouri, to wit, in the city of St. Louis, aforesaid, and from that day until the eighteenth day of May, one thousand nine hundred and five, unlawfully and feloniously did abide and cohabit with the said Wilmer Jones, and her, the said Wilmer Jones have to wife,

the said former and lawful wife, the said Loney Wells Stuart, being then and there still alive; against the peace and dignity of the state. Rich M. Johnson, Assistant Circuit Attorney.

"A true bill. F. P. Crunden, Foreman."

The motion to quash, omitting caption, was as follows: "Now on this day comes the defendant, by his attorney, and moves the court to quash the indictment herein for the reasons following: (1) Because the indictment charges no offense under the laws of the state of Missouri. (2) Because on the face of the indictment this court nor any other court in the state of Missouri has jurisdiction to inquire into nor to try this defendant; it being apparent and charged in the indictment that the alleged bigamous marriage took place in another county and state. (3) Because the charge contained in the said indictment is indefinite, uncertain, and vague, and does not fully apprise the defendant of the offense wherewith he is charged. (4) Because of other reasons and matters apparent upon the face of the record."

1. Section 2169, Rev. St. 1899, is in these words: "Cohabiting in This State Bigamy, When: Every person, having a husband or wife living, who shall marry another person, without this state, in any case where such marriage would be punishable, if contracted or solemnized within this state, and shall afterwards cohabit with such person within this state, shall be adjudged guilty of bigamy, and punished in the same manner as if such second marriage had taken place within this state." By reference to the foregoing statement, it will be noted that the indictment in this cause is predicated on a violation of said section, and was quashed on motion by the circuit court of the city of St. Louis. We are not advised upon what ground the indictment was set aside, but the argument in this court on both sides was directed principally to the constitutionality of the section, and to that question we will first address ourselves. With the right of a sovereign state in the protection of the morals of its own citizenship to make crimes committed elsewhere punishable in her own courts, if the guilty offender shall come within her jurisdiction, we are not concerned in this case. The statute is leveled at an offense against public morality committed in this state, to wit, the continued cohabitation in this state under a bigamous and criminal marriage contracted without the state, which would be punishable in this state criminally if contracted or solemnized within this state. By common law it was not punishable to marry a second time during the life of the first consort or to cohabit under such second marriage, though it was a canonical offense, but as early as 1604 it was made a felony by act of Parliament in England and Wales.

The prototype of our statutes on the subject of Bigamy and bigamous cohabitation

is found in St. 9 Geo. IV, c. 31, § 22, which provides that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere every such offender and every person counselling, aiding or abetting such offender, shall be guilty of felony," etc. This statute is to all intents substantially reaffirmed in St. 24 & 25 Vic., c. 100, § 57. Many of our sister states have followed St. 9 Geo. IV, conforming it to our American conditions. That the General Assembly of Missouri has the power, for the protection of good morals and to punish indecency, to make the cohabitation of a man and woman begun under a bigamous marriage in another state a felony in this state, there can be no sort of question, and it is practically conceded by the learned counsel for the defendant in this case that if the General Assembly had denominated the offense which it denounced in section 2169, Rev. St. 1889, a felony only, and not bigamy, there could be no constitutional objection to it. Indeed, a similar statute is found in many of our sister states. Thus it is provided by section 4933 of the Iowa Code that "if any person who has a former husband or wife living marry another, or continue to cohabit with such second husband or wife, he or she, except in the cases mentioned in the following section, is guilty of bigamy," etc. In *State v. Steupper*, 91 N. W. 912, the Supreme Court of Iowa sustained an indictment which charged the defendant with feloniously cohabiting with a woman in Iowa in 1901, after he had feloniously married her in Nebraska, the said defendant at the time of said marriage and cohabitation having a lawful wife living, the court said: "It is not the continuation of cohabitation within this state which is important, but it is the fact that in this state cohabitation continues which was commenced in another state under the bigamous marriage." It will be observed that the Iowa statute defines as bigamy the same acts which our statute denounces as such. By section 4185 of the Code of the state of Alabama it is provided: "If any person having a former wife or husband living, marries another, or continues to cohabit with such second husband or wife in this state, he or she must on conviction be imprisoned in the penitentiary, or sentenced to hard labor for the county for not less than two nor more than five years." In *State v. Brewer*, 59 Ala. 101, the Supreme Court of that state, speaking of this section, said: "But section 4185 of the Code declares two offenses of very different constituent elements, although of the same general character and punishable in the same manner. One of the offenses can be prosecuted and punished only in the county in which the unlawful marriage is solemnized. In the other, no matter where the marriage takes place, if bigamous, the offense is complete if the parties thus unlawfully married

continue to cohabit in the county in which the indictment is found." By section 2, c. 130, Rev. St. Mass. 1836, under the title of Polygamy, it is provided: "If any person who has a former husband or wife living, shall marry another person or shall continue to cohabit with such second husband or wife in this state, he or she shall, except in the cases mentioned in the following section, be deemed guilty of the crime of polygamy, and shall be punished," etc. And in *Commonwealth v. Bradley*, 56 Mass. 553, an indictment charging that the defendant was married in New Hampshire in 1836, and afterwards in 1846, while that marriage was still subsisting, was married in Connecticut to another woman, and afterwards did cohabit and continue to cohabit with said second wife in Massachusetts, the said former wife still living, was held good, and the conviction sustained. Many other similar statutes might be cited to show that in various states of our Union cohabitation under a bigamous marriage contracted without the state has been denominated and defined as bigamy. At common law the entering into the second marriage while a former one remained undissolved was designated polygamy, but the terms bigamy and polygamy are used to denote the same offense by most modern law writers, and treated under the same head.

The proposition urged by the learned counsel for the defendant is that it was unconstitutional for the General Assembly to define continued cohabitation under a bigamous marriage as bigamy. Conceding that the offense denounced in section 2169, Rev. St., would not have constituted bigamy as that term was and is used to designate the offense defined in section 2167, Rev. St. 1899, and in various statutes in other states and as stated by authors on criminal law generally, why was it not competent for the General Assembly in the exercise of its plenary power to legislate to make that bigamy which before the enactment of section 2169 was no offense at all in this state? The contention of learned counsel, if followed to its logical conclusion, would lead to the nullification of many other statutes in this state. For instance, burglary at common law, according to the accurate Mr. Chitty, was the breaking and entering the dwelling house of another in the nighttime with intent to commit a felony, whether the felony be actually committed or not, and if a statute merely punished one who should commit burglary doubtless the common-law essentials of the crime would be held necessary, but there is probably not a state in the Union which has not by its own legislation extended the offense so as to include breaking and entering in the daytime, and so as to include breaking into and entering shops, warehouses, railroad cars, booths, boats, and other premises; so that at this day many acts constitute burglary which at common law or a few years ago were a different of-

fense, or no offense at all. In this state eight different sections of our Criminal Code (section 1880 to section 1889) are devoted to defining what acts shall constitute burglary, the larger portion of which did not amount to burglary at common law. The same may be said of numerous well-defined crimes at common law, and it has been and is now the accepted doctrine of the courts that what acts shall constitute a crime is a matter left entirely to the legislative branch of the government, subject, of course, to the limitations of the federal and state Constitutions. *People v. Barry*, 94 Cal. 481, 29 Pac. 1026.

Learned counsel for the defendant relies upon *State v. Hartley*, 185 Mo. 669, 84 S. W. 910, 105 Am. St. Rep. 608, in which section 1825 (Laws Mo. 1901, p. 127), which provides that "every person who shall administer to any pregnant woman any medicine, drug or substance whatsoever or shall use or employ any instrument or other means with intent thereby to destroy the fetus or child of such pregnant woman, unless the same shall be necessary to preserve the life of such woman, shall be guilty of manslaughter, in the second degree," was held inoperative by this court, because the statute undertook to establish a degree of homicide where there was in fact no killing or homicide either of the mother or child, and the same view was taken of an almost exactly similar statute by the Supreme Court of Kansas in *State v. Young*, 55 Kan. 349, 40 Pac. 659. We still adhere to the *Hartley* Case, but are of opinion that it does not support defendant's contention in this case or the judgment of the circuit court. As said by Mr. Bishop: "Language is the offspring of the past, but its life is in and for the ever opening and progressive future. Its principal mission is to convey, from one mind to another, the new thoughts as they arise; for the old is continually dying while the new is being born. If each word had a single fixed and unchanging meaning, and if there were simply certain established collocations of words, each with its one signification, the powers of language would be very limited, and it could never express a new idea." There is no such confusion of ideas or incongruity in the acts which our Legislature has declared in section 2169 shall constitute bigamy and be punished as such as there was and is in the law which we held inoperative in *State v. Hartley*, 185 Mo. 669, 84 S. W. 910, 105 Am. St. Rep. 608.

The argument of counsel is that the unconstitutionality of section 2169 lies in the fact that it seeks to make cohabitation bigamy, and that it is beyond the power of the Legislature to name the acts denounced by the statute bigamy. Counsel assumes that because the bigamous marriage is first contracted in a foreign state the crime is complete, and cannot be again committed in this state. We think counsel has misconceived the purpose of our statute. It does not pur-

port or attempt to punish the void form of a marriage, the prostitution of a solemn ceremony which the law permits only when a legitimate union is formed, which, of course, is punishable in the state where it occurs, but it does what the greater number of the states of the Union have done, it makes the continuation of a cohabitation, begun and commenced under the void and illegal ceremony in another state, in this state a felony, and names it bigamy, and, of course, punishable under our Constitution in the county in which the offense is committed in this state.

Under the act of 9 George IV, and under all the statutes of the several states of the United States making bigamy a felony or crime, the second marriage itself, however formal the ceremony, is void. Although the statutes provide that if any person being married shall marry another, it is obvious as was said by Lord Chief Justice Cockburn, in *Regina v. Allen*, L. R. 1, c. c. 307, 12 Cox, Cr. C. 193: "When it is said that, in construing the statute in question, the same effect must be given to the term 'marry' in both parts of the sentence, and that consequently, as the first marriage must necessarily be a perfect and binding one, the second must be of equal efficacy in order to constitute bigamy, it is at once self-evident that the proposition as thus stated cannot possibly hold good; for, if the first marriage be good, the second, entered into while the first is subsisting, must of necessity be bad. It becomes necessary, therefore, to ingraft a qualification on the proposition just stated, and to read the words 'shall marry' under such circumstances as that the second marriage would be good but for the existence of the first. But it is plain that those who so read the statute are introducing into it words which are not to be found in it, and are obviously departing from the sense in which the term 'being married' must be construed in the earlier part of the sentence. But, when once it becomes necessary to seek the meaning of a term occurring in a statute, the true rule of construction appears to us to be not to limit the latitude of departure so as to adhere to the nearest possible approximation of the ordinary meaning of the term, or to the sense in which it may have been used before, but to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the Legislature intended to apply." "Polygamy, in the sense of having two wives or two husbands at one and the same time, for the purpose of cohabitation, is a thing altogether foreign to our ideas, and which may be said to be practically unknown, while bigamy, in the modern acceptation of the term, namely, that of a second marriage consequent on an abandonment of the first while the latter still subsists, is unfortunately of too frequent occurrence. It takes place, as we all know, more frequently where one of the married parties has deserted the other; sometimes where both have voluntarily sepa-

rated. It is always resorted to by one of the parties in fraud of the law, sometimes by both, in order to give the color and pretence of marriage where the reality does not exist. Too often it is resorted to for the purpose of villainous fraud. The ground on which such a marriage is very properly made penal is that it involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, to be applied only to a legitimate union, to a marriage, at best, but colourable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception." Now the words "shall marry another person" may well be taken to mean shall "go through the form and ceremony of marriage with another person." We think we are warranted in inferring that the words were used in the sense we have referred to, and that we shall best give effect to the legislative intention by holding such a case as the present to be within their meaning.

When it is considered that in both cases the relation of the party who has a living husband or wife, and then goes through the form and ceremony of marriage with another person, and afterwards continues cohabitation with such party, an outrage on public decency and morals is perpetrated and a public scandal ensues, it is obvious, we think, that the two offenses are so nearly akin and partake of the same general character that it was perfectly competent for the lawmaking power to describe both of them as bigamous, and that in so doing the Legislature has done no more than it has done in extending the law of burglary to acts which at common law did not constitute burglary, and that there is no such a repugnancy in the nature of things as would justify this court in holding a statute which has been on our statute books since the revised statute of 1855, and which has never before been questioned, as inoperative and void. If the simple word "marry" in the act of Parliament and in all of the statutes in the several states on the subject of bigamy is susceptible of such diverse meanings in the same section, with what reason can it be said that the statute of this state and of Iowa and other states which designate the felonious continued cohabitation in pursuance of a bigamous second marriage as bigamy, and the statute of Massachusetts which defines it as polygamy, are inoperative merely because the word "bigamy" is used to define acts which theretofore had been used only to define the act of going through the form and ceremony of marriage with another person, when in law such marriage was illegal, criminal, and void? We are not willing to strike down so salutary a statute on such a flimsy ground.

In support of this contention the learned counsel has cited us to various decisions of this court which we will now consider. In *State v. Smiley*, 98 Mo. 605, 12 S. W. 247, the

defendant was indicted in Madison county. The indictment charged that the defendant on August 24, 1884, at the county of Johnson in this state, married Ruth Grant, he then having a wife living, and that afterwards and prior to the finding of this indictment he was lawfully apprehended and in custody in Madison county for the felony aforesaid. The indictment was drawn under sections 1533 and 1536 of Rev. St. 1879. Section 1533 of the Revision of 1879 was identical with section 2167, Rev. St. 1899, but section 1536 provided that an "indictment for bigamy as defined in the preceding sections, might be found and proceedings, trial, conviction, judgment and execution thereon had in the county in which such second or subsequent marriage or the cohabitation shall have taken place, or in the county in which the offender may be apprehended." Black, J., after reciting sections 1533, 1535, and 1536, said: "The first marriage is alleged to have been contracted in this state, so that section 1535 [now section 2169, Rev. St. 1899] has no application whatever to the present case. Indeed, it is not alleged that defendant cohabited at any time or place with Ruth Grant. The indictment is based on section 1533 and cohabitation is not made an element of the offense therein described. The offense was completed in Johnson county when the second marriage was solemnized. *State v. Fitzgerald*, 75 Mo. 572. The indictment should have been preferred by the grand jury of Johnson county unless it can be upheld by force of the last clause of section 1536, namely, 'or in the county in which the offender may be apprehended.' There can be no doubt but the allegations of the indictment are sufficient to bring the case within this clause." This clause has nothing to do with the elements of the offense, and relates alone to the place where the indictment may be found. Now, under the Constitution of 1875, the indictment for a felony must be found by a grand jury of the county where the offense was committed. *Ex parte Slater*, 72 Mo. 102; *State v. McGraw*, 87 Mo. 161; *State v. Briscoe*, 80 Mo. 644. "It follows that the clause of section 1536, just quoted, is void, because in conflict with the Constitution of 1875, and it matters not that it might have been upheld under the Constitution of 1865."

This case, therefore, is authority only for the proposition that where an indictment for bigamy is based solely upon section 1533, Rev. St. 1879 (now section 2167, Rev. St. 1899), it must be found in the county where the second or bigamous marriage is solemnized, and that so much of section 1536, Rev. St. 1879, as authorized an indictment and prosecution "in the county in which the offender may be apprehended," was void. This court expressly excepted section 2169, Rev. St. 1899, from the scope of its opinion. Of the soundness of that opinion no doubt whatever can be entertained under our Constitution of 1875. To the same effect is *State v. McGraw*, 87 Mo.

161, which simply decides that an indictment for burglary can only be found in the county where the burglary was committed. To other cases cited, to wit, *State v. Cooper*, 103 Mo. 266, 15 S. W. 327; *State v. Hansbrough*, 181 Mo. 348, 80 S. W. 900; *State v. Fitzgerald*, 75 Mo. 571; *State v. St. John*, 94 Mo. App. 229, 68 S. W. 374; *Adair v. Mette*, 156 Mo. 496, 57 S. W. 551, have no bearing on the question now under consideration. They relate solely to the quantum and character of proof necessary to establish a valid first marriage in the prosecution of the crime of bigamy. *State v. Hatch*, 91 Mo. 568, 4 S. W. 502, merely holds that the crime of embezzlement can only be prosecuted in the county in which the embezzlement occurs. The statute (section 2169, Rev. St. 1899), already quoted, provides that "every person having a husband or wife living who shall marry another person, without this state, in any case where such marriage would be punishable, if contracted or solemnized in this state and shall afterwards cohabit with such person within this state, shall be adjudged guilty of bigamy and punished," etc. It is at once obvious that this section is leveled at an offense committed in this state, but it makes no attempt to make any provision for the indictment or prosecution of such offender in a county other than that in which the bigamous cohabitation occurs in this state, and the indictment in this case charges the bigamous cohabitation to have taken place in the city of St. Louis within this state, and the indictment is preferred by the grand jury of said city, so that it clearly appears that the indictment was found and prosecuted in the county in which the offense was committed, and therefore the doctrine of *Ex parte Slater*, 72 Mo. 102, and *State v. Smiley*, 98 Mo. 605, 12 S. W. 247, and similar cases have no application unless we accept the contention that it is without the power of the state of Missouri to punish the criminal cohabitation in this state of parties under a bigamous and felonious marriage solemnized in another state. To do this would be to announce that the state was impotent to punish an act flagrantly immoral and indecent committed within its own boundaries. In the language of Mr. Justice Baldwin in *Holmes v. Jennison*, 14 Pet. (U. S.) 540, 10 L. Ed. 579: "It would be but a poor and meagre remnant of the once sovereign power of the states, a miserable shred and patch of independence which the federal Constitution has not taken from them. If, in the regulation of its internal police, state sovereignty has become so shorn of authority as to be competent only to exclude paupers who may be a burden on the pockets of its citizens, unsound infectious articles, or diseases which may affect their bodily health, and utterly powerless to punish those moral ulcers on the body political which corrupt its vitals and demoralize its members."

We hold that it is too clear for doubt that

it is and was entirely competent for the state to enact and enforce a law, such as is found in section 2169, Rev. St. 1899, to punish a man or woman who has contracted a bigamous marriage in another state, a marriage which would be punishable under the laws of this state if contracted here, and then cohabit within this state with the consort of such bigamous and criminal marriage. A statute like this obtains in many of the states of our Union and the power of such states to make and enforce it has been uniformly upheld. It is the offense against the state in which the bigamous cohabitation is committed that is punished, and not the mere solemnization of a bigamous marriage in another state. The doctrine of relation has nothing to do with the question. *State v. Stuepper* (Iowa) 91 N. W. 912; *State v. Brewer*, 59 Ala. 130; *Bishop on Stal. Crimes*, § 588; *Finney v. State*, 3 Head (Tenn.) 544; *Com. v. Bradley*, 56 Mass. 553. While a state cannot punish as crimes acts committed beyond the state boundary, "if the consequences of an unlawful act committed outside the state have reached their ultimate and injurious result within it, the perpetrator may be punished as an offender against such state." *Cooley's Const. Lim.* p. 177, and cases cited in note 3; *Beggs v. State*, 55 Ala. 108. We hold, then, that section 2169, Rev. St. 1899, is a valid, constitutional statute, and the objection that the indictment is bad because bottomed on an unconstitutional law is not tenable.

2. As to the other grounds of the motion to quash, we think they are not well taken. The indictment alleges that at the time of the second marriage in Illinois the defendant had a lawful wife, to wit, Loney Wells Stuart, living. It avers the unlawful second marriage in Illinois, and then, as already observed, charges that the defendant afterwards, to wit, on the 16th of December, 1903, and from that day until the 18th day of May, 1905, unlawfully and feloniously, in the city of St. Louis, within this state, did abide and cohabit with said Wilmer Jones, the said second wife. This was a substantial compliance with the statute, and there is no merit in the claim that it only charges adultery. It individuates every fact necessary to bring the case within the provisions of section 2169, Rev. St. 1899.

The circuit court erred in quashing the indictment, and the judgment is reversed, and the cause remanded for further proceedings.

BURGESS, P. J., and FOX, J., concur.

WHITING et al. v. BIG RIVER LEAD CO.
(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

APPEAL—RECORD—ABSTRACT OF RECORD—NECESSITY.

The filing of a complete transcript of the record in the court on appeal does not dispense

with the necessity of filing an abstract thereof as required by Rev. St. 1899, § 813, and court rules 12, 13 (73 S. W. vi); and the opinion of counsel as to what the record is, expressed in the statement of appellant's case, is insufficient. [Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2574.]

Appeal from Circuit Court, St. Francois County; R. A. Anthony, Judge.

Action by Edward A. Whiting and others against the Big River Lead Company. From a judgment for plaintiff, defendant appeals. Dismissed.

Merrifield W. Huff, for appellant. W. D. Isenberg and John C. Brown, for respondent.

BRACE, P. J. The appeal in this case is brought here on a complete transcript, but the appellant has failed to file an abstract thereof as required by statute (Rev. St. 1899, § 813) and rules 12 and 13 of this court (73 S. W. vi). The only paper filed herein by the appellant is indorsed "Statement, Brief, and Argument of Appellant." It does not purport to, and does not, contain an abstract of the record upon which the same ought to be based, as required by the statute and rules aforesaid. It is a mistake to suppose that filing a complete transcript of the record in this court dispenses with the necessity of filing an abstract thereof. *McLaughlin v. Fischer*, 188 Mo. 546, 87 S. W. 913; *Whitehead v. Railroad*, 176 Mo. 475, 75 S. W. 919; *Clements v. Turner*, 162 Mo. 466, 68 S. W. 84. The mere opinion of counsel as to what the record is, expressed in the statement of appellant's case, cannot be taken for an abstract. Counsel cannot thus evade the duty of making a correct abstract of the transcript to the verity of which their professional honor is pledged, or devolve that duty upon the court.

Hence this appeal will be dismissed. All concur.

HORNSTEIN v. UNITED RYS. CO. et al.
(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

STREET RAILROADS — OPERATION — INJURY TO PERSON ON TRACK — CONTRIBUTORY NEGLIGENCE.

Where a passenger alighting from a street car passed around the rear end of the car and was struck by a car coming in the opposite direction, he was guilty of contributory negligence, either in proceeding further than was necessary to observe the approaching car or in failing to wait until the car from which he alighted had moved far enough for him to see whether another car was approaching.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 204-208.]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Charles H. Hornstein against the United Railways Company and another. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Boyle & Priest and Geo. W. Basley, for appellants. Lee Sale, for respondent.

MARSHALL, J. This is an action for \$10,000 damages for personal injuries received by the plaintiff on the 6th of June, 1901, about half past 6 o'clock p. m., in consequence of a collision with the defendants' street car, at the corner of Vandiventer avenue and Page avenue, in the city of St. Louis. There was a verdict and judgment for the plaintiff for \$6,000, from which the defendants appealed.

The issues:

The petition alleges that, at the time of the accident, the defendants' cars were provided with a bell or gong, "which it was customary and usual for said motorman to ring, for the purpose of warning persons of the approach of said car, whenever said motorman had reason to anticipate the sudden appearance of persons upon or near the track on which the car was running," and were further provided with a brake for stopping the car or checking the speed thereof; that on the day named the plaintiff was a passenger on one of defendants' cars, going south on Vandiventer avenue, and that when the car reached the south side of Page avenue. it was stopped for the purpose of permitting passengers to alight from said car; that plaintiff alighted from said car, and was proceeding in the rear thereof, along the south side of Page avenue, going from the west track of defendants' to the pavement on the east side of Vandiventer avenue; that as he approached the east track of defendants' railroad, upon said Vandiventer avenue, and was about to cross the same, a north-bound car, in charge of defendants' servants, as aforesaid, carelessly and negligently ran into plaintiff and knocked him down, and injured him in a painful manner; that the injuries were caused "by the carelessness and negligence of defendants' servants in operating its cars in the following respects, to wit: That immediately prior to the happening of the said injury, and while said south-bound car was discharging its passengers upon the street on the south side of Page avenue, defendants' servants in charge of said car carelessly and negligently failed to give the plaintiff, as he was alighting from said car, and was about to cross defendants' eastwardly track, any warning of the fact that said north-bound car was approaching and was near to the south side of Page avenue; that while said south-bound car was so discharging its passengers as aforesaid, including the plaintiff, said north-bound car was negligently permitted to run at a high and dangerous rate of speed, as it approached and passed the corner of Page avenue; that notwithstanding the fact that his view of the south crossing at Page and Vandiventer avenues was obstructed by defendants' south-bound car, and he had reason to anticipate the sudden appearance of persons desirous of crossing the eastward track of said road, at said

point, the motorman of said north-bound car negligently and carelessly failed to ring his gong or to give any warning whatever of the approach of said north-bound car to Page avenue, and negligently and carelessly failed to check the speed of his said car, or to have said car under control; and that the said motorman negligently failed to keep watch for persons approaching said eastward track, or to stop said car as soon as he could have done after he saw, or by the exercise of ordinary care could have seen, plaintiff in a position of danger. Plaintiff further states that but for the carelessness and negligence of the defendants' servants in operating its said cars, as aforesaid, the injuries herein complained of would never have happened." The answer is a general denial, coupled with a plea of contributory negligence, in that the plaintiff stepped upon or near the railway track while the car of the defendants' was in close proximity to him, and in that the plaintiff failed to look or listen or heed the approach of the car. The reply is a general denial.

The case made is this:

Vandiventer avenue runs north and south. Page avenue runs east and west. The defendants have a double street car track on Vandiventer avenue. The south-bound cars run on the west track, and the north-bound cars run on the east track. The space between the said two tracks is 4 feet 8 inches according to the plaintiff's statement, or 5 feet according to the defendants' statement. The space between the passing cars is 10 inches according to the plaintiff's statement, and 1 foot according to the defendants' statement. The plaintiff lived on the south side of Page avenue, and east of Vandiventer. He worked down town. On the day of the accident, as was his custom, he took the car to go home, which would take him west to Vandiventer avenue, and thence south to Page avenue. When the car reached the south crossing of Page avenue on Vandiventer avenue, a passenger alighted therefrom before the car stopped, and crossed Vandiventer avenue towards the east. When the car stopped, the plaintiff alighted, and immediately passed around the rear of the south-bound car, for the purpose of crossing Vandiventer avenue towards the east, in order to reach his home. The testimony for the plaintiff tends to prove that, as he passed along the rear of the south-bound car, he listened for the bell, to see if a north-bound car was approaching, and heard no bell, and that no bell was sounded; that his view to the south was obstructed by the south-bound car, from which he had alighted, so that he could not see whether a north-bound car was approaching; that as he passed to the east side of the south-bound car, he stooped to look toward the south for a north-bound car, and that at that time he was "a little over the west track, one foot over the west track. I guess, with my left foot I went over a little.

* * * Q. Had you gotten as far as the north-bound track when you saw the car? A. Yes, sir. Q. You just now told me that you had gotten to the corner of that car. A. Yes, sir. Q. The corner nearest to your house? A. Yes, sir. Q. The corner is between the east track and the west track, isn't it? A. Yes, sir. Q. Had you gotten as far as the east track, the car track that goes north—had you gotten that far? A. Pretty near it, near that. Q. Then you had not gotten that far; you say you had gotten or had stepped beyond the west track with your left foot? A. Yes, sir; the west track with my left foot, yes; that is right. Q. Do you remember how you turned back? A. I can remember that when I saw the car coming I turned right back with my body, at the same time the car struck me on my right shoulder—the car running north, the car on the east track—and I fell down and I fell unconscious."

For the plaintiff Miss Caroline Zwalhas, a music teacher, testified: That she lived in a flat, upstairs, on the south side of Page avenue, three doors east of Vandiventer avenue. That "I was looking out of my window, and I saw Mr. Hornstein coming towards his house, and just as he was about to cross the east track he turned his head to the south, and then I heard some one halloo, 'Look out!' Just that instant the car struck him. Q. Where was Mr. Hornstein when you first saw him? A. He was right behind the south-bound car. Q. In what track, or where about in the street? A. On the west track. Q. You saw him coming east towards his home? A. Yes, sir. Q. On what side of Page avenue? A. On the south side. Q. He was coming on the south side, and when you saw him he was there? A. He was on the track—on the west track—the first time I saw him, and then he was coming towards the east track. He stooped and looked around to the south. Q. Will you show the jury exactly how he stopped? A. Well, he was walking this way [indicating], as if looking behind something, just as a person would when looking behind something that was there. Q. Where was he, do you say, when he stooped as if looking behind something? A. Well, on the track. Q. How is that? A. On the track, on the west track, or a little beyond, a little more to the east. Q. A little beyond the west track. A. Yes, sir; on the east side. Q. Which direction did he look? A. To the south. Q. With reference to that action on his part, when was he struck? A. Just as I saw him do that movement somebody hallooed out, 'Look out,' and then he was struck just the same time. Those three things went all together, I could not say it as quick as it was done."

Conrad Cohnhelm, the passenger who alighted ahead of the plaintiff, testified for the defendants, and said that he got off of the car before it stopped, and had crossed

the track going eastwardly. He then testified as follows: "Q. At the time you got off, did you see Mr. Hornstein? A. I did not. Q. When did you first see him? A. I first seen him when I crossed the tracks, and he was coming around the car, the rear end of the car. Q. Which end was he coming in? A. He was coming east. Q. What direction was he facing? A. He was facing slightly northeast. Q. When you saw him state whether he was standing still or moving? A. He was moving when I first saw him. Q. Did you see this north-bound car coming? A. Yes, sir, I did. Q. What, if anything, did you say to Mr. Hornstein at that time? A. When I got across the street, at the east crossing of Vandiventer and Page avenue, I turned around and I seen the car, and I hallooed to him to stand back. Q. In what tone did you halloo? A. A very loud tone. Q. Louder than you are speaking now? A. Yes, sir; a good deal louder. Q. He was then looking in your direction, was he? A. Yes, sir. Q. State whether or not, at any time, after he started towards the east track, you saw him look towards the south. A. I did not. Q. Did you see the car strike him? A. Yes, sir; I did. Q. What portion of the car struck him? A. Why, the front end of the platform; that is, the northwest corner of the dashboard. Q. Did you see the north-bound car stop? A. Yes, sir. Q. Where was it when it stopped? A. The rear end stopped about 10 feet from where it struck him. * * * Q. State whether or not, at any time after Mr. Hornstein started towards the east behind the south-bound car, you saw him stop before he was hit. A. Well, I don't know as he did stop; he simply was walking along and seemed to look more towards the north. Q. And was in that position? A. And was in that position when he was struck."

The testimony of Miss Zwalhas was that the bell of the north-bound car was not rung. Mrs. Fleming, a witness for the plaintiff, who was more than 100 feet west of Vandiventer avenue, testified that she heard the car, from its noise, coming north, half a block away from the crossing. The testimony of the defendants' witness Cohnheim was that he did not remember hearing any gong sounded on the north-bound car. It is conceded in the briefs that the car was running at a speed of seven miles an hour, and that the grade on Vandiventer avenue, at the point of collision, was a slight up-grade towards the north. Over the objection and exception of the defendants, the plaintiff read in evidence a rule of the defendants as follows: "When passing a car that is discharging passengers, or when at or near the crossings, the gong should be sounded once when within 100 feet of each other, and once when half way past. The current must be turned off, and the car slowed up so that it could be stopped instantly in case any person

should attempt to cross the track in front of the moving car. The gong must also be sounded 150 feet before the crossing at all streets both day and night."

At the close of the plaintiff's case, and again at the close of the whole case, the defendants demurred to the evidence. The court overruled the demurrers and the defendants excepted, and now assign that ruling as the chief error relied on.

1. The first error assigned is the refusal of the trial court to give the instruction asked for a nonsuit. The case was formerly tried and resulted in a verdict for the plaintiff for \$1,000. The defendants appealed to the St. Louis Court of Appeals, where the judgment was reversed, and the cause remanded. The majority of the court (Judges Barclay and Goode) voted in favor of a reversal, because of the failure of the trial court to give an instruction in reference to joint, mutual, and concurring negligence. Bland, P. J., wrote the opinion, and held that the demurrer to the evidence should have been sustained; thus making the court unanimous in favor of a reversal; the two named being in favor of remanding, while the one was in favor of reversing without remanding. The case is reported in 97 Mo. App. 271, 70 S. W. 1105. The opinion of Bland, P. J., upon the question now being considered, is so terse, lucid, and convincing that it is a pleasure to reproduce it here. It is as follows: "Defendant insists that its demurrer to plaintiff's evidence should have been given. In the circumstances of the case negligence of defendant is not to be inferred from the mere happening of the injury. *Murphy v. Wabash Ry. Co.*, 115 Mo. 111, 21 S. W. 862; *Yarnell v. Kansas City, F. S. & M. Ry. Co.*, 118 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Harper v. Standard Oil Co.*, 78 Mo. App. (St. L.) 338; *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. (St. L.) 202. There is no evidence in support of the first, second, and fourth allegation of negligence in the petition. In respect to the third allegation of negligence, the failure to give the warning signal, it is unquestionably the law that the duty of the motorman in charge of the car running north was to have sounded the gong on approaching the crossing. The omission of this duty was negligence. *Dixon v. C. & A. Ry. Co.*, 109 Mo. 413, 19 S. W. 412, 18 L. R. A. 792; *Weller v. C. M. & St. P. Ry. Co.*, 164 Mo. loc. cit. 195, 64 S. W. 141, 86 Am. St. Rep. 592. While there is no direct proof that the signal was not given, there is negative evidence of the fact, and it was within the power of the defendant to have proven affirmatively by the motorman in charge of the car. If it was a fact, that the warning was given. Defendant failed to produce the motorman as a witness or to account for his absence. The negative evidence of the failure to give the warning signal and the failure of defendant to prove affirmatively that it was sounded, if

such was the fact, was sufficient proof of the third allegation of negligence to send that issue to the jury, and there was no error in refusing defendant's peremptory instruction, unless the evidence is all one way that plaintiff was guilty of such contributory negligence as to preclude his right of recovery, notwithstanding the defendant was guilty of negligence in failing to give the warning signal. The plaintiff testified that he looked for the north-bound car as he was moving out of his car, but he saw none; that he looked and listened when he got off, but that he neither saw nor heard the approaching car. He could not see on account of the obstruction caused by the car he had just left; looking, under the circumstances, was a useless performance. The car from which he had alighted, he testified, began to move away when he was in the middle of the west track. Had he then halted but for one moment, the car that was obstructing his vision would have moved away and he could have seen the north-bound car, but he did not take this precaution. He moved on towards the east track without halting or hesitating, and arrived sufficiently near that track just in time to come in contact with the corner of the vestibule of the car. This was negligence of the most pronounced sort. It was plaintiff's duty, in the circumstances, to have stopped and waited until he could see whether or not there was an approaching car on the east track before blindly proceeding to cross over that track. *Weller v. C. M. & St. P. Ry. Co.*, 164 Mo., loc. cit. 198, 64 S. W. 141, 86 Am. St. Rep. 592; *Diauhli v. St. Louis, I. M. & S. Ry. Co.*, 139 Mo. 291, 40 S. W. 890; *Kelsay v. Mo. Pac. Ry. Co.*, 129 Mo. 362, 30 S. W. 339; *Childs v. Bank of Missouri*, 17 Mo. 214; *Easley v. Mo. Pac. Ry. Co.*, 113 Mo. 236, 20 S. W. 1073; *Culbertson v. Street Ry. Co.*, 140 Mo. 35, 36 S. W. 834; *Pinney v. M. K. & T. Ry. Co.*, 71 Mo. App. (K. C.) 577; *Lien v. C. M. & St. P. Ry. Co.*, 79 Mo. App. (K. C.) 475. Common prudence would have dictated, when the south-bound car began to move away, that the plaintiff stop for a moment that he might have an unobstructed view of the east track and see whether or not it was safe to proceed across the street. His failure to exercise this precaution was negligence, and there is no escape from the conclusion that this act of negligence contributed to and was the proximate cause of his injury; where this is the case, the law is well settled that no recovery can be had. *Weber v. K. C. Cable Ry. Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541; *Hogan v. Citizens' Ry. Co.*, 150 Mo. 36, 51 S. W. 473; *Moore v. K. C., Ft. S. & M. Ry. Co.*, 146 Mo., loc. cit. 580, 48 S. W. 487; *Corcoran v. St. L., I. M. & S. Ry. Co.*, 105 Mo. loc. cit. 405, 16 S. W. 411, 24 Am. St. Rep. 894; and cases cited; *Tesch v. Milwaukee Electric R. & R. L. Co.* (Wis.) 84 N. W. 823, 53 L. R. A. 618.

There is substantially no difference in the

facts as they appeared when this case was before the Court of Appeals, and the facts as they appear in this record. Counsel for plaintiff claim that the evidence here is different from the evidence there, in this, that at the former trial there was no evidence as to the exact speed of the north-bound car as it passed Page avenue; whereas at the second trial defendants' witnesses admit a speed of seven miles an hour; also that at the former trial there was only negative evidence that the bell was not sounded, whereas here there is positive evidence that the bell was not sounded. These considerations, however, do not make the essentials of the case here presented different from the case that was presented to the St. Louis Court of Appeals, for, conceding the speed of the car to have been seven miles an hour, that was not an unlawful or dangerous rate of speed, and was not shown to have been in excess of the authorized rate of speed; and there is no material difference between the negative evidence that the gong was not sounded and positive evidence that it was not sounded, so far as the question of whether or not the plaintiff had made out a prima facie case for the jury was concerned. The reasoning and conclusions of Bland, P. J., above quoted, are strictly in harmony with the rules of law declared by this court in the opinion of Valliant, J., in *Giardina v. Railroad*, 185 Mo. 330, 84 S. W. 928. In that case the plaintiff went to a car, going in one direction, to give his brother a key, and, after he had done so, crossed in the rear of that car and was injured by a collision with the car coming in the opposite direction on the other track. The rule of the company as to the running of the cars that was introduced in this case was also introduced in that case. The trial court sustained a demurrer to the evidence in that case, and the plaintiff appealed; and the correctness of the ruling of the trial court was the sole point decided by this court. Valliant, J., said: "Plaintiff testified that he had noticed that it was a custom of the company, in the operation of its cars, to have the motorman of a car which was approaching a car that had stopped, to sound his gong and go slowly and, knowing this custom, he, before attempting to cross the north track, paused behind the east-bound car and listened, but hearing no gong, concluded that no car was coming west, stepped out and was struck. The tracks looking east from where the plaintiff stood were straight for 1,000 feet, and the car coming west could have been seen from that distance if one had been looking. It may be conceded that the defendant was negligent in running its car at a high rate of speed and without sounding the gong past a standing car from the rear of which the motorman ought to have known that people were liable to pass. It is not likely that the peremptory instruction was given on the theory that no negligence of

the defendant was shown, but rather that the plaintiff failed to observe that degree of care that was to be expected of a man of ordinary prudence, and that his negligence contributed with the negligence of the defendant to produce the injury complained of. Plaintiff was familiar with the location and also the movements of the cars; he had even taken such notice of the operation of the cars that he was aware that it was the custom for a running car, passing one that had stopped, to be checked in its speed and its gong sounded freely. He was so confident of this custom that he seemingly on this occasion staked his life on its observance, for, after pausing to listen for the sound of the gong and hearing none, he stepped on the north track or in front of the coming car without looking and was struck. From where he stood the body of the east-bound car shut off his view to the east, but one who was as familiar with the movements of the cars as he said he was—in fact, any man of common experience in the plaintiff's place should have known that in a moment the east-bound car would have gone and the obstruction to his vision have been removed. But even if he had not had that moment to spare he could have leaned forward beyond the line of the standing car in perfect safety and have seen the west-bound car coming. The measured distance between the tracks was 6 feet 10 inches. One witness for plaintiff said that the distance between two cars passing on those tracks was about 1 foot, but he also said that the distance between the tracks was about 4 feet; he had made no measure for either estimate; he was short 2 feet 10 inches in his estimate as to the distance between the tracks. But even if the space between the passing cars was only one foot, it was sufficient to enable the plaintiff to have looked, and if he had looked he would have seen the car coming and would not have been hurt. His act in stepping on or near the north track without looking for the west-bound car was negligence and it contributed to cause the accident. If authorities are needed to sustain this view of the law, they may be found in the cases cited in the brief for respondent, and the cases cited in the brief for appellant are not to the contrary." In that case it appeared that the car that struck the plaintiff was running at a high rate of speed, and without sounding the gong while passing the standing car, and thus it was shown that the defendant was guilty of negligence, but a recovery by the plaintiff was denied solely on the ground that although defendant was negligent, the plaintiff was also guilty of such contributory negligence as barred his recovery. There is no substantial difference between that case and the case at bar, except in this, that here it is not shown that the car was running at a high rate of speed, but, on the contrary, it is conceded that the car was running only seven miles an hour, and that

rate of speed is not shown to have been an unauthorized rate, nor was it negligence in itself.

The principal contention of the plaintiff here is that there is no law which requires him to stop until the car from which he had alighted had moved away, so as to afford an unobstructed view of the north-bound car. But even if this contention be conceded to the plaintiff, nevertheless it is and must be admitted that the common-law duty was cast upon the plaintiff to exercise ordinary care, before stepping upon the north-bound track, or getting so close thereto as that a collision with a car thereon was almost inevitable, to discover whether or not there was a car approaching on the north-bound track. The argument of the plaintiff is that there was only a space of $4\frac{1}{2}$ feet between the two tracks, and a space of only 10 inches between the passing cars, and that the plaintiff could not, by the exercise of ordinary care, have discovered the approach of the car on the north-bound track, because there was not space enough between the passing cars for him to have looked around the rear of the south-bound car, without getting so close to the north-bound track that a collision with the car coming on that track was inevitable. And plaintiff differentiates this case from the *Giardina Case* by claiming that in the latter there was a distance of 6 feet 10 inches, as against 4 feet 8 inches here, and a distance of 1 foot between the passing cars as against a distance of 8 inches here. The distance between the tracks is immaterial, and the difference between the distance between the tracks in the *Giardina Case* and here was only a difference of two inches, which is too insignificant to constitute a difference between the principles of the *Giardina Case* and of this case. But conceding that there was not space enough between the passing cars for the plaintiff to have looked around the rear of the south-bound car to see whether there was a car coming on the north-bound track, and that without so doing he could not have determined whether there was or was not a car approaching, it also follows that the motorman of the north-bound car could no more have seen the plaintiff in his position at the rear of the south-bound car than the plaintiff, in his position, could have seen the approach of the north-bound car. These considerations necessarily compel the conclusion that common prudence on the part of the plaintiff demanded that he take some other precaution to discover whether or not there was a car approaching on the north-bound track, before getting so close to that track as to make a collision with the car inevitable. The plaintiff lived in that immediate vicinity, and was familiar with the conditions there existing. He traveled on the same road every day. He knew the frequency with which cars passed. He knew the distance between the tracks, and the distance between the passing cars, or, at any rate, was chargeable with

notice thereof, for he had the means constantly at hand of knowing those facts. It would have been but the loss, at most, of a second or two for the plaintiff to have paused, before getting so near to the north-bound track as to come in contact with a passing car, long enough to have permitted the car from which he had alighted to move southwardly far enough for him to see whether or not it was safe for him to attempt to cross the north-bound track. As was well said by Bland, P. J.: "Common prudence would have dictated, when the south-bound car began to move away, that the plaintiff stop for a moment that he might have an unobstructed view of the east track, and see whether or not it was safe to proceed across the street. His failure to exercise this precaution was negligence, and there is no escape from the conclusion that this act of negligence contributed to and was the proximate cause of the injury; where this is the case the law is well settled that no recovery can be had."

The report of this case before the St. Louis Court of Appeals shows that counsel for plaintiff then cited *Railroad v. Snell*, 54 Ohio St. 197, 43 N. E. 207; *Railroad v. Gentry* (Ind.) 44 N. E. 811, 37 L. R. A. 378, 62 Am. St. Rep. 421; *Consolidated Traction Co. v. Scott* (N. J.) 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *Railroad v. Robinson*, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87; *Smith v. Union Trunk Line*, 18 Wash. 351, 51 Pac. 400, 45 L. R. A. 169. Counsel for plaintiff now also cite those same cases, and in addition thereto the following cases: *Dobert v. Railroad*, 91 Hun, 28, 36 N. Y. Supp. 105, *Bass v. Railroad*, 100 Va. 1, 40 S. E. 100, and *Railroad v. Whitcomb*, 66 Fed. 915, 14 C. C. A. 183. The cases then and now cited differentiate between steam railroads and street cars, and, whilst conceding that it is contributory negligence for a person to thus enter upon or near a steam railroad, under circumstances like those here presented, hold that it is not contributory negligence for one so to do with reference to street cars. In fact, some of them go to the extent of holding that it is not the duty of the person to stop, look, or listen before attempting to cross a street car track. Counsel for defendant have been equally diligent, and in addition to the cases from other jurisdictions, cited by them in this case, when it was before the St. Louis Court of Appeals, now refer the court to the following cases: *Buzby v. Traction Co.*, 126 Pa. 559, 17 Atl. 895, 12 Am. St. Rep. 919; *Smith v. Railroad Co.*, 29 Or. 539, 46 Pac. 136, 46 Pac. 780; *Creamer v. Railroad Co.*, 156 Mass. 320, 31 N. E. 891, 16 L. R. A. 490, 32 Am. St. Rep. 456; *Electric Ry. Co. v. Boddy* (Tenn.) 58 S. W. 648, 51 L. R. A. 885, which hold to the rule that where a person deliberately walks from behind a street car, from which he has alighted, and attempts to cross a public street without using his powers of observation, and is injured

by an approaching car, which could have been avoided by the use of ordinary care, he cannot recover damages for such injury. In some of the cases cited by plaintiff, notably *Railroad v. Whitcomb*, supra, it is said that the doctrine contended for by defendant is the rule in Pennsylvania, and that the courts of the other states have not adopted it, and that it is not the rule in the federal courts. The learned judge who made that statement evidently had not had the benefit of the research of counsel that is afforded this court by the cases cited. The sum of the matter as to the state of the law in other jurisdictions may, therefore, be said to be that in Ohio, New York, Virginia, Illinois, New Jersey, Washington, and Indiana, the rule contended for by plaintiff obtains, and likewise the distinction between steam railroads and street cars also obtains, or did obtain before the adoption of rapid transit, such as now exists in all large cities. Whereas, in Pennsylvania, Maryland, Oregon, and Tennessee the rule stated by the defendants obtains. The later cases in Missouri do not recognize such a distinction between steam railroads and street railroads, with respect to the obligation of the pedestrian to look or listen for an approaching car, and, if necessary, stop, but the courts of this state, keeping pace with the progress of the times, recognize that there is quite as much danger to be apprehended now from stepping on the street car tracks, where the cars are run by electricity and at a rapid rate, and with great frequency and at short intervals, as there is from stepping on the steam railroad tracks, where the cars do not run as often. And therefore common prudence requires increased care on the part of the pedestrian in proportion to the dangers to be apprehended. In other words, the decisions in this state have kept step with the times. This is the rationale of *Giardina v. Railroad*, supra, and the principles there announced have been followed by this court ever since.

Plaintiff, however, cites the cases of *Riska v. Railroad*, 180 Mo. 168, 79 S. W. 445, and *Eckard v. Transit Co.* (Mo. App.) 89 S. W. 602, as holding a different doctrine. But an examination of those cases clearly demonstrates that the contention is untenable. In *Riska v. Railroad* the conditions here presented were not shown to have existed. That was a plain case of a person stepping onto the track, without any obstruction, such as a car from which he had just alighted, preventing his seeing the approach of the car. There was no evidence to show whether the deceased in that case looked or listened before stepping onto the track. The car was running from 15 to 30 miles an hour. The authorized rate of speed was 10 miles an hour. The case went off entirely on the proposition that the car was being operated at an unlawful and dangerous rate of speed, and the presumption that the deceased listened and saw the car, but that he indulged the

presumption, "as he had a right to do," that the car was not running at a unlawful rate of speed, and that he could cross the track in safety. That case is easily distinguishable from the case at bar in that the plaintiff walked behind the rear of the car and was struck by a car coming in the opposite direction. But it was unlike the case at bar in that the deceased had almost completely crossed the track on which the car was coming that struck him—one more step would have put him in a place of safety—and the car that struck him was running at an unlawful rate of speed of from 20 to 25 miles an hour; and that the motorman saw the deceased when he was from 30 to 50 feet away from him; and upon the presumption that the deceased was exercising ordinary care, and that he had a right to presume that the railroad company would obey the ordinance with reference to speed. The vigilant watch ordinance of St. Louis also figured in the case. A recovery was sustained in that case on the ground of the unlawful rate of speed of the car, and the question of the contributory negligence of the deceased was held to be a proper question for the jury, because fair minded men might reasonably differ as to whether or not it was exercising ordinary care for the deceased to attempt to cross the track, under the circumstances, upon the presumption that the car was not running at a higher rate of speed than the law authorized. Stress was also laid upon the fact that the deceased was not instantly struck upon stepping on or near the track, but that he had almost crossed the track before the collision occurred. That case is very different from the case at bar, and does not support the contention, here made, that a person is not obliged, when passing along the rear of one car, to stop until that car moves far enough for him to see whether it is safe to attempt to cross the other track, if it is impossible for him to see while the car from which he has alighted obstructs his view, and likewise impossible for him to look around the end of the car from which he has alighted without getting so close to the other track as to be necessarily struck by an approaching car. The physical facts in this case, even under the most favorable view that can be taken of the plaintiff's testimony, show that he got so close to the north-bound track, before looking to discover whether a car was approaching on that track, as that a collision with that car was inevitable, and that there was either no necessity for him so to do, or that if there was such a necessity, it was his duty to wait until the car from which he had alighted had moved far enough away to the south to enable him to see whether a car was approaching on the north track, and would have only been a matter of a second, for the evidence is that the north-bound car was then only half a car length from the place of collision.

The plaintiff says that when he looked around the south-bound car he saw at once the north-bound car coming, and then "I turned back and the car struck me on my shoulder." Conceding that there was only a space of 10 inches between the passing cars, and that the plaintiff, therefore, had only that space in which to look for the approaching car, still he could have so looked without placing himself in such close proximity to the approaching car as to make it necessary for him to "turn back," or as to be struck on his shoulder by the approaching car. Upon the case made, therefore, the conclusion is inevitable and irresistible that there is no essential difference between the case at bar and the *Giardina Case*, and the prior decisions of this court applicable to facts like those here presented. Even conceding that the defendant was guilty of all the negligence charged, nevertheless, under the unquestioned facts in this case, the plaintiff was guilty of contributory negligence, which bars his recovery.

The trial court, therefore, erred in overruling the demurrers to the evidence, and its judgment is reversed. All concur.

CROWL v. CROWL.

(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

1. JUDGMENT—CONCLUSIVENESS.

An action in ejectment does not bar another action in ejectment between the same parties in respect to the same title and the same tract of land.

[Ed. Note.—For cases in point, see vol. 30. Cent. Dig. Judgment, § 1051.]

2. ADVERSE POSSESSION—HOSTILE POSSESSION—NECESSITY.

Mere possession of land, where not in any way hostile to the legal title, does not create title by limitation, however long continued.

[Ed. Note.—For cases in point, see vol. 1. Cent. Dig. Adverse Possession, §§ 279-281.]

Appeal from Circuit Court, Jasper County; Jos. D. Perkins, Judge.

Action by Catherine E. Crowl against Joseph F. Crowl. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

R. J. Tucker and Cole, Burnett & Moore, for appellant. Thurman, Wray & Timmonds, for respondent.

MARSHALL, J. This is an action in ejectment for the S. E. $\frac{1}{4}$ of section 29, township 31, range 32, in Barton county, Mo. The petition is in the usual form. The answer was a general denial, coupled with a special plea that on the 23d of February, 1900, the plaintiff and others, instituted an action against the defendant for the partition of the land in controversy; that the defendant claimed to be the absolute owner of the land; that thereupon the circuit court ordered the plaintiff in the partition suit to institute a suit in ejectment against the defendant to try the title to the land, and further ordered

that the partition suit should be continued to await the result in the ejectment suit; that in obedience to said order the plaintiff, on the 15th of October, 1900, commenced an action against the defendant in ejectment; that said action was tried on the 30th of January, 1901, and resulted in a verdict and judgment for the defendant, which has never been appealed from, set aside, or vacated, but is still in full force and effect; that since said judgment the plaintiff has not acquired any interest or claim in the premises, other than such as was involved in the original ejectment suit. The answer then pleaded that the plaintiff's right to the premises in controversy was finally adjudicated in the former ejectment suit. On motion of the plaintiff the special plea of the defendant was stricken out, and on the same day the case was tried, and resulted in a verdict for the plaintiff for the possession of an undivided one-half of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 29, township 31, range 32, and for \$150 damages and \$4 a month rents and profits, and judgment was thereupon entered in favor of the plaintiff for the same. After proper steps the defendant appealed.

The case made is this: Mordekliah Crowl is the common source of title. He died on the 21st of April, 1899, without issue, leaving surviving him his widow, the plaintiff. He lived in Sangamon county, Ill. The record is silent as to the relationship of the defendant to him, but in the briefs counsel speak of him as the brother of the deceased. Plaintiff introduced in evidence a patent from the government of the United States, for 160 acres in the S. E. $\frac{1}{4}$ of section 29, township 31 north, of range 32, to Charles A. Davis and Green Moore, assignee of Burnham Hill, dated July 1, 1859, and recorded on the 29th of December, 1883; also a warranty deed dated November 6, 1868, from said Davis and said Moore to Levi Oswalt, for the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section 29, township 31, range 32, recorded November 27, 1868; also a warranty deed from Levi Oswalt to Mordekliah Crowl, dated November 5, 1881, to the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ aforesaid, recorded December 13, 1881. The plaintiff then introduced evidence tending to prove that Mordekliah Crowl lived in Sangamon county, Ill., and died April 21, 1899, without issue, leaving surviving him, his widow, the plaintiff; that letters of administration on his estate were granted by the probate court of Barton county, on February 23, 1900, to B. O. Avery, who qualified as such administrator; that on the 30th of January, 1900, the plaintiff, as such widow, duly elected to take one-half of the real and personal property of the estate, subject to the payment of the debts thereof, which election was filed for record in Barton county, on the 23d of February, 1900. The plaintiff then introduced evidence tending to show that the defendant is, and at the time of the institution of the suit, and for 20 years, had

been in possession of the premises; and also showed the rental value thereof. The evidence did not tend to prove the character of the possession of the defendant, nor was any attempt made to show that it was adverse to the plaintiff, or her said deceased husband. This was all the evidence in the case. The defendant asked and the court refused to give an instruction to the jury to find for the defendant, and the defendant stood upon the ruling, introduced no evidence, and now assigns that ruling as one of the errors of the trial. At the request of the plaintiff the court instructed the jury that if they believed from the evidence that the defendant was in possession of the land sued for at the time of the commencement of this action, and at the time plaintiff elected to take one-half of the land, they would find for the plaintiff for an undivided one-half of the land described in the petition, and would assess her damages at one-half of the value of the rents and profits from the 23d of February, 1899, the date of the alleged ouster, and would also assess the monthly rents and profits of the land. To the giving of which instruction the defendant excepted, and now assigns the same as error.

1. The first error assigned is the ruling of the trial court in striking out the special plea of the defendant, to the effect that the rights of the plaintiff to the premises had been adjudicated against her in the former ejectment suit, and that since that judgment she had obtained no new or additional rights. The rule in this state has long been settled that one action in ejectment does not bar another action in ejectment between the same parties, in respect to the same title and the same tract of land. In *Spencer v. O'Neill*, 100 Mo., loc. cit. 58, 12 S. W. 1054, *Sherwood, J.*, speaking for this court, said: "Something has been said about the adjudications in that cause being *res adjudicata* in this one, but the case of *Foster v. Evans*, 51 Mo. 40, which upholds that view, has long since been repudiated in this court, and the now prevalent rule asserted, that one action of ejectment is no bar to another, though between the same parties, in respect to the same title, and the same tract of land. *Ekey v. Inge*, 87 Mo. 493; *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. 6. It is because of this, that it becomes necessary, in order to put a stop to repeated actions of ejectment, to resort to bills of peace. *Primm v. Raboteau*, 56 Mo. 407." In *Sutton v. Dameron*, 100 Mo., loc. cit. 149, 13 S. W. 497, the same learned judge further said: "The well-settled rule of law in this state, notwithstanding an improvident dictum in *Foster v. Evans*, 51 Mo. 39, to the contrary is, actions of ejectment, though between the same parties, having the same defenses, concerning the same title and possession, and in all respects similar in other facts, may be maintained *ad infinitum*, so long as equitable defenses are not interposed and ruled upon,

thereby converting the whole proceeding into an equitable one, and thus making the adjudication binding. *Kimmell v. Benna*, 70 Mo. 52; *Ekey v. Inge*, 87 Mo. 493; *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. 6; *City v. Lumber Co.*, 98 Mo. 613, 12 S. W. 248. For this cause it is that when two or more ejectments are brought, and decided in favor of the defendant, he, in order to prevent being further harassed by a litigious adversary, may maintain his bill of peace, and thus put a stop to oppressive litigation. *Primm v. Raboteau*, 56 Mo. 407." The doctrine announced in the case just stated must be now understood in the further light that a mere equitable defense does not convert the whole proceeding into one in equity, but that in order that the case may be converted from one at law to one in equity, there must not only be an equitable defense, but a prayer for affirmative relief. *Martin v. Turnbaugh*, 153 Mo., loc. cit. 184, 54 S. W. 515, and cases cited. See, also, *Jamison v. Martin*, 184 Mo. 422, 83 S. W. 750. In *Swope v. Weller*, 119 Mo. 556, 25 S. W. 204, *Brace, J.*, in speaking for this court, said: "It is settled law in this state that one action of ejectment is no bar to another, though between the same parties, in respect to the same title, and the same tract of land (citing cases). * * * Hence when a defendant is found to have the legal title and therefore succeeds in an action of ejectment, in order to prevent being further harassed by subsequent actions for the same property under the same title, he must invoke the aid of a court of equity by a bill of peace." In *Callahan v. Davis*, 125 Mo., loc. cit. 35, 28 S. W. 162, *Burgess, J.*, speaking for this court, said: "It is well settled in this state that one judgment in an action of ejectment is no bar to the prosecution of another suit for the recovery of the same premises (citing cases). The rule is different in regard to other kinds of action, in which one judgment between the same parties, in regard to the same subject-matter of controversy, is a bar to another suit between them, and the pendency of the first suit may be pleaded in abatement to the last one instituted. But as a former judgment or recovery is no bar to a subsequent suit between the same parties, in an action of ejectment, it must necessarily follow that the pendency of another action between the same parties, for the same purpose, at the time the last suit was brought, could not be successfully pleaded in abatement of the last suit. *Hall v. Wallace*, 25 Ala. 438." It follows that there was no error in the ruling of the trial court in striking out the special defense in this case.

2. The next contention of the defendant is that the plaintiff's claim is barred by limitation. This contention is based upon the fact that the evidence introduced by the plaintiff showed that the defendant had been in possession of the premises for at least 20

years prior to the institution of this suit. There is absolutely no evidence in the case even tending to show that the possession of the defendant was in any way hostile to the legal title. Mere possession does not create title by limitation however long continued. To have such an effect the possession must be open, notorious, continuous, and adverse, under claim of ownership or color of title. *Sell v. McAnaw*, 158 Mo., loc. cit. 471, 59 S. W. 1003, and cas. cit. As hereinbefore pointed out, it seems to be conceded in the briefs that the defendant was a brother of the plaintiff's deceased husband, and there is nothing to show that he held the possession adversely to his deceased brother at any time. *Mordekiah Crowl* died in April, 1899, without issue, and leaving the plaintiff, his widow, surviving him; and under sections 2939 and 2941, Rev. St. 1899, the plaintiff, as his widow, was entitled to take one-half of the real and personal estate belonging to the husband, at the time of his death, absolutely, subject to the payment of his debts, or to take one-third part of all the land whereof the husband was seised of an estate of inheritance, at any time during the marriage, and to which she had not relinquished her right of dower, for and during her natural life. In this case the widow elected to take the one-half of the real and personal property, subject to the payment of the debts, and this was the sum of her recovery, allowed her in this case.

Upon the case made, therefore, there is no doubt, whatever, that the plaintiff is entitled to the relief accorded her in the circuit court, and the judgment of that court is affirmed. All concur.

KING v. PHOENIX INS. CO. OF BROOKLYN, N. Y.

(Supreme Court of Missouri, Division No. 1, Feb. 22, 1906.)

1. INSURANCE—ORAL CONTRACTS—VALIDITY.

Under Rev. St. 1899, § 974, providing that parol contracts may be binding on corporations, if made by them or an authorized agent, an insurance company may make a parol contract of insurance.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Insurance, §§ 204-209.]

2. SAME.

A provision in the charter or by-laws of an insurance company merely requiring the signature of the president to all policies of insurance does not prevent its making an oral contract of insurance.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Insurance, § 205.]

3. CONSTITUTIONAL LAW—CONTRACTS—IMPAIRING OBLIGATION.

A decision of a court changing a prior construction of a statute does not contravene Const. U. S. art. 1, § 10, prohibiting any state from passing a law impairing the obligation of contracts.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 278.]

4. INTERNAL REVENUE — STAMP ACT — ORAL CONTRACTS.

Act June 13, 1898, 30 Stat. 452, § 7 [U. S. Comp. St. 1901, p. 2292], providing that, if one make a document without putting a revenue stamp on it, he shall be guilty of a misdemeanor and the document shall not be admissible in evidence, does not make an oral contract invalid.

5. INSURANCE—POWER OF AGENT—RENEWALS.

Under the power given an insurance agent to fix premium rates, receive moneys, countersign, issue, renew, and consent to the transfer of policies signed by the president and secretary, subject to the rules and regulations of the company and instructions of its officers, the agent may, in the absence of rules, regulations, or instructions to the contrary, renew a policy by a verbal agreement.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 206, 207.]

6. WITNESSES — CONTRADICTION ONE'S OWN WITNESS.

Testimony of a party who has merely taken a deposition of a witness but not introduced it cannot be objected to as contradicting such witness.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1099.]

7. INSURANCE—ACTION ON BUILDER'S POLICY —INSTRUCTIONS.

No error can be predicated of an instruction, in that it speaks of the building insured as "the property of plaintiff," in an action by a contractor on a builder's policy; his contract requiring him to furnish a complete building, so that he had an interest therein, it having been burned before it was completed and he had been fully paid.

8. SAME — VALUED POLICY LAW — BUILDER'S POLICY.

The valued policy law applies to a policy taken out by a builder, as well as to one taken out by the owner of the property; the builder's interest in the building being one in real estate.

Appeal from Circuit Court, Lincoln County; H. W. Johnson, Judge.

Action by John H. King against the Phoenix Insurance Company of Brooklyn, N. Y. Judgment for plaintiff. Defendant appeals. Affirmed.

Barclay, Shields & Fauntleroy and Norton, Avery & Young, for appellant. E. B. Woolfolk and W. A. Dudley, for respondent.

MARSHALL, J. This is an action to recover \$750 for the loss of a frame building in Elsberry, Lincoln county, Mo., that was in process of construction, or reconstruction, for church purposes. The plaintiff recovered a judgment for \$748, and after proper steps the defendant appealed. This is the second judgment in favor of the plaintiff, and the second appeal by the defendant. The former appeal was to the St. Louis Court of Appeals. *King v. Insurance Co.*, 101 Mo. App. 163, 76 S. W. 55.

The petition, after alleging the character of the defendant, states that on the 7th of February, 1901, John W. Pace was the defendant's local agent at Elsberry, and was duly authorized and empowered, as such agent, "to receive applications, to take risks and insure and make out and deliver policies of insurance on property, for defendant, against loss or damage by fire, and to collect

and receive premiums therefor; that on the 7th day of February, 1901, plaintiff applied to said John W. Pace, agent for defendant, for insurance against loss or damage by fire, upon a one-story frame, shingle-roof building and its foundations, to be occupied as a church when completed, and situated in survey 1,724, township 50, range 2 E., in Lincoln county, Mo., then and until the happening of the loss hereafter mentioned, the property of the plaintiff; that said defendant, on said date, by its agent agreed and contracted to insure said property for a term of 10 days from said date, in the amount of \$750, at a premium of \$2, to be thereafter paid to defendant by plaintiff in a reasonable time, which sum the plaintiff then and there agreed and became liable to pay defendant, and it was then and there agreed, in pursuance to said contract of insurance so made and entered into, and in consideration of the liability so assumed by plaintiff to pay the premium aforesaid, that defendant would issue and deliver to plaintiff an insurance policy binding said defendant to pay plaintiff all such loss or damages as plaintiff might sustain by reason of injuries to or the destruction of the property above described, by fire, within said term of 10 days, to the amount of \$750." The petition then alleges the destruction of the building by fire on the 9th of February, 1901, the attempt to make proof of loss and the tender of the premium on the 12th of February, 1901, together with an averment that the plaintiff had performed all of the conditions of the contract, on his part to be performed. The answer is a general denial.

The case made is this: The plaintiff is a contractor and was engaged in the construction or reconstruction of a building for church purposes, under a contract and specifications which required him to build and complete a church building in accordance with the plans and specifications, and subject to the approval and acceptance of the church committee; and in consideration thereof he was to receive the materials in the old building on the premises, valued at \$400 to \$480, and \$675 cash. The plaintiff had given a bond for \$1,000 for the performance of his contract. While so engaged in the work, the plaintiff, on the 9th of November, applied for and received from the defendant a policy of insurance on the building for \$750, for a term of 60 days from its date, to wit, until the 7th of January, 1901. On the 7th of January, 1901, and before the expiration of the policy, the plaintiff procured from defendant another policy for a like amount, insuring the building for a further term of 30 days from the 7th of January, and to expire at noon on the 7th of February, 1901. This policy contained the following provision: "\$750.00 on the one-story, frame, shingle-roof building and its foundation, to be occupied as a church when completed

(boulder's risk), and situated in survey 1,724, township 51, range 2 E., Lincoln county, Missouri." The plaintiff paid the premiums required by the defendant for said policies, to wit, \$4.50 for the first policy, and \$3 for the second. All of the plaintiff's dealings were had with John W. Pace, the defendant's agent at Elsberry. Pace was acting under a written commission or appointment as agent of the defendant, which recited the appointment of Pace as agent, "with full power to receive proposals for insurance against loss and damage by fire, in Elsberry, Missouri, and vicinity, to fix rates of premiums, to receive moneys, and to counter-sign, issue, renew, and consent to the transfer of policies of insurance signed by the president and the secretary of the said Phoenix Insurance Company, subject to the rules and regulations of the said company, and to such instructions as may from time to time be given by its officers." No rules or regulations or instructions were introduced in evidence in this case. On February 7th, before 12 o'clock noon, and before the expiration of the second policy, the plaintiff notified Pace that he had been unable to complete the building at that time, and applied to him for insurance on the building for a like amount, and on the same terms as the last policy. Pace asked him how long he wanted the insurance to run. The plaintiff replied that he would like to have it for five or six days, and asked Pace what limit of time he could write a policy for, saying that he did not care to carry the policy any further than was necessary for him to complete the building. Pace replied that he could write a policy for as short a time as five days. The plaintiff replied that he could not get the building done in five days. Thereupon Pace said he would write a policy for 10 days and charge \$2.25 premium therefor. Plaintiff objected to the rate of premium, with the result that Pace agreed to charge only \$2 premium. The plaintiff accepted the proposition and said to Pace, "Don't fail to have this policy at 12 o'clock." Pace replied that when he told a man anything he could depend on it. Nothing was said about the payment of the \$2 premium. Prior to that time the plaintiff had not been required to pay the premium on the two other policies at the time he applied for them, or when they were issued, but had paid them thereafter; Pace saying that it did not make any difference about paying the money at the time, but that it could be paid at "any time in the run of the policy, so I can make my report, will do." On this understanding the plaintiff left and heard nothing more about the matter until after the 9th of February, when the fire occurred. The second policy, which expired on the 7th of February, had never been delivered to the plaintiff, but had remained in Pace's hands.

The defendant objected to all of the testi-

mony relating to the insurance for 10 days last aforesaid, on the ground: First, that the stamp act of the United States then in force required a United States revenue stamp to be fixed on all policies of insurance, and that, under article 6 of the federal Constitution, the effect of the Constitution and revenue laws of the United States is to require every fire insurance risk and contract to be expressed in the form of policies and in writing; second, because insurance contracts, under the laws of Missouri, must be in writing; third, because, under the terms of the commission of appointment, Pace had no power to make any oral contract of insurance, and that it would impair the obligation of said contract between Pace and the defendant if the courts of Missouri should bind defendant by the oral contract, and that such a declaration of law by the courts of Missouri would violate article 1, § 10, of the federal Constitution, which prohibits any state to pass any law impairing the obligation of contracts. The court overruled the objection, and the defendant now assigns that ruling as the principal error in the case. The defendant also offered testimony tending to prove that the amount of the plaintiff's interest in the building at the time the fire occurred was only \$108. On the objection of the plaintiff the court excluded the evidence, and this is assigned as error. Error is also assigned as to certain instructions given for the plaintiff, which will be noticed in the course of the opinion.

1. The first question that is presented for adjudication in this case is whether or not an oral contract of insurance is valid. This question first came before this court in *Hennings v. Insurance Co.*, 47 Mo. 425, 4 Am. Rep. 332. Wagner, J., delivering the opinion of the court, held that "at common law there is nothing absolutely requiring that the contract should be in writing." After stating that there was much disagreement in the books as to the power of insurance companies to make contracts of insurance by parol, and after reviewing a number of cases bearing on the subject, and saying that the court would be strongly inclined to follow the rule laid down in most of the cases cited which held that a parol contract of insurance was good, the learned judge then quoted from the act incorporating the defendant company, which declared that "all the conditions of policies issued by said company shall be printed or written on the face thereof," and that authority had been given the company to make by-laws, one of which required the president to sign all policies or contracts by which the company was to be bound, and another required every proposal for insurance to be by written application, signed by the applicant or his agent, and concluded that, by virtue of the act of incorporation and the by-laws referred to, "there could be no original and binding contract by parol," as to the defendant company.

The question came again before this court in *Baile v. Insurance Co.*, 73 Mo. 371. That was a suit in equity to enforce a verbal agreement to issue a policy of insurance. The defense was that the defendant could only be liable for a written or printed policy, signed by the president and attested by the secretary, and that no verbal contract of insurance was binding on the defendant under its charter, and the laws of this state. The court said: "The validity of the contract is the first point demanding attention. The charter of the defendant company is that furnished by the general laws. Chapter 67, p. 353, Gen. St. 1865. The concluding words of section 1 of that chapter require that the 'conditions of all policies issued by such company shall be written or printed on the face thereof,' and section 8 of the same chapter provides that 'all policies and contracts of insurance and instruments of guaranty, made by said company, shall be subscribed by the president, or president pro tempore, and attested by the secretary.' Similar language to that just quoted was passed upon by this court in *Henning v. U. S. Ins. Co.*, 47 Mo. 425, 4 Am. Rep. 382, and it was held that with such a charter and by-laws, the company could make no original and binding oral contract of insurance. In that case, however, section 6 of chapter 62, Gen. St. 1865, was overlooked. That section, which has been on the statute books for over 35 years (Rev. St. 1845, p. 232, c. 34, art. 1, § 8), provides that: 'Oral contracts may be binding on aggregate corporations, if made by an agent, duly authorized by a corporate vote, or under the general regulations of the corporation, and contracts may be implied on the part of such corporation, from their corporate acts, or those of an agent whose powers are of a general character.' That section is now section 974, Rev. St. 1899. Passing upon the effect of this section, it was held, in the Circuit Court of the United States for the Eastern District of Missouri, in an action between the forementioned parties, that construed in the light of the general law, the charter of the insurance company did not disable it from making a binding contract of insurance without writing. *Henning v. U. S. Ins. Co.*, 2 Dillon, C. C. 26, Fed. Cas. No. 6,366. This view is certainly the better one, even where there is no such general provision as that above quoted, making oral contracts of aggregate corporations valid. It must now be considered as the well-settled doctrine by the nearly universal concurrence of the authorities that oral agreements of insurance are enforceable, although the charter of the company contains similar provisions to those contained in chapter 67, supra. The principle underlying these doctrines is this: That the right to make contracts of insurance, like any other right of contracting, exists as at common law, unless prohibited by statute; that the contract of insurance having its

origin in mercantile law and usage, the distinction which denies the power to enter into such a contract, except in particular modes and forms, is without foundation and repugnant to, and inconsistent with, that general capacity of contracting which the common law concedes to every person ordinarily competent to enter into binding engagements; that the provisions of a charter of a company that they shall have the right to make contracts of insurance by the signature of a president, etc., are regarded by the courts as merely enabling, and not restrictive of the general power to effect contracts in any other mode not unlawful, dictated by convenience; and that 'the distinction between a contract to insure or to issue a policy of insurance, and the policy itself, is obvious and constantly recognized by the courts.' May on Ins. §§ 14, 22, 23, 128; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. (N. Y.) 82; *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Trustees v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291; *New England, etc., v. Robinson*, 25 Ind. 536; *Claflin v. Torlina*, 56 Mo. 371; *Henning v. Ins. Co.*, supra. In view, however, of the broad statutory provisions heretofore cited, relating to the power of aggregate corporations to contract orally, all difficulty as to the power to make, in the present circumstances, an oral contract of insurance, vanishes. Besides, this, section 8, supra, requiring the signature of the president, etc., uses no prohibitory words; relates not to agreements to insure, but only to policies when completed and ready for official signature. It is unnecessary to the proper determination of this case that the one already cited from our own reports, and greatly relied on by defendant, be overruled; but it is not unworthy of remark that the utterances in that case were, for the most part, almost, if not altogether, obiter, since therein it is distinctly asserted that the contract in that instance was 'nothing but a naked verbal agreement * * * sued upon. This is denied, and there is no proof of it.' So that that case could have been very briefly disposed of, as having no evidential foundation requiring either judicial discussion or determination. Be that as it may, the doctrine announced in that case does not dominate this one, for the reason that that case was a suit at law on an alleged oral and completed agreement; this is a proceeding in equity to compel that to be done which already upon sufficient consideration had been agreed should be done. And the case under discussion expressly recognizes the principle, announced in *Commercial Ins. Co. v. Union Mutual Ins. Co.*, 19 How. (U. S.) 819, 15 L. Ed. 636, as well as in numerous other cases cited by plaintiffs, that equity will specifically enforce 'agreements to make insurance.'"

Baile v. Insurance Co., supra, has since been cited and approved, and the doctrine

announced that unless prohibited by statute, a corporation has all the rights of contracting, under the common law, that an individual has. *Liebke v. Knapp*, 79 Mo., loc. cit. 24, 49 Am. Rep. 212; *Railroad v. Railroad*, 135 Mo., loc. cit. 200, 36 S. W. 602, 33 L. R. A. 607; *State ex inf. v. Lincoln Trust Co.*, 144 Mo., loc. cit. 592, 46 S. W. 593. In the case last cited it was said: "Corporations, when they are not restrained in any particular manner by their charter, may adopt all reasonable means in the execution of their business which a natural person may adopt in the exercise of similar powers." The same doctrine was taken as settled law in this state in *Duff v. Fire Ass'n*, 129 Mo. 460, 30 S. W. 1034. Thus it will appear that the rule laid down in the *Henning Case*, supra, has not been followed in this state since, but that, as pointed out in the *Baile Case*, the statutes of this state (now section 974, Rev. St. 1899) expressly provide that parol contracts may be binding upon aggregate corporations if made by an agent authorized to contract, and contracts may be implied on the part of such corporations from their corporate acts, or those of an agent whose powers are of a general character. In fact, while the *Henning Case* was not expressly overruled in the *Baile Case*, because it was not essential to the decision of that case that it should be overruled, nevertheless it was distinctly pointed out in the *Baile Case* that the learned judge who delivered the opinion in the *Henning Case* had overlooked the express statute of the state, and it was further pointed out that the correct doctrine announced by the great weight of authority is that parol contracts of insurance are valid, unless expressly prohibited by statute. The rule thus announced in this state is in harmony with and amply supported by the great weight of modern authority. In 16 Am. & Eng. Enc. of Law (2d Ed.) p. 852, it is said: "The contract is sometimes evidenced by a binding slip signed by the insurer's agent, or by a memorandum in his record book, but neither the statute of frauds nor public policy requires it to be in writing, and it is equally valid if made orally." Decisions from the Supreme Court of the United States, and from the Supreme Courts of Alabama, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New York, Ohio, Oregon, Pennsylvania, South Carolina, and Wisconsin are cited in the note to the text sustaining that doctrine.

The same rule is announced by the text-writers. *Joyce on Insurance*, vol. 1, § 525, says: "As we have stated in a preceding chapter, the company may be bound by an oral contract of insurance, or an oral agreement to insure; so an agent intrusted with blank policies, signed by the president and secretary, with authority to negotiate, fill up, and issue the same, may bind the company by a parol contract to insure, and an

agent authorized to make the necessary surveys, and negotiate and conclude all the terms of the contract, and to fill up and countersign the policy, may bind the company by a parol contract to issue a policy. * * * And a local agent of a foreign company, with similar authority, may bind the company by parol to contracts of original or renewal insurance." *Richards on Insurance*, § 41, lays down the rule as follows: "An oral contract of insurance or an oral contract to issue a policy is valid, unless prohibited by statute, as by the Civil Code of Georgia, or sometimes by stamp laws, and will be binding from the time the oral contract is completed, although the loss occur before the policy is issued. The statute of frauds is not applicable; and although the charter of a company provides that the contract of insurance must be in writing, this requirement is, by most courts, held to be a direction to the company, and not binding upon an innocent party, who has parted with value to the company in good faith under an oral contract." *May on Insurance* (4th Ed.) vol. 1, § 23D, says: "On principle it would seem that at common law there could be no objection to an oral contract to make an insurance in future, or to issue a policy at a time named, or within a reasonable time, holding the applicant insured meanwhile (this is the usual agreement); or to insure now, making the full contract by parol, without any expectation of a policy. So far the law is clear when the contracting parties are natural persons, and there is no statute in the way. But when a corporation makes the contract, or a statute enters the question, the problem is not so simple. Unless prevented by the charter, a company may make valid oral insurance policies"—citing *Henning v. Insurance Co.*, 47 Mo. 425, 4 Am. Rep. 332, which, as above shown, is no longer the law in Missouri.

But the rule is that, unless prevented by statute, a corporation has the same right to contract that an individual has, under the common law, and that, under the statute of this state, parol contracts of corporations are binding on the corporation if made by the corporation or by an authorized agent, and that such contracts may be implied from the corporate acts, or those of the agent whose powers are of a general character; and that the provisions of the charter or by-laws, requiring the signature of the president to all policies of insurance, and using no prohibitory words, do not prevent the making of oral contracts. There was, therefore, no error in the ruling of the trial court in admitting the evidence tending to prove an oral contract of insurance.

2. It is contended, however, that such a construction of the law impairs the obligation of the contract between the company and its agent, in that, under the written appointment of the agent, he had no power to enter into an oral contract of insurance, and

that therefore the rights of the defendant guarantied by section 10 of article 1 of the federal Constitution would be denied the defendant. This contention is untenable. The modern rule is that "in order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract be impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only." *City of Sedalia v. Donohue* (Mo. Sup.) 89 S. W., loc. cit. 389, and cas. cit.

3. It is next contended that at the time this contract was entered into, the federal stamp act required all contracts of insurance to have an internal revenue stamp fixed thereto. Act June 13, 1898, 30 Stat. 448 et. seq. [U. S. Comp. St. 1901, p. 2286]. And it is argued that, as the stamp cannot be fixed to an oral contract, it would enable parties to evade the stamp act and defraud the government, by permitting oral contracts of insurance to be made, and therefore the oral contract relied on in this case was invalid. Section 7 of the stamp act provides as follows: "That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereon an adhesive stamp to denote such tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars at the discretion of the court, and such instrument, document or paper, as aforesaid, shall not be competent evidence in any court." 30 Stat. 452 [U. S. Comp. St. 1901, p. 2292]. It is a sufficient answer to the contention to say that the literal wording of that statute is that the failure to stamp such instrument, document, or paper is made a misdemeanor and the document is inadmissible as evidence, but in this case there was no such instrument made, and none such is offered in evidence, and the statute does not prohibit the making of oral contracts, such as, under the common law, every person and every corporation has the right to make, under the laws of this state, and under the laws of the United States. In addition thereto, it has been held that under the act the instrument may be received in evidence, unless it be shown that the omission to stamp it was with the intent to evade payment of the revenue, and that in the absence of such showing the instrument or contract is not void. *Hooper v. Whitaker*, 130 Ala. 324, 30 South. 355; *Small v. Slocumb*, 112 Ga. 279, 37 S. E. 481, 53 L. R. A. 130, 81 Am. St. Rep. 50. In the case last cited it was held that while Congress had the power to require revenue stamps to be placed

on written instruments, and to prescribe a punishment for the failure or refusal to comply with that requirement, and to require that such instruments, unless stamped, should not be admissible as evidence in the federal courts, it had no power to prescribe rules of evidence for the state courts, and therefore the act which declared that such instruments should not be received in evidence in any court until stamped is to be understood as applicable to the federal courts only. To the same effect are *Wade v. Foss*, 96 Me. 230, 52 Atl. 640; *Clemens v. Conrad*, 19 Mich. 170; *Sammons v. Holloway*, 21 Mich. 162, 4 Am. Rep. 465; *Wilson v. Carey*, 40 Vt. 179; *Garland v. Gaines*, 73 Conn. 662, 49 Atl. 19, 84 Am. St. Rep. 182; *Latham v. Smith*, 45 Ill. 29.

4. It is contended that Pace had no authority, under his written appointment, to make an oral contract, but that his power was limited "to fix rates of premium, to receive moneys, and to countersign, issue, renew, and consent to the transfer of policies of insurance, signed by the president or the secretary" of the defendant. As hereinbefore pointed out, where an agent is intrusted with blank policies signed by the president and secretary of the company, with authority to negotiate, fill up, and issue the same, he may bind the company by an oral contract to insure. *Joyce on Ins.*, vol. 1, § 525. But even under the strictest construction of his appointment, the act of Pace in this instance may be regarded, under the facts in judgment, as a mere renewal of the contract that was to expire on the 7th of February at noon, and there are no rules, regulations, or instructions of the company in this regard, tending to show that the agent had no power to renew a policy of insurance by a verbal agreement, and for a consideration.

5. The St. Louis Court of Appeals reversed the former judgment in this case, because, after the plaintiff had introduced the deposition of Pace denying that he had authority to make a contract of insurance for 10 days, the plaintiff introduced evidence of statements made by Pace after the loss, tending to show that he had such authority, and it was held by the St. Louis Court of Appeals that such statements were inadmissible, both because they were not a part of the res gestæ of the business Pace was transacting, and also because they tended to contradict the testimony of Pace, who was plaintiff's witness. It is now insisted that on the trial anew the plaintiff fell into "the same old error." The record discloses, however, that on this trial the plaintiff did not introduce the deposition of Pace, nor did he call Pace as a witness. It is true, the plaintiff had formerly taken Pace's deposition, but he did not introduce it in this case. The record shows that in rebuttal, the plaintiff was called and asked whether or not Pace, the agent, or anybody else, had told him at any time that a policy could not be made for less than 10 days. This was objected to

on the ground, among others, that the plaintiff was thereby seeking to contradict Pace's testimony, and that the plaintiff could not do so because the plaintiff had taken Pace's deposition, although the plaintiff had not used it, and it had not, up to that time, been introduced in evidence by either party. The objection was overruled, and the witness answered that he had no such knowledge. Thereupon, on cross-examination, it was proved that the plaintiff had called Pace as a witness on the former trial, and, over the objection of the plaintiff, the defendant introduced the bill of exceptions preserving the testimony of Pace on the former trial, and also introduced the deposition of Pace, which had been previously taken by the plaintiff. It is plain, therefore, that in this case the plaintiff was not guilty of the error for which the St. Louis Court of Appeals reversed the former judgment. Here the plaintiff did not call Pace at all, and therefore the evidence admitted did not tend to contradict anything Pace had said, for up to that time Pace had not spoken, either in person or by deposition, on this trial. Neither did the plaintiff, on this trial, introduce testimony as to statements made by Pace after the fire occurred.

6. The first instruction is claimed to be erroneous, because it speaks of the building insured as "the property of the plaintiff." And it is argued that it was not the property of the plaintiff, because he had only \$108 interest in it. The policy was a builder's policy. The contract required the plaintiff to take down the old building, and to furnish the church a complete building, in consideration of the materials that came out of the old building and \$675 cash. The fact, if it be a fact, that the plaintiff had received all but \$108 on the contract price would not deprive him of an insurable interest in the building, for, if the building was destroyed, the plaintiff would have to rebuild it, and would not be entitled to any further payment than was provided by the original contract. The plaintiff, therefore, had an insurable interest in the building; and the building was a part of the realty, and hence the plaintiff had, at least, a qualified interest in the realty. 16 Am. & Eng. Enc. of Law (2d Ed.) p. 846.

7. The second instruction for plaintiff is claimed to be erroneous because it gave the plaintiff the benefit of the valued policy law of Missouri. Section 7969, Rev. St. 1899. That instruction told the jury that although they might believe from the evidence that the building in question did not stand on premises owned by the plaintiff, yet if they believed that the plaintiff had contracted with the agent or building committee of the owners of the property to build a complete church building upon the premises, and turn the same over to the owners when completed and accepted by them, and that, at the time of the fire, said building had not been accepted by and turned over to them, then the

plaintiff had such ownership or interest in said building as entitled him to insure the same and collect the insurance under the conditions mentioned in instruction 1, given for the plaintiff in this case. It is claimed that the instruction is erroneous, because the interest the plaintiff had was simply an interest in personalty, and that the valued policy law does not apply to personalty, but only to realty. This objection is more technical than real. The interest the plaintiff had was a builder's interest. That interest was in the building that was attached to the land, and was therefore a part of the land. True, the building might be destroyed by fire, while the land could not, hence the necessity for insuring against loss by fire during the construction of the building. But the building was none the less a part of the realty, because it might be destroyed by fire like personalty may be destroyed by fire. The same argument might be applied to insurance on a building taken out by the owner of the land on which the building stood. Yet the valued policy law applies to the buildings on the land and not to the land itself, and no good reason is perceived, or has been suggested, why there should be any difference in the application of the valued policy law to a policy taken out by the owner of the land and where the policy is taken out by the builder. The building is as much personalty to the one as it is to the other.

For the foregoing reasons, the judgment of the circuit court is affirmed. All concur.

MING v. OLSTER et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 22, 1906.)

1. EJECTMENT — PLEADING — EQUITABLE DEFENSE.

In ejectment, an answer setting up a partition under which the defendants claim title, not specifying whether it was oral or in writing, does not set up an equitable defense, since it is presumed that the contract was in the form to constitute it a legal obligation.

2. SAME—EVIDENCE—ADMISSIBILITY.

In ejectment, where the genuineness of a deed in partition under which defendants claimed title was contested, evidence that the parties to the deed went into possession of the land in accordance with its terms was admissible.

3. SAME—PLEADING—EQUITABLE DEFENSE.

Though, under Rev. St. 1899, § 626, permitting a party to plead title in the alternative, defendants in ejectment might plead legal title and equitable estoppel in the alternative, where they pleaded a partition, and in addition thereto, but not in the alternative, pleaded that the parties to the partition deeds went into possession thereunder and were estopped to deny their validity, this did not constitute an equitable defense.

4. EVIDENCE—DOCUMENTS—CERTIFIED COPY — BEST EVIDENCE.

In ejectment, where a certified copy of a deed was offered in evidence by the defendants, whereupon plaintiff objected on the ground that it was not the original, and produced the original, and the defendants called attention to what appeared to be erasures in the purported orig-

inal, the certified copy was properly admitted in evidence.

5. TRIAL—RECEPTION OF EVIDENCE—VALIDITY OF DEED.

Where the admission of a certified copy of a deed in evidence is objected to on the ground that the deed is a forgery, it was properly admitted in evidence without first permitting the objecting party to introduce testimony tending to show that the deed was a forgery.

6. SAME—PROOF OF EXECUTION OF INSTRUMENT—ORDER OF PROOF.

Under Rev. St. 1899, § 933, permitting the introduction in evidence of a certified copy of a deed on showing that the party has not the original or control of it, proof of the execution of a deed need not be made before the introduction of a certified copy.

Appeal from Circuit Court, Cooper County; James E. Hazell, Judge.

Action by Mary S. Ming against Julius Olster and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Bente & Wilson, Joseph F. Rutherford, and Mark A. McGruder, for appellant. A. F. Rector and W. M. Williams, for respondents.

VALLIANT, J. Plaintiff sued in ejectment for an undivided half of a tract of land in Saline county containing 584 acres. The cause was taken by change of venue to the circuit court of Cooper county, where it was tried and judgment rendered for defendants, from which judgment the plaintiff has appealed.

The petition is in the usual form. The answer of defendant Olster admits that he is in possession as tenant under his codefendant Marshall, and denies all the other allegations of the petition. Defendant Marshall, by his answer, admits that he is in possession in the person of his tenant Olster and denies all other allegations of the petition; then he goes on to plead what he calls an equitable defense which is substantially as follows: The land in suit with other lands were owned by one Jacob H. Fisher, in his lifetime, who died in 1866 leaving a will whereby he devised this and his other lands to his two children James P. Fisher and the plaintiff, Mary S. Fisher. That in January, 1882 James and Mary, she being then Mrs. Mary S. Ming made partition of the lands devised to them whereby the land in this suit, called the Shroyer farm, was set apart to James Fisher and a certain other tract, called the Finley farm, was set apart and conveyed to the plaintiff Mary S. Ming, each entering into possession of the farm allotted to him and her respectively and holding it thereafter in severalty. That in 1887 James Fisher executed a deed conveying the Shroyer farm to a trustee, to secure a certain promissory note therein described, with power of sale. That in December 1900, default in payment of the note having been made, the deed of trust was foreclosed, according to its terms, the land sold and bought at the trustee's sale by defendant Marshall for the sum of \$18,500 to whom the trustee executed a deed, under which this defendant went into possession

and holds the same. That this defendant made the loan to James Fisher, for which the note and deed of trust above mentioned were executed, relying on the partition and on the fact that the plaintiff went into possession of the Finley farm thereby set apart to her, and has ever since held the same, and therefore she is now estopped from asserting any claim to the Shroyer farm set apart to her brother James Fisher. The answer concludes with a prayer that the partition be confirmed, the title to the Shroyer farm be decreed to defendant Marshall and the plaintiff be enjoined from asserting title thereto. The reply denies that there was any partition, and says that if James Fisher gave a deed of trust on the Shroyer farm, as alleged, it was without her knowledge or consent.

1. Before referring to the evidence, let us go to the pleadings and ascertain what the issues were. This becomes necessary in the consideration of one of the assignments of error by appellant, that is, that the general finding for defendants, without reference to what is called the equitable defense pleaded in the answer, was not responsive to the issues and that the general judgment thereupon left the equity feature of the case undisposed of or left the plaintiff at sea without knowing whether she was defeated on the one or the other phase of the case. The answer does not really set up an equitable defense and there was no evidence offered by defendants which, if admissible at all, was not admissible under the general denial in defense of the legal title. Defendants relied for their title on the alleged partition between the brother and sister. If that partition was executed by means of a deed or deeds executed according to law it was a complete legal defense to the plaintiff's action. If it was not executed by means of such deeds but rested in parol and in the fact that the parties entered, into and remained in possession, each of his and her allotted part and the continuance of that situation down to the time of the execution of the deed of trust, inducing the public to believe that each owned his and her several farms, respectively, and on the faith of that the loan secured by the deed of trust was obtained by James Fisher, then a case for the interposition of equitable jurisdiction would arise. But this answer does not say that that was a parol partition and for that reason it fails to show any ground for the interposition of the powers of an equity court. True the answer does not say that the partition was effected by good and sufficient deeds of conveyance but that is not necessary. When a petition states that a contract was made the presumption is that it intends to say that the contract was made in form to constitute it a legal obligation, and if it be a transaction that the statute of frauds requires to be in writing the presumption is that the pleader means to say that it was in writing, and if on the trial he should attempt

to prove it by oral testimony his adversary may object although he may have entered only a general denial. *Allen v. Richard*, 83 Mo. 55; *Springer v. Kleinsorge*, 83 Mo. 152; *Boyd v. Paul*, 125 Mo. 9, 28 S. W. 171. It is the fact, but not the evidence by which the fact is to be proven, that is required to be pleaded. Therefore, treating this answer as an affirmative defense setting up the act of partition, the plaintiff, under the general denial in her reply, had a right to object to any evidence except such as would be admissible under issues as in an action at law, that is to say written evidence as required by the statute of frauds. There was some evidence in the case tending to show that after the alleged act of partition the parties took possession of their respective shares and each thereafter continued to exercise acts of exclusive ownership of his and her part. That was evidence of a kind that would have been admissible to sustain an equitable or parol partition, but there was no objection to the evidence made on that ground or if made there was no exception preserved. Besides, as will hereinafter more clearly appear, such evidence would have been admissible in this case under the issues in the action at law, because the main point of conflict was as to the genuineness of the deed in partition alleged to have been executed by the plaintiff and her husband, such evidence tended to show her treatment of her property and her knowledge of her brother's treatment of it, consistent only with the validity of the deed whose genuineness she now disputes, and thus it tended to meet her evidence on that point.

A plea of estoppel in pais is not necessarily a matter of equity jurisdiction, it is cognizable also in courts of law. In *Bigelow on Estoppel*, p. 557, it is said: "Though still called equitable estoppel is as fully available at law as in equity." In 16 Cyc. 682, it is said: "The term [estoppel in pais] was borrowed originally from equity, and hence denominated 'equitable estoppel.' Equitable estoppels are so called, not, however, because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just. The doctrine is recognized in the courts of common law just as much as in the courts of equity, although it was at first administered as a branch of equity jurisprudence." Under some circumstances, however, full effect cannot be given to the estoppel by a mere judgment at law, for example, where it becomes necessary to fill a gap in record title by a decree vesting the title. The law writer last above quoted says: "Where however the estoppel sought to be set up involves the title to land or interests therein which can only be transferred by deed, it is held in some jurisdictions that it cannot be taken advantage of in an action at law." 16 Cyc. 725, 726. In the case at bar, if the partition

relied on by defendants was not evidenced by a legal deed or deeds, but rested its proof only in parol, whilst a court of law might have taken cognizance of the plea yet a court of equity could have rendered more adequate relief by an affirmative decree transferring and vesting the legal title where it would have been if a proper deed at the time had been executed by the parties. Defendant's plea of estoppel in the case at bar says in effect that the plaintiff and her brother, owning jointly these two farms made partition of them, giving to her one and to him the other, whereupon each took exclusive possession of the one allotted to her or him assuming all the indicia of separate ownership and on the faith thereof the brother of the plaintiff obtained the loan for which he executed the deed of trust under which defendants claim, therefore the plaintiff ought not to be heard to dispute the fact of partition and a court of chancery ought to make a decree settling the title. The defect in the defendants' plea of estoppel is that it fails to point out any flaw in the legal title under which they claim and, therefore, gives no reason for invoking the aid of an equity court. This was not an accidental omission as was shown by the course of the defendants at the trial, their position then was, and now is, that the partition was effected by good and sufficient deeds, and if that is the case there was no occasion for invoking the doctrine of estoppel, there is no room for its application. Defendants might, if they had chosen to do so, have availed themselves of the privilege of pleading the legal title and the equitable estoppel in the alternative as authorized by section 623, Rev. St. 1899, but they did not do so. As it is, the answer sets up no defense that could not have been proven under the general denial and there was nothing for the court to try except the issues involving the legal title; which the court did, a jury being waived.

2. At the trial the plaintiff introduced in evidence the will of her father, Jacob H. Fisher, by which the farm in suit and other farms were devised to her brother and herself; also evidence as to its rental value, a decree of a court in Montana granting her husband a divorce and dissolving their bonds of matrimony, and a lease dated in November, 1900 from plaintiff to Olster for this Shroyer farm. Defendants' evidence was as follows: (1) A certified copy of what purported to be a deed executed by the plaintiff and her then husband John O. Ming conveying with general warranty to James P. Fisher the land in suit, it was dated January 31, 1882, filed for record 14th June, 1883; the consideration expressed was the conveyance to her of Fisher's undivided half of the Finley farm. The copy was duly certified by the recorder of deeds of the county. When this was offered it was objected to on the ground that "no such deed was ever executed and for the further rea-

son, if it had been, the original would be the best evidence." Defendants then introduced evidence to show that the original was not in their possession or under their control. Thereupon counsel for the plaintiff presented a paper which they said "purports to be the original." When asked if they tendered the original deed they answered: "We make no tender of it. We have it here and we object to your using copy." The paper was then shown to the court, and the attention of the court was called by defendant's counsel to what appeared to be erasures causing it to differ in material points from the certified copy, the chief point of difference being the erasure of the name of John O. Ming in the certificate of acknowledgment. The certified copy was again offered in evidence and counsel for plaintiff said: "We make the further objection to the original deed in this case that it is a forgery, and now offer to prove that the original deed as tendered here was never executed, signed or acknowledged by John O. Ming; and that the certified copy in this case is a copy of a forged deed which never existed." The court allowed the copy to be read, to which plaintiff duly excepted. (2) A deed of trust dated October 27, 1887, by James P. Fisher to Robert J. McMahan, trustee, conveying the land in suit to secure James A. Marshall in the sum of \$12,200, duly acknowledged and recorded. Objection to this was made on the ground that James could not convey Mary's title. (3) A deed from the sheriff acting as substitute trustee foreclosing the deed of trust, dated 5th January, 1901, conveying the land to James A. Marshall for the sum of \$18,500, cash to the trustee paid. (4) A deed from James P. Fisher conveying the Finley farm to Mary S. Ming of the same date as the deed from Mary S. Ming and John O. Ming her husband above shown, and filed for record March 1, 1882. (5) A deed of trust executed by Mary S. Ming, 7th December, 1888, conveying the Finley farm to a trustee to secure the Missouri Trust Company in the sum of \$2,400, duly acknowledged and recorded December 12, 1888, with subsequent notation on the margin of the record that the debt had been paid and the deed of trust released. (6) A similar deed of trust on the same land executed by Mary S. Ming to secure a debt of \$4,000 dated April 1, 1900, to another party. The testimony showed that the two deeds of partition, of date January 31, 1882, were in the handwriting of John O. Ming, the then husband of the plaintiff. There was other evidence on the part of defendants tending to show that James Fisher exercised acts of exclusive ownership over the Shroyer farm, and that the plaintiff did so with the Finley farm, and that all the while they lived together in the town of Houstonia. Plaintiff, in rebuttal, introduced evidence tending to show that the Finley farm was not as valuable as the Shroyer farm, and there-

fore the partition was not an equitable one. This evidence was addressed to what was supposed to be the equitable defense in the case. Plaintiff also introduced evidence tending to show that she and her brother, for several years after the alleged partition, together exercised acts of ownership over both the farms. Also evidence tending to show that her former husband did not execute the partition deed, or acknowledge it, that his name was forged to it.

It is unnecessary to set out the plaintiff's evidence tending to prove that the deed of partition was not signed or acknowledged by her husband, it is sufficient to say that such testimony was introduced and that it was weighed by the court and found wanting. The original deed exhibited by the plaintiff showed that it had been tampered with, and the circumstances justified the court in concluding that the erasures had been made after the deed had been recorded. The cause was submitted to the court without any instruction or declaration of law being asked or given. There was no exception taken to any ruling of the court on the admission of evidence, except that in relation to the admission of the certified copy of the deed from the plaintiff and her husband to James Fisher and the only ground of objection to that, other than that it was a copy, was the assertion that the original was a forgery, which of course presented a question of fact, not of law.

Plaintiff complains that the court ought to have interrupted the order of procedure and allowed her to inject her testimony tending to show that the deed was a forgery into the defendant's case, before they had rested. But that would have been irregular. When the defendants showed that they did not have the original deed, or control of it, they were entitled under the express terms of the statute to read the certified copy in evidence. Section 933, Rev. St. 1899. When her turn came, the plaintiff was allowed to introduce all the evidence she offered tending to discredit the deed. Plaintiff invokes the common-law rule of evidence that secondary evidence of the contents of a written document cannot be introduced until proof is made to show that there was such a document duly executed. But our statute gives the certified copy of a recorded deed a force as evidence which was not accorded to a mere copy at common law. The statute takes into account that the recorder has examined the deed before he puts it on record, and it ranks his certified copy next to the original and allows it to be read in evidence whenever the original is not in the possession or control of the party offering it. The law makes the certified copy only prima facie evidence, however, and the other party may, if he can, discredit it by showing as the plaintiff tried to do in this case that the pretended original was a forgery or discredit the copy in any other manner to which it is

amenable. That privilege was accorded to the plaintiff in this case, she was allowed to show, if she could, that there was no such deed executed. But her proof did not satisfy the trier of the fact. We find no error in the record.

The judgment is affirmed. All concur.

CHICAGO HERALD CO. v. BRYAN.

(Supreme Court of Missouri, Division No. 2.
Jan. 31, 1906.)

RELEASE — JOINT TORT-FEASOR — SATISFACTION OF INJURY.

Where plaintiff delivered his notes to a corporation to discount for plaintiff, and the corporation intrusted the discounting to defendant, who effected such purpose, but converted the proceeds, and the corporation made a settlement with plaintiff, fully satisfying the injury, plaintiff could not subsequently maintain an action against defendant.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by the Chicago Herald Company against William S. Bryan. From a judgment in favor of plaintiff, defendant appeals. Reversed.

S. T. G. Smith and Thos. S. Meng, for appellant. Selden P. Spencer, for respondent.

GANTT, J. This suit was instituted in the circuit court of the city of St. Louis, October 13, 1902, by the Chicago Herald Company, an Illinois corporation. The petition alleged: That on September 23, 1902, the plaintiff delivered to N. D. Thompson three promissory notes, dated October 1, 1902, payable January 2, 1903, aggregating \$10,967.40; all of said notes being made by plaintiff to the order of N. D. Thompson Publishing Company. That said notes were delivered to Thompson to be discounted by the publishing company and proceeds returned to plaintiff for the purpose of paying certain other notes due October 1, 1902, aggregating \$10,800. That the publishing company failed to discount the notes and delivered the same to defendant, who represented that he would have the same discounted and return the money to Thompson to be forwarded to the plaintiff. That defendant did have the notes discounted and received the proceeds and wrongfully converted the same to his own use. That plaintiff demanded of defendant the delivery of said money on October 10, 1902. Plaintiff asked judgment for the sum of \$10,967.40, with interest from October 1, 1902. The second amended answer, upon which the case was tried, admits that plaintiff executed the notes to the publishing company as alleged, and that the same were delivered by the publishing company to defendant, and denies all the other allegations in the petition. The answer further stated that the notes were negotiable and payable to the order of the publishing

company, and that the publishing company indorsed the same before maturity and delivered the same to defendant to be indorsed by him and sold, and that he did indorse and sell said notes, and credited the proceeds to an indebtedness of the publishing company to him without notice of any interest of plaintiff therein. The answer further set up, in bar to the action, that the publishing company had settled with plaintiff in full for any and all claims which they might have either to said notes or their proceeds. The answer further states: That since the time of said settlement this action has been prosecuted in the name of the plaintiff, but solely and entirely by the publishing company, and for the use and benefit of the publishing company. That in 1899 a contract was entered into between the publishing company and defendant for the publication of a book called "Our Island Possessions," under which contract the profits arising from the sales of said publication were to be divided between defendant and said publishing company, in proportion of one-third to defendant and two-thirds to the publishing company. That continually since the date of said contract the publishing company had been engaged in the sale of said publication, and had realized therefrom, after deducting the cost thereof, profits amounting to the sum of \$150,000, to one-third of which defendant was entitled, and which amount was due and owing from the publishing company. That the publishing company was insolvent, and that defendant could not realize from it the money so due him by the ordinary process of law. The answer further prayed that an accounting might be had to determine the amount due defendant on account of said profit sharing contract. The answer further prayed that the indebtedness from the publishing company to defendant on account of said contract should be taken and treated as an offset against the claim for the proceeds of the notes sued for in this case. The reply to this answer was a general denial. The case was heard on March 11, 1903, before the court.

At the hearing the plaintiff produced as a witness A. A. McCormick, secretary and general manager of the Chicago Herald Company, who testified: That the Chicago Herald Company had been buying of the publishing company large quantities of the publication known as "Our Island Possessions." That the books were purchased on 12 months' time, the first 6 months to be without interest and the next 6 months with interest. That from time to time, as purchases were made, six months' notes were to be given, without interest, and as the maturity of these notes approached plaintiff was to deliver to the publishing company other notes of like amount, to be discounted by them and the proceeds returned in time to be applied to the payment of the notes first maturing. That in accordance with this

arrangement the plaintiff had given certain notes to the publishing company for book purchases in April, 1902, these notes aggregating \$10,800. That the notes in controversy were delivered to Thompson in September, to be by the publishing company discounted and the proceeds returned to plaintiff in time to be applied to the payment of the original notes. The witness further testified that on the day the notes were discounted by the defendant, or the day after, the publishing company notified the plaintiff of the fact and turned over to plaintiff, in Chicago, 4,000 sets of the publication called "Our Island Possessions," being of value sufficient to cover the amount of the notes in controversy, as security for the claim of plaintiff for the proceeds of the notes in controversy here, which proceeds plaintiff was entitled to receive from the publishing company, but did not receive. That plaintiff had been buying these books from the publishing company from a period commencing about January 1, 1902, and that it continued to purchase them up to about the end of December, 1902, covering a period of approximately one year. That in December, 1902, a settlement was had between plaintiff and the publishing company covering their book purchases up to that time. That in this settlement the publishing company was given credit for all the "Island" books which had been delivered to plaintiff, including the 4,000 sets delivered on October 7, or 8, 1902, as security. That the publishing company was charged with the full amount of the proceeds of the notes in controversy here, and that plaintiff gave to the publishing company a note for the balance due it, and that the account between plaintiff and defendant was closed on plaintiff's books. That Mr. N. D. Thompson was present at this settlement and consented thereto and approved of the same. That it was further agreed that whatever amount plaintiff might be able to realize out of this suit should be turned over to the publishing company and the suit should be prosecuted at the expense of the publishing company. Mr. McCormick also testified that at the time the "Island" books were delivered to plaintiff as security, which was five days prior to the institution of this suit, it was agreed between plaintiff and the publishing company that all of the expenses of the litigation to recover the proceeds of these notes from defendant should be borne by the publishing company. That this was the agreement from the beginning. That Mr. Thompson had selected the attorneys to be employed in the matter. The witness further testified that Judge Spencer, who appeared for the plaintiff at the trial of the cause, did not really represent the Chicago Herald Company in this litigation, although he afterwards stated that he had written a letter which was offered in evidence authorizing Judge Spencer to appear in this cause

on behalf of plaintiff, provided, however, that plaintiff should be at no expense whatever for his services. The witness also testified that the three notes discounted by W. S. Bryan were each indorsed by the said W. S. Bryan.

Plaintiff also produced N. D. Thompson as a witness, who testified as to the sales of the "Island" books to the Chicago Herald Company. He testified: That the business amounted to \$20,000 a month. That Mr. Bryan, the defendant, was interested in the contract with the Chicago Herald Company and was as familiar with its terms as the witness. That when the notes had been delivered to him by the Chicago Herald Company in September he had attempted to have them discounted in Chicago through brokers there. That these brokers had agreed to place the paper to the amount of \$100,000, but had stated that they were unable to discount this paper, giving as a reason a monetary flurry at the time in Wall street. That the notes were then sent to St. Louis, and that he attempted to discount them through brokers there, and also with a party in East St. Louis. That his bank had told him that they had enough Record-Herald paper and did not want any more of it. He had therefore defaulted in his obligation with the plaintiff to deliver them funds on or before October 1st with which to take up the maturing notes. He stated that, while matters stood this way, Mr. Bryan called upon him at his office and he explained the situation to him. That Mr. Bryan said that he could have the notes discounted at his bank. That, after another ineffectual attempt by the witness to have the notes discounted himself, when Mr. Bryan called a few days later he was given the notes. Thompson says that he told defendant that he was very anxious to obtain the proceeds that day to send them to plaintiff, and that Bryan agreed to give him a check for the proceeds that day if it was possible to get them through the bank; that the next he heard from Mr. Bryan was a letter from his attorney, which was offered in evidence, in which it was stated that Mr. Bryan had discounted the notes and had applied the proceeds on account of the indebtedness existing to him from the publishing company on account of the profit-sharing contract for the "Island" publication. Plaintiff also offered in evidence the original answer filed by defendant, and also the first amended answer. These answers admit the execution of the notes by plaintiff to the publishing company, and that said notes were indorsed and delivered by the publishing company to defendant, and that defendant indorsed and delivered the same to the National Bank of Commerce in St. Louis. There are no other admissions in these answers further than are contained in the second amended answer, upon which the case was tried. There was no evidence offered to show the

amount of the proceeds of the discount of the three notes in controversy.

Defendant offered in evidence the contract, of date March 29, 1899, between defendant and the publishing company for the publication of the book known as "Our Island Possessions." This contract provided that the work should be written and compiled by defendant, who was also to supervise the mechanical processes of the publication of the same and see it through the press; that the book was to be published and put on the market by the publishing company; and that the profits arising from the sale thereof were to be divided between defendant and the publishing company in the proportion of one-third to defendant and two-thirds to the publishing company. This contract was excluded by the court on plaintiff's objection and over defendant's exception. Defendant proved, upon cross-examination of N. D. Thompson, that a petition in bankruptcy had been filed against the publishing company October 9, 1902; that a proposition of compromise was gotten up between the company and its creditors, under the witness's supervision; that the condition of the company at the time of the trial was about the same as in October, 1902. Defendant also offered in evidence the composition agreement between the publishing company and its creditors, providing for the settlement of its indebtedness in monthly notes for 50 per cent. of the face of its obligations. This was excluded on plaintiff's objection and over defendant's exception, as well as other testimony offered to prove the insolvency of the publishing company. Defendant offered to prove by W. F. Ryan, an expert accountant who had examined the books of the publishing company with reference to the amount due by it to W. S. Bryan on account of the "Island" publication, that according to the books of the publishing company it was indebted to defendant in a sum exceeding the amount sued for in this case on account of his share of the profits of the "Island" publication. The books of the publishing company were in court and were offered in evidence in connection with this expert testimony. This testimony was objected to by plaintiff on the ground that it was immaterial and irrelevant, as the publishing company was not a party to this cause, and because defendant had an adequate remedy against the publishing company. The objection was sustained, and the testimony excluded, over the defendant's exception.

Defendant asked a peremptory declaration of law to the effect that the finding of the court must be in his favor, which was refused. Defendant also asked a declaration to the effect that, as the proof showed that the plaintiff was not the real party in interest, the finding must be for defendant. Defendant also asked a declaration that, if the notes had been delivered by the publish-

ing company to defendant to be discounted in bank and defendant had indorsed the same and become liable for the payment thereof, then the finding must be for the defendant; also declarations to the effect that, if a settlement had been made between the publishing company and plaintiff for the proceeds of the notes in controversy, wherein plaintiff had received full satisfaction of the amount of said proceeds, then this was a satisfaction and discharge of plaintiff's cause of action, and that no recovery could be had. These declarations were refused over the exception of defendant. The court rendered judgment for the plaintiff for the sum of \$11,261.75, being the full amount of the face of the three notes and interest on said notes up to the time of the rendition of the judgment. Defendant in due time filed his motion for a new trial, in which his objections and exceptions as hereinbefore set out were renewed, which motion being overruled, defendant excepted to the ruling, and an appeal was taken to this court.

1. At the date of the commencement of this action the plaintiff unquestionably had a cause of action against defendant for the proceeds of its notes, which it had intrusted to the N. D. Thompson Publishing Company for the purpose of having the same discounted and the proceeds forwarded to plaintiff to meet plaintiff's notes which fell due October 1, 1902, pursuant to the contract between plaintiff and the Thompson Publishing Company. The evidence leaves no doubt whatever that, when defendant received the notes from the Thompson Publishing Company, he was fully cognizant of the arrangement between plaintiff and the Thompson Publishing Company as to the application of the proceeds of the notes when they should be discounted, and that defendant, moreover, expressly undertook and agreed with the Thompson Company to discount the notes and send or turn over the proceeds of the same, on the next day, to the Thompson Publishing Company to be forwarded to plaintiff. He knew the Thompson Publishing Company was not the owner of the notes and would not be entitled to the proceeds. Having discounted the notes and obtained the proceeds thereof, as between him and plaintiff, defendant in these circumstances was liable directly to plaintiff for the proceeds of the notes, and when he undertook to and did apply the same to his own use, by crediting the amount on his account against the Thompson Publishing Company, he was guilty of an unlawful conversion thereof, and plaintiff had the right to elect to proceed directly against defendant for the unlawful conversion of the proceeds of the notes. That an action might also have been maintained by the plaintiff against the N. D. Thompson Publishing Company for the tort of the defendant, its agent, committed within the scope

of the business intrusted to him, on the principle of respondeat superior, is also clear, even though it is obvious the publishing company was not willingly a party to the unlawful conversion. There can be little or no doubt that the Thompson Company recognized its liability for the misfeasance of defendant, since it immediately advised plaintiff of the unlawful conduct of defendant and at once turned over 4,000 sets of the "Island" books to secure the plaintiff against loss by reason of defendant's unlawful conversion. While the plaintiff had, at the commencement of this suit on October 13, 1902, a clear right of action against the defendant for the proceeds of its notes converted by him to his own use without right or authority, we are brought to the contention of defendant that by the subsequent conduct of plaintiff and the N. D. Thompson Company, in December, 1902, the only loss which plaintiff could possibly have sustained by the conduct of defendant was satisfied by the N. D. Thompson Publishing Company assuming the full responsibility for the misappropriation of plaintiff's notes and charging itself therewith in a settlement with plaintiff, and that, as plaintiff has sustained but a single injury, to wit, the loss of the proceeds of its notes, and this loss having been satisfied, plaintiff cannot now recover a second time for the same injury.

It is settled law in this state that a release of one of two joint tort-feasors releases the other. *Hubbard v. Ry. Co.*, 173 Mo., loc. cit. 255, 72 S. W. 1073. But it is insisted that the Thompson Publishing Company and defendant were not joint tort-feasors and the above rule cannot be invoked. It may be conceded that, in strict law, the Thompson Company was not a joint tort-feasor with defendant, in that it did not knowingly or willingly consent to or connive at defendant's unlawful conversion of the proceeds; but is the rule above announced confined to joint tort-feasors in a strict sense? In other words, can plaintiff assert, as it did, a claim for satisfaction for the loss of the proceeds of its notes from the N. D. Thompson Publishing Company, and that company acquiesce in the demand and fully satisfy it, and after receiving this satisfaction be heard to say that the Thompson Publishing Company was in fact not liable to it, and therefore a satisfaction by it of the one injury is no bar to a suit by plaintiff against defendant for the same injury? Or, what is even more pertinent, in the light of the testimony that this action is being prosecuted wholly at the cost of the Thompson Publishing Company and in fact for its sole benefit, can that company be heard to say it was not liable for the proceeds of the notes, but satisfied the same in full, and that plaintiff can still maintain its action, for the use of the Thompson Company, for the same injury? We think the rule has been given a much more

extended application, and applies to torts for which an injured party has an election to sue one or more parties severally. It is clear that plaintiff assumed that the Thompson Publishing Company was liable for defendant's conversion of its notes, and the publishing company acquiesced in this claim. In *Hubbard v. Ry. Co.*, 173 Mo., loc. cit. 255, 72 S. W. 1073, this court approved *Ledy v. Barney*, 139 Mass. 394, 2 N. E. 107, in which it was said: "The rule that a release of a cause of action to one of several persons liable operates as a release to all applies to a release given to one against whom a claim is made though he may not in fact be liable. The validity and effect of a release of a cause of action do not depend upon the validity of a cause of action." In *Brown v. Cambridge*, 8 Allen (Mass.) 474, it is said: "The same doctrine applies to all joint torts, and to torts for which the injured party has an election to sue one or more parties severally. Where, for example, a master is liable for the tort of his servant, a satisfaction from one discharges both, though they cannot be sued jointly." The liability of the principal for his agent's tort is not based upon any presumed authority in the agent to do the act, but upon public policy, and that it is more reasonable, when one of two innocent persons must suffer from the wrongful act of a third person, that the principal who has placed the agent in the position of trust and confidence should suffer than a stranger. *Andrews, J.*, in *Higgins v. Turnpike Co.*, 46 N. Y. 24, 7 Am. Rep. 293, said: "It is sufficient to make the master responsible civiliter, if the wrongful act of the servant was committed in the business of the master and within the scope of his employment; and this, although the servant, in doing it, departed from the instructions of his master. This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. If he employs incompetent or untrustworthy agents, it is his fault; and, whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim 'respondeat superior' applies, provided only that the agent was acting at the time for the principal and within the scope of the business intrusted to him." And this is the doctrine announced by this court in *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405.

On the face of plaintiff's petition it appears that plaintiff had delivered its three notes to the Thompson Company to discount for plaintiff, and the Thompson Company intrusted the discounting to defendant. Defendant in discounting the notes was acting strictly within the scope of his authority, but in neglecting to pay over the proceeds

to the Thompson Company and in converting the proceeds defendant was guilty of an actual misfeasance, for which the Thompson Company, his principal, was liable to plaintiff, within the rule first announced. 1 Eng. & Amer. Ency. 1151, 1152, subsec. 6. When the plaintiff and the Thompson Company entered into a settlement of the injury thus suffered by the plaintiff by reason of the unlawful conversion of the proceeds of plaintiff's notes, and the Thompson Company fully satisfied plaintiff for said injury, plaintiff no longer had a cause of action for said injury against defendant, and this action could no longer be prosecuted by plaintiff against defendant for said injury. Having reached this conclusion, the question in regard to the equitable set-off or counterclaim of defendant against the Thompson Company and the accounting between the Thompson Company and defendant are not before us for adjudication at this time, as the Thompson Company is not a party to this action and the plaintiff is in no wise interested in their adjustment.

Our conclusion is that plaintiff has received complete satisfaction of the injury it has received for the unlawful conversion of its notes by defendant, and the instruction in the nature of a demurrer to the evidence should have been sustained. For the refusal to so declare the law, the judgment of the circuit court is reversed.

BURGESS, P. J., and FOX, J., concur.

CHICAGO HERALD CO. v. BRYAN.
(BRYAN, garnishee).

(Supreme Court of Missouri. Division No. 2.
Jan. 31, 1906.)

1. APPEAL — GARNISHMENT — JUDGMENT AGAINST PRINCIPAL DEFENDANT—REVERSAL—EFFECT ON APPEAL BY GARNISHEE.

A judgment against a garnishee must be reversed on his appeal, where the judgment against the principal defendant has been reversed.

2. SAME—MATTERS NOT IN RECORD—EVIDENCE—JUDICIAL NOTICE—JUDICIAL RECORD.

The Supreme Court takes judicial notice of its own records.

Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by the Chicago Herald Company against William S. Bryan, with Nannie M. Bryan, garnishee. From a judgment in favor of plaintiff against the garnishee, she appeals. Reversed, and garnishee discharged.

S. T. G. Smith and Thos. S. Meng, for appellant. Selden P. Spencer, for respondent.

GANTT, J. This is a proceeding by garnishment instituted by summoning Nannie M. Bryan as garnishee, on the execution on the judgment rendered in favor of the plaintiff

against William S. Bryan in the circuit court of the city of St. Louis, on the 23d day of March, 1903, for \$11,261.75. Interrogatories were filed by the plaintiff to the garnishee as to whether she was indebted to the defendant, or had any money, property, or effects of the defendant in her possession. Garnishee was also specifically asked as to whether she had, on or about October 7, 1902, received from the defendant approximately \$10,967.40, and, if so, under what circumstances and for what purpose. The garnishee answered, denying specifically any indebtedness to the defendant or that she had any of his property in her possession. The answer stated that she had, on or about October 7, 1902, received from the defendant the sum of \$10,806.53 in cash, in payment of the indebtedness owing to her from the defendant. A denial of the garnishee's answer was filed, in which plaintiff alleged that on October 7, 1902, defendant was intrusted with certain negotiable promissory notes belonging to plaintiff, which defendant agreed to take up to the National Bank of Commerce, in the city of St. Louis, and have discounted and to return the proceeds to the N. D. Thompson Publishing Company; that defendant had the notes discounted at said bank and received the proceeds, amounting to \$10,967.40, and appropriated the same to his own use; and that judgment for that amount together with interest and costs, had been rendered against defendant in favor of plaintiff in the circuit court of the city of St. Louis, to enforce which judgment this garnishment was issued. Plaintiff further alleged that defendant had admitted that he turned over the money to the garnishee, and claimed that it was turned over to her in payment of some indebtedness from him to her. It was further alleged that the garnishee had full knowledge that the money thus delivered to her by the defendant was not the property of said William S. Bryan, and that he had no title thereto. To this denial the garnishee filed a reply, denying each and every allegation therein contained. On the issues thus framed a trial was had on June 18, 1903, and a verdict was rendered in favor of the plaintiff against the garnishee for \$10,800. On motion of the plaintiff, the garnishee was ordered to pay the money into court on or before June 22, 1903. Thereupon motions for new trial and in arrest of judgment were filed in due time, which were heard and overruled, and an appeal was granted to this court.

On the trial, over the objection of the garnishee, the plaintiff was permitted to show the facts set out in the principal case of Chicago Herald Company v. William S. Bryan (already determined at this term) 92 S. W. 902, and in addition thereto that the said W. S. Bryan, after discounting the notes, took the money which he received for the notes and placed same in a package, and took the package and turned it over to Mr.

W. N. McConkin. Several days thereafter the garnishee, Mrs. Bryan, called upon Mr. McConkin and received the package from him, and the money was then counted out and turned over to Mr. McConkin's firm as a loan. Afterwards it was returned to the garnishee in cash. There was evidence, also, on the part of the garnishee, in a deposition taken by the plaintiff, that this money was turned over to her by her husband as a credit for moneys that he owed her; that at that time he was indebted to her in the sum of \$16,000, which was partly evidenced by a note for \$3,000, which was offered in evidence, and also by an assignment of certain interest in Kentucky lands to secure a further indebtedness of \$5,000 and interest. She testified that the money that she had loaned Mr. Bryan had been inherited by her from her father and mother; that at the time of her mother's death she inherited a half interest in certain real estate in the city of St. Louis, on Seventh street between Olive and Pine, which was sold for \$46,000, of which she received \$23,000; that her husband had not paid her anything on this indebtedness, except \$560 paid as interest at various times, beginning June 1, 1895. Instructions were given on behalf of the plaintiff, to which the garnishee duly excepted, and instructions were asked by the garnishee, which were refused, to which she saved her exceptions.

The appeal in this case presents some exceedingly interesting questions, among others, whether a plaintiff by garnishment process can recover of the garnishee his own property or its value, and whether he is not, by the statute itself, restricted to subjecting the property or the debts of the garnishee to the defendant to the satisfaction of his judgment. Other propositions are also ably argued and presented by learned counsel, but we are confronted at this time with the fact that this court has reversed the judgment in favor of the plaintiff against the defendant without remanding the cause, and that, therefore, there is no judgment left to support the execution under which the garnishee in this case was summoned and required to answer. Garnishment under our laws is one of the modes pointed out by the statute by which the execution is executed, and is not a new suit. It is an incident or an auxiliary of the judgment, and a means of obtaining satisfaction of the same by reaching the defendant's credit or property. As the garnishee must make his answer in the court whence the execution issues, it alone has exclusive control over its process. As the judgment upon which this garnishment was issued has been reversed by this court, and the appeal in the garnishment is before us, this court must take notice of its own record, and it thus appears to us that in no event can the garnishee be held. Because there is no longer any judgment to sustain

the garnishment, it becomes wholly unnecessary to determine the rightfulness of the judgment obtained by the plaintiff against the garnishee. It has been ruled in various cases that a garnishment proceeding cannot be based on a void judgment against a defendant. *France v. Evans*, 90 Mo. 74, 2 S. W. 141.

In *Mitchell v. Watson*, 9 Fla. 160, it was held that the judgment against a garnishee in a suit commenced by attachment is annulled by the dissolution of the attachment, even after plea pleaded; the court saying: "The judgment against the garnishee, growing out of the attachment and being a mere incident of it, must necessarily fall with the attachment on which it is based. After it has been adjudged that a party has wrongfully and illegally sued out his attachment, it would be inconsistent to say that he shall nevertheless hold on to all the fruits he may have attempted to secure by such wrongful and illegal act." The law everywhere is that when a judgment is reversed the defendant in the judgment is entitled to be restored to all that he has lost. In *Withington v. Southworth*, 26 Mich. 381, the Supreme Court of Michigan, through Judge Cooley, said: "The writ in this case brought up the proceedings in an ancillary proceeding by garnishment. We think, if those were to be reviewed, a separate writ should have been sued out. It is not important, however, as those proceedings must fall to the ground when the judgment in the principal case is set aside." In *Clough v. Buck*, 6 Neb. 343, the Supreme Court of Nebraska said: "This process of garnishment is authorized when there is a judgment upon which an execution has been issued and returned unsatisfied for want of property whereon to levy and collect the debt, and therefore the whole proceeding must be supported by a judgment in esse. And if, after such process has been had, the judgment is reversed, set aside, or vacated, the execution falls with it, and the garnishment becomes wholly dissolved, for there is nothing left to support either the one or the other." In *Rowlett v. Lane*, 43 Tex. 274, it was ruled that the garnishee's liability is dependent upon the judgment rendered against the defendant. The reversal of such judgment annuls the judgment against the garnishee in the same proceedings. In *Hammett v. Morris*, 55 Ga. 644, it was said: "A judgment against a garnishee is ancillary to and dependent upon the judgment against the principal debtor, and satisfaction of the principal judgment extinguishes the judgment against the garnishee."

The judgment of the circuit court of St. Louis, upon which this garnishment is based, having been reversed at this term of this court, there is nothing left to sustain the judgment against the garnishee from which she has appealed to this court; and, taking

judicial notice of our own records of such reversal, it must be ruled that the judgment against the garnishee, Mrs. Bryan, must be reversed, and the garnishee discharged, without any examination into the exceptions saved on the trial of the garnishment.

Judgment reversed, and garnishee discharged.

BURGESS, P. J., and FOX, J., concur.

MORRIS v. KANSAS CITY et al.

(Kansas City Court of Appeals, Missouri.
Feb. 5, 1906. Rehearing Denied March
8, 1906.)

NEW TRIAL—GROUNDS—VERDICTS AGAINST EVIDENCE—DISCRETION OF COURT.

Whether or not there is any conflict in the evidence, the trial judge has a supervisory power over verdicts, and may, in the exercise of a sound discretion, affirm or set them aside in the interest of justice, and should do so if they are against the preponderance of the evidence or are for the wrong party as a matter of law.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 9, 10, 130.]

Appeal from Circuit Court, Jackson County; Shannon C. Douglass, Judge.

Action by John H. Morris against the city of Kansas City and another. From an order setting aside a verdict and judgment for defendants and granting a new trial, defendant named appeals. Affirmed.

Edwin C. Meservey, City Counselor, and W. H. H. Platt, Associate City Counselor, for appellant. Charles R. Pence, for respondent.

BROADDUS, P. J. The plaintiff, Morris, brought this suit, as the husband of Sarah H. Morris, to recover damages sustained by him on account of injury to his said wife, the result of a fall into an unguarded excavation in a public street of the city. The wife had previously recovered judgment for her injury against these defendants in the circuit court of Jackson county, which had been paid. The plaintiff pleaded said judgment as res adjudicata in respect to the injury to his wife, the negligence of defendants, and the absence of contributory negligence on her part. The trial was conducted upon the theory that the judgment in the said suit of the wife established the defendants' liability, according to the holding in *Brown v. Mo. Pac. Ry. Co.*, 96 Mo. App. 164, 70 S. W. 527. And "every question of fact that could arise in the present case was determined in that, except as to the kind and quantum of damages to which the plaintiff was entitled."

Defendants contend that in addition to the injuries alleged in the suit of the wife were included in the petition herein injuries to her side and back. That could make no difference as to defendants' liability, and plain-

tiff was required to prove the allegation, and the matter was contested by evidence introduced upon the part of defendants. Its only effect was upon the question of damages. The verdict and judgment were for the defendants. Plaintiff filed a motion for new trial, which was sustained on the ground that "under the evidence and law, as declared by the court, the plaintiff was entitled to a verdict for some amount," being a ground assigned for a new trial.

Instruction No. 1, given for plaintiff, tells the jury that the judgment of the former suit of the wife establishes the negligence of defendants and the absence of contributory negligence on her part in relation to the injuries she received; and "that if the jury find that plaintiff is, and was, at the time of said injury the husband of said Sarah H. Morris, and that he has suffered any damage or incurred any expenses by reason of the injury to his said wife as defined in another instruction given, then your finding must be for the plaintiff." There was substantial evidence that the plaintiff had been deprived, by reason of his wife's injuries so received, of her services at his home, and that he had incurred expense for medical aid in caring for her. In fact, at least, the preponderance of the evidence was in his favor on that issue.

The defendants' grievance is that the plaintiff was irrevocably bound by the verdict of the jury, as they were the sole judges of the credibility and weight of the testimony; citing *Lovell v. Davis*, 52 Mo. App. 342, where it is held: "It was not error to tell the jury they were not bound to believe the declarations of witnesses, because such declarations were uncontradicted. They might believe or disbelieve them as it might appear from all the facts to be true or untrue." In *Seehorn v. American Nat. Bank*, 148 Mo. 258, 49 S. W. 886, it is held that "where allegations in the petition are denied by the answer, and evidence is introduced by the plaintiff to sustain the issue upon his part, the defendant is entitled to have a jury, or the court sitting as a jury, to pass upon the issues, although defendant offers no evidence at all." The rule thus announced is not without exceptions. In *May v. Crawford*, 150 Mo. 504, 51 S. W. 693, it is held that the court may on the uncontradicted evidence direct a verdict on the issue. The decisions of this state are not uniform on the question, but the case last cited and later decisions by this court appear to be founded on sound basis of reason.

But whether or not a party litigant has the right to the verdict of the jury in any given case, whether or not there was any conflict in the case, the trial judge has a supervisory power over such verdicts, and he may, in the exercise of a sound discretion, affirm or set them aside in the interest of justice. And while the appellate courts will not

set aside a verdict, even where it is against the great preponderance of the evidence, the trial court may, and ought to, do so. In a recent case in this court, not yet officially reported, it is held that, where the verdict is supported by uncontradicted evidence, this court will sustain the action of the trial court in setting it aside on the ground that it would not interfere with the action of the former in the exercise of a sound discretion. *First Nat. Bank v. Bennett et al.* (Mo.) 90 S. W. 417. See, also, *Pritchard v. Hooker* (Mo.; not yet officially reported) 90 S. W. 415. These cases reaffirm what is so well said in *Bank v. Hainline*, 67 Mo. App. 483. In this case, the great preponderance of the evidence was with the plaintiff. In fact, he was as a matter of law entitled to an instruction directing a verdict in his favor for some amount.

The court was right in setting aside the verdict, and its action is affirmed. All concur.

SIMS v. ST. LOUIS & S. RY. CO.

(St. Louis Court of Appeals. Missouri. Feb. 18, 1906. Rehearing Denied Feb. 27, 1906.)

1. RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Plaintiff, in an action for injuries sustained in a crossing accident, was guilty of contributory negligence, where the physical facts showed that if he had looked, he could have seen the car in time to have avoided the collision.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1043-1056, 1305-1310.]

2. SAME—DIRECTION OF VERDICT.

Where, in an action for injuries sustained in a crossing accident, the evidence showed plaintiff guilty of contributory negligence, and there was no evidence of willfulness or wantonness on the part of the motorman, a verdict should have been directed for defendant.

3. SAME—CONCURRING NEGLIGENCE.

Where the negligence of plaintiff injured in a crossing accident concurred with that of the motorman, plaintiff could not recover.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1084-1089.]

Appeal from Circuit Court, St. Charles County; Elliott M. Hughes, Judge.

Action by Alvin Sims against the St. Louis & Suburban Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

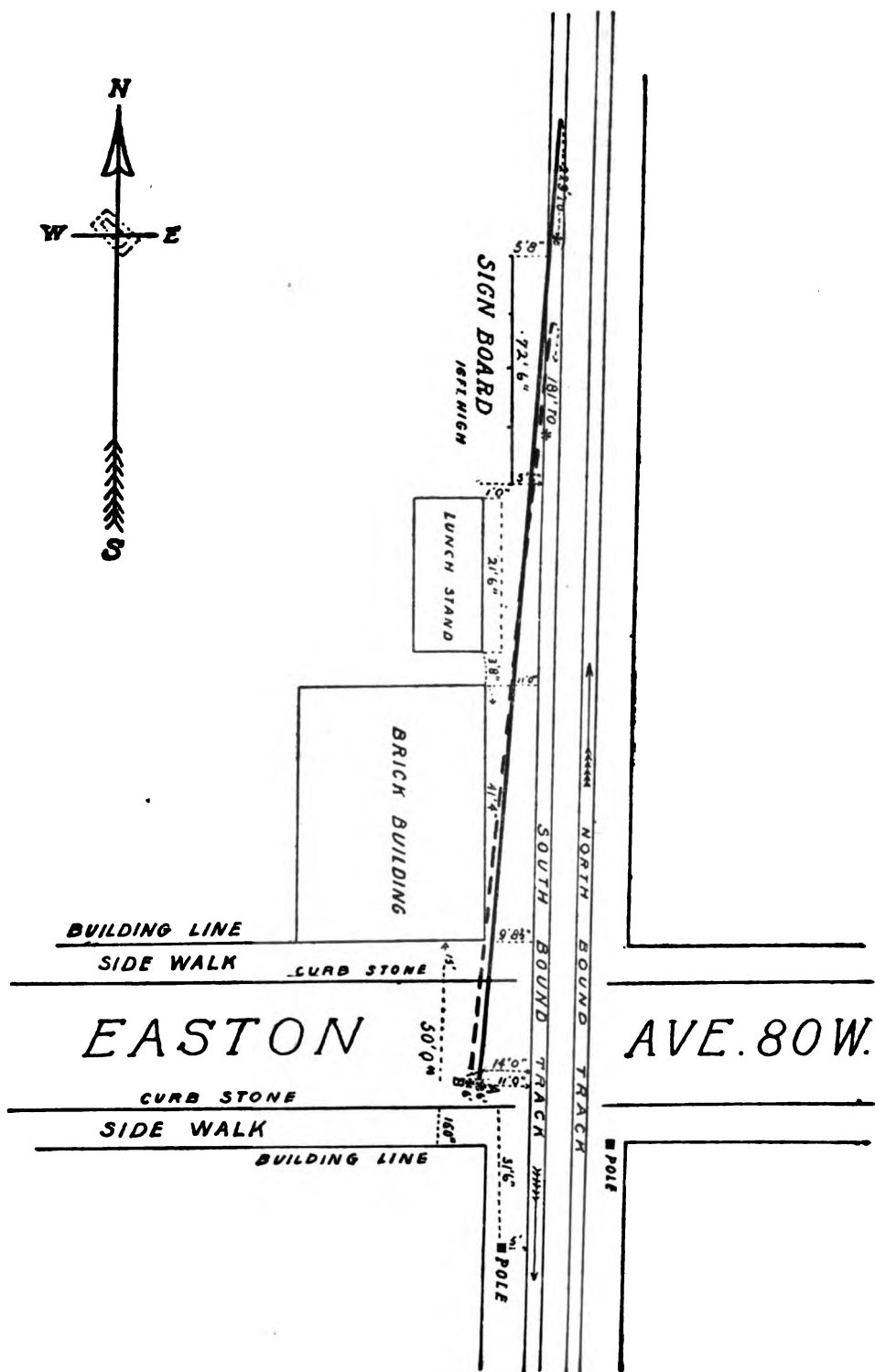
Jefferson Chandler, for appellant. R. H. Stevens and O. W. Wilson, for respondent.

BLAND, P. J. The action is to recover damages to property and for personal injuries, alleged to have been caused by defendant's negligence in running its car against the plaintiff's wagon. The specific charges of negligence were, first, running its car at a high and unlawful rate of speed, to wit, 30 miles an hour; second, failure to ring a bell or give any warning of the car's approach;

third, failure to stop the car after the defendant's motorman saw or, by the exercise of ordinary care, could have seen plaintiff's wagon crossing its track in ample time to have stopped the car and prevented the collision. The answer was a general denial and a plea of contributory negligence on the part of the plaintiff in carelessly failing to look and listen for a car. The reply denied all new matter in the answer. The trial resulted in a verdict for plaintiff for \$1,200. A motion for a new trial was moved and overruled and judgment was entered on the verdict. Defendant appealed.

The evidence shows that about 1 o'clock in the morning of August 15, 1900, plaintiff was driving eastwardly along Easton avenue, in the city of St. Louis. Plaintiff testified that as he approached the point where the tracks of the defendant railway company crosses said Easton avenue, he was driving about three or four feet from the south curb of the street; that the street was rough and his wagon was loaded with farm produce; that he looked both ways, north and south, for a car, while his horses were traveling toward the track; that there were double tracks running north and south, and he was looking south when his wagon entered the west or southbound track, and as he turned to look north, he saw the car that struck him just about the building line on the north side of Easton avenue, coming at a very high rate of speed; that he was scared and did not have time to jump before his wagon was struck with such terrific force as to throw him about 40 feet from the wagon and against a post; that a shoe of one of his horses was jerked off and his wagon "smashed up"; that the wagon was struck almost immediately on the brake and hub of the hind wheel, the horses being on the east track; that by the force of the fall against the post, two of his ribs and his collar bone were broken and that he had not fully recovered from his injuries; that one of his horses was made seriously lame, and his wagon ruined. Plaintiff also testified that he did not hear the car or gong until he got on the south track, and that his sight and hearing were good. Plaintiff's evidence and the evidence of his witnesses, is that the car was running at a speed of from 25 to 30 miles an hour and that the gong was not sounded until within a few feet of the wagon.

Plaintiff employed and assisted Edgar Rapp, a surveyor, to survey and make a plat of the crossing and surroundings. The plat sufficiently exhibits the physical facts and we insert it here (in condensed form) for the reason they are important in view of the fact that on them and the plaintiff's own evidence, the defendant rests its contention that the court should have given its instruction in the nature of a demurrer to plaintiff's evidence, asked at the close of his evidence and again at the close of all the evidence.



On the plat are red stars (A and B) indicating two positions of plaintiff's wagon as he drove on the crossing and the distance from these points (11 and 14 feet, respectively) to the outside rail of defendant's tracks. The red lines¹ running north from these two points show the line of vision and the distance on defendant's tracks where a car could have been seen. From point B a car could have been seen 180 feet north, and from point A 229 feet. Rapp testified that point A represented, by actual test, the distance a man would be, seated on a wagon, when his horses' heads would be over the west rail of the track, and point B the distance before his horses' heads had quite reached the track. Plaintiff testified that from point A, looking north on the track, there was no obstruction and a car could be seen 229 feet and from point B a car could be seen 181 feet to the north; that, ordinarily, a car could be heard 150 feet, and the gong, if sounded, 300 feet. Plaintiff described his approach to the tracks as follows: "As I approached the suburban track I was going slow, from the fact the bulk of my load was on the top of the wagon, and tomatoes are very heavy, and I always had a horror in passing there, and I looked first one way and then another, and I heard no car and seen none until my horse was partially across the track, or I was just on the track, and I seen the car, I think, an instant before I heard the gong, and the man halloosed and I threw up my hands, and I thought I was going to be killed; just hadn't time to jump or do anything." Plaintiff further testified that he was looking south for cars, and after he saw the car coming from the north it did not seem to him it was any time, that could be reckoned in minutes, before his wagon was struck; that he kept looking, was turning his head from the south to the north, and then saw the car.

The evidence shows that defendant's tracks, running north from Easton avenue, are straight and the grade ascending, and in daylight, a wagon on the crossing could be seen for a distance of 800 or 900 feet. There were three small lights on the avenue near the crossing; none right at the crossing, nor any large lights in the neighborhood. The motorman and conductor testified that the car was running at a speed of from five to six miles an hour. Plaintiff's evidence tends to show that a car running at that speed could be stopped in from 25 to 30 feet. The defendant's evidence tends to show that a car running 20 miles an hour could not be stopped in less than 200 feet. The evidence in respect to the distance a running car can be heard is conflicting. Defendant's wit-

nesses, three police officers, standing near the crossing at the time of the accident, testified that they heard the car two blocks north of the crossing. Plaintiff testified that he did not hear it at all. The motorman testified that he did not see the plaintiff until he was within 15 feet of him and then did everything in his power to stop the car. Defendant's evidence is that the car ran only a few feet after striking the wagon and merely pushed the wagon around. The plaintiff's evidence shows that, if he had looked north from either point A or B, he would have seen the car, but he continued to look south and did not look north for a car until his horses had crossed over and his wagon was on the west track of defendant's railway. His duty was to look both ways, and to look north at his earliest opportunity to see if there was a car coming from that direction; and his evidence, that he could not look in two directions at the same time, does not excuse him for his failure to look north when he should have done so. He could have changed the direction of his vision from south to north in the twinkling of an eye, and had he looked north from point B on the plat, according to his own evidence, he could have seen the car, if at that time it was within 181 feet of the crossing, and it is beyond doubt that had he looked north from point A on the plat, he could not have failed to see the car. To have seen the car from either of these points would have given him ample time to have stopped his team, and avoided the collision. On his own evidence, by which he is conclusively bound, plaintiff convicted himself of negligence which directly contributed to his injury, and there being neither allegation or evidence that the motorman willfully and wantonly ran his car on to plaintiff's wagon, the court should have granted defendant's peremptory instruction. *Guyer v. Railroad*, 174 Mo. 344, 73 S. W. 584; *Van Bach v. Railroad*, 171 Mo. 338, 71 S. W. 358; *Tanner v. Railroad*, 161 Mo. 497, 61 S. W. 826; *Holwerson v. Railroad*, 157 Mo. 216, 57 S. W. 770. But the plaintiff's counsel contends that contributory negligence is no excuse, if the defendant's motorman, by the use of ordinary care, could have avoided the injury; in other words, the last fair chance or humanitarian doctrine is invoked. That doctrine is that where A., after discovering that B. has carelessly exposed himself to danger, neglects to use ordinary care to avoid hurting him and inflicts injury upon B., as a result of his (A's) negligence, then A. is liable. This doctrine presupposes that B's careless exposure of himself to danger preceded the negligence of A., and it does not apply where the negligence of both parties is contemporaneous. Beach in his work on Contributory Negligence, at section 56, states the doctrine as follows: "The courts have usually adopted this form of expressing the

¹ The red lines are indicated on the plat by a heavy black line and a heavy black dotted line.

law in cases where the negligence of the plaintiff preceded that of the defendant in point of time, and it has more generally been applied where the defendant's negligence is the proximate cause of the injury. When the negligent acts or omissions of the parties to the action were contemporaneous, or, what is to say the same thing, when the catastrophe is the result of concurring or mutual acts of negligence, the plaintiff cannot recover damages. This is hardly more than a reiteration of the general rule of contributory negligence, but it is the form in which the rule is sometimes stated. Having now considered the legal effect of the plaintiff's negligence, both when, in point of time, it is prior to that of the defendant, and when it is contemporaneous therewith, we proceed to a discussion of the consequences of that negligence when it is subsequent to the negligent wrongdoing of the defendant." This section is approvingly quoted in *Holwerson v. Railroad*, 157 Mo. 226, 57 S. W. 772, and is in full accord with the decisions in *Guyer v. Railroad*, *Van Bach v. Railroad*, and *Tanner v. Railroad*, supra. The negligence of the plaintiff and of the defendant, if it was negligent, were contemporaneous and concurrent and the negligence of both directly contributed to produce the injury. In such circumstances the authorities are all one way that plaintiff cannot recover.

The judgment is reversed. All concur.

MCQUERRY v. METROPOLITAN ST. RY. CO.

(Kansas City Court of Appeals. Missouri. Feb. 5, 1906. Rehearing Denied March 3, 1906.)

1. CARRIERS—CARRIAGE OF PASSENGERS—CARRIER'S DUTY.

The duty of a carrier to exercise the highest degree of care to protect a passenger from assaults, whether offered by strangers or by the carrier's servants, continues until the passenger has left the vehicle in safety at his destination.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1123-1125.]

2. SAME—EJECTION OF PASSENGER—FORCE JUSTIFIED.

If it becomes necessary to eject a passenger because of his misconduct, no more force must be employed than is required to accomplish the removal.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1413, 1451.]

3. SAME—RULES—CONDUCT OF PASSENGER.

A passenger is bound to observe and obey reasonable rules established for the convenience and comfort of other passengers, and, on his failure so to do, his ejection is warranted.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1439-1442.]

4. SAME—REASONABLENESS OF RULE—PROHIBITION OF SMOKING.

A prohibition of smoking in a street car is a reasonable rule.

5. SAME—EJECTION OF PASSENGER—CONTINUOUS ASSAULT.

Where a conductor in attempting to eject a passenger used excessive force, and assaulted the passenger, and followed him from the car, and ran after him, and, overtaking him, again assaulted him, there was a continuous assault, all of which was included within the exercise of excessive violence in the ejection.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1413, 1451.]

6. SAME—EJECTION OF PASSENGER—PROCURING PASSENGER'S ARREST.

A carrier was liable for a conductor's assault on a passenger, who had been ejected from the car, the assault being incident to an effort to procure the passenger's arrest.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1412.]

7. SAME—EJECTION OF PASSENGER—EXCESSIVE FORCE—ACTION—INSTRUCTIONS.

Where, in an action against a carrier, the petition charged that defendant's servants assaulted plaintiff, drove him from the car, and knocked him down upon the streets of the city, and there was evidence tending to show that the first assault committed by the conductor was all over when the plaintiff left the car, and that it was several minutes before the conductor started to look for an officer and as incident to such search committed another assault, it was error to instruct the jury in effect that they might find for plaintiff, either under the hypothesis that the assault was continuous, or that two separate assaults were made.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by Reuben McQuerry against the Metropolitan Street Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Boyle, Guthrie & Smith, for appellant.
John H. Lucas and Ohas. A. Loomis, for respondent.

JOHNSON, J. Action against a common carrier to recover damages alleged to have been sustained by a passenger as the result of the breach of the contract of carriage. Plaintiff recovered judgment in the sum of \$100, actual, and \$2,500, punitive damages. Motions for new trial and in arrest of judgment were filed by defendant, and, upon hearing, sustained by the court on the ground that error had been committed "in giving plaintiff's instruction No. 6, and in refusing defendant's instruction No. 10." The cause is here on plaintiff's appeal.

The petition charges: "That on or about the 2d day of January, 1904, while the plaintiff was a passenger, having duly paid the usual compensation for carriage upon one of the lines of the said street railway lines of the defendant company, and at or near the corner of Main street and Missouri avenue in said city of Kansas City, the defendant, through its employes, the motorman and conductor in charge of such car, while in the discharge of their duties as servants of the defendant, violently assaulted, beat, bruised and wounded the plaintiff, striking and beat-

ing him with their fists, and with metal objects, and driving him from said car, and knocking him down upon the streets of said city, and chasing him along and over the streets of said city, and finally, while he was fleeing from such assault and pursuit, shooting him in the lower part of the back with a revolver; that the ball from said revolver entered the plaintiff's body about one and one-half inches from the spinal column, just above the hip on the left side; that said ball is still in plaintiff's body and the doctors have been unable to extract the same; that as a result of said wounds so received, as aforesaid, the plaintiff suffers great bodily pain and mental anguish, and that his health is impaired, and that he is not capable of performing manual labor, as a result of said injuries, and that plaintiff is permanently injured on account of the matters and things above set forth, and has been damaged in the sum of ten thousand dollars (\$10,000). That such injuries so inflicted upon the plaintiff were inflicted violently, maliciously, wantonly, recklessly, and oppressively, by reason of which the plaintiff should recover from the defendant the additional sum of ten thousand dollars (\$10,000.00) as exemplary, punitive, and vindictive damages."

The evidence introduced by plaintiff, consisting chiefly of his own testimony, discloses this state of facts. Plaintiff, a young man 24 years old, was employed as a cook in a restaurant near Fourth and Main streets in Kansas City. On the day of the occurrence in question, he quit work at 8 o'clock in the evening, and went to his home in the southeast part of the city, arriving there at about 8:30 o'clock. His brother-in-law, with whom he lived, had left word for him to come to a certain saloon, some five or six blocks away, and plaintiff immediately repaired to the saloon, where he met his brother-in-law, and each took a drink of whisky. After remaining there a few minutes, they went to another saloon near Eighteenth street and Lydia avenue, where they played pool and occasionally drank beer until near 12 o'clock. They then concluded to go to another saloon near Fourth and Main streets, where plaintiff knew a bartender, and, for that purpose, boarded a west-bound car on defendant's Jackson avenue line. They paid their fare, and all went well until they reached a point some two or three blocks away from their destination, when plaintiff, who was seated in the car near the front, lighted a cigarette and began smoking. There were four or five other passengers in the car, one of them a woman. It was in the winter; the windows of the car were closed, and plaintiff knew it was against the rules of the company for him to smoke in any part of the car, except in the rear vestibule. The conductor approached, grabbed him by the shoulder, and roughly said, "You will have to go in the vestibule with that." Plaintiff rejoined, "Which way is the vestibule?" though he

knew where it was, and kept on smoking; but says he was just starting to get up when the conductor struck him in the face. A fight ensued, blows were exchanged, and the conductor was knocked down. In the meantime, the car was stopped near the corner of Fifth and Main streets, and the motorman entered the mêlée at about the time the conductor was floored, and dealt plaintiff a blow on the head with an iron instrument called a "sand punch." Plaintiff, thereupon, retreated to the rear end of the car, left it, walked eight or nine feet to the curbstone, looked around, and saw the conductor armed with an iron switch rod in the act of jumping from the car for the purpose, as plaintiff thought, of renewing the affray. Plaintiff then ran first north on Main street to the corner, and thence east to the alley, with the conductor in hot pursuit. Finding his enemy was about to overtake him, plaintiff turned at bay just in time to ward off with his left arm a blow from the iron rod aimed at his head, and retaliated with a blow from his fist, that landed upon the conductor's face and felled him to the ground. Plaintiff then became the aggressor, but before he could inflict any injury to his prostrate foe, the latter succeeded in drawing a revolver from his pocket, seeing which, plaintiff took to his heels, but in his flight was shot in the back by the conductor and seriously injured.

The conductor testified that when he discovered plaintiff was smoking in the car, he went up to him and in a courteous manner informed him that it was against the rules to smoke and requested him to go to the vestibule. Plaintiff rejoined, "Where is the vestibule?" The conductor replied, "It is out in the rear end of the car here." Plaintiff exclaimed, "Oh, I don't know." The conductor says plaintiff's manner was "mighty haughty" and he kept on smoking without making any show of compliance with the request. The conductor then said to him, "My friend, you will have to smoke out in the vestibule, if you want to smoke." Plaintiff continued smoking, and the exasperated conductor knocked out the cigarette, whereupon plaintiff "rose right up fighting," knocked the conductor down, and was engaged in pummeling him when the motorman came to the rescue, hit plaintiff with the sand punch, and ordered him to "get off the car." Plaintiff immediately left the car, and went to the sidewalk, where he stood for a few minutes. The conductor got up, looked for and found his cap, and went to the rear vestibule with no thought of renewing the fight. It then occurred to him that it was his duty to have the plaintiff arrested and he proceeded to leave the car for the purpose of finding an officer. Plaintiff then started to run away, and, fearing that he might escape, the conductor entered into pursuit for the purpose of keeping plaintiff in sight until he could encounter an officer. Seeing that he was pursued, plaintiff suddenly stopped,

turned, and advanced upon the conductor, knocked him down, cut him in the face with a knife, and was endeavoring to inflict further injury upon him when the conductor drew his revolver and "took a shot" at plaintiff, who, in the meantime, had turned and fled.

The two instructions, which the court found were erroneously ruled upon, are as follows: No. 6, given for plaintiff: "Even though you may believe from the evidence that the obligation of defendant to plaintiff as a passenger [if any] had terminated upon plaintiff's leaving said car, still if you believe from the evidence that after plaintiff had left said car the conductor of said car pursued the plaintiff for the purpose of arresting him because said conductor believed plaintiff had violated the law while on said car, and in such pursuit wrongfully shot plaintiff in the back, then if you further believe from the evidence that the conductor in so doing was acting within the scope of his employment as a servant of defendant, then the defendant is responsible for his wrongful acts [if any]. In determining whether such wrongful acts [if any] of such conductor were committed within the scope of his employment, you are instructed the defendant is liable for all acts committed by such conductor while in the performance of the work entrusted to him, whether lawful or unlawful, which are within the scope of the authority conferred upon him either expressly or by fair implication even though the specific act was not expressly authorized by defendant." No. 10, asked by defendant, the giving of which was refused. "If you find from the evidence that plaintiff and defendant's trainmen had a fight on the car of defendant at the time and place in question, and that soon thereafter plaintiff got off of said car and ceased to be a passenger thereon, and after he got off of said car the conductor of defendant, for the purpose of finding an officer to procure the arrest of plaintiff, left the car and followed plaintiff, and after plaintiff and said conductor had gone some distance away from said car they had an altercation, and said conductor shot plaintiff, then you are instructed that defendant is not responsible for said shooting, and plaintiff cannot recover any damages therefor, and your verdict will be for the defendant on that issue."

Not only is the duty upon the carrier to exercise the highest degree of care during the transportation of the passenger to protect him against assaults and outrages, whether offered by strangers or by the carrier's own servants, but that duty continues until the passenger has left the vehicle in safety at his destination. As to the acts of its servants, the duty of the carrier is that of an insurer. Its contract to carry safely implies an agreement for considerate and courteous treatment of the passenger by the carrier's servants. And if it becomes necessary for the carrier to eject the passenger before the end of his

transportation, because of the misconduct of the latter, no more force must be employed than is required to accomplish the removal of the passenger from the car. If the carrier fails in the performance of any of these duties, it is liable to the passenger for any injury thereby sustained. On the other hand, the passenger is duty bound to conduct himself in a decent and orderly manner. He should observe and obey the reasonable rules established by the carrier for the benefit of its service or for the safety, convenience, and comfort of its other passengers, and, if he refuses to do this, he forfeits his rights under the contract of carriage, and subjects himself to removal from the car. *Eads v. Metropolitan Ry. Co.*, 43 Mo. App. 536. It is not intimated, nor would the suggestion be entertained, that defendant's prohibition of smoking in its closed cars, which are used alike by all classes and conditions of people, is not a reasonable regulation. It is essentially for the comfort of the public, and we do not hesitate in saying, as a matter of law, that a passenger who persists in disobeying it, after his attention is called to it, deserves expulsion from the car. Plaintiff's own testimony admits of no other construction than that he knowingly and deliberately violated this rule, and was guilty of impertinent conduct after he had been asked to desist. Up to this point, plaintiff was clearly in the wrong, and defendant's trainmen would have been justified in ordering him to leave the car, and, had he refused, in employing force necessary to eject him. But the conductor, instead of following this course, according to his own admission, became a wrongdoer himself. We do not mean to say that a conductor must degrade his manhood and tamely submit to gross insult; but in serving the public and in performing his master's contract to treat passengers with all due consideration, he is expected to exercise some degree of self-restraint, and not to fly into a rage and misbehave at every impertinence from a passenger. His right and duty to eject a passenger on account of misconduct, not grossly insulting or offensive, does not justify him in assaulting the passenger, unless the resistance of the latter during his removal is of a nature to make physical violence an imperative necessity. When the conductor, instead of ordering plaintiff to leave the car, employed physical violence, plaintiff then became the injured party, and was justified in defending himself, and it does not appear that plaintiff used any more force than was required to free himself from his assailants. Defendant is liable for the wrongful acts of its agents and servants committed in the course and scope of their employment, and, under the conceded facts, must be held liable for the damages from the unjustifiable, though not entirely unprovoked, assault of the conductor and motorman in the car.

According to the testimony of plaintiff, the

conductor continued to be the wrongful aggressor after plaintiff left the car. His attack was continuous and persistent from the moment the first blow was struck until the shot was fired, for during that whole period he was actuated by the single purpose of inflicting immediate bodily injury upon plaintiff. The momentary pause that occurred while plaintiff was escaping from the car was not due to any relaxation in the conductor's purpose. So that when plaintiff left the car he did not alight in safety, as defendant agreed he should, but in imminent danger from defendant's servant, the same danger, too, but of increased potentiality, that threatened him in the car. He did not know, nor is it believable under his version of the facts, that the conductor was following him, not for the purpose of renewing the fight, but to procure his arrest. The conductor overtook him, aimed a deadly blow at him, and compelled him again to defend himself. From start to finish, the conductor, though twice defeated, kept after him with ferocious intent, and finally brought him down with a shot from his revolver. We have here every element of a continuous assault, and, as it began during the existence of the relation of carrier and passenger, and appears as a consistent and indivisible whole, the fact that part of it occurred on the car and part in the street does not affect the relation between the parties. The whole affray is included within the exercise by the carrier of excessive violence in ejecting a passenger, who had forfeited his right to be carried further, but who yet retained the right not to be subjected to unnecessary violence in his removal from the car. *O'Brien v. Transit Co.*, 185 Mo. 263, 84 S. W. 989, 105 Am. St. Rep. 592; *Flynn v. Transit Co.* (Mo. App.) 87 S. W. 560; *Wise v. Railway Co.*, 91 Ky. 537, 16 S. W. 351. But the conductor's testimony presents a situation radically different from that just reviewed, and defendant was entitled to have its statement of the facts fairly submitted to the jury, and to have the cause of action presented in the instructions confined within the limits of that pleaded in the petition. Plaintiff pleaded a continuous assault as the sole basis of his right to recover. The learned trial judge in giving plaintiff's instruction No. 6 enlarged the scope of the cause of action pleaded, and declined to correct the error when his attention was called to it by the asking of defendant's instruction No. 10. The jury was thus directed to find for plaintiff, either under the hypothesis that the assault was continuous or that two separate assaults were made; the first during the relation of carrier and passenger, and the second after the termination of that relation. The cause of action pleaded being based solely upon a tort committed by a carrier upon its passenger during the performance of the contract of carriage, a recovery

should not have been permitted for another injury inflicted by the carrier through the hand of its servant after the act of ejecting plaintiff from the car had been fully accomplished. According to the testimony of the conductor, the first fight was all over when plaintiff left the car, and he was free to go his way. He stood on the sidewalk near the car, and it was several minutes before the conductor started out to look for an officer. If this is true—and it was a question of fact for the jury—the duty of defendant to plaintiff as a carrier had ended before the conductor had renewed hostilities. And, if the second fight resulted from the conductor's effort to perform a duty incident to his employment—that is, to procure the arrest of a disorderly passenger after the latter's expulsion from the car—defendant would be liable for the wrongful act of the servant committed in the discharge of that duty, but upon an entirely different principle from that applying to an assault made by the servant upon the passenger during his transportation. One liability is founded upon the breach of the duty of an insurer, the other upon the breach of the duty one stranger owes another not to wrongfully injure him.

Considering the state of the pleadings and the conflict in the testimony noted, plaintiff's right to recover should have been restricted to the finding that the assault was continuous. We therefore conclude that the learned trial judge committed no error in granting defendant a new trial, and the judgment sustaining the motion therefor is accordingly affirmed. All concur.

ELLISON, J. As stated by Judge Johnson, the plaintiff deliberately violated a proper and reasonable rule of the company, and was impertinent when remonstrated with by the conductor. He testified that he knew he was "acting in absolute disregard of the rules and customs of the company." He thereby forfeited his right as a passenger, and became a trespasser, and the defendant's duty to him as a passenger ceased, and its duty to the public—to the other passengers—began. It was under no further duty as an insurer of a safe alighting of plaintiff. He testified that he started out that night to have "a time"—to have "a little fun"; and that he was drinking in several saloons and at time of the difficulty (about midnight) was on his way to another. It, therefore, may very well have been that the exigencies of the situation were such as to have compelled the defendant's servants to give him an unsafe alighting. The only obligation defendant was under to plaintiff was to use no more force than was reasonably necessary to put him off of the car, and it is from such standpoint that that branch of the case should be treated. The case of *Wade v. Met. Ry. Co.*, 43 Mo. App. 536, like the one before us, was where the plaintiff's own

testimony placed him in the position of having forfeited his rights as a passenger; while the case of *O'Brien v. Transit Co.*, 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592, on the plaintiff's testimony, called for a consideration of his rights as a passenger.

It appears from plaintiff's testimony in this case that when the fight in the car was over, he walked to the platform or vestibule, got off, walked eight or nine feet to the sidewalk, where he stopped, turned around, and leaned against an electric pole. He then saw the conductor standing on the back platform, and when he had stood leaning against the pole for about a moment the conductor got off the car with the switch bar in his hand, and he started to run. That the conductor pursued him to an alley where the second fight, ending with the shooting, occurred. It seems to me to be clear that when the plaintiff left the car and crossed over to the sidewalk and there stopped, that all duty to be performed by the conductor for defendant in the line of his employment had ceased, and defendant should not be held liable for anything done by the conductor thereafter; unless for the following consideration. It appears from the testimony of the conductor that it was one of his duties to have a person arrested, who conducted himself as he stated plaintiff did; and that in his getting off the car his purpose was to have an arrest made; and that in pursuing plaintiff, as he ran, he was engaged in performing a duty to defendant. If he was, then defendant would be liable for any improper and unlawful performance of that duty. But, as the first difficulty was a distinct affair in the pursuit of one purpose, and had ended, the second difficulty, in consequence of a different purpose, should be considered from the standpoint of that purpose.

In these suggestions, I have not considered whether plaintiff's petition covers such a case as I think the evidence makes.

LOWE v. MONTGOMERY.

(Kansas City Court of Appeals. Missouri.
Feb. 5, 1906. Rehearing Denied
March 3, 1906.)

1. TRUSTS—TRUSTEE—REMOVAL—GROUNDS—SUFFICIENCY.

The fact that a solvent trustee with ample bond deposited the money received as trustee in a bank in his individual name when his account was overdrawn, and did not keep any separate books of account of his trusteeship, and the fact that his loaning of the fund was not done in accordance with approved business methods, did not make it incumbent on the court to remove him, especially where the trustee considered that he was liable for interest on the whole sum received.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 217, 218.]

2. SAME.

A trustee holding stock in a bank as a part of the trust estate aided in the organization of a new and rival bank and became a stockholder

thereof. He was a large stockholder in the former bank, and continued to remain so. *Held*, that his acts did not show an intent to injuriously affect the property of the former bank, and did not justify his removal.

Appeal from Circuit Court, Jackson County; L. T. Dryden, Special Judge.

Proceedings by Isaac N. Lowe for the removal of Eugene E. Montgomery, as trustee. From a judgment refusing to remove the trustee, plaintiff appeals. Affirmed.

J. Allen Prewitt, for appellant. J. D. Strother, J. W. Clements, and Cowherd & Ingraham, for respondent.

ELLISON, J. Plaintiff's father died in November, 1903. He left plaintiff by his will \$5,000 in money and 20 shares of bank stock (of the face value of \$100 per share) in the Bank of Blue Springs. By the terms of the will, the defendant was made trustee for the money with directions to loan it out for at least five years and pay the interest to the plaintiff. For the bank stock, while left in trust, a trustee was not named and, afterwards, defendant was appointed by the court as trustee for that also. This proceeding was brought to remove defendant from the trusteeship, and resulted in refusal by the trial court; whereupon plaintiff appealed.

The main grounds charged as cause for removal were that defendant had not loaned the money, but had converted it to his own use; and that the relations between him and the plaintiff had become unfriendly by reason of business rivalry between two banks at Blue Springs, which had resulted from defendant having started and becoming largely interested in a bank in opposition (as alleged) to the bank in which plaintiff was interested in the same little town; the tendency of which was alleged to lessen the value of the stock owned by plaintiff. It appears that defendant received the money from the executor of the estate in March, 1904, and that this proceeding was instituted in a year and a month thereafter; so that whatever breach of trust there is must have occurred within that space of time. Defendant gave bond in the sum of \$10,000 with an approved surety company as surety, on account of the \$5,000 in money, and \$3,000 on account of the stock. The bond is not questioned, and defendant is amply solvent. But it was shown that defendant deposited the money received as trustee in bank in his individual name, at a time that his account was overdrawn in the sum of about \$600. This, and the fact that he does not appear to have kept any separate book of account of his trusteeship, and that his loaning of the fund was, in some instances, done in a somewhat involved manner, and not in a way which approved business methods would suggest, are the grounds of complaint which have chiefly arrested our attention.

The mere fact that a solvent trustee with

ample and sound bond mingles the trust fund with his own does not necessarily make it incumbent on a court to remove him. *Tittman v. Green*, 108 Mo. 22, 18 S. W. 885. In determining such a question, it is but common sense to take into consideration the solvency of the trustee and the sufficiency of the bond, and so it was said by Judge Gantt in the case just cited. So we conclude that that irregularity (which ought not to be continued) was properly considered insufficient by the trial court; especially, in view of the fact that defendant considered that he was liable for the interest on the whole sum thus received and placed. When the time is considered, we think the money (in amount) has been fairly kept at interest, and that it was amply secured and the rate of interest, at this time, exceedingly in plaintiff's favor; all, but one loan of \$500, drawing 7 per cent., and that drawing 6 per cent. There has been but one payment of interest received, by defendant to the plaintiff, but he has never called for or demanded more. The fact is that the time between defendant's receiving the money and the institution of this proceeding is too short for any serious or substantial default in the payment of interest to the plaintiff. It was shown that the notes for all loans made were deposited with the surety company, and that that was the agreement defendant made with such company. It is worthy of remark, in this connection, that some time after the irregularities to which we have referred, this plaintiff consented to the appointment of the defendant as trustee for the bank stock. And, furthermore, he has not appeared as a witness in the cause in his own behalf. But

it is said that defendant has become unfriendly to the plaintiff, and that he has done things tending to lessen the value of the defendant's stock in the Bank of Blue Springs. These things consisted in assisting to organize what is termed an opposition bank in the town of Blue Springs. But we do not consider the act of aiding in the organization and becoming a stockholder of another bank as evincing a desire to destroy or lessen the value of the stock owned by the plaintiff; nor do we find that it has in fact affected the value. It was shown that the defendant was a large stockholder in the Blue Springs Bank, and that he still owns that stock. From which fact, it ought to be supposed that, so far as his intentions are concerned, he would not do anything to injuriously affect the prosperity of that bank. Enmity between trustee and beneficiary is a matter for consideration on the question of removal of the trustee, but it is not a mandatory cause for removal. *Gaston v. Hayden*, 96 Mo. App. 683, 73 S. W. 933. However, we do not consider that there has been cause for an interruption of friendship between these parties, and, save for the institution of this proceeding, do we see that there has been.

While it is advisable for defendant, if he has not already done so, to immediately adopt more acceptable business methods in the trusteeship, so that a specific statement of a separate account of his stewardship could be made at any time, yet, from the whole record, it is apparent that the funds in his charge have not been in anywise endangered. We, therefore, adopt the view of the trial court, and affirm the judgment. All concur.

GAMACHE v. JOHNSTON TIN FOIL & METAL CO.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906. Rehearing Denied Feb. 27, 1906.)

1. APPEAL—GROUNDS OF REVIEW—PRESENTATION IN LOWER COURT—FAILURE TO ASK DEFINITE INSTRUCTIONS.

A party cannot complain that an instruction is couched in too general terms, where he has requested no specific instruction.

2. DEATH—DAMAGES—ACTION BY CHILD FOR DEATH OF PARENT.

In an action by a child for negligence causing death of her father, plaintiff may recover damages for the loss of support, education, and maintenance, and also for the loss of intellectual and moral instruction by the deceased parent, and in estimating this latter element of damage, the jury is not confined to an exact calculation, but is vested with considerable discretion, with which the court will not interfere unless such discretion is abused.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 103, 104, 108, 109–119, 123.]

3. SAME—EXCESSIVE DAMAGES.

In an action by a child 13 years of age for negligence causing the death of her father, a verdict for \$4,200 was not excessive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 125, 126, 129.]

Appeal from Circuit Court, Franklin County; Robert S. Ryors, Judge.

Action by Catherine Gamache, by the St. Louis Union Trust Company, as her curator, against the Johnston Tin Foil & Metal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McKeighan, Wood & Watts and Wm. R. Gentry, for appellant. Johnson, Houts, Marlatt & Hawes, for respondent.

GOODE, J. The plaintiff, Catherine Gamache, a child 13 years old, sues by her curator. She is a daughter of Alphonse Gamache, who was killed in the defendant's factory on August 4, 1904. The factory is in St. Louis and among the articles manufactured is tin foil. The plates of tin foil were made by running ingots of metal some 10 inches long between heavy revolving rollers. The rollers were turned by a steam engine to which was attached an 8-foot fly wheel of great weight and revolving 175 times per minute. When one of the ingots was passing through the rollers, the load on the rollers required more power from the engine to rotate them than when there was no ingot between them. To give the increased power, more steam was required in the steam chest or cylinder of the engine. Hence, if the same head of steam was kept on all the time, the fly wheel would revolve much more rapidly when the rollers were running light than when they were loaded. To control the revolutions of the machinery, an appliance called a governor was attached to it. The operation of this appliance regulated the quantity of steam which passed into the cylinder of the engine, letting in more when the rollers were loaded and less when they were not; thus making

the revolutions uniform, and preventing the fly wheel from revolving too rapidly. The testimony that such an appliance is necessary and that it is practically impossible to run an engine in safety without one, is very strong, and, we may say, convincing. The governor worked automatically and controlled a valve which admitted steam into the cylinder. On July 24th, which was 14 days before the accident, the governor broke and was removed, and from that time to the day of the accident, the engine was operated without a governor. A new governor was ordered from Salem, Ohio, and reached St. Louis about a week before the tragedy, but for some reason was not attached to the engine. The testimony for the plaintiff tends to show it was not attached because the company owning the factory did not wish to shut down the machinery long enough and were waiting for an idle Sunday in which to put on the new governor. The testimony of the defendant indicates that it was not put on because it was not ready for use. After the old governor broke, the revolutions of the machinery were regulated by the engineer sitting at the throttle and, with his hand, opening it wide to admit the steam into the cylinder when the rollers were loaded, and partially closing it when they were not. In other words, the engineer acted as a governor. Occasionally he would call some other employé to the throttle to do the work. Gamache's business was running ingots through the rollers; but on the day he was killed, he had been placed at the throttle to act as governor. It is impossible to run the machine with safety without an automatic governor, because the opening and closing of the throttle which is necessary in order to keep the proper amount of steam in the cylinder as the rollers run first heavy and then light, require such instantaneous action by a man, that the nerve tension becomes too great, and brings about an irregular control of the throttle. One of the experts said a man would have to open and close it at the "psychological moment," and another one, who is the city inspector of boilers, that it was only a matter of time until the machine would run away if it had no automatic governor on it; that no man could long control the engine, which should be shut down at once whenever the governor broke. While Gamache was regulating the throttle, the motion of the fly wheel became so rapid that the wheel burst, and one of the fragments struck Gamache, almost decapitating him and producing instant death. This action is to recover damages for that accident. The negligence alleged is in running the machine without a governor when the defendant knew it was dangerous to do so. Plaintiff obtained judgment for \$4,200, and the defendant appealed.

Beyond all doubt, the evidence made a case for the jury on the main question of whether the defendant had been guilty of negligence which caused the death of Ga-

mache. There was no evidence that Gamache was guilty of any negligence which contributed to his death, and probably the trial court would have been justifiable in directing a verdict for the plaintiff. We overrule the contention that a demurrer to the plaintiff's evidence should have been sustained.

It is strenuously insisted that the verdict was excessive and the judgment should be reversed on that account. In this connection, the defendant's counsel cites the instruction given on the measure of damages, which was of a general character and similar to an instruction approved by the Supreme Court in the case of *Barth v. Railroad Co.*, 142 Mo. 535, 44 S. W. 778. The instruction the court gave is admitted to be correct but the contention is that because of its generality, the jury were too much influenced by sentiment in fixing the plaintiff's damages. The defendant requested no instructions pointing out the particular elements of damage which the jury should consider in assessing the amount of plaintiff's recovery, as should have been done if more definite advice on the measure of damages was desired. Plaintiff was entitled to recover damages for the loss of support, education, and maintenance and also loss of intellectual and moral instruction by her deceased parent. It appears plaintiff's mother was living at the time of the death of the father, but the two were separated and the child lived with her father, who was shown to be a man of exemplary character in all respects. As to the character of the mother and whether she would fill the place of the dead father, the record is silent. In *Stoher v. Railroad Co.*, 91 Mo. 518, 4 S. W. 889, it was said that a parent's care in educating, maintaining, and supporting a child has, in addition to its moral value, an appreciable pecuniary value because it aids in fitting the child for the struggles and duties of life. It is said too that in cases where minor children sue for damages for the death of a father, juries are not confined to an exact calculation of the amount of the child's loss, but are vested with considerable discretion which the courts will not interfere with unless it is abused. That decision of our Supreme Court approved the opinion in *Tilley v. Hudson River R. Company*, 29 N. Y. 252, 86 Am. Dec. 297, in which it was pointed out that the physical, mental, and moral training of a child by a conscientious parent, were to be considered, as having a pecuniary as well as a moral value, in estimating the loss sustained by the child from the death of a parent. In that case, a verdict for \$5,000 for the death of a mother was allowed to stand. We think the evidence regarding Gamache's character proves that he was well fitted to train his child along right lines and mold her into a good woman. To be deprived of the affectionate guidance and admonition of such a parent is an element to be considered by a

jury in making up the amount of damages which a plaintiff ought to receive. 13 Cyc. 371; *St. Louis, etc., R. Co. v. Haist*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; *Searle v. Railroad Co.*, 32 W. Va. 370, 9 S. E. 248.

We cannot say conscientiously that the jurors who tried this cause were not as competent to estimate the damages sustained by the plaintiff from the loss of her father as we are. There is no certain criterion for fixing such damages, and the question is one within common knowledge and experience and peculiarly suited for determination by a jury. Unless the amount assessed as damages in a cause like this one, was so enormous as either to show passion and prejudice on the part of the jury, or leave no doubt that it was unjust, we would not interfere with it. Moreover, as the defendant requested no instruction defining the amount of damage, it chose to leave the matter largely to the jury's discretion. It was conceded on the argument in this court, that defendant's counsel refused to argue the case before the jury. An argument presenting the defendant's side of the question in a favorable light, would have assisted the jury in their effort to ascertain the damages which ought to be given. In view of the fact that the defendant neither asked instructions defining the elements of damage nor discussed the subject to the jury, we think it would be manifestly unfair to reverse the judgment on the ground that the verdict was excessive, unless the point was perfectly clear. We are far from confident that it was excessive. It received the approval of the trial judge, and that circumstance is entitled to weight.

The judgment is affirmed.

BLAND, P. J., and NORTON, J., concur.

HAINES v. NEECE et al.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906. Rehearing Denied Feb. 27, 1906.)

1. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In an action for breach of warranty in the sale of mattresses, defendants denied that they sold the mattresses, but claimed that plaintiff purchased from a traveling salesman representing the seller and that for an agreed commission paid by plaintiff, defendants agreed to become primarily liable to the seller for the purchase price of the goods and permitted them to be shipped in defendants' name. The court instructed that, if defendants sold the mattresses as agent for the manufacturer and not as their own property, and disclosed their agency and the name of the seller prior to the making of the sale, plaintiff could not recover. *Held*, that the instruction, though objectionable as abstract, was not prejudicial for that reason; it not being calculated to mislead the jury.

2. PRINCIPAL AND AGENT—AGENT FOR BOTH PARTIES.

Where defendants negotiated a sale of mattresses between plaintiff and a traveling salesman acting for a furniture association, agreeing, for a commission, to permit the goods to be shipped to defendants, and to become

primarily liable for the price, defendants became agents for both buyer and seller, though the seller was not advised of the fact that plaintiff was the real purchaser.

3. SALES—EXPRESS WARRANTY—BREACH—ACTIONS—PETITION.

Where a petition alleged that defendants agreed that certain mattresses purchased by plaintiff should be of first grade, of first-class style, make and pattern and suitable for a first-class hotel business, and that plaintiff agreed to pay a first-class price, etc., and then negated the fact that the mattresses were first-class, and also alleged that plaintiff was unfamiliar with such articles and did not know the grade of the goods, the petition should be construed as charging a breach of an express and not an implied warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1235.]

4. TRIAL—CURING ERROR—INSTRUCTIONS.

Where an instruction was faulty in that it failed to define an express warranty of mattresses purchased for use in a first-class hotel as alleged, the error was cured by another instruction basing plaintiff's right to recover on the fact that defendants represented the articles sold to be of first-class quality and make and suitable for use in a first-class hotel.

5. APPEAL—INSTRUCTIONS—HARMLESS ERROR.

Where, in an action on an express warranty of quality, there was nothing in an instruction on implied warranty which could have misled the jury, the error in giving it was harmless.

Appeal from Circuit Court, Lawrence County; Henry C. Pepper, Judge.

Action by C. J. Haines against J. N. Neece and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. H. Bloss and Thos. F. T. Whitney, for appellant. Edw. J. White, for respondent.

BLAND, P. J. Omitting caption, the petition is as follows: "Plaintiff for cause of action states, that during all the times hereinafter mentioned the defendants were engaged in the furniture business as copartners under the firm name and style of Neece Bros. That on the — day of October, 1903, the plaintiff purchased of the defendants 28 combination mattresses and springs, which as the defendants were then and there at the time of such purchase advised by the plaintiff were to be used in the hotel building then owned by the plaintiff in the city of Aurora and according to the contract of purchase then and there entered into between the plaintiff and defendants the said combination springs and mattresses should and were to be of first-class style, make, and pattern and suitable for a first-class hotel business and were to be of a first-class grade and condition, and the plaintiff thereupon agreed to pay a first-class price or one suitable to the articles or merchandise he was purchasing and agreed that it should be \$15 apiece or an aggregate price of \$420. That in accordance with said contract thereafter, on the — day of November, 1903, the defendants delivered to plaintiff the number of combination springs and mattresses agreed but in derogation and violation of said contract delivered to plaintiff unfit, unsuitable, and an utterly

inferior and unserviceable set of combination springs and mattresses than those agreed to be sold and delivered and as a result of the unfit and inferior condition and grade of said mattresses and springs, they have worn out in the short term of six months or thereabout and will now have to be replaced with new ones, whereas had they been of the kind that they should have been would have stood service for 20 years or more. That at the time of delivery of said mattresses and springs, the plaintiff was unfamiliar with such articles of merchandise and did not know the kind and grade of mattresses and springs he was receiving from the defendants and being so ignorant of such information, he accepted said goods and paid the entire purchase price agreed on, to wit, \$420, that thereafter by use and service to which said mattresses and springs furnished. That said springs and mattresses were and are entirely worthless and valueless to this plaintiff and he has thereby suffered damage in the sum of \$420 for which with costs he asks judgment."

The answer denied, specifically, that defendants sold the mattresses to the plaintiff, and denied, generally, all other allegations of the petition. Further answering, defendants alleged: "That the only connection they had with the purchase of such mattresses by the plaintiff was in the sole capacity of agents. That at the special instance and request of the plaintiff they permitted him to order said mattresses in their names for a fixed commission and charge, less than ordinary profit which they would have received for a purchase of said mattresses from them direct; that by introduction they brought the plaintiff face to face with the vendor of said mattresses and did not even know the kind of mattresses that he had ordered until their arrival in their car of furniture. That the defendants had advised the plaintiff to buy a different make of mattresses from those described in the petition, but after a personal negotiation with the vendor the plaintiff purchased said mattresses of his own volition and upon his own responsibility. Further answering defendants say that although they received a small commission in the transaction they were not the vendors of the mattresses described, but the same were purchased direct from a wholesale furniture dealer in the city of St. Louis, Mo., and that said mattresses were delivered direct by said vendor to the plaintiff; that the plaintiff received, unboxed and set up the same in his hotel in Aurora, Mo., and ever since said acceptance and receipt of said mattresses by the plaintiff the same have been constantly in use by the plaintiff in his hotel and said mattresses now are and will long continue to be an attractive feature of said hostelry on account of the ease and comfort which they afford plaintiff's guests. Further answering

defendants deny that said mattresses were unfit, unsuitable, inferior or unserviceable for the purpose for which they were sold, but aver that the same were first-class in every particular. Defendants deny that plaintiff was ignorant of the kind of mattresses he was buying or that he ever offered to return said mattresses to the defendants, deny that said mattresses are worthless or that the plaintiff is entitled to recover any part of the purchase price therefor, particularly as against the defendants who had nothing to do with his selection or purchase of said mattresses, except as herein set forth."

Defendants were partners engaged in the sale of furniture at retail, in the city of Aurora, Mo. Plaintiff is the owner of the Bank Hotel, in said city, which he had leased to one Edwards. Plaintiff, desiring to furnish the hotel with 28 box-spring mattresses, went to defendants with a view of buying them. Defendants did not have the mattresses in stock but informed the plaintiff that J. W. McCoy, a traveling salesman for furniture houses, in the city of St. Louis, would be along in a few days and arrangements could then be made to procure the mattresses. McCoy arrived in Aurora a short time thereafter, and the mattresses were ordered through him, and in due time thereafter were shipped from the city of St. Louis, by the manufacturer, C. J. Costuba, consigned and billed to the defendants. On their arrival and the receipt of Costuba's invoice, the mattresses were delivered to plaintiff by defendants and installed by plaintiff in the hotel. Defendants turned the invoice over to plaintiff and he paid them the invoice price, plus 5 per cent. as their commission, and the railroad freight charges. The evidence in regard to the quality of the mattresses is conflicting, that of plaintiff tends to show they were of a very inferior quality, made of poor material, and were almost worthless; that of defendants tends to show they were well and skillfully made of first-class material and were first-class mattresses. There is a sharp conflict in the evidence in regard to the real parties to the contract of sale and purchase of the mattresses. On this branch of the case, plaintiff testified as follows: "I went to Mr. Neece and told him I was going to furnish the hotel, and would sooner buy them (the mattresses) in town than out of town, then he said he would like to sell me, and we talked about the matter several times. They had some catalogues there, and said they would write to their traveling man, and have some more catalogues, and have their man come down, and he finally came, and they didn't have no catalogues with combination box mattresses, and the traveling man finally came and brought those catalogues, and I told Mr. Neece if they would send me something like that I would be willing to take them, and the price of them was

\$18.50, the kind I bought, and I told Mr. Neece I didn't believe I could stand that much. Well, he said he didn't know that they could make them for that, that he would send them in to the house, and if they could make them they would find out and let me know, and some time later they came and said the goods had come for me, and they had them hauled up to my house, and they put them in and unpacked them. The goods at the time looked to be all right. I put them in the house." Witness also stated that the mattresses were to be "spring mattresses with a steel band around them and tied with wire, the first quality, best that was made, at \$15 each," and that he agreed to pay defendants 5 per cent. on the invoice price as their commission; that all his negotiations for the purchase of the mattresses were with defendant J. N. Neece, who, on the part of the defendants, testified as follows: "I am one of the defendants in this case. I did not sell Mr. Haines any mattresses from my stock of goods. I didn't have any contract with Mr. Haines, Mr. McCoy sold him the mattresses. Mr. McCoy is a traveling salesman for three or four St. Louis houses. Mr. Haines met him. He had talked to us about some springs and mattresses. He was talking about buying a black steel spring and loose mattress. We did not carry the kind he bought from Mr. McCoy in stock. I did not hear the contract made between him and Mr. McCoy. Mr. Haines first talked about a black steel spring-hair mattress, as well as I remember, and then Mr. McCoy came down and they made a different deal together. I was not present when he ordered them from Mr. McCoy. Q. Where did McCoy take the order, from your store? A. I think so. We were to have 5 per cent. on the furniture ordered. He ordered quite a bill of stuff aside from the mattresses at that time, dressers, and tables and such things as that. They were shipped in a car load by themselves. Mr. Haines paid the freight when he paid the bill for the goods. I paid the agent and Mr. Haines paid me. I received 5 per cent. commission on these goods. That was the amount under the contract we were to receive." J. W. McCoy testified as follows: "I am working for the Furniture Manufacturers' Association of St. Louis. I sold the mattresses in litigation. I made the contract with Mr. Haines at the Neece store. They told me to go and sell him the goods for the hotel and they would get a commission and so I sold Mr. Haines a car load of goods for the hotel, in their store. I did not know at the time what commission they had agreed on, I understood afterward it was 5 per cent. I don't remember who told me that, I don't know exactly what was said, only at the time I remember the remark that was said. Mr. Neece said, 'Go ahead and sell him the stuff,' and they would get a commission, and Mr.

Haines made a remark, joking, and said, 'I can beat Newt out of the commission,' in a joking way. I sold him a combination moss and hair box mattress. There was no warranty or guarantee made on the sale to Mr. Haines." On cross-examination, witness stated: "The car was shipped to Neece Brothers, it had to be. I could have shipped it to Mr. Haines, but the factories always protect the dealer. In shipping the two cars separate they would have to look to Mr. Haines' rating, because we had been shipping to Mr. Neece and they would have to look up the rating of Mr. Haines. My understanding was 5 per cent. was given for the purpose of shipping through them. They would not ship to a man that was not a dealer without looking him up. They realized the responsibility of Mr. Neece and shipped to them." Witness also stated that he expected Neece Bros. to stand good for the sale made to Haines under the terms of the contract at 5 per cent.

The verdict was for the defendant. A timely motion for new trial was filed and overruled, whereupon plaintiff appealed.

Plaintiff's instruction No. 1 reads as follows: "(1) The court instructs the jury that if you believe from the evidence in this case, that the defendants sold to the plaintiff the combination mattresses and springs in evidence, and that at the time of such sale they represented that they were of a first-class quality and make and were suitable for use in a first-class hotel, and, if you further believe from the evidence, that such combination mattresses and springs were not of the quality and kind contracted to be delivered, but were of an inferior kind and quality and not suitable for use in a first-class hotel, and if you further believe from the evidence that such combination mattresses and springs were of less value owing to such inferior kind and quality, if any, than the contract price agreed to be paid therefor at the time of such sale, then the plaintiff would be entitled to recover in this action such difference in value, and your verdict should be for him."

The court gave the following instructions for the defendants: "(1) The court instructs the jury, that if they believe from the evidence that defendant sold the mattresses in controversy as agents for J. C. Costuba or Jacob Kelser, and not as their own property, and disclosed their agency and the name of the vendor prior to and in the making of such sale, then the plaintiff cannot recover. (2) The court instructs you that you cannot find for plaintiff unless you believe from a preponderance of the evidence, that the defendants made an express contract to warrant the condition of the mattresses sold to plaintiff. No recovery in this case is sought on an implied contract, and even though you may believe from the evidence that the mattresses were unfit for the purposes for which they were ordered, this will not authorize

you to find a verdict for the plaintiff unless you further find from the evidence that the defendants agreed with plaintiff, that such mattresses were to be fit for such purpose, or unless they authorized some one in their name to make such contract for them. (3) The court instructs you that while one selling personal property in his possession is presumed in law to warrant the fitness thereof for the purpose for which the same is purchased, yet this possession must be that the owner or one who sells the property as his own, if then, that the jury shall believe from the evidence that the defendants, when the sale of the mattresses was made to the plaintiff, sold the same as agents for Jacob Kelser, and that the plaintiff had full knowledge that they acted as such agents and not as principals, then your verdict should be for the defendants." The giving of each of these instructions is assigned as error.

1. Defendants' theory of the case is that there were three parties to the transaction, plaintiff, the purchaser, defendants, as intermediaries between plaintiff and Costuba, the seller, through the agency of McCoy and Kelser. That defendants brought plaintiff and McCoy, representing the seller, together, and agreed, for a money consideration to be paid by plaintiff when the goods arrived, to become primarily liable to the seller for the purchase price of the goods, to permit them to be shipped or consigned to them, and to receive them on arrival and deliver them to plaintiff. On this theory of the case, supported by defendants' evidence, they were, in a sense, the agents of both the buyer and the seller. Instruction No. 1 is in harmony with this theory of the defense and, though objectionable as stating an abstract proposition of law, we do not think the jury could have been misled by it, and for this reason does not call for a reversal of the judgment. Plaintiff further contends that the instruction went outside the pleadings, that it is nowhere stated in the answer nor shown by the evidence, that the defendants were the agents of Costuba. The answer alleged that the sole connection defendants had with the purchaser of the goods was "in the capacity of agents," but it does not allege for whom they were agents. The defendants' evidence tends to show that the contract of sale was made by and between plaintiff and McCoy; that McCoy was the traveling salesman for the Furniture Manufacturers' Association of St. Louis, and after taking the order sent it to Kelser to be filled; that Kelser did not have the goods on hand and could not manufacture them on account of a labor strike in his establishment, and turned the order over to Costuba; that Costuba accepted the order and furnished the goods. Under this state of the evidence, though Costuba may not have been informed of the fact that plaintiff was the real purchaser of the goods, yet, if, as defendants contend, they agreed to become primarily liable for the purchase price

of the goods and that they might be shipped in their name, and agreed to receive and deliver them to plaintiff, they acted for both parties, and were the agents of both the seller and the buyer.

2. Plaintiff contends that the suit is for breach of an implied warranty of the goods, and that defendants' second instruction, which told the jury that before they could find for the plaintiff, they should find that the defendants expressly warranted the quality of the mattresses, is erroneous. A warranty "is express where the seller makes some positive representation or affirmation, with respect to the article to be sold, pending the treaty of sale, upon which it is intended that the buyer shall rely in making his purchase." Biddle, on Warranties in the Sale of Chattels, § 2. The same author, at section 3, says: "A warranty is implied where, from the circumstances surrounding the parties at the time of the sale, or from the nature of the thing sold, the law assumes it to be just that the buyer should be protected, in addition to the contract of sale, by a further implied contract or guaranty on the part of the vendor, and so raises by implication a warranty on the seller's part." This author, at section 35, says: "It is not necessary, in order to constitute a warranty, that the seller should use the word 'warranty,' nor is any special form of words necessary; but any affirmation or assurance of a fact, during the treaty of sale on the part of the seller, upon which the buyer is intended to, and actually does, rely in making his purchase, is sufficient to constitute a warranty." In *White v. Stellob*, 74 Wis. 435, 48 N. W. 99, an instruction containing the following language was approved, to wit, "Any assertion or averment by the seller to the purchaser during the negotiations to effect a sale, respecting the quality of the article or the efficiency of the property sold, will be regarded as a warranty, if relied upon by the purchaser in making the purchase." In *Carter v. Black*, 46 Mo., loc. cit. 385, *Wagner, J.*, after quoting from *Parsons on Contracts* and *Hilliard on Sales*, on the subject of warranty and what representations are necessary to constitute a warranty, said: "It is sufficient if there be a representation of the state of the thing sold, or a direct, positive, unequivocal, and express affirmation of its quality and condition, being part of the consideration of the sale, and showing an intention to warrant or make good the quality of the thing sold, and so understood and relied upon, instead of a mere recommendation or expression of an

opinion, leaving the buyer to understand that he must still examine and judge for himself; more especially if the subject is within the particular knowledge of the vendor; and the question is for the jury, under the advice of the court." See, also, *Danforth & Co. v. Crookshanks*, 68 Mo. App., loc. cit. 316, and *Long Bros. v. The J. K. Armsby Co.*, 43 Mo. App. 253. The petition alleges that defendants agreed that the combination mattresses "should and were to be of first-class style, make and pattern and suitable for a first-class hotel business, and were to be of a first-class grade and condition, and the plaintiff thereupon agreed to pay a first-class price," etc. The petition not only alleges that the mattresses were to be first-class and suitable for a first-class hotel, but further on it is stated that plaintiff was unfamiliar with such articles and did not know the grade of the goods. These statements in the petition show that defendants positively agreed that the mattresses were to be first-class and suitable for a first-class hotel, and that the plaintiff relied upon this undertaking in making the purchase. The petition, therefore, under the foregoing authorities, clearly counted on the breach of an express warranty of the grade and quality of the mattresses. The instruction is faulty in that it fails to define what is meant by an express warranty, but we think this omission is cured by instruction No. 1, given for plaintiff, which based plaintiff's right to recover on the fact that the defendants represented the mattresses to be of first-class quality and make, and suitable for use in a first-class hotel. Read together, the two instructions fairly submitted to the jury the issue, as to whether or not the mattresses were sold on an express warranty.

3. The third instruction given for defendant is outside the issues made by the pleadings and is unsupported by any evidence in the case and is not the counterpart of any instruction given for the plaintiff. As we have seen, the petition counted on an express warranty of the quality, etc., of the mattresses, and plaintiff's evidence tended to prove that they were sold on an express warranty. The instruction is based on the theory of an implied warranty, of which there is neither allegation nor evidence. But we can see nothing in the instruction that could have led the jury astray from the real issue in the case, and we think the error in giving it was non-prejudicial and harmless.

No reversible error appearing in the record, the judgment is affirmed. All concur.

HILL'S GUARDIAN v. HILL et al.
GAILBRAITH v. SAME.

(Court of Appeals of Kentucky. April 25, 1906.)

1. EVIDENCE—ADVANCEMENTS—DECLARATIONS OF PARENT.

On an issue as to whether money given by a parent to a child was an advancement, evidence of declarations by the parent made after the gift to the effect that it was an advancement was not competent.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 427; vol. 20, Cent. Dig. Evidence, § 1066.]

2. SAME—BOOK OF ACCOUNTS.

On an issue whether money given by a parent to a child was an advancement, a book of accounts kept by the parent and in which the child was debited was admissible to show the amount of the alleged advancement and the purposes for which it was made.

3. DESCENT AND DISTRIBUTION—MONEY TO OBTAIN PROFESSIONAL EDUCATION.

Under Ky. St. 1903, § 1407, declaring that any property or money given by a parent or grandparent to a descendant shall be charged to the descendant and those claiming through him on distribution of the estate of the parent or grandparent, except that the maintaining or educating or the giving of money to a child or grandchild without any view to a portion or settlement in life shall not be deemed an advancement, sums furnished by a father to his son to enable the latter to obtain a professional education and charged to the son in a book of accounts kept by the father should be regarded as advancements.

Appeal from Circuit Court, Nelson County.
"To be officially reported."

Suit by J. W. Hill, as administrator of the estate of J. W. Hill, deceased, for a settlement of the estate. From a decree of distribution, J. W. Hill's guardian and Rebecca T. Gailbraith prosecute separate appeals. Reversed and remanded with directions for judgment.

J. S. Kelly and G. S. & J. S. Fulton, for Wallace Hill's guardian. C. T. Atkinson and N. W. Halstead, for J. W. Hill and Rebecca T. Gailbreath.

CARROLL, C. These two appeals involve questions that arose in a settlement of the estate of Dr. J. W. Hill, and by agreement of counsel are heard together.

To clearly understand the issues, it will be necessary to state in detail the facts. Dr. J. W. Hill, having survived his wife, died in September, 1903, leaving surviving him a son, Dr. J. W. Hill, a daughter, Ada Hill, and a grandchild, J. Wallace Hill, son of a deceased son, B. F. Hill, as his only heirs at law. He owned at his death an interest in a house and lot in Louisville, Ky., and a house and lot in Bardstown, and personal estate of little value. The Bardstown property sold under decree for \$4,060, and the Louisville property for \$2,500. The administrator brought suit for a settlement of the estate, and averred among other things that the Louisville property was conveyed to the decedent and his wife and Rebecca Gail-

braith, and that each owned an undivided one-third thereof; that a note for \$515, asserted as a claim against the estate by Mary V. Powell, although signed by the decedent, and Rebecca Gailbraith, was in fact the debt of Rebecca Gailbraith alone; this Rebecca Gailbraith denied, and presented a claim against the estate for \$329, and also claimed to be the owner of an undivided one-half interest in the Louisville property; and Ada Hill filed a claim for \$41.25. She also alleged that her father advanced to B. F. Hill, to enable him to obtain a medical education, \$733, and in addition thereto, \$405 in cash, and a sewing machine worth \$20, in all \$1,138, and this sum she asked that his son J. Wallace Hill be charged with as an advancement; that he had advanced to his son, Dr. J. W. Hill to enable him to obtain a professional education and in cash the sum of \$1,325, and sought to charge him with this amount as an advancement. The infant, J. Wallace Hill, after denying that his father should be charged with the advancements, averred that if he was charged, that Ada Hill should also be charged an equal sum as an advancement for her education, and that Ada Hill and Rebecca Gailbraith should be charged with various other amounts. Dr. J. W. Hill admitted that the charge against him of \$1,325 was correct, and on hearing of the case the chancellor adjudged that J. Wallace Hill should be charged with \$1,138, advanced to his father—being the full amount of the advancement asserted against him, less the value of the sewing machine, \$20; Ada Hill was allowed \$38.25 on her claim of \$41.25; Rebecca Gailbraith was adjudged to own one-half of the Louisville property, and was charged with the payment of the Mary V. Powell note, and was only allowed \$107.30 on her claim of \$329 against the estate; Rebecca Gailbraith and Ada Hill were charged with \$129.33 rent of the Bardstown house from October 17, 1903, until the 1st of May, 1904, at the time the purchaser took possession under a decretal sale. J. Wallace Hill complains of so much of the judgment as charges him with the advancements to his father, as gave Rebecca Gailbraith one-half of the Louisville property, of the allowance of \$38.25 on the claim of Ada Hill, and of the allowance of \$107.30 on the claim of Rebecca Gailbraith. Rebecca Gailbraith complains of the judgment requiring her to pay the note of Mary V. Powell, and interest. Ada Hill and Rebecca Gailbraith complain of the judgment requiring them to pay \$129.33 rent.

The most important question to be determined is whether or not the infant shall be charged with the advancement to his father to enable him to obtain a professional education. Section 1407 of the Kentucky Statutes of 1903 reads: "Any real or personal property or money, given or devised by a parent or grand-parent to a descendant, shall be charged to the descendant of those claim-

ing through him in the division and distribution of the undivided estate of the parent or grand-parent; and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevise. The advancement shall be estimated according to the value of the property when given. The maintaining or educating, or the giving of money to a child or grand-child, without any view to a portion or settlement in life, shall not be deemed an advancement." This statute has been before the court in a number of cases, and various features of it have received construction, but the precise question here presented has never been passed on. It appears from the record that Dr. J. W. Hill kept a book of accounts against his two sons, B. F. Hill and J. W. Hill, in which book the following entries appear at the head of the account of B. F. Hill: "B. F. Hill, dr., to J. W. Hill, for cash furnished him at medical school at Louisville, and New York school, as follows." Then follows a number of cash items, making the amount before mentioned. The account against J. W. Hill is entered in substantially the same way. He did not keep any account against his daughter, Ada Hill, nor does it appear that he ever contemplated charging her with any advancements, nor does the record disclose what advancements, if any she received.

Several witnesses testified as to statements made by Dr. Hill, indicating a purpose on his part to charge his two sons with the advancements made to them for the purpose of obtaining college and professional educations. Some of these declarations were made during the time the money was being expended, and others subsequently. In *Bailey's Adm'r v. Barclay*, 60 S. W. 377, 22 Ky. Law Rep. 1244, the court held that declarations of a donor prior to or contemporaneous with the advancements are competent, but that subsequent declarations are inadmissible, unless a part of the *res gestæ*, or against the interest of the donor. And under the rule announced in this case, the declarations of Dr. Hill subsequent to the advancements made to his son are not competent evidence; but the book of accounts kept by Dr. Hill is competent to show the amount of the advancements, and the purpose for which the advancements were made, and is further competent, as we shall presently show, for the purpose of establishing that the advancements were made to B. F. Hill with a view to a portion or a settlement in life. In *Bowles v. Winchester*, 13 Bush, 1, the court held that the intention of the testator will not control either as to gift of money or land; the cardinal object of the statute being to make those entitled to the estate equal in its distribution. The provision of the statute that "maintaining or educating, or the giving of money to a child or grand-child, without any

view to a portion or settlement in life, shall not be deemed an advancement," is the only exception, and in all other cases the gift or devise must be charged. In that case the court further said in determining whether the gift to the heir is within the exception provided by the statute, the chancellor must take into consideration the character and value of the ancestor's estate, the sum of money given to the child, and the purpose for which it is to be applied. And while no definite rule can be prescribed, the exception in the statute applies alone to money given for the purposes of amusement, health, education, maintenance, or temporary enjoyment, and not with a view to its investment in property, or its appropriation in any mode in which it may be permanently enjoyed. It is the duty of the parent to give to his child an ordinary education, and also to maintain and provide for him during infancy, and money or property necessary for these purposes will not be charged to the child as an advancement (*Brannock v. Hamilton*, 9 Bush, 446), nor should the child be charged with money given to it in trifling sums or in keeping with the estate of the parent for purposes of amusement, or health, or travel. As said in *Bowles v. Winchester*, *supra*: "To establish a contrary rule, would be to deprive the parent of giving and the child from receiving the smallest donation in the way of money for purposes of amusement or pleasure without the child accounting for it in the final distribution of the parent's estate."

Dr. Hill, so far as the evidence shows, did not keep any account against his children for money expended in giving them an ordinary education, or one suited to their station and opportunities in life. The account only begins when money is expended for the purpose of giving his children a professional education, and the potent fact that the father when he commenced expending money in giving them a professional education opened an account and charged the children with the sum so furnished is persuasive, if not conclusive, of the proposition that this money was furnished with a view to a portion or settlement in life. The chief purpose of the statute is to provide for equality in the distribution of estates, and to require children who have received money or property from the ancestor to account for it in the division of the undivided estate, and the court in interpreting this statute has uniformly construed it with a view to carry out this manifest legislative intention. It would be unfair and unjust, and a violation of the spirit of the statute to say that a child who had been furnished with a thousand dollars in money or property must be charged with it as an advancement, whether so intended by the parent or not, and another child who had been given a similar sum to enable him to obtain a professional education, with a view to a settlement in life, should not be required to account for it, although an equal amount

had been expended in educating and maintaining each up to the time when they desired to start out for themselves—one in the farm or counting room, the other in a profession. To one child the opportunity of a professional education might be infinitely more valuable than a costlier gift to the other in agricultural or commercial presents. It may be that some cases will present perplexing questions in the application of this rule; but the chancellor, with all the facts before him, will not find it difficult to determine whether or not the education was afforded by the parent with a view to a settlement in life, and it may be safely assumed that when the parent in the discharge of his natural and legal obligations has given to his child an ordinary, or even a college, education, if his means will justify it, makes further advancements to secure him an education that will qualify the child to enter a profession, that they are with a view of a permanent settlement, especially when the parent has manifested, as in this case, that such was his intention, and no good reason can be assigned why the child who is equipped with the means and opportunity of obtaining fame and fortune should not be required to stand on an equal footing with his brother, whose tastes and talents will be satisfied with a competency in less prominent and favored employments. To hold otherwise, would be to deny that equality in distribution that the statute contemplates, and work injustice and favoritism where none was intended. We are therefore of the opinion that the chancellor properly charged J. Wallace Hill with the advancement to his father.

The controversy as to the ownership of the Louisville property, and whether or not Rebecca Gallbraith should be charged with the Powell note, presents several complicated questions of fact. It appears that Miss Gallbraith, who is a sister of Dr. Hill's wife, and a maiden lady, was deeply interested in the welfare and success of Dr. B. F. Hill, as well as the other children, and that when Dr. B. F. Hill located in Louisville, for the purpose of practicing his profession, the family considered that it would be desirable to purchase for him a house and lot, with the expectation on their part and his that he would soon be able out of his income to pay for the property, and with this view a house and lot costing \$4,000 was purchased, and the deed made to Dr. J. W. Hill and wife and Miss Gallbraith. Two thousand dollars of the purchase money was paid in cash, and notes for \$1,000 due in one year, \$500 due in two years, and \$500 due in three years, were executed for the balance of the purchase money. It is conceded that Dr. J. W. Hill, or he and his wife, paid \$1,500 of the cash payment, and that Miss Gallbraith paid the other \$500, and the evidence tends to show that she paid the \$1,000 note. When the other notes became due, and the vendor, Mrs. Riley, wanted her

money, it was borrowed from Mary V. Powell upon notes signed by Dr. J. W. Hill and Miss Gallbraith. One of these notes was paid by Miss Gallbraith, the other \$500 note, and the one in controversy in this case, was executed on September 1, 1897, and was a joint note signed first by Miss Gallbraith, and second by J. W. Hill, Sr. Interest to the amount of \$180 was paid on this note by Miss Gallbraith. There is testimony indicating that this was the individual note of Miss Gallbraith, and that it was signed by Dr. J. W. Hill as her surety, but Dr. J. W. Hill, Jr., the administrator of the estate, and his sister, Miss Ada Hill, both testify positively that the money on this note was borrowed for the purpose of making up the \$2,000 necessary to pay Dr. J. W. Hill's half of the purchase price; he having paid the other \$1,500 in cash when the house was purchased, and that it was the debt of Dr. J. W. Hill, and we are disposed to accept this theory of the transaction, and hold that this note and interest thereon (\$180) should be paid by the estate of Dr. J. W. Hill. Entertaining this view, it follows that Miss Gallbraith paid \$2,000 of the purchase price, and although the deed conveys the property equally and jointly to Dr. J. W. Hill, his wife, and Miss Gallbraith, and under its express terms Miss Gallbraith would only be entitled to an undivided one-third interest in the property, the evidence is very conclusive that it was understood and recognized by all the parties to the transaction that she was to own or have an undivided one-half interest. It is also very clear that this deed should really be treated as a mortgage, because it was contemplated by the parties at the time of the purchase and when the deed was made that Dr. B. F. Hill would pay the remainder of the purchase price due, and reimburse his father and Miss Gallbraith for the money they had invested in the property, and therefore the chancellor properly adjudged Miss Gallbraith to be the owner of one-half the proceeds realized from the sale of this property. Without going into details, we have reached the conclusion that the chancellor erred in allowing Miss Ada Hill \$38.25 on her claim, and in allowing Miss Gallbraith \$107.30 on her account of \$329. Nothing should have been allowed on either of these claims.

The only remaining question is the charge of \$129.33 against Miss Gallbraith and Miss Hill for the rent of the Bardstown house from October, 1903, to May, 1904. It appears that these two ladies remained in the house this short period of time between the death of Dr. J. W. Hill and the sale of the property at the request of the administrator, and as much for the purpose of taking care of and protecting the property as for any other reason, and the administrator testifies that it was understood that they should pay \$3 a month rent for the house during the time they occupied it. In view of this understand-

ing and agreement, and the manifest difficulty there would have been in renting the property to a tenant for so short a period, we think they should be charged \$3 per month rent from October 17, 1903. to May 1, 1904.

The judgment of the lower court is reversed, with directions to enter judgments in these two cases in conformity to this opinion; the costs of the appeal in both cases to be paid by the estate.

SOUTHERN RY. IN KENTUCKY v. SCANLON'S ADM'R.

(Court of Appeals of Kentucky. May 2, 1906.)

1. TRIAL — MISLEADING INSTRUCTIONS — OPINION OF JUDGE.

In an action for negligence, causing death, an instruction that if there was an absence of slight care the jury might award exemplary damages as a punishment for a wrongful act, or acts done with great indifference to safety of life or limb, while not alone cause for reversal, was improper, because of the possibility of impressing the jury with the idea that the court was of the opinion that defendant's punishment ought to be great for the injury inflicted.

2. SAME — CONFORMITY TO EVIDENCE.

In an action for the death of an engineer, killed in a collision, an instruction that if deceased received notice to look out for the other train, sufficient to put an ordinarily prudent person on guard, and thereafter he failed to stop his train, thereby contributing to the collision, the finding should be for defendant, was erroneous, in the absence of any evidence that deceased did stop his train before the collision occurred.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-612.]

Appeal from Circuit Court, Mercer County.
"Not to be officially reported."

Action by J. B. Scanlon's administrator against the Southern Railway in Kentucky. From a judgment for plaintiff, both parties appeal. Reversed on defendant's appeal, affirmed on plaintiff's appeal, and new trial awarded.

Humphrey, Hines & Humphrey and E. H. Gaither, for appellant. James F. Vanarsdall, Robert Harding, E. M. Harding, and Greene & Van Winkle, for appellee.

NUNN, J. The towns of Burgin and Harrodsburg are situated upon the line of appellant's railway, and are five miles apart. There is no station upon the line of railway between these towns, and at the time of the occurrence hereinafter stated there was no siding or switch on the line to enable trains to meet and pass each other. On June 14th appellee's intestate, J. B. Scanlon, was in charge of one of appellant's freight trains, No. 62, and while at Burgin received the following order from appellant's train dispatcher: "No. 62, engine 1,436, will run ahead of second 96, engine 507, until overtaken." This order was received by Scanlon and his conductor at 1 minute after 6 o'clock a. m. This order gave him the right of way over the track to Har-

rodsburg, and he left Burgin with his train as required by it, and when he arrived within one mile of Harrodsburg, and when going around a hill and curve in the road, his engine came in collision with a "work train" coming from Harrodsburg, at the rate of between 40 to 45 miles an hour, according to appellee's testimony, and according to appellant's testimony 12 to 15 miles an hour, resulting in demolishing both engines, killing Scanlon and others upon the train. It was 21 minutes after 6 o'clock a. m. when the collision occurred, as shown by the testimony. It also appears that the following order was issued to the engineer and conductor of the "work train" at Harrodsburg, by the chief train dispatcher: "Work extra 1,442 will work 6 a. m. until 9 p. m. between Burgin and Salvisa, protecting against second and third class trains." Scanlon's train was a third-class train, and second 96 following it was a second-class train. The order to the work train was given after Scanlon had left Burgin, and he had no notice of it. "Protection against second and third class trains," as used in the order to the work train, according to the proof, meant that in going out on the road to work from Harrodsburg it was the duty of the engineer and conductor not to do so unless they should first send out, in advance of the work train, either the fireman or one of the brakemen, equipped with a red flag and three torpedoes, which were to be used as was required by the rules of the company, which were in evidence.

Appellant admits that the rules of the company were not strictly complied with in this matter, but proved by its conductor of the "work train" that he requested a foreman of a section gang, who left Harrodsburg with his section hands, before 6 o'clock that morning, to flag appellee's intestate's train and warn those in charge that the work train would be in the cut about a mile distant from Harrodsburg. The appellant also proved by one or two of the sectionmen that they did flag Scanlon's train, and gave him the warning as requested, at a considerable distance from the cut. The appellee proved many facts and circumstances showing that this claim of giving Scanlon warning of the presence of the work train in the cut was very improbable. As this case will have to be reversed, we refrain from detailing and commenting upon the testimony produced upon the trial. The administrator of the deceased instituted this action to recover \$30,000 damages for the negligent killing of his intestate by the appellant's agent and servant in charge of the work train. The answer presented a traverse in the first paragraph and a plea of contributory negligence in the second. This was controverted by a reply. At the October term, 1904, the case was tried upon these issues, resulting in a verdict for appellee in the sum of \$15,000. The judgment upon this verdict, upon motion of appellant, was set aside by the court, and appellant was granted a

new trial. From this action of the court Scanlon's administrator has appealed, and the appeal is heard in connection with this. At the February term, 1905, another trial was had, resulting in a verdict for appellee in the sum of \$17,000. The court having overruled its motion and grounds for a new trial, it prosecutes this appeal.

We deem it unnecessary to notice any of the reasons assigned for a reversal, except those with reference to the instructions given by the court, as on other questions the court committed no material error prejudicial to the substantial rights of the appellant. The court closed its first instruction with the following language: "If you believe from the evidence that such negligent act or acts (if any there were) were done in such a manner as to show that there was an absence of slight care, then you may, in your discretion, find for the plaintiff, in addition to compensatory damages, exemplary damages as a punishment meted out for a wrongful act or acts done with great indifference to the safety of life or limb," etc. The appellant complains of these words in this instruction: "As a punishment meted out for a wrongful act or acts done with great indifference to the safety of life or limb." This is technically a good definition of exemplary or punitive damages, but these words need not be defined by the court, as their meaning is well understood, and in addition the use of this language in the instruction may have possibly impressed the jury that the court was of the opinion that the appellant's punishment ought to be great for the injury inflicted. While we would not reverse for this, it would be better on another trial to omit this language from the instruction.

Instruction No. 2 reads as follows: "However, although you may believe from the evidence that the defendant was guilty of any degree of negligence as set out in instruction No. 1, yet if you further believe from the evidence that the deceased, John B. Scanlon, while moving his train west after leaving Burgin station, received such notice to look out for the work train at a certain point west of him as would put a person of ordinarily prudent habits, acting under such or similar circumstances as then existed and surrounded him, on guard, and that thereafter he failed to stop his train at said point, or before he reached same, and that thereby he contributed to the collision that resulted in his death, then you should find for the defendant." This instruction would have been correct if the following words had been omitted: "And that thereafter he failed to stop his train at said point, or before he reached same, and that thereby he contributed to the collision that resulted in his death." There is no pretense that Scanlon stopped his train before the collision occurred, and it was shown that those in charge of the work train were negligent in running it up-

on the road at the time and under the circumstances shown in the evidence; but, notwithstanding their negligence, if Scanlon had received such notice to look out for the work train at a point west of him as would put a person of ordinarily prudent habits, acting under such or similar circumstances as then existed and surrounded him, on guard or notice that the work train was ahead of him on the track, and he continued to run his train until he met and collided with the work train, then appellee should not be permitted to recover, as this would have constituted negligence on the part of his intestate.

The instructions given by the court on the first trial were more erroneous than upon the last.

For these reasons the judgment of the lower court is reversed upon the appeal of the appellant company, and affirmed on the appeal of Scanlon, and a new trial is awarded consistent with this opinion.

BEISER v. CHESAPEAKE & O. RY. CO.
(Court of Appeals of Kentucky. May 1, 1906.)

1. RAILROADS—OPERATION—DUTY TO PERSON ON TRACK—TRESPASSER.

A railroad company owed no lookout duty to a trespasser on its bridge; all that the law requires being that after his peril is actually discovered those in charge of the train should exercise reasonable diligence to prevent injuring him.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1238.]

2. SAME.

Where a railroad maintains at each end of its bridge a sign with a warning against trespassing, one who went on the bridge was none the less a trespasser because others trespassed on the same bridge; mere acquiescence of the railroad company not being sufficient to authorize the use of the bridge by foot passengers.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1228-1231.]

3. SAME—BRIDGE IN CITY.

That a railroad bridge is located within city limits does not impose a lookout duty on the railroad company as to trespassers on the bridge, where it is 25 to 30 feet above the grade of the street.

4. SAME—EVIDENCE—ADMISSIBILITY.

In an action against a railroad for injuries to a person while trespassing on its bridge, the plaintiff's rights were not prejudiced by the exclusion of evidence as to the distance within which a train could be stopped, where there was no evidence that the railroad employees actually saw the plaintiff before he was hurt.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by John J. Beiser against the Chesapeake & Ohio Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

R. C. Williams, for appellant. Galvin & Galvin, for appellee.

BARKER, J. Appellant, John J. Beiser, in going from his home in Covington to his place of business in Newport, undertook to

walk across appellee's railroad bridge between Greenup and Garrard streets, in Covington, which is elevated from 25 to 30 feet above the grade of the streets over which it crosses. At each end of the bridge the appellee maintains a sign upon which is written the following warning against trespassing: "Caution: Keep Off the Bridge." When about midway of the bridge, one of appellee's trains ran up from behind appellant and knocked him off the track, inflicting severe bodily injury, to recover damages for which he instituted this action. Upon the trial of the case, after all of appellant's evidence was in, the trial court peremptorily instructed the jury to find a verdict for appellee, which was done, and of which appellant now complains.

Appellant being a trespasser upon appellee's bridge, it owed him no lookout duty whatever, and all that the law required of it was, after appellant's peril was actually discovered by those in charge of its train, to exercise reasonable diligence to prevent injuring him. Appellant was none the less a trespasser because others trespassed upon the same bridge. Mere acquiescence upon the part of the railroad corporation cannot be construed into permission that its bridge should be used by foot passengers as a highway. *Brown's Adm'r v. Louisville & Nashville Railroad Company*, 97 Ky. 228, 30 S. W. 639. And especially is this true when the trespassing is done in the face of a solemn warning on the part of the corporation, forbidding it and pointing out the danger of so doing.

Nor does the fact that the trestle or bridge is within the corporate limits of Covington impose the lookout duty which is required when a train runs at grade through a municipality. In this case the evidence shows that the bridge is elevated 25 or 30 feet above the surface of the earth. No one can be placed in danger by reason of the operation of its trains across it without his taking great pains to become a trespasser upon the corporation's property. No reason exists for the enforcement of the lookout duty required when trains are run at grade through the municipality, when they are operated over a bridge at a high altitude above the surface of the street. These trestle bridges, such as the one under discussion, are erected and maintained at great cost to the corporation, and they remove a serious menace to public safety which occurs when railroads are operated through cities at grade; and both reason and expediency require that, when railroads are operated at an altitude, they should be free from the duties and restrictions necessary from the danger to the general public when they are operated at grade.

No injury accrued to the substantial rights of the appellant by the ruling of the trial judge in excluding evidence as to the distance

at which a train being operated over appellee's bridge at the point where the accident occurred might have been stopped by the exercise of ordinary diligence. There was no evidence adduced that the employes of appellee actually saw appellant on the track before he was hurt. It was quite immaterial that they could have seen him, had they looked. They were not required by any duty to him to look, and no inference that they actually saw him could legitimately be drawn from the fact that they might have seen him. It is manifest that it would be entirely useless to announce the principle that the corporation owes a trespasser upon its track no lookout duty, if the evidence that the employes might have seen him, had they exercised ordinary diligence, would warrant the inference that they actually saw him. Such a rule would reduce a principle of law to a question of fact. In the case of *Thornton v. Louisville & Nashville Railroad Company*, 70 S. W. 53, 24 Ky. Law Rep. 854, it is said: "When a recovery is sought on the ground that defendant's employes failed to stop or slacken the speed of the train after their discovery of plaintiff's peril, the burden was upon plaintiff to show that this could have been accomplished in time to have avoided the injury." In the case of *Smith's Adm'r v. Illinois Central Railroad Company*, 90 S. W. 254, 28 Ky. Law Rep. 723, we said: "The evidence, without contradiction, showed that the decedent was a trespasser upon the railroad bridge of appellee, and the trial judge properly held her personal representative to all of the consequences flowing from her being wrongfully upon it. The employes of the corporation owed her no lookout duty whatever. All they were required to do was, after actually discovering her peril, to exercise ordinary diligence to stop the train in order to avoid injuring her. This proposition of law has been so often decided, and so uniformly upheld, that it is now quite beyond question. The railroad had the exclusive right to the use of its line at all points save those where the public had a right to be, and was under no duty to anticipate the presence of trespassers. [Omitting citations.] The instructions correctly presented this view of the law to the jury, and that was all to which appellant was entitled." To the same effect is *L. & N. R. R. Co. v. Logsdon's Adm'r*, 81 S. W. 657, 26 Ky. Law Rep. 457, and *Eastern Kentucky Railway Co. v. Powell*, 83 S. W. 629, 17 Ky. Law Rep. 1051.

There being no evidence in the case that appellee's employes in charge of its train actually saw appellant in time to have saved him from injury, the court very properly awarded a peremptory instruction to the jury to find for appellee. In all of the cases relied on by appellant as authorizing the submission of his question to the jury, there was

more or less evidence that the employees actually saw the injured party in time to have saved him from injury. Not so in this case.

Judgment affirmed.

CORWIN v. YOUNG.

(Court of Appeals of Kentucky. May 1, 1906.)

APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action on a contract, the jury found for defendant upon her contention that the contract was not made, error, if any, in an instruction on the measure of damages, was harmless.

Appeal from Circuit Court, Pendleton County.

"Not to be officially reported."

Action by R. F. Corwin against Mary A. Young. From a judgment for defendant, plaintiff appeals. Affirmed.

Jno. H. Barker, for appellant. Applegate & Clarke, for appellee.

HOBSON, C. J. R. F. Corwin instituted this action to recover damages of Mary A. Young for her refusal to permit him to cultivate some land owned by N. C. Young her husband, which he claimed to have rented verbally of her husband before his death. He alleged that the contract sued on was made in November, 1903, and that N. C. Young died in February, 1904, before he was put in possession of the land. The defendant filed an answer, in which she denied that her husband had made the contract alleged, or had rented the land to the plaintiff. The case was tried before a jury, who found a verdict for the defendant, and the plaintiff appeals.

The chief complaint of the appellant is that the court, in instructing the jury, did not give them the correct measure of damages. But under the evidence and the instructions which the court gave the jury, if they had believed the plaintiff's case made out, they would have found for him in the sum of about \$7 on account of labor that he had done on the land and his expenses in looking for another tract. In finding a verdict for the defendant under the instructions, the jury necessarily found in favor of the defendant on the issue as to whether the contract alleged by the plaintiff had been made. When the jury reached the conclusion that the contract alleged by the plaintiff had not been made, he was not prejudiced by the instruction as to the measure of damages; for in that view of the case their verdict would have been the same as it was if the instruction asked by him on the measure of damages had been given. While the evidence was conflicting, it was so nearly balanced that we cannot say the verdict is against the evidence.

Judgment affirmed.

CITY OF MADISONVILLE v. HARDMAN.

(Court of Appeals of Kentucky. May 1, 1906.)

1. MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS—DISCHARGE OF SEWAGE—LIABILITY.

Where a city so constructed its sewers that filth accumulated near a person's premises, causing injuries to the premises and sickness, annoyance and discomfort to the person, the city was liable.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1780-1783, 1786.]

2. NUISANCE—PRIVATE NUISANCE—MEASURE OF DAMAGES.

Where a nuisance is permanent, the measure of damages is the depreciation in the market value of the property; but, if the nuisance is temporary, the measure of damages is the depreciation in the rental value of the property, if it be rented, or, if occupied by the owner, the damage to its use and occupation.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 125.]

3. SAME.

In the spring of 1903 a city completed a sewer to a point in front of a person's property. It could at any time have removed a nuisance created by accumulation of filth near the property by extending the sewer beyond the property and up to the place where it was contemplated the sewer should go. For two years no change was made by the city. *Held*, that the nuisance was permanent, making the measure of damages the depreciation in the market value of the property.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 124-126.]

4. SAME—DAMAGES—EXCESSIVE DAMAGES.

In an action for a nuisance, the evidence on the question of the depreciation in the market value of the property injured was conflicting: some of the witnesses testifying that the value had not been decreased, while others placed the damages at a considerable sum. Plaintiff became sick in consequence of the odors coming from the nuisance. *Held*, that a verdict of \$500 was not excessive; it including past and future damages.

5. MUNICIPAL CORPORATIONS—CONSTRUCTION OF SEWERS—LIABILITY.

Though a city, in the exercise of its governmental functions, may construct sewers, it has no right to complete a sewer in such a manner that it will discharge near the property of a person the accumulated filth.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1786.]

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by J. F. Hardman against the city of Madisonville. From a judgment for plaintiff, defendant appeals. Affirmed.

Yost & Laffoon and Gibson & Hall, for appellant. Gordon, Gordon & Cox, for appellee.

CARROLL, C. Prior to 1902, a large covered sewer in the city of Madisonville stopped at Union street, and from that point the water and filth from the sewer flowed in a natural drain, or branch, that passed close by the house and premises of appellant. This open drain afforded a convenient receptacle into which the garbage, refuse, and trash from adjacent premises was thrown.

causing at times, in connection with the flow of the sewer, disagreeable odors, obnoxious fumes, and an accumulation of insects annoying and injurious to the health of the people living in the vicinity. The city in 1902 extended its sewer in the bed of the drain about 300 feet from Union street, and to a point within 37 feet of appellant's front door. This sewer, when completed to Franklin street, was about 1,000 feet in length, and into it the drainage and filth from a livery stable, bathrooms, water-closets, and other sources, were conducted and carried in a volume to the mouth, and there discharged.

To recover for the injury thus wantonly inflicted upon his property and health appellee brought this action, alleging in substance that the city improperly and negligently constructed its sewer so that it ran to and stopped at a point near his home, and caused the water and filth to accumulate there, and become stagnant and breed malarial diseases, poisonous insects, obnoxious gases and odors, and as a consequence the market value of his property was depreciated, and as a direct result of the nuisance his family suffered great annoyance and discomfort, and he contracted a fever that caused him loss of time, expense, and suffering. A demurrer to the petition was overruled, and by its answer the city traversed the petition, and in the second paragraph averred that the sewer complained of was built with the consent and approval of appellant. A reply to this paragraph completed the pleadings, and on the trial the appellee recovered \$500. The city contends that the court erred in overruling the demurrer to the petition, in allowing appellee to recover for sickness, in fixing the measure of damage to the property at the decrease in its market value, that it was not permitted to prove that the sewer was constructed with the consent of appellee, and that the verdict is excessive.

Counsel for appellant do not point out in their brief the grounds upon which they based their demurrer, nor do they assign any good reason why the petition is not sufficient. In an action such as this, a recovery may be had where the evidence justifies it for sickness, disease, annoyance, discomfort, and injuries to property. In fact, every injury to person and property that the person complaining has sustained by reason of the nuisance may be recovered in one action. There was sufficient evidence introduced to authorize a submission of the issues to the jury, and the court correctly presented the law in the instructions given.

Counsel earnestly insists that the measure of damage to the property was the depreciation in its rental value, and not the depreciation in its market value. The rule in this state is that, where the injury or nuisance complained of is permanent, the measure of damage is the depreciation in the market value of the property, and in this class of cases limitation begins to run from the com-

pletion of the improvement or the structure, whatever it may be, that caused the injury, and the action is barred in five years from that time, and all the damages for past, present, and future injury must be recovered in one action. *Hay v. City of Lexington*, 71 S. W. 867, 24 Ky. Law Rep. 1495; *City of Paducah v. Allen*, 63 S. W. 981, 23 Ky. Law Rep. 701. If, however, the nuisance is temporary in its character, and such a thing that it may be readily remedied, removed, or abated, the measure of damage is the depreciation in the rental value of the property, if it be rented out, or, if it is occupied by the owner, the damage to its use and occupation, and in this class of cases successive actions may be brought for damages caused by continuance of the nuisance. In applying these rules, it is often a difficult matter to determine whether the nuisance is permanent or temporary, or to establish any fixed rule. The solution of the question depends in a large measure upon the facts of each case. In the case at bar the sewer was completed to a point in front of appellee's house in the spring of 1903, and the city could at any time have removed the trouble by extending the sewer beyond his premises and to the place where it seems to have been contemplated it would go; but when the trial was had in January, 1905, no change had been made, and it is fair to assume that the city intends the sewer to remain as it was when work on it was stopped in 1903, and therefore it may be said to fall within the line of permanent structures, and the measure of damage to appellee's property was as stated in the instructions—the depreciation in its market value directly caused by the nuisance. It does not appear that appellee with any thought that the sewer would be constructed to his premises and there stop, approved the building of the sewer, or consented to the improvement, and the trial judge properly refused to submit this question to the jury.

Counsel also contend that the verdict is excessive. The evidence as to the depreciation in the market value of appellee's property is conflicting. Some of the witnesses say that its value had not been decreased, while others placed the damages at a considerable sum. The testimony that his sickness was caused by the obnoxious gases and poisonous odors that came from the filth discharged from the sewer is quite conclusive, and, under all the circumstances proven in this case, we are of the opinion that the verdict of the jury was very reasonable indeed—as the appellee cannot again recover in damages for injury to his property by this sewer in the condition it was in at the time of the trial. Cities in the exercise of their governmental functions may construct sewers, streets, and other similar improvements; but they have no right to build a sewer in such a manner that it will discharge at the very door of a citizen the accumulated filth of

livery stables, hotels, water-closets, and bath-rooms, and, when guilty of such wanton disregard of the rights of others, they must respond in damages.

The judgment is affirmed.

ADAMS EXPRESS CO. v. COMMON-WEALTH. (No. 1,835.)

(Court of Appeals of Kentucky. April 27, 1906.)

1. COMMERCE—INTERSTATE TRAFFIC—SALE OF INTOXICATING LIQUORS.

Where a liquor dealer outside the state ships whisky C. O. D. into the state consigned to one who has not ordered it, and then notifies him thereof, whereupon he pays for and receives it, the transaction is not interstate commerce.

2. INTOXICATING LIQUORS—VIOLATION OF PROHIBITION LAW—EXPRESS COMPANIES.

Where a liquor dealer outside the state ships whisky by an express company C. O. D. consigned to one who has not ordered it, and then notifies him thereof, whereupon he pays the company therefor and receives it, the company is guilty of violating the prohibition law, even if it believes the acts of the consignor are legitimate acts of interstate commerce.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 161.]

3. SAME—EVIDENCE.

Evidence on "a prosecution of an express company for violation of the prohibition law held sufficient to show that it knew the nature of the transaction.

Appeal from Circuit Court, Knox County.
"To be officially reported."

The Adams Express Company was convicted of a violation of the prohibition law, and appeals. Affirmed.

Lawrence Maxwell, Jr., Joseph S. Graydon, and C. W. Metcalf, for appellant. N. B. Hays, Atty. Gen., and Charles H. Morris, for the Commonwealth.

BARKER, J. The appellant was indicted by the grand jury of Knox county, Ky., for a violation of the prohibition law prevailing therein. The indictment contains much surplusage with reference to what is called the "C. O. D. Statute," and as to the manner in which the Adams Express Company received the whisky said to have been sold by it in contravention of law. Stripped of all unnecessary verbiage, the indictment contains a statement sufficient to charge the defendant company with a sale of liquor by retail, in violation of the prohibition statute applicable to Knox county; and as to the unnecessary allegations, they may be dismissed from view under the shelter of the maxim "utile, per inutile non vitiatur." The defendant company pleaded not guilty, and the case was submitted to the court on the law and facts—the intervention of a jury being waived—resulting in an adverse judgment against it.

The evidence showed, for the commonwealth, the delivery by the defendant's agent, J. A. Owens, to one J. D. Main, of a gallon of

whisky, for which he paid \$3.85, which the agent at once transmitted to the shipper of the whisky in Cincinnati; also that Main did not order the whisky, and did not know the name of the consignor, but it was shipped to him at Barbourville, Knox county, Ky., from Cincinnati, by the Adams Express Company, C. O. D. This is but a small part of a general system prevailing by which unscrupulous dealers in whisky undertake, through the facile aid of express companies, to evade the prohibition laws in effect in certain counties in the state, and retail liquor therein in violation of the laws forbidding such traffic. By this system the names of the men accustomed to drink whisky are obtained by the dealers, and then, without any order therefor, or any contract whatever, the whisky in gallon packages is sent to various small towns throughout the prohibition counties, addressed to the parties whose names are thus acquired. The express company does not notify the involuntary consignee, but simply holds the whisky in its warerooms, and the party in whose name the liquor had been expressed receives notice, either by postal from the consignor, or by some local agent of his in the county, that there is an express package for him, and then, whenever the thirst for liquor becomes sufficiently strong to tempt him to pay the express charges and take it out of the express office, this is done. The name of the consignor is not known by the involuntary consignee, and the address for the return of the money is the number of a lock box in the Cincinnati post office. After the involuntary consignee becomes sufficiently acquainted with the system existing between the consignor and the express company, he finds that a gallon of liquor is generally kept at the express office subject to his order and the payment of charges, and he goes there for it with the same confidence that he would go to an ordinary dealer. The evidence in this case shows that, within six months next before the trial, J. D. Main had taken from the Adams Express Company's office at Barbourville, Ky., as many as 20 separate packages of whisky, of a gallon each, and the testimony of the express agent shows that he often had as many as 50 gallons of whisky on hand at one time consigned to various parties under the same system. Frequently, several parties club in and take out whisky together, dividing it in proportion to the amounts paid in by each; it being a rigid rule of the defendant company never to deliver the whisky to any person other than the named consignee. It was stipulated between the commonwealth and the defendant that the whisky in question was shipped from Cincinnati in the ordinary course of the express business.

The first and crucial question in this case is whether or not the shipment and delivery of the whisky was an act of interstate commerce. If so, it may be conceded that the defendant should go acquit; if not, it is prac-

tically conceded that the acts of the defendant constituted a sale of liquor in Knox county in violation of the prohibition law. We do not think the amendment of the prohibition law commonly denominated the "Farris" or "C. O. D." law has any bearing upon the merits of the offense under discussion. The learned counsel for appellant hinge the whole defense on the fact that the act of the express company constituted the carrying on of interstate commerce, and the C. O. D. law, being an attempt to regulate interstate commerce, which admittedly is under the exclusive regulation of the Congress of the United States, is for that reason void. This may be conceded. However, if the C. O. D. amendment was stricken from the statute book entirely, it would not affect in any way the merits of the transaction under investigation as we see it. The prohibition statute, without the amendment, forbids, under penalty, the sale of liquor by retail in Knox county; but neither the statute itself, nor the amendment thereto, undertakes to regulate interstate commerce. No state statute can affect interstate commerce, and the Legislature did not attempt to do so by that in question.

We do not agree to the proposition that the transaction which took place between the express company and J. D. Main in Knox county was interstate commerce. Nor do we agree with the Attorney General in his view of the effect of the Wilson bill upon the transaction in hand. As we understand him, he insists that, although the shipment from Cincinnati be conceded to have been a legitimate act of interstate commerce in its original inception, yet after the goods arrived in Barbourville, if kept overtime in a warehouse, then the transaction ceases to be one of interstate commerce, and becomes one of local commerce. We do not understand the Wilson bill, as construed by the Supreme Court of the United States, to have this effect upon a shipment of the kind under discussion. Without naming the decisions, or discussing them with minute particularity, we understand the Supreme Court to have decided, in the various cases cited in the briefs of counsel, that, where the whisky is purchased in a foreign state, it may be shipped by the seller to the buyer into a state where the sale of liquor is prohibited by law; that it is interstate commerce, unaffected by the local law, until it is delivered to the consignee, and the mere lapse of time, or the particular place where the goods are kept until called for, have no effect to change the quality of the transaction so that it ceases to be interstate commerce before the delivery. If this were not true, then if the consignee happened to be absent from home, or refuse to call for his goods promptly, that which was a legitimate transaction in its original inception would become vicious and illegal by the mere lapse of time occasioned by the negligence of the consignee. If the transaction be interstate commerce originally, it con-

tinues so until the goods are delivered into the hands of the consignee.

But was this transaction interstate commerce? No contract of purchase is even pretended to have been made in Cincinnati. So far as the consignor is concerned, he simply shipped his illegitimate goods into the state of Kentucky to a point where the prohibition law prevails, and through the instrumentality of the express company there made a sale to J. D. Main. No one disputes, or can dispute, that the transaction, so far as the consignor was concerned, was illegitimate and in violation of the law. He shipped forbidden goods into a prohibition district of Kentucky for the chance of being able to sell it after it reached its destination to Main. So far as he is concerned, the transaction in substance is the same as if he had brought the whisky himself to Barbourville and there sold it to Main. This being true, the transaction was not interstate commerce. The commonwealth proved facts which, of themselves, established the guilt of the defendant company. It showed the existence of the prohibition law in Knox county, the delivery of liquor by the defendant to Main, and the payment of the price by the latter to the company's agent. These facts constituted an offense under the prohibition laws prevailing at the place of sale, and the defendant is guilty unless it has a defense which takes the transaction from without the operation of the state statute. It seeks to do this by alleging that the transaction was interstate commerce. The burden to establish this fact is upon the defendant. There can be no doubt of the soundness of this proposition. When the commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do it to the satisfaction of the court or jury, or else be condemned. Did the defendant show that the transaction out of which grew the offense with which it stood charged was interstate commerce? The answer to this must be in the negative. It simply showed that it received in Cincinnati, in the usual course of business, which means no more, as we understand it, than that the goods were shipped in the ordinary way, whisky consigned to J. D. Main in Barbourville, Ky; but this does not constitute interstate commerce. Unless there was a bona fide shipment to a real consignee in Barbourville, the transaction was not interstate commerce, but a mere simulacrum of interstate commerce. In this case there was no bona fide shipment of merchandise from Cincinnati to Barbourville, but there was an illegal sending of whisky into Knox county through the instrumentality of the express company for the purpose of finding a buyer there. In its very substance, the unknown consignor, whose headquarters is a lock box in the Cincinnati post office, simply appointed the

Adams Express Company as his agent to find for him a purchaser in Knox county for a gallon of whisky on a given commission. The defendant cannot say it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment. It must show in defense of its otherwise illegal act in Knox county that the state law did not apply to it at that time, because what it did was in pursuance of an act of interstate commerce. Now, interstate commerce cannot be based upon fraud or chicanery. It must necessarily be a legitimate transaction. The Constitution and statutes of the United States are not shields for criminals; nor do they furnish a means by which crime may be effectuated. The Supreme Court of the United States does not uphold criminal acts, or protect criminals from the consequence of their misdoings. The transaction which took place between Cincinnati and Barbourville bears the same resemblance to interstate commerce as the wares of the green goods man bears to the genuine money of the United States. Both are mere counterfeits. As said before, in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce.

In the case of *State v. Robinson*, 49 Me. 285, four baskets of champagne were seized under the laws of the state, and the question arose whether or not they, being in the original packages, were subject to seizure, and the question of interstate commerce was involved. It was said: "It is not pretended, in the case at bar, that the wine was imported by Robinson. If he claimed the right to sell it on that ground, the burden of proof was on him to show that he was the importer. No evidence on that point was offered. The instructions given to the jury, that he had shown no right to sell, were correct, and the exceptions must be overruled." The case of *Commonwealth v. Zelt*, 138 Pa. 615, 21 Atl. 7, 11 L. R. A. 602, in principle involved the same question as the Maine case above cited. The court, on the question in hand, said: "The fourth assignment is not sustained. The fact that defendant Porter was the agent of an importer was a matter of defense, and the burden was upon him to establish it by competent evidence, to such an extent as to throw a reasonable doubt upon the commonwealth's case. This is substantially what the court below said to the jury."

Suppose, instead of the defense being interstate commerce, it had been license, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and that the latter was duly licensed to carry on the business; would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be impera-

tive upon it to show, not that it honestly believed it was, but that it was, the agent of a licensed dealer? In the case at bar, the defendant undertakes to show that it was the agent of the consignor, and that it believed the consignor's acts were legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not. Appellant cannot shelter itself under its common-law duty as a common carrier of goods. There is no common-law duty devolving upon a common carrier to act as the collecting agent of the consignor. That is a matter of private contract, and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent. In *Am. & Eng. Encyc. of Law*, vol. 12, p. 553, on this subject, it is said: "There is no common-law duty devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by contract, express or implied." *Cox, Hill & Thompson v. Columbus & Western Railway Co.*, 91 Ala. 392, 8 South. 824; *James McNichol v. Pacific Express Co.*, 12 Mo. App. 401.

But, passing this, while there is no direct evidence upon which one could lay his finger and say this showed knowledge, or that showed knowledge, on the part of the express company, that the business in which it was engaged was a criminal one, we think, taking the evidence as a whole, and looking at the circumstances from the point of view in Barbourville, there was enough to show that the defendant was bound to know that the consignors were carrying on, systematically, a criminal business, and that the names given as consignees to the various packages of whisky shipped were fictitious. In other words, while there were real persons in Barbourville bearing the names used, these persons had no contract of purchase, but the whisky was shipped in their names with a view of tempting them to purchase it after its arrival in Barbourville. Let it be remembered that Barbourville is a small town, scarcely above the dignity of a village, although it is the county seat of Knox county. It is a matter of common knowledge that in a small town there are no secrets. Every man knows every other man, what he does, how he conducts himself, and what are his habits. The system under consideration had been carried on a long time. Owens, the express agent, states that he had been at Barbourville 14 years; that during that time shipments of whisky had been received in the same way continuously. He admits that in no case did he ever notify any named consignee that there was a package for him. This tends to show that he expected the party to be notified in other ways. Large numbers of similar packages were held by him constantly. He rigorously enforced the rule not to deliver a package to any one except the consignee. This showed him to

be a formalist, and that he knew the advantage of surrounding the transaction with every semblance of legality. To borrow one of Edmund Burke's fine phrases, the transaction was made "most iniquitously legal." We do not believe it possible for an illegitimate business to be carried on through the express company on so large a scale, for so long a time, and especially where remittances were to be made to a lock box, instead of to a named firm, without its being ascertained that the system was criminal. Viewing the whole case, together with the large number of similar cases against the same defendant involving the same facts, and which were all heard together, we are forced to the conclusion that the agents of the defendant corporation at Barbourville knew of the illegality of the system they were helping to conduct, and that the corporation itself was the accomplice for pay of the criminal consignors.

The question involved here is a most important one for the people among whom the offense was committed. The mountain counties of Kentucky are thinly populated, and the arm of the law is necessarily weak, and the passions of men correspondingly strong. We do not transcend the bounds of judicial conservatism in saying that a very large number of the cases involving violent crimes which come to this court, on appeal from that section of the state, are directly caused by the use of whisky. Largely influenced by this consideration, no doubt, the good people of a majority of the mountain counties have sought to control crime by the enactment of prohibition laws, and the welfare of the whole community is bound up in the enforcement of these laws. It goes without saying, however, that if, by the instrumentality of such transactions as we have under discussion, whisky can be introduced and sold by retail through the aid of the express company, which makes itself the agent to deliver the spirits and collect the pay therefor, the law is reduced to a nullity. We do not believe that an express company can legitimately thus thrust the shadow of its greed between the people and their uplift.

The judgment is affirmed.

ADAMS EXPRESS CO. v. COMMONWEALTH (No. 685.)

(Court of Appeals of Kentucky. April 27, 1906.)

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

The Adams Express Company was convicted of a violation of the prohibition law, and appeals. Affirmed.

Lawrence Maxwell, Jr., and Joseph S. Graydon, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. This case, in principle, is identical with case No. 1,835, of the same style, this day decided (92 S. W. 932); and the judgment in this is affirmed for the reasons stated in the opinion in that case.

ADAMS EXPRESS CO. v. COMMONWEALTH. (No. 666.)

(Court of Appeals of Kentucky. April 27, 1906.)

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

The Adams Express Company was convicted of a violation of the prohibition law, and appeals. Affirmed.

Lawrence Maxwell, Jr., and Joseph S. Graydon, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. This case, in principle, is identical with case No. 1,835, of the same style, this day decided (92 S. W. 932); and the judgment in this is affirmed for the reasons stated in the opinion in that case.

ADAMS EXPRESS CO. v. COMMONWEALTH. (No. 1,866.)

(Court of Appeals of Kentucky. April 27, 1906.)

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

The Adams Express Company was convicted of a violation of the prohibition law, and appeals. Affirmed.

Lawrence Maxwell, Jr., Joseph S. Graydon, and C. W. Metcalf, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. This case, in principle, is identical with case No. 1,835, of the same style, this day decided (92 S. W. 932); and the judgment in this is affirmed for the reasons stated in the opinion in that case.

ADAMS EXPRESS CO. v. COMMONWEALTH. (No. 1,861.)

(Court of Appeals of Kentucky. April 27, 1906.)

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

The Adams Express Company was convicted of a violation of the prohibition law, and appeals. Affirmed.

Lawrence Maxwell, Jr., Joseph S. Graydon, and C. W. Metcalf, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. This case, in principle, is identical with case No. 1,835, of the same style, this day decided (92 S. W. 932); and the judgment in this is affirmed for the reasons stated in the opinion in that case.

ADAMS EXPRESS CO. v. COMMONWEALTH. (No. 1,846.)

(Court of Appeals of Kentucky. April 27, 1906.)

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

The Adams Express Company was convicted of a violation of the prohibition law, and appeals. Affirmed.

Lawrence Maxwell, Jr., C. W. Metcalf, and Joseph S. Graydon, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. This case, in principle, is identical with case No. 1,835, of the same style, this day decided (92 S. W. 932); and the judgment in this is affirmed for the reasons stated in the opinion in that case.

ADAMS EXPRESS CO. v. COMMONWEALTH. (No. 1,841.)

(Court of Appeals of Kentucky. April 27, 1906.)

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

The Adams Express Company was convicted of a violation of the prohibition law, and appeals. Affirmed.

Lawrence Maxwell, Jr., Joseph S. Graydon, and C. W. Metcalf, for appellant. N. B. Hays, Atty. Gen., and Chas. H. Morris, for the Commonwealth.

BARKER, J. This case, in principle, is identical with case No. 1,835, of the same style, this day decided (92 S. W. 932); and the judgment in this is affirmed for the reasons stated in the opinion in that case.

COMMONWEALTH v. BERRY, Judge.

(Court of Appeals of Kentucky. April 27, 1906.)

1. GRAND JURY—PRESENCE OF STENOGRAPHER.

Under Cr. Code Prac. § 110, declaring that no person except the attorney for the commonwealth and the witness under examination shall be present while the grand jury are examining a charge, the court had no authority to direct a stenographer to take the testimony before the grand jury.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Grand Jury, § 81.]

2. MANDAMUS—JUDICIAL PROCEEDINGS—CRIMINAL PROSECUTIONS.

Mandamus will lie to compel the judge of a circuit court to set aside an erroneous order directing a stenographer to take the testimony before the grand jury.

Paynter and Nunn, JJ., dissenting.

"Not to be officially reported."

Mandamus by the commonwealth to compel A. S. Berry, as judge of the Campbell circuit court, to set aside an order directing a stenographer to take the testimony before the grand jury. Writ issued.

W. A. Burkamp and J. W. Heuver, for the Commonwealth. Hazelrigg, Chenault & Hazelrigg, for defendant.

HOBSON, C. J. On the 19th of April, 1906, the judge of the Campbell circuit court entered the following order: "At the request of the grand jury that a stenographer be appointed to take the testimony, the court now appoints Miss Della Dressell, and she was sworn by the court to faithfully perform the duties of said stenographer, and to keep secret the proceedings of the said grand jury, and not to divulge the aforesaid proceedings, unless by due process of law." On the next day the commonwealth's attorney moved the court to set aside the order and enter an order excluding the stenographer from the sessions of the grand jury, and, the motion being overruled, moved the court to direct the grand jury to prevent any stenographer from attending its sessions. This motion was overruled. Thereupon, upon notice to the circuit judge, this proceeding was instituted in this court by the commonwealth's attorney in the name of the commonwealth against the judge of the circuit court, praying this court to issue a writ commanding him to set aside the order of April 19, 1906, and directing him to exclude from the grand jury room any person not authorized by law to be in the room.

Section 110 of the Criminal Code of Practice is as follows: "No person except the attorney for the commonwealth and the witness under examination shall be present while the grand jury are examining a charge; and no person whatever, while they are deliberating or voting on a charge." The secrecy of the proceedings of the grand jury has from the earliest times been rigidly enforced, the purpose being to free that body from all espionage or intimidation, and to enable them to ferret out violations of law quietly, step by step. If the proceedings of the grand jury are not kept secret, the jurors themselves might be less free to do their duty, and various obstacles might be placed in their way, destroying the independence of the body. The statute providing that no one but the commonwealth's attorney and the witness under examination shall be present is peremptory, and the circuit court erred in directing the stenographer to take down the testimony heard before the grand jury. By section 110 of the Constitution this court is given power to issue such writs as may be necessary to give it a general control of inferior jurisdictions. Under this section it has been held that a writ may issue where the inferior court is proceeding out of its jurisdiction, or when it is proceeding erro-

neously within its jurisdiction, if the remedy by appeal is not adequate. *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006; *Weaver v. Toney*, 54 S. W. 732, 21 Ky. Law Rep. 1157, 50 L. R. A. 105; *Shackelford v. Patterson*, 62 S. W. 1040, 23 Ky. Law Rep. 316; *L. & N. R. R. Co. v. Miller*, 66 S. W. 5, 23 Ky. Law Rep. 1714; *Campbellsville Telephone Company v. Patterson*, 69 S. W. 1070, 24 Ky. Law Rep. 832; *Louisville Public Warehouse Company v. Millor & Tilford*, 81 S. W. 275, 26 Ky. Law Rep. 351; *Hargis v. Parker*, Judge, 85 S. W. 704, 27 Ky. Law Rep. 441, 69 L. R. A. 270; *Boone v. Riddle*, Judge, 86 S. W. 978, 27 Ky. Law Rep. 828.

The case at bar falls within the rule laid down in these cases. There is no adequate remedy by appeal. The indictments found by the grand jury would be invalid if the proceedings of the grand jury were not conducted as required by the statute. The commonwealth is entitled to have the grand jury conduct its proceedings as provided by the statute. The Legislature has deemed the matter of sufficient importance to provide by law that no one but the commonwealth's attorney shall be present during the examination of witnesses before the grand jury. If this writ does not lie, then in every case the circuit court may appoint a stenographer to take down the evidence before the grand jury, and the commonwealth would be without remedy, thus defeating the statute entirely.

The motion for the writ is therefore sustained.

PAYNTER and NUNN, JJ., dissent.

LOUISVILLE, H. & ST. L. R. CO. v. SANDERS' ADM'R.

(Court of Appeals of Kentucky. April 26, 1906.)

1. RAILROADS—CROSSING ACCIDENT—ACTION—VENUE.

Under Civ. Code Prac. § 73, providing that an action against a common carrier for personal injuries must be brought in the county in which the defendant resides, or in which plaintiff is injured, or in which he resides, if he resides in a county into which the carrier passes, an action may be brought against a railroad for injuries at a crossing in the county in which the plaintiff resides where the carrier has a track extending through that county, even though trains have never been operated on the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 50.]

2. SAME—INSTRUCTIONS—SIGNALS AT CROSSINGS.

Under Ky. St. 1903, § 786, requiring railroads to give warning signals at least 50 rods from the place where the road crosses a highway, and section 406, declaring that a person injured by the violation of any statute may recover from the offender such damage as he may sustain, it is proper in an action against a railroad company for injuries received in a crossing accident, to charge that it was the duty of defendant's servants to give reasonable notice of the approach of a train to the cross-

ing, and that failure to do so was negligence, and it was not error to refuse to modify this instruction by a statement that it was the duty of the injured person to stop, look, and listen, before going upon the track.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1201½, 1208, 1210.]

3. TRIAL—IMPROPER ARGUMENT—CORRECTION OF ERROR.

In an action against a railroad company for injuries received in a crossing accident, plaintiff's counsel in argument handed his watch to one of the jurors, and took hold of a string attached to some object and undertook to demonstrate how often the bell cord could have been jerked in two seconds. The court admonished counsel in the presence of the jury that it was his duty to argue the testimony as adduced, but did not directly tell the jury to disregard the attempted demonstration. *Held*, that in view of the admonition of the court the error, if any, in allowing the argument, was not cause for reversal.

Appeal from Circuit Court, Bullitt County.
"Not to be officially reported."

Action by William Sanders' administrator against the Louisville, Henderson & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Helm, Bruce & Helm, for appellant.
Bennett H. Young, for appellee.

NUNN, J. This is an appeal from a judgment of the Bullitt circuit court for \$3,750 against the appellant for the killing of appellee's intestate. The deceased was killed at a point where a public highway crossed appellant's track. He was driving along in a spring wagon, and, when on appellant's track, a passenger train which was running behind time and very fast instantly killed him and his horse. The appellant concedes that it has no grounds for a reversal on the evidence, and asks for a reversal for the following reasons: (1) The court erred in taking jurisdiction of the defendant, over its objection. (2) The court erred in giving and refusing instructions. (3) The court erred in allowing misconduct on the part of appellee's counsel in his concluding speech to the jury. We will consider these questions in the order recited.

It appears without contradiction that the deceased was killed in Jefferson county, that he resided in Bullitt county, that the summons was served upon one of the chief officers of appellant in Jefferson county. It is also conceded that appellant owns a right of way and roadbed into and possibly through Bullitt county. It executed a mortgage to secure some bonds which were recorded in Bullitt county, and described its line of road as "beginning at West Point in the county of Hardin, and extends into and through Bullitt and Jefferson counties," but, prior to this injury and the institution of this action, it had never run an engine or train of cars onto its roadbed in the county of Bullitt, and, by reason of this last fact, appellant contends that it was improperly

sued in Bullitt county; that court not having jurisdiction of it. Section 73 of the Civil Code of Practice, so far as it applies to the matter before us, reads as follows: "An action against a common carrier for an injury to a passenger or other person * * * must be brought in the county in which the defendant * * * resides; or in which the plaintiff * * * is injured, or in which he resides, if he resides in a county into which the carrier passes."

The appellant contends that the Code means by the words "carrier passes" is the operation of the trains, and as it had not operated a train in the county of Bullitt, that court did not have jurisdiction of it. We cannot agree to this construction of the Code. We are of the opinion that the word "carrier," as used in this section, applies not alone to the operation of trains, but it applies to the appellant as a common carrier. Suppose the appellant had owned the right of way, and had graded its roadbed from Henderson to Louisville, and had partly placed the ties and rails thereon, and was preparing to run engines and cars for the purpose of carrying persons and property to effectuate the purposes for which the company was organized. Could it be reasonably contended that under such circumstances it was not a carrier in the sense that word is used in the Code? Would it be contended that every person injured upon the line by the corporation or its agents would be compelled to sue appellant at its home office simply because it had not run a train of cars over its roadbed? We think not. In our opinion, as the appellant at that time owned a right of way and roadbed, which extended and passed into Bullitt county, this had the effect to make it, the corporation, a "carrier" which passed into Bullitt county in the sense and meaning of the Code. The appellant complains of the following instruction: "The court instructs the jury that it was the duty of the defendant's servants in charge of the engine to give reasonable and timely notice of the approach of the train to said crossing by ringing the bell or sounding the whistle of the engine continuously or alternately until the engine reached the crossing, and a failure to do so, if they so failed, was negligence." This instruction follows the language of section 786 of the statute of 1903, except that the statute says that those in charge of the train must begin to give these warnings at least 50 rods from the place where the road crosses the highway. Appellee's counsel offered an instruction embodying this portion of the statute, and upon the objection of the appellant the court refused to give it. The appellee was entitled to it. This statute was enacted for the benefit and protection of persons using a highway, as well as these riding on the train. By section 793, a penalty is imposed for the violation of this statute. By section

466 of the statute, it is provided: "A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture be thereby imposed."

There was evidence introduced upon the trial from which the jury might have concluded that the failure to ring the bell or blow the whistle upon that occasion by appellant's servants, caused the death of appellant's intestate. The appellant cites the cases of *Paducah & Memphis Railroad Company v. Hoehl*, 12 Bush, 41, and *Chesapeake & Ohio Railroad Company v. Gunter*, 108 Ky. 362, 56 S. W. 527, as sustaining its position. In the first case, the child was not attempting to cross at a public highway, nor had section 786, Ky. St. 1903, been enacted at that time. In the second, or *Gunter Case*, the lower court had given an instruction to the effect that if the jury believed from the evidence that the crossing was an exceptionally dangerous one, it was the duty of the defendant to keep a watchman at the crossing. The court in that case had not given an instruction like the one given in this case. The court also instructed the jury that it was the duty of Sanders in approaching the crossing to exercise ordinary care for his own safety, and if the jury should believe from the evidence that Sanders failed to exercise such degree of care and was thereby injured, then the law was for the defendant, and the jury should so find. The appellant contends that the court should have in substance told the jury that Sanders in approaching the crossing should have stopped, looked, and listened for the approach of a train before entering upon the track. This court has frequently in cases like this, approved instructions similar to the one given by the court, and condemned the modification as asked for by the appellant.

The substance of the third and last ground assigned for a reversal is this: Appellee's counsel, in the closing speech to the jury, handed his watch to one of the jurors, and took hold of a string attached to some object and undertook to demonstrate how often the bell cord could have been jerked in two seconds, and claimed that it could have been jerked 10 times. To this appellant objected. The court then admonished the counsel in the presence of the jury that it was his duty to argue the testimony as adduced, and instructions given by the court, but did not tell the jury in so many words, to disregard the attempted demonstration made by counsel in their presence. There had been some attempt while the engineer of the train was on the witness stand to get him to state how often the bell rope could have been jerked in the length of time named, and counsel for appellee was discussing this when he attempted to make the demonstration referred to. If an error it was of but little

consequence, as in our opinion the admonition of the court given at the time removed from the jury the evil effects of it.

For these reasons, the judgment of the lower court is affirmed.

JOHNSON v. GREEN.

(Court of Appeals of Kentucky. April 26, 1908.)

VENDOR AND PURCHASER—ACTION FOR PRICE—DEFENSES—INSUFFICIENT TITLE.

In a suit by a vendor for the price, the fact that he, prior to the sale to defendant, had conveyed the coal under the land to another, did not entitle defendant to an abatement of the price, where it was shown that he learned of the conveyance of the coal shortly after the sale to him, but made no complaint, until sued, that he had ever been molested in his use of the land by the owner of the coal, and that defendant had so used the land as to materially decrease its value and desirability to the vendor.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 885, 889.]

Appeal from Circuit Court, Carter County.
"Not to be officially reported."

Action by William R. Green against J. H. Johnson. From judgment in favor of plaintiff, defendant appeals. Affirmed.

G. W. Armstrong and E. B. Wilhoit, for appellant. Theobald & Theobald, for appellee.

O'REAR, J. Appellee sold to appellant a tract of land containing 40 acres, in Carter county, this state, and agreed by title bond to execute a sufficient deed when the lot was conveyed, upon the payment of the purchase price. Part of the purchase money was paid in March, 1908, when appellant was put into possession of the lot, and the remainder was to be paid in future installments. The vendee, after taking possession under his purchase, suffered the place to get out of repair, let his cattle damage the fruit orchard, destroying some of the trees, allowing the fencing to fall into disrepair, and cut and sold much, if not all, the valuable timber from the place. When sued recently by appellee, who sought to collect the balance of the purchase price, which had become due and was unpaid, appellant defended on the ground that appellee was unable to convey a good title to the land. The facts in respect to the defense are that appellee's remote vendor, back in 1873, sold and conveyed the coal from a tract of 300 acres, of which this 40 is a part, with right of way to and from mines. Appellant asked that the purchase price of the land be abated by the value of the coal privileges, which appellee was unable to convey, which were alleged to be worth pretty near as much as appellant had agreed to pay for the fee-simple title to the land. Appellant did not claim that coal had been discovered under this 40 acres, or that he had ever been molested in the full enjoy-

ment and use of the land by claim or otherwise of the owner of the coal privileges. While it was shown that a stratum of coal underlaid a part of the 300 acres, it was not proven that it was upon this particular part, although there was evidence that it had been searched for at different times. The circuit court rejected the defense, and rendered judgment in behalf of appellee, enforcing his lien for the balance of the purchase money.

The coal privileges having been conveyed to others by appellee's vendor, the former was unable to convey to appellant a sufficient title as called for by the bond. But it does not follow that a court of equity was bound, under the circumstances recited, to let appellee hold the land for less than he had agreed to pay for it. An equitable defense rests upon the same principles, as to its being allowed, as an equitable cause of action. The chancellor is not bound in either case to give relief in equity which it would be inequitable to give. The fear of molestation in this case is based upon such a remote probability that it is well-nigh impossible to fix the damage appellee might sustain by reason of its ever materializing. To attempt to fix the damage to his title now by reason of it would be highly speculative. If appellee had, at the time of the sale to appellant, executed the warranty deed to appellant which was tendered with the petition, the latter would never be heard upon a claim for damages because of its breach until the damage had been actually sustained. Ordinarily an executory contract for the sale of land is treated differently; for a court of chancery will not generally decree a specific execution of the contract by one party when the other is unable to convey all that he has agreed to. Cases of that sort are not wanting. But it is the peculiar province of equity, and is its distinguishing quality, that it varies its relief according to the meritoriousness of the claim or defense. It is the conscience of the law, so to speak, and deals principally and peculiarly with the right of the matter. At law, supposing the defense as well as the action were cognizable at law, the defense would be irresistible, although to apply it might trouble the conscience of the court, which gave rise to an equity jurisdiction, ameliorating, by this branch of the law, the rigors of the other.

Had appellant, upon learning of the defect in the title (as he did shortly after his trade) seasonably proffered to return what he had got, placing his vendor in statu quo, his position in this controversy would be altogether different from what it is. But that he did not do, and does not even yet offer to do. On the contrary, he insists on holding the land, but would have the chancellor abate the agreed purchase price, so as to really make a new and essentially different contract from that which the parties entered into. He was not overreached by the design

or fraud of his vendor. They were each equally innocent, we may suppose, from the facts shown, of intent to do wrong to the other when they entered into their agreement. If they could be restored, each as he was, in his property rights, it would be the duty of the court to do it. But that cannot be done, because appellant has it not in his power to restore the property in substantially the condition it was when he got it. Appellant has, with knowledge of the incurable defect in the title, held on to the lot without complaint till sued for the balance of the purchase money. He has so used the land, by cutting and selling the timber from it, that it is materially changed in value, as well as in its desirability to the former owner; and to either abate the purchase price, as appellant asks, or to adjudge a rescission by requiring an accounting for rents and damages, would in this case amount to the making of an altogether different contract between these parties from any that either of them probably ever contemplated. That such a result is not sometimes produced is not claimed. But then it is only where such a course seems to be the most practicable and just settlement of the controversy. Under the facts recited we think appellant was too slow in disclaiming the sufficiency of the title he had bought. By his laches, as well as by his active conduct and treatment of the property, he has elected to take the title as it is, and will be held to look to the warranty of his grantor for redress in the event his present fear of molestation from the owner of the coal privileges become an actual damage to him.

Judgment affirmed

FINCH v. COMMONWEALTH.

(Court of Appeals of Kentucky. April 25, 1906.)

1. CRIMINAL LAW — ADMISSIONS — ACQUIESCENCE.

In a criminal prosecution, evidence that one jointly indicted with defendant, while they were both in custody, made a remark to defendant importing that he was guilty of the crime, as well as the speaker, and that defendant made no denial, was competent.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 898, 968.]

2. SAME — APPEAL — HARMLESS ERROR — INSTRUCTION.

It was not prejudicial error to fail to instruct that no conviction could be had on the uncorroborated testimony of an accomplice, where the accused himself testified to substantially the same facts as the accomplice.

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

Charlie Finch was convicted of murder, and he appeals. Affirmed.

John Feland and C. R. Clark, for appellant. N. B. Hays and C. H. Morris, for appellee.

PAYNTER, J. The appellant was convicted as a participant in the murder of an unknown white man, a stranger in the community, near Pembroke. The persons who committed the crime did so for the purpose of robbery, and the details attending the commission of the crime were of the most brutal and horrifying character. Merriweather, Holland, Carney, and others were indicted for the same offense. As the facts fully appear in the cases of *Holland & Carney v. Commonwealth*, 82 S. W. 596, 26 Ky. Law Rep. 791, and *Merriweather v. Commonwealth*, 82 S. W. 592, 26 Ky. Law Rep. 793, we will not again detail them. A trial of the case resulted in the appellant's conviction, and sentence to the penitentiary for life.

The appellant urges that the court erred to his prejudice in allowing Herbert McMath to testify to statements made in the presence of the appellant by George Holland, who was jointly indicted with him. The statement complained of was made when both the appellant and Holland were in the custody of the law charged with the crime. The court permitted McMath to testify as to the statement made by Holland which imported that the appellant was guilty, as well as himself, of the crime, but excluded the testimony of Joe Jackson with reference to the same statement; but it is urged that, although the court excluded the statement of Jackson, it operated upon the minds of the jury to the prejudice of the appellant. In referring to what George Holland said to the appellant, Jackson detailed what occurred as follows: "Q. Well, tell the jury what it was? A. Well, sir, Charles and old man George had a talk about this killing, and old man George made this remark to Charles: 'That if it had not been for him, he would not have been in this.' He said: 'You know I went home to get out of it, and you came after me, you thought I was the drunkest'—and Charles didn't say anything to the contrary. Q. Where did he say Charles came to after him? A. He said he came to his house after him."

It will be observed that Holland addressed his remarks to appellant, and he made no denial of the accusation against him, although the record shows that he was near Holland at the time he made the statement. It is insisted that this evidence was not competent under the rule announced in *Merriweather v. Commonwealth*, but we do not think that is true. The appellant heard Holland's statement, and he certainly understood it. He had ample opportunity to express himself concerning the statement, and the circumstances were such as to call for a denial of them, if they were not true. In *Eaton v. Commonwealth*, 90 S. W. 972, 28 Ky. Law Rep. 908, it is said: "Admissions by acquiescence in what somebody else has said or done should not be admitted, unless

It plainly appear that such act was fully known or the language fully understood by the party sought to be bound thereby. Evidence of such admissions would be very dangerous indeed, and should only be received with caution. The circumstances must also be such as afforded the party an opportunity to act or to speak, and which would properly and naturally call for some action or reply from men similarly situated." We think the court erred in excluding the testimony of Jackson, and did not err in admitting that of McMath.

It is suggested that the court did not give the whole law of the case in its instructions to the jury, because the commonwealth introduced Ed Mosely, who was jointly indicted with the appellant for the crime, and did not instruct the jury that a conviction could not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense. Mosely was introduced by the commonwealth, and testified that he and the appellant and two others stood in the road near by and witnessed the killing of deceased by Merriweather and George Holland, and that after they did so they ran away from the scene of the murder. This witness endeavored to exculpate himself from participation in the commission of the murder. The defendant was introduced as a witness, who testified to substantially the same facts with reference to the murder. He admitted that he was standing at the place where Mosely testified that he stood and witnessed the commission of the offense by Merriweather and Holland. While it is proper for the court to give the instruction suggested, still its failure to give it in this case was not prejudicial to the rights of the appellant, as he and the appellant gave substantially the same evidence in the case.

The judgment is affirmed.

COMMONWEALTH v. HUSTONVILLE & C. M. TURNPIKE ROAD CO.

(Court of Appeals of Kentucky. April 18, 1906.)

TURNPIKES AND TOLL ROADS—CORPORATIONS —SETTLEMENT WITH COUNTY COURT—FAILURE—INDICTMENT.

Under Ky. St. 1903, § 4718, providing that the president and managers of all toll bridges, turnpikes, and gravel and plank roads shall within the month of July make a full settlement in the county court in each county in which the same is located, etc., an indictment for violation of the statute, which alleged that "on the — day of July" the president and managers of the defendant company failed or refused to make a statement, etc, was insufficient.

Appeal from Circuit Court, Lincoln County.

The Hustonville & Coffey's Mill Turnpike Road Company was indicted under Ky. St. 1903, § 4718. From a judgment sustaining a demurrer to the indictment, and dismissing it, the state appeals. Affirmed.

Harvey Helm, C. A. Hardin, N. B. Hays, and C. H. Morris, for the Commonwealth.

SETTLE, J. Appellee, an incorporated turnpike road company, was indicted by the grand jury of Lincoln county for failing to make a full settlement on the — day of July, 1904, with the county court of Lincoln county; that county, according to the allegations of the indictment, being the only county in the state that owns stock in the appellee company. The lower court sustained a demurrer to the indictment, and from the judgment sustaining the demurrer and dismissing the indictment the commonwealth has appealed.

The indictment was based on section 4718, Ky. St. 1903, which provides: "The president and managers of all toll bridges, turnpike, gravel and plank road companies shall, within the month of July in each year make a full settlement with the county court in each county in which the same is located, showing an itemized account of the entire earnings of said toll bridge, turnpike, gravel or plank road company and said settlement shall be sworn to by the officer making the same; and they shall also make or declare a dividend of the profits of such bridge, turnpike or road company, if any, and pay to the stock holders when called for, the amount due to the state or county within twenty days thereafter: provided, that when the state or county owns stock in any of said roads, the settlement herein required shall be made only in the county or counties owning stock, and the indictment for failure to make said settlement shall be found in one of said counties. It shall be the duty of the county attorney to see that said settlement is made or dividend is declared; and upon the failure of any of the companies herein enumerated to comply with the requirements of this section, they or any of them, shall upon indictment in the circuit court of the county, be fined not less than \$25.00, nor more than \$100.00 for each offense." The record does not disclose the ground upon which the demurrer was sustained, but a cursory examination of the indictment manifests at least one fatal defect sufficient to have authorized the judgment appealed from.

It will be observed that the statute, supra, requires of such companies as that of appellee an annual settlement, which must be made "within the month of July in each year." The allegations of the indictment are: "The Hustonville & Coffey's Mill Turnpike Road Company, in the county and state aforesaid, on the — day of July, 1904, and before the finding of this indictment, did unlawfully by its president or managers fail and refuse on the — day of July, 1904, to make a full statement, sworn to, showing an itemized account of the entire earnings of said company, with the county court of Lincoln county, which county was the only county in the state of Kentucky on said date that owned

stock in said company. * * * As under the statute appellee might have reported and made the required settlement with the county court at any time during or "within" the month of July, 1904, its failure to do so on any particular day of that month did not constitute an offense. Manifestly, it was not sufficient for the indictment to allege that the failure to make the settlement occurred on the — day of July; for as that may, and ought to be, construed as meaning the 1st day of the month, it is patent that there remained 30 other days of that month, on any one of which (Sundays excepted) appellee might have made the settlement. It follows, therefore, that to constitute an offense under the statute, supra, the indictment should have alleged that appellee unlawfully failed to make such settlement with the Lincoln county court within or during the month of July, 1904. The demurrer to the indictment was properly sustained.

Judgment affirmed.

LYON v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 8, 1906.)

TURNPIKES AND TOLL ROADS—FAILURE TO MAKE REPORT—INDICTMENT—SUFFICIENCY.

Under the statute requiring the officers of turnpike companies to make an annual settlement within the month of July in each year and providing a penalty for failure to do so, an indictment for violation of the statute, alleging that defendant was an officer of a certain turnpike company "on the — day of July," and that no report was made during that month, was insufficient for failure to show that defendant was an officer during the entire month during which the report might have been made.

Appeal from Circuit Court, Lincoln County.

"Not to be officially reported."

G. C. Lyon was convicted of violation of the statute requiring turnpike companies to make an annual settlement, and appeals. Reversed and remanded.

M. C. Saufley, for appellant. N. B. Hays and O. H. Morris, for the Commonwealth.

CARROLL, C. The indictment under which appellant was fined charges that "G. C. Lyon, in the county and state aforesaid, on the — day of July, 1903, and before the finding of this indictment, was the president, treasurer, manager of, and director in the Hustonville & Coffey's Mill Turnpike Road Company, which was incorporated under and by virtue of the laws of Kentucky, and in which corporation the county of Lincoln owns stocks, and did fail and refuse to make a full report or settlement sworn to by him as such officer as required by law, or any report at all, to the county court of Lincoln county, Ky., during the month of July, 1903, showing an itemized

account of the entire earnings of said turnpike company; no manager, director, president, or any other officer of said turnpike company having made a full report or settlement sworn to by any one of said managers, directors, president, or other officers as required by law, or any report at all to the county court of Lincoln county during the month of July, 1903, showing an itemized account and settlement of the entire earnings of said turnpike road company, and no report and settlement as required by law having been made by said officers of said company to the county court of Lincoln county, Ky., owning stock in said corporation, during the month of July, 1903." To this indictment a demurrer was filed, and the first error complained of is the action of the court in overruling the demurrer.

In the case of Commonwealth of Kentucky v. Hustonville & Coffey's Mill Turnpike Road Company, 92 S. W. 941, in which the opinion of the court was delivered by Judge Settle in April, 1906, the company was indicted for failing to make a settlement on the — day of July, 1904, with the county court of Lincoln county. In considering the case the court said: "The statute requires that an annual settlement must be made 'within the month of July in each year,' and, as it might have been made at any time within the month, it was not sufficient for the indictment to allege that the failure to make the settlement occurred on the — day of July; for as that may, and ought to be, construed as meaning the 1st day of the month, it is patent that there remained 30 days of that month, on any one of which, Sundays excepted, appellee might have made the settlement" and further held that, "to constitute an offense under this statute, the indictment should have alleged that appellee unlawfully failed to make such settlement with the Lincoln county court within or during the month of July, 1904." The indictment in this case charges that appellant, on the — day of July, 1903, was the president of the company, but fails to allege that he was president during the entire month of July, 1903; and as the report might have been made at any time during the month of July, 1903, it was necessary to charge that he was at all times during said month an officer of the company. The allegation of this indictment might be true, and yet appellant have had no connection at all with the company, except on the 1st day of July, 1903. Applying to the state of facts presented by the indictment the reasoning of the court in the case supra, the indictment was defective, and the demurrer should have been sustained.

The judgment is reversed, and cause remanded, with directions to the lower court to proceed in conformity to this opinion.

AULL v. BOWLING GREEN OPERA HOUSE CO.

(Court of Appeals of Kentucky. April 17, 1906.)

1. APPEAL—FINAL ORDER.

Where, in an action for settlement of a partnership, there is a judicial sale of property, and a general writ of possession is awarded against the tenants occupying the property, in favor of the assignee of the purchasers, to whom a commissioner's deed has been made, the denial of the petition of a tenant to be made a party, he alleging a lease from the purchasers, and the issuance of the writ of possession, is a final judgment, within Civ. Code Prac. § 368, and so authorizes an appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 520, 521, 628.]

2. PARTIES—RIGHT TO INTERVENE.

Where, in an action for settlement of a partnership, there is a judicial sale of property, and a general writ of possession is awarded against the tenants of the property, in favor of the assignee of the purchasers, a corporation into which they organized themselves, a tenant, claiming to have received a lease from the purchasers before their assignment, is entitled to be made a party.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 63.]

Appeal from Circuit Court, Warren County.
"To be officially reported."

Petition by T. H. Aull to be made a party to an action. Objection made by the Bowling Green Opera House Company was sustained, and petitioner appeals. Reversed.

Sims & Grider, Hazelrigg & Hazelrigg, and C. P. Chenault, for appellant. Sam'l D. Hines, J. McKenzie Moss, R. C. P. Thomas, and Thos. W. Thomas, for appellee.

BARKER, J. In an action styled "J. E. Potter, Executor, etc., v. Mrs. Mamie Browder and Others," pending in the Warren circuit court for a settlement of the partnership of Potter Bros. property situated in the city of Bowling Green, known as the "Potter Opera House," was sold at judicial sale, and purchased by H. D. Fitch, T. Lindsey Fitch, Mrs. Henrietta Miller, S. W. Coombs, and James H. Barclay, jointly, for the sum of \$29,825. This purchase was confirmed by the court, and afterwards the purchasers, having organized themselves into a corporation under the style of "Bowling Green Opera House Company," for the purpose of holding and managing the opera house, assigned the benefit of their bids at the judicial sale to the corporation, and a commissioner's deed for the property was made to it. Afterwards, on motion, the court awarded what is called a "general writ of possession" against the tenants occupying the opera house in favor of the Bowling Green Opera House Company. When this was done, the appellant, T. H. Aull, tendered his petition to be made a party to the action, in which he set forth, substantially, that he was then occupying a room in the opera house as a drug store; that he acquired possession thereof from the original owners, Potter Bros., and

had been occupying the premises continuously for five or six years prior to the judicial sale; that his lease from Potter Bros. expired on the 1st day of January, 1906; that after the order of confirmation to the individual purchasers, but prior to the assignment to the corporation, the petitioner had obtained a lease of the property from the individual purchasers for one year for the sum of \$1,262; that this lease was subsequently reduced to writing and extended for a period of three years; that the memorandum was in the possession of the lessors, and could not be produced by the petitioner; that afterwards the purchasers had organized themselves into a corporation, and, in violation of his rights, assigned the whole benefit of their purchase to it. The court, on objection of the Bowling Green Opera House Company, refused to permit this petition to be filed, but allowed it to be noted of record, and from the order sustaining the objection to its being filed, and also the order awarding a general writ of possession against the petitioner, an appeal was granted and a supersedeas executed in due form before the clerk. Afterward the clerk, deeming that the supersedeas was void, issued the writ of possession, and thereupon the petitioner prayed an appeal in this court from the order issuing the writ of possession.

We think the judgment refusing to permit the filing of the petition and the issuance of the writ of possession constituted a final order, within the meaning of section 368 of the Code. *Helm v. Short*, 7 Bush, 623; *Maysville & Lexington R. R. Co. v. Punnett, etc.*, 15 B. Mon. 48; *Turner v. Browder*, 18 B. Mon. 826. And the position of appellees, that appellant is a stranger to the record, and cannot be heard in this case to set up his rights under the lease from the purchasers at the judicial sale against the issuance of the writ of possession is untenable. The purchasers were themselves strangers to the record until they bought the property at the judicial sale, and the Bowling Green Opera House Company was a stranger to the record until the assignment by the purchasers was made to it and it was allowed to come into court, prove up its rights under the assignment, and have a deed made to it in conformity thereto. If the Bowling Green Opera House Company could be heard on its rights under the assignment, why may not the appellant be heard on his rights under the lease? Both are claiming from the same parties—the purchasers at the judicial sale. One claims the whole by assignment; the other claims a part by the lease. The same reasoning, which admits the corporation to come into the case to protect its rights under the assignment, admits the appellant to come for the purpose of protecting his rights under the lease. If what he states be true, then the corporation took the property under the assignment subject to the provisions of the lease. It is difficult to see how the appellant can be called a stranger to the record in a case where his

substantial rights are being adjudicated against him, in the sense that he will not be permitted to protect those rights from adverse adjudication by bringing them to the notice of the court. Suppose, after making the assignment to the corporation and receiving the purchase money therefor, the purchasers had, in violation of their assignment, again assigned it to another party, and attempted to have a deed made to the second assignee; is it possible that the corporation would not be heard to set up its claim under the first assignment, and contravene the rights of the second assignee? If this question is answered in the negative, then it must be equally sound that the appellant here must be heard on his claim to the property under the lease.

We are of opinion that the trial court erred in refusing to permit the appellant to file his petition to be made a party. Equity abhors a circuity of actions, and there is no reason for turning the petitioner out of court and requiring him to bring a new action for relief, when an efficient remedy can be afforded him in the case now pending. We know of no rule of judicial procedure which authorizes the turning out of a party in possession by the exercise of the summary writ issued in this case without affording him, if desired, an opportunity to show why he should not be thus summarily dispossessed. We, of course, express no opinion on the merits of the issue tendered by the petition. We have assumed the truth of its allegations only for the purpose of testing appellant's right to file it.

The judgment is reversed for proceedings consistent with this opinion.

COMMONWEALTH v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky. April 18, 1906.)

HIGHWAYS — OBSTRUCTION OF HIGHWAY — CRIMINAL LIABILITY.

A railroad company, unnecessarily placing its cars across a public highway and thereby obstructing the same, may be prosecuted by indictment for maintaining a nuisance, though Ky. St. 1903, § 4335, imposes a penalty for the obstruction of public roads, recoverable in a civil action.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, § 444; vol. 1, Cent. Dig. Action, § 274.]

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

The Illinois Central Railroad Company was indicted for maintaining a nuisance. From a judgment sustaining a demurrer to the indictment, the commonwealth appeals. Reversed.

N. B. Hays, C. H. Morris, and J. L. Grayot, for the Commonwealth. Gordon, Gordon & Cox, J. M. Dickinson, and Trabue, Doolan & Cox, for appellee.

CARROLL, C. From a judgment of the Hopkins circuit court, sustaining a demurrer to an indictment charging the appellee with creating and maintaining a common public nuisance, "by unlawfully, willfully, and continuously placing, keeping, and allowing to remain a freight train, box cars, coal flats, and freight cars, unnecessarily and for an unreasonable length of time, in, on, and across a public highway, known as the 'Nortonville and Haley's Mill Road,' * * * thereby obstructing and rendering impassable said highway for an unnecessary and unreasonable length of time, and causing all the people who pass and repass and drive teams and buggies over and along said public highway, and who had the right to travel and drive teams and buggies and wagons over said highway, great inconvenience, trouble, and delay, for an unreasonable length of time, to the common nuisance of all the people of the commonwealth." The commonwealth prosecutes this appeal.

We are not advised as to the ground upon which the demurrer was sustained, except from a statement contained in the brief for appellee that the circuit judge was of the opinion that it did not state a public offense, within the jurisdiction of the circuit court; and it is argued for appellee that this indictment charges an offense in violation of section 4335 of the Kentucky Statutes of 1903, which must be prosecuted by a warrant in the name of the commonwealth, in the quarterly court of the county, and cannot be prosecuted by indictment as a common-law nuisance in the circuit court. The precise question here involved was passed on by this court in the case of *Commonwealth v. American Telegraph & Telephone Company*, reported in 84 S. W. 519, 27 Ky. Law Rep. 29, adversely to the contention of appellee. In that case the court held that an indictment, charging in substance that the telegraph and telephone company had unlawfully, wrongfully, and unnecessarily cut down and felled a large tree, in and across a public highway, so as to obstruct travel thereon, to the common nuisance of all good citizens passing and repassing, might be prosecuted in the circuit court, and that the penalty provided in section 4335 of the Kentucky Statutes of 1903 for obstructing a public road did not preclude the commonwealth from indicting in the circuit court the perpetrators of such offense for a common-law nuisance.

Upon the authority of this case, as well as *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Baughman*, 76 S. W. 1103; 25 Ky. Law Rep. 705, *Commonwealth v. Illinois Central R. Co.*, 47 S. W. 258, 20 Ky. Law Rep. 606, and *Louisville & Nashville R. Co. v. Com.*, 40 S. W. 913, 19 Ky. Law Rep. 455, the judgment of the lower court must be reversed, and the cause remanded for proceedings in conformity to this opinion.

LAYNE v. POWER.

(Court of Appeals of Kentucky. May 23, 1906.)

BILLS AND NOTES—ACTIONS—TITLE TO SUE.

An executor, having taken a note payable to himself in his representative capacity, is, after settling with all the distributees and devisees under the will of his testatrix and paying all that is due them, entitled to maintain an action on the note in his individual capacity without a formal assignment of the note to himself individually.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 260-267, 1397; vol. 22, Cent. Dig. Executors and Administrators, § 1668.]

Appeal from Circuit Court, Floyd County. "Not to be officially reported."

Action by James P. Layne against James Preston Power. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

James Goble, for appellant. W. S. Harkins, for appellee.

CARROLL, C. On a note executed to James P. Layne, executor of the estate of Matilda Smith, the appellant individually instituted this action, alleging that he had settled with all the distributees and devisees under the will of Matilda Smith, had paid all that was due them, and was entitled to the proceeds of the note in his own right. To this petition the defendant filed a general and special demurrer. The court sustained the special demurrer on the ground that the plaintiff did not have legal capacity to sue, basing his judgment on the theory that as the note was executed to James P. Layne in his representative capacity the suit should have been brought by him as executor and not individually; and it is insisted, in support of this judgment, that the estate of Matilda Smith, or a personal representative who might succeed the defendant James P. Layne, would not be estopped by a judgment on this note in favor of James P. Layne individually from prosecuting another suit against the payor of the note. Under the averments of the petition, which must be accepted as true on the question here presented, James P. Layne as executor of the estate has settled in full with all of the distributees and devisees who would be entitled to any part of the proceeds of this note, and it is now his property. An executor or administrator may assign and transfer a note executed to him in his representative capacity, and if he should do so he would be liable on his official bond for the value of the note, and the persons entitled to it could recover in an action on the bond, and in the case at bar James P. Layne as executor of Matilda Smith could have assigned this note to James P. Layne individually; but, as the individual who brought the suit on the note was also the executor of the estate and in possession of the note, we do not think a formal assignment by him as executor to himself as individual was necessary to enable him

to prosecute a suit in his own name on the note. Generally, where there is no written assignment of a note, the assignor should be joined with the assignee as plaintiff in an action to recover on it; but, where the assignee and assignor are in fact the same person, this formality is not necessary. Nor do we doubt that the sureties on his bond would be liable to the estate if James P. Layne has not in fact accounted to the estate for the amount of this note. Therefore the payor of the note who satisfies the judgment will be fully protected. That an executor or administrator may charge himself in the settlement of an estate with a note due the estate, and thereby become the owner of, and have the right to recover on it, has been determined by this court in *Jones v. Everman*, 15 B. Mon. 632, 63 Am. Dec. 521; *Maraman v. Turnell*, 8 Metc. 146, 77 Am. Dec. 167. This being true, we see no reason why the personal representative may not pay the heirs and distributees the amount of a note due the estate, and thereby become the owner of it. The effect in both cases is precisely the same. The sureties in either case would be liable to the estate for the amount of the debt if the personal representative should fail to account for the amount due, and the payor would be protected by his payment to the representative in his individual capacity.

The judgment of the lower court is reversed, with directions to proceed in conformity to this opinion.

HENDERSON v. LIGHTNER et al.

(Court of Appeals of Kentucky. May 8, 1906.)

1. BILLS AND NOTES — ACTION — EVIDENCE — SUFFICIENCY.

On an issue in an action on a note as to how much interest the maker had paid, it could not be assumed, in the absence of convincing evidence, that he paid a greater rate of interest than the note called for.

2. GUARDIAN AND WARD — INVESTMENTS — GUARDIAN'S LIABILITY.

Where a guardian acted in good faith in the purchase of a note, and exercised reasonable and proper care, she was not liable because of her failure to realize on the note the amount expected at the time of its purchase.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 235.]

Appeal from Circuit Court, Fleming County.

"Not to be officially reported."

Action by Sarah Lightner against Josephine P. Henderson, as guardian. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. H. Power, for appellant. Maher & Grannis, for appellee.

CARROLL, C. In 1882 Henry Lightner purchased from Robert Toller 410 acres of land for \$4,000. Eight hundred dollars of this sum was paid in cash, and for the balance of the purchase money three notes were executed—one for \$1,200, due in 1883, and

two for \$1,000 each, due in 1884 and 1885. To make the cash payment of \$800 he borrowed this amount from G. A. Henderson, giving to Henderson his note and pledging the deed he had received from Toller as collateral security. The notes were written by Henderson; the \$1,200 note reciting that it was given for the "first payment" on the land, the \$1,000 note due in March, 1884, reciting that it was given for the "second payment," and the \$1,000 note due in March, 1885, reciting that it was given for the "third payment" on the land. Soon afterwards Henderson by assignment from Toller became the owner of the \$1,200 note and the \$1,000 note due March, 1884; Toller keeping the \$1,000 note due in 1885. Lightner paid the \$800 note and the \$1,200 note of Henderson. The \$1,000 note due in 1884, and assigned by Toller to Henderson, is the one in controversy in this case. In 1889 Henderson bought from Toller's administrator the \$1,000 note due in 1885, paying for it \$500. This note Lightner paid to Henderson in a land transaction. On June 20, 1892, Lightner executed to Henderson the following obligation: "On demand I promise to pay to G. A. Henderson four hundred and eighteen dollars and forty cents and six per cent. interest from this date until paid. This note is given for the balance on the third payment on four hundred and ten acres of land in Fleming county, Ky., and a good deed has been made to the land." In August, 1892, Henderson died, and his administrator found among his papers the \$1,000 note due in 1884, the note sued on, and also the note for \$418.40, executed on June 20, 1892. In March, 1893, Lightner paid to the administrator the full amount of the note for \$418.40. In May, 1894, the administrator assigned to Josephine P. Henderson, the appellant herein, who was the widow of G. A. Henderson and the guardian of their only child, the \$1,000 note due in 1884. The amount due on the note, at the date of its assignment, as appears by the indorsement of the administrator on the note, was \$837. For this amount the widow as guardian of the child accepted this note as an asset of her ward. Lightner having died in 1897, the appellant, as guardian, brought this suit against the Lightner heirs to recover the amount of this note. She also sought to recover \$117.30, taxes paid by her upon the land upon which this note was a lien. The heirs of Lightner, appellees herein, in their answer averred in substance that the note for \$418.40 was executed by him to pay the balance due Henderson on the \$1,000 note due in 1884, the note sued on, and that, having paid this \$418.40, nothing was due on the note sued on. They further sought to recover from the guardian \$123.45, paid to her by Lightner in 1895 under the impression that it was due on this \$1,000 note, when in fact, as they aver, at the time of this payment there was nothing due by Lightner to Henderson on any of the notes. The lower court adjudged

that the note for \$418.40 was executed by Lightner to Henderson to pay the balance on the \$1,000 note due in 1884, and that, as the \$418.40 note had been paid before the institution of this action, the appellant was not entitled to recover anything on the note sued on. The court allowed appellant the full amount of the taxes paid by her, \$117.30, and gave the appellee judgment for \$123.45, the amount of their over-payment, bringing appellant in debt to appellees in a small amount, for which judgment was rendered.

G. A. Henderson was an active, intelligent business man, the president of a bank, and possessed of considerable means. Lightner was an illiterate German, industrious, frugal, and a man of good common sense. The relations between the two were very intimate; Henderson having assisted Lightner to buy the farm and in other ways helping him by counsel and advice. It will be noticed that the notes executed by Lightner to Toller for the land specified for which payments they were executed; the note due in 1884, the one sued on, stating that it was given for the "third payment," and the note for \$418.40, which was also written by Henderson, and that appellees contend paid this \$1,000 note, reciting in its face: "This note is given for the balance on the third payment on four hundred and ten acres of land." The circuit judge in his opinion was largely influenced by this statement in the \$418.40 note, which tends to establish the fact it states that it was given to pay the balance due on the note sued on. The master commissioner, to whom the case was referred, found that when the \$418 note was executed, on June 20, 1892, there was only due by Henderson on all the notes \$181.55, and according to this report the note for \$418 was executed for \$237 more than Lightner really owed; but in arriving at this result he left out of his calculations the \$1,000 note due in 1885, and purchased by Henderson for \$500 in 1889, upon the ground that Lightner paid to Henderson, in full satisfaction of this note, the \$650 that Henderson received about this time as the proceeds of land sold by Lightner to Sower; the theory of appellees being that Henderson bought this note in for Lightner's benefit under an agreement that Lightner would pay Henderson for the note \$650, thereby making a profit to Henderson of \$150 and saving to Lightner \$350. There is no evidence to support this theory, except the statement of Lightner's son that his father brought this \$1,000 note home with him at the time the \$650 was paid to Henderson by Sower. A large number of exceptions were filed to the master's report, but the chancellor ignored the exceptions, as well as the report, basing his judgment upon the ground that the \$418 note represented the balance due at that time by Lightner to Henderson on all these notes, and, it being admitted that the \$418 note had been paid off, there was nothing due by Lightner. The fact that the chancellor refused to pass on the exceptions to the

commissioner's report cannot be said to be prejudicial to appellants, in view of the conclusion reached by him upon the whole case.

The principal contention of appellants is that appellees are estopped to question the note sued on by reason of various declarations made by Lightner in his lifetime. It appears that after the death of G. A. Henderson, and after Lightner had paid off the \$418 note, the administrator of Henderson was pressing him for a settlement of the note sued on, and Lightner prevailed on Mr. John S. Power, an attorney at Flemingsburg, to induce the appellant to buy the note and thereby protect him from the apprehended suit by the administrator; Lightner stating to Mr. Power, as well as to one or two other persons, that there was due on the note sued on the sum of \$850. Mr. Power, considering the note a good investment, induced appellant to invest her ward's money in it, and Lightner was present when the note was assigned by the administrator to appellant. After appellant became the purchaser of the note, Lightner paid to her \$18.45 in March, 1895, and \$105 on July 2, 1895. It further appears that Lightner paid in full to the administrator the \$418 note on March 8, 1893, and at the same time made to him a payment on the note in controversy, and that afterwards, in May, 1894, and a few days before the note was assigned by the administrator to Mrs. Henderson, Lightner paid to him on the note in controversy \$120. In view of these uncontradicted facts, and the repeated declarations of Lightner in reference to the note sued on, and his efforts to induce appellant to purchase it, it is earnestly contended that appellees are now estopped to deny any indebtedness on this note. In answer to this plea of estoppel, appellees say Lightner was an uneducated man, and at the time that these statements and payments were made by him was laboring under some mental trouble that unfitted him, taken in connection with his ignorance, to understand the nature of the transactions or the force and effect of the declarations that he was making. The chancellor, as well as the commissioner, was evidently of the opinion that the \$1,000 note due in 1885 and purchased by Henderson for \$500 was fully satisfied by the \$650 paid to Henderson by Sower for Lightner. Appellant's theory of this transaction is that, although Henderson bought the note for \$500, it was a private business transaction on his part, not made for the benefit of Lightner, and that, after Lightner paid this \$650 to Henderson on this \$1,000 note, the balance of the \$1,000 and interest on it made up the \$418 note afterwards executed on June 20, 1892, by Lightner to Henderson. They also insist, and there is some evidence to support it, that Lightner was paying Henderson 10 per cent. interest on the \$800 note executed to Henderson when Lightner purchased the land from Toller, and 8 per cent.

interest on the balance of the notes. The \$800 note bore by its terms 10 per cent. interest, the others 6 per cent., and in the absence of convincing evidence to the contrary it cannot be assumed that Lightner paid a greater rate of interest than the notes specified. We therefore think the commissioner's calculation of interest, in which he charged Lightner 10 per cent. on the \$800 note until it was settled, and 6 per cent. interest on the other notes, was correct.

Under the facts of this case we are not disposed to hold that Lightner is estopped by his declarations and conduct to deny that there was due on the note sued on at the time of its assignment to appellant \$850, or any like sum, because, even if appellant's theory that the \$418 note was executed for the balance due on the \$1,000 note is accepted as true, and the interest on all these notes, except the note for \$800, is computed at 6 per cent., the amount due by Lightner when the note was assigned to appellant would fall far short of amounting to \$850; nor can it be said that appellant was really prejudiced by the representations that induced her to purchase this note. She acted in perfect good faith in its purchase, and exercised reasonable and proper care for the investment of her ward's money, and no loss can accrue to her by the failure to realize on the note the amount expected at the time of its purchase; nor will the ward's estate suffer great loss, because, if this defense by Lightner had been made in a suit by the administrator on the note, it would have reduced the estate going to appellant and her ward the amount of the note. It would be manifestly unfair and unjust to require Lightner to pay more than the amount actually due on the note, and it is very evident that there was nothing like \$850 due on it at the time of its assignment to appellant.

The death of the parties to this transaction had involved this case in a number of complicated questions of fact that in all probability would not have arisen if either or both of them had been living, and it is extremely difficult, after a careful and patient reading of the record, to determine with reasonable certainty the exact status of this transaction; but we have reached the conclusion that the chancellor in his judgment did substantial justice between the parties, and his judgment is affirmed.

BALTIMORE & O. S. W. R. CO. v. HUDSON.

(Court of Appeals of Kentucky. May 3, 1906.)

1. CARRIERS — REFUSAL TO STAMP RETURN TICKET—EVIDENCE.

Evidence in an action against a carrier for refusal to validate the return portion of a passenger's ticket, good only when validated, examined, and held to support a finding that the carrier improperly refused to validate the ticket, authorizing a verdict for the passenger.

2. SAME—EXCESSIVE DAMAGES.

In an action against a carrier for refusal to validate the return portion of a ticket, it appeared that the carrier violated its contract with reference thereto, and that, through its agents, it insulted and humiliated the passenger, from which she suffered great mortification and mental anguish, and that she, being in a weakened physical condition, did not recover from the nervous shock received for many months thereafter. *Held*, that a verdict for \$1,750 would not be set aside as excessive.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1344.]

3. SAME—EVIDENCE—ADMISSIBILITY.

In an action against a carrier for refusal to validate the return portion of a ticket, good only when validated, it was not error to permit plaintiff to testify with respect to her consulting a lawyer and detailing the circumstances under which she made the effort to do so after the carrier's agent had refused to validate the ticket.

Barker, J., dissenting.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division. "Not to be officially reported."

Action by Susie C. Hudson against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gibson, Marshall & Gibson, for appellant. Myers & Howard, W. M. Smith, and J. C. Dodd, for appellee.

PAYNTER, J. This is the second appeal in this case (80 S. W. 454, 25 Ky. Law Rep. 2154). The appellee, Susie C. Hudson, claims that before 2 o'clock on the morning of December 22, 1900, she bought at the appellant's ticket office, in St. Louis, Mo., a round-trip ticket from St. Louis to Cincinnati; that she left for Cincinnati at 2 o'clock that morning, and used the part of the ticket which entitled her to travel over appellant's road from St. Louis to Cincinnati; that it was a limited ticket; that on the 26th of the same month, at half past 7 o'clock, p. m., she went to the depot in Cincinnati with a view of taking passage on appellant's train leaving at 8 o'clock p. m. for St. Louis; that under the terms of the ticket it was necessary that the ticket agent at Cincinnati should validate the ticket to enable her to return to St. Louis on it; that she handed the ticket to the validating agent, and, as was required by the terms of the ticket, signed her name on it in the presence of the agent, who compared the signature written in his presence and the one written on it in St. Louis and refused to validate the ticket. The appellant refused to allow her to use the ticket, and this action was instituted to recover for the alleged breach of contract and the treatment she received by the appellant's agent at the ticket office in Cincinnati. On the first trial she recovered a verdict for \$1,000, and on the last trial she was given a verdict and judgment for \$1,750.

The evidence offered by appellee conduces to show that she purchased a round-trip ticket in St. Louis; that she signed her name on the ticket when she bought it "Susie

Hudson," and when she offered it to the agent at Cincinnati she wrote her name "Susie C. Hudson"; that she sometimes wrote it with the "C." and sometimes without it; that the ticket agent at Cincinnati refused to validate the ticket, and, although she told him that she had purchased it in St. Louis and had signed the name "Susie Hudson," and that she was "Susie Hudson," he refused to validate it, and stated to her in the presence of others that it was a broker's ticket, that she bought it from a broker, that it was not her signature, and that he would have nothing to do with it. She pleaded with him to validate it, so she could take the 8 o'clock train, and thus avoid the loss of her position as a teacher in a business college. She assured him that she had papers in her valise in the baggage room of the depot that would convince him that she was the person whom she represented herself to be, and when she could induce him to make any response to her pleas to have the ticket validated and to allow her to prove to him by the papers in her valise that she was the person whom she represented herself to be, he would say that it was a broker's ticket and he would have nothing to do with it. She had no friends in Cincinnati. The train upon which she expected to go had left for St. Louis, and she went across the river to Covington to consult her kinsman, who was a lawyer, as to her right to have the \$9 the cost of a ticket to St. Louis, refunded, in the event she bought a ticket. She returned to the Cincinnati depot at 11 o'clock that night, and found the ladies' waiting room closed, and so she sat in the gentlemen's waiting room until 2 o'clock the next morning, when she left on a train for St. Louis. Geo. W. Bain, a well-known temperance lecturer in this state, was present in the depot, and his feelings were very much aroused on account of the agent's conduct towards the appellee, and so much so that he felt like interceding with the ticket agent, though a stranger to appellee, in her behalf. He finally concluded that, as the ticket agent was so positive, the appellee was the fraud which he made her appear to be, and he abandoned his purpose to intercede in appellee's behalf. Another gentleman, a stranger to appellee, was present, and he in a measure had the same feeling in regard to the matter as Mr. Bain. When the appellee returned from Covington, she approached the ticket office to buy a ticket for St. Louis, when another agent in the office asked her in an insulting way what she had done with the broker's ticket. He was evidently present earlier in the evening, when she sought to get the ticket agent to validate her ticket.

On the former appeal the court recognized the appellee's right to maintain this action, if the agent at Cincinnati refused to validate the ticket, provided she was the purchaser of the ticket, so we do not deem it necessary to enter into the consideration of

the question as to her right to maintain this action. The principal grounds urged for a reversal will appear as they are considered in this opinion.

It is urged that the verdict is not sustained by the evidence. It is true that there is some dissimilarity in some of the letters of signature at St. Louis when the ticket was purchased and the one written at Cincinnati. The dissimilarity consists in the capital "S" in the given name and the "H" in the surname and the appearance of the "O" in the one signature and not in the other. There is a very striking similarity in the other letters in the signature in writing the name "Susie," and the same is true as to some of the other letters in the name "Hudson." It is a matter of common knowledge that persons do not always form letters in writing their signatures in exactly the same way. The assistant ticket agent at St. Louis, whom appellant claims sold the ticket in question, wrote on the ticket the name "Henry Lihou," the general ticket agent at St. Louis. He also wrote on the ticket the name "Holliday," and there is a striking dissimilarity in the capital "H" in "Henry" and "Holliday," and the "y" at the end of the name "Holliday" and the "y" at the end of the name "Henry," as there is in any two letters in the signatures of the appellee. The ticket, with the signatures thereon referred to, is before us. That the appellee lived in St. Louis and went to Cincinnati about the time in question is not denied. Her business demanded her return to St. Louis within the time limit of the ticket. Her financial condition was such that required that she should travel in as inexpensive a way as possible; hence would want to purchase a ticket at reduced rates, if possible. In fact, this desire is not confined to persons in the financial condition of appellee. It is the delight of those who travel to get tickets at reduced rates. While testimony was offered by appellant which tended to impeach that offered by appellee, still the jury was the judge of its weight and credibility, and both juries have accepted her statements as true in preference to the testimony offered by the appellant. The court must decline to disturb the verdict upon the ground that it is not sustained by the evidence.

It is urged that the damages awarded are grossly excessive. On the former appeal the court in effect held that the verdict for \$1,000 was not excessive. Excessive damages being one of the grounds urged on the former appeal for a reversal, the court must have reached the conclusion that it was not excessive, or it would have said so in the opinion reversing the case. This being true, it was in effect a holding by the court that the cases of *Railroad Co. v. Lyons*, 104 Ky. 23, 46 S. W. 209, and *Railroad Co. v. Breckinridge*, 99 Ky. 1, 84 S. W. 702, relied on in this case, did not furnish a precedent for holding that the verdict for \$1,000 was ex-

cessive. It was the business of the company to protect appellee, as she was its passenger, from insult and injury. If the evidence of the appellee is true, the appellant violated its contract, and, through its agent, insulted and humiliated her, from which she suffered great mortification and mental anguish, and, being in a weakened physical condition, did not recover from the nervous shock she received for many months thereafter. The record does not justify this court in saying that the verdict was superinduced by prejudice or passion.

It is urged that the court allowed the appellee to prove that she went to Covington to consult a lawyer, and detailing the circumstances under which she made the effort to do so. The appellant had refused to validate her ticket, and she certainly had a right to consult some one, and especially a kinsman, as to what she should do under the circumstances. She had no friends in Cincinnati, and, while Covington is separated from Cincinnati by the Ohio river, a bridge and street railway makes it nearer and more convenient to reach than many parts of Cincinnati. She had a right to consult some one in the matter, and she seems to have sought to consult the only convenient person upon whom she had any natural claim for advice or assistance. The court did not err in allowing appellee to tell of her visit to Covington.

The instructions of the court fully comply with the opinion on the former appeal.

The judgment is affirmed.

BARKER, J., dissents.

HAASE v. SCHICKNER et al.

(Court of Appeals of Kentucky. April 11, 1906.)

LANDLORD AND TENANT—UNLAWFUL DETAINER—SCOPE OF ACTION—PERSON CLAIMING UNDER TENANT.

Under Civ. Code Prac. § 452, declaring that a forcible detainer is a refusal of the tenant to give possession to his landlord after the expiration of his term, or of a tenant at will or by sufferance to give possession to the landlord after the determination of his will, and in view of Ky. St. 1903, § 2292, providing that, unless the landlord consents in writing, every assignment or transfer of the term of a tenant having a term of less than two years shall operate as a forfeiture to the landlord, who may recover possession by forcible entry or detainer, one who has received from the tenant possession of premises leased for a term of more than two years under an agreement that there shall be no sublease or assignment of the term may, on failure to pay rent, be dispossessed by an action of forcible detainer.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by A. F. Schickner and others against Fred Haase, Jr. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. H. Caldwell and Mat Moore, for appellant. Hall & McLean and Greene & Van Winkle, for appellees.

CARROLL, C. W. G. Schickner leased to Fred Haase, Sr., certain premises in Campbell county, Ky., for a term of five years, beginning May 1, 1900. The lease obligated Haase to pay as rent \$30 per month, and also provided that if the rent or any part thereof should remain unpaid for 30 days after it was due, or if the lessee assigned the lease or underlet the premises, the lease should terminate and the lessor have the right to re-enter and take possession of the premises. The lessor died in 1904, and soon thereafter his heirs gave notice to appellant, who was in possession of the premises, to surrender possession in 30 days, and upon his failure to do so they obtained a warrant of forcible detainer against him, and on the trial he was found guilty. He traversed the finding, and in the circuit court, under a peremptory instruction so to do, the jury again found him guilty, and from the judgment of restitution he prosecutes this appeal.

There is no material dispute as to the facts. Neither the appellant nor his father, Fred Haase, Sr., had paid any rent for a year, and there was due under the lease more than \$1,000. The lessors had not consented to any assignment of the lease to appellant, nor did they know he was claiming to be in possession of the premises, until the spring of 1904, when, after they had obtained a judgment of restitution under a warrant of forcible detainer against the lessee, Fred Haase, Sr., the appellant for the first time disclosed the fact that the lease had been assigned to him some three years before by Fred Haase, Sr., the lessee, and that he was in possession of the leased premises under the assignment. The appellant contends that under these facts a warrant of forcible detainer cannot be prosecuted against him, because the relation of landlord and tenant at no time existed between himself and appellees. Civ. Code Prac. § 452, provides that "a forcible detainer is, first, the refusal of a tenant to give possession to his landlord after the expiration of his term, or of a tenant at will or by sufferance to give possession to the landlord after the determination of his will." There are three other definitions of forcible detainer; but, as they are not applicable to the facts here presented, it is not necessary to mention them. Under these Code provisions counsel for appellant insist that it is indispensable that the relation of landlord and tenant shall exist, and cites in support of his view *Powers v. Sutherland*, 1 Duv. 152; *Goldsberry v. Bishop*, 2 Duv. 148; *Taylor v. Monohan*, 8 Bush, 288. It is true that under the provisions of the Code and the cases construing them it is necessary, to maintain this writ, that the relation of landlord and tenant must exist in some form. It is not, however, important in what form this relationship exists,

nor is it required that the tenant in possession shall have entered or hold the premises under a direct contract with the landlord. The appellant took possession of the premises under the tenant, Fred Haase, Sr., and his occupancy under the assignment from Fred Haase, Sr., does not entitle him to any more rights or privileges than Fred Haase, Sr., enjoyed under his lease; and, having entered into possession under and by virtue of the lease Fred Haase, Sr., held, he will not be permitted to deny that he is a tenant, and thereby defeat the right of the landlord to obtain possession of the premises in this proceeding. The fact that the lease provided that, if Fred Haase, Sr., assigned it or sublet the premises without the consent of the lessor, the lease should terminate, and the lessor have the right to enter the premises, does not give appellant, who entered in violation of the terms of the lease, the right to dispute the title of the landlord to the possession of the premises. As held in *Brubaker v. Poage*, 1 T. B. Mon. 123, "a subtenant must be held as entering, though not immediately, under the landlord, and as subject to all the remedies existing against the first tenant; otherwise, a death or a sale would defeat the remedy given, which could not have been intended by the Legislature." In *Clinton v. Clinton*, 2 Bibb, 483, the court holds that "the possession of a tenant is always deemed the possession of him under whom he holds, and to prevent fraud it is an established principle that the possession must be held according to the title under which it was obtained." In *Harrison v. Marshall*, 4 Bibb, 524, it appeared that Harrison obtained possession of the premises from Miss McArthur who entered as tenant of Marshall, and the court said: "As Harrison is estopped, therefore, from disputing the right of Marshall, it follows that, by holding over the possession against Marshall's will, he has in legal estimation forcibly detained the possession, and therefore subjected himself to an expulsion from the premises by a warrant of forcible detainer."

If any other rule were established, a tenant who took possession under a lease, as in this case, could sublet the premises or assign the lease without the consent of the landlord, and the landlord, although he might eject his lessee by a writ of forcible detainer, could not oust the subtenant or assignee, and thus the lessee, through his assignee or subtenant, might retain the possession of the premises or put the landlord to considerable expense and delay in ejecting him. As illustrative of the legislative intention in respect to cases like this, section 2292 of the Kentucky Statutes of 1903 provides that, "unless the landlord consents thereto in writing, every assignment, or transfer of his term or interest in the premises, or any portion thereof, by one who is a tenant at will or by sufferance, or who has a term less than two years, shall operate a forfeiture to the landlord,

who, after having given the occupant ten days' written notice to quit, may re-enter and take possession, or may, by writ of forcible entry or detainer, or the proper procedure, recover possession of the premises from any occupant thereof, whoever he or she may be." If the landlord in the case at bar had leased the premises to Fred Haase, Sr., for a term less than two years, he could have obtained a writ of forcible detainer against the appellant if he had entered without his consent, and the mere fact that the lease is for five years, in place of two years, does not deny him this remedy, as the contract between the parties provided that the assignment or subletting of the premises should forfeit the lease and give the lessor the right of entry and possession.

The action of the court in giving a peremptory instruction was proper, and the judgment is affirmed.

LOUISVILLE BELT & IRON CO. v. HART.

(Court of Appeals of Kentucky. May 4, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE.

Where, in an action for injury to a servant engaged in removing the dross from a furnace in which iron was reduced to working metal, it was alleged that the employer furnished an insufficient number of buggies in which to catch and remove the dross, the testimony of a person with 25 years' experience in similar work in the employer's and similar foundries with respect to the universal custom in such foundries in reducing iron to working metal was admissible on the issue whether the employer furnished sufficient appliances.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 921.]

2. NEW TRIAL — NEWLY DISCOVERED EVIDENCE—DISCRETION OF COURT.

In an action for personal injuries, plaintiff was surprised at the testimony of a witness introduced by defendant who claimed to have seen the accident. The plaintiff and this witness were the only persons who claimed to have seen the accident. On a motion for a new trial plaintiff showed by several witnesses that defendant's witness was elsewhere when the accident occurred. *Held*, that the newly discovered evidence was more than impeaching evidence and authorized the granting of a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 221, 222.]

3. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant who, with knowledge of the dangerous condition of the premises, undertakes to do the work assigned, assumes the risk, unless the master promises to repair them, in which case the servant can for a reasonable time continue in the work without assumption of risk, relying on the master's promise.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 642-644.]

4. DAMAGES—PERSONAL INJURY — MORTALITY TABLES—ADMISSIBILITY.

Where, in a personal injury action, damages for loss of capacity to earn money are sought, mortality tables are admissible on the issue of damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 487.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by Joe Hart against the Louisville Belt & Iron Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Forcht & Field, for appellant. Bradley & Batson, for appellee.

O'REAR, J. This case was twice tried in the Jefferson circuit court, common pleas branch, second division. The first trial resulted in favor of appellant. A rehearing being granted, appellee obtained a verdict for \$3,000. Appellant excepted to the order granting the new trial, filed a bill of exceptions and a transcript of the testimony on the first trial, and now seeks a reversal of the lower court on the ground that the order awarding a new trial was erroneous. Appellant also filed a bill of exceptions, and a transcript of the testimony on the second trial, and seeks to reverse the second judgment.

Appellant conducted a rolling mill. Appellee, in its employ, was injured by the explosion of a tap cinder. When iron was being melted in a heating furnace, the dross in it was run off in a molten state through a small hole at the bottom and rear of the furnace. It was then caught in a small iron buggy on two wheels, holding some 200 pounds. When full, the buggy was drawn away and dumped; another buggy being substituted at the tap hole. This dross is called "tap cinder." As it runs into the buggy it is cooled by contact with the sides and by the air, and it gradually hardens. The center, however, remains in a molten state, and generates a gas which keeps the top perforated for its escape. As long as it escapes there is no danger; but, if confined, the increasing volume of gas generated will produce a violent explosion. There is a contrariety of opinion among the witnesses in the case as to the action of water upon this tap cinder. Some hold that it will have no effect if poured on top of the cinder in a buggy, unless it closes the vents through which the gas escapes. Others hold that it will cause an explosion in any event. At any rate, the evidence sustains the verdict of the jury, which in its result necessarily found the danger to be as first stated, and as testified to by appellee's witnesses. Appellee was engaged for the first time in the work in which he was injured, but a few days before the accident. His duty was to catch the dross at the tap holes of the furnaces in the iron buggies, and wheel it away a few yards to a dumping ground, where it was deposited by him, and subsequently removed by others. Directly overhead, and above the route he had to take in hauling the tap cinders, was a steam exhaust pipe, temporarily in use because of some defect in the boiler in appellant's engine room, which spurted water in greater or less quantities at irregular inter-

vals; the water falling to the ground beneath. Only two buggies were provided by appellant in which to catch and remove the tap cinders. If the tap cinder could have been let stand long enough in the buggies before emptying, they would have solidified by cooling; thus removing all possibility of danger from an explosion by coming in contact with water or otherwise having the pores closed by foreign interference. It was claimed by appellee that at least a dozen such buggies should have been provided for that work, so as to allow its being done with reasonable safety. Thus it will be seen that two grounds of negligence were asserted by appellee: One, that appellant furnished him insufficient and unsafe tools or implements with which to work; and the other, that he was furnished an unsafe place in which to work.

After having worked at this job for a day or so, appellee learned through the statement of a passing employé that it was highly dangerous, on account of the escaping water being liable to fall on a tap cinder while being removed before it was sufficiently cooled, which would cause it to explode. He immediately complained of the dangerous condition of the premises to the superintendent, who directed him to another superior servant, who promised to repair the defect the next morning—Sunday. Early Monday morning, just after he had begun the day's work, and before he was aware the defect had not been remedied, while removing a buggy of tap cinder, the water suddenly shot from the pipe and fell upon the cinder, causing it to explode, permanently and seriously injuring and maiming appellee. It was for this he sued.

Appellant first contends that the trial court erred in granting the new trial. This action of the court was said to be, and may be assumed to have been, rested on two grounds, viz.: The exclusion of the testimony of Frick and Patterson, witnesses for appellee, and that of newly discovered evidence. Frick and Patterson testified as experts. They qualified by showing that they had had many years'—perhaps 25 years or more—experience in appellant's and similar foundries, and in the identical or similar work as that in which appellee was engaged when injured. They showed that they were familiar with the mode of doing such work in rolling mills similar to appellant's mills. They then testified that it was the universal custom in such mills, in melting iron and reducing it to working metal and dross, to melt it in a furnace having a tap hole at the base through which the dross would run. The dross was always and necessarily caught in some movable receptacle, and when sufficiently cooled by the action of the air was removed, and the receptacle, whether buggy or other contrivance, was then used again, and that to do this required such a number of buggies or receptacles to be provided as would permit of those filled being allowed to stand long enough to

cool off before dumping. It was complained that the effect of this testimony was to admit evidence of comparison between the method in use by appellant and the methods of other iron manufacturers, who had adopted perhaps more improved appliances, from which the jury might be led to infer that the latter methods were the correct standard of care, whereas the true standard is whether the one adopted by appellant was a reasonably safe one, considering the nature of the work and the hazards naturally incident to it. The trial court may have then concluded he had erred in admitting the evidence alluded to. At any rate, he excluded it from the jury. On the next trial the court admitted the same evidence over appellant's objections.

We are of opinion that the evidence was relevant. It was not, as is assumed by counsel for appellant, a comparison of two or more methods employed by different given ironmasters. Nor was the admission of the evidence to fix or substitute a standard of care. It was evidential, receivable with other proper evidence which tended to show whether the work, as it was being conducted, was extrahazardous or not; as tending to show the common experience of those engaged in the same or similar work as to whether it was safe to do it with more or less buggies or more or less time in which to permit the dross to cool before dumping it. This evidence showed the tendency of the thing which the jury was considering, and as to whether, and under what circumstances, it was in fact dangerous, defective, or the reverse. It is entirely distinct in its nature and scope from the law's standard of care required in the matter, which must be a fixed one, for example, in this case, such care as an ordinarily prudent or careful person would have exercised under similar circumstances to have protected himself from injury. Of it Wigmore, in his recent work on Evidence, says (volume 1, § 461): "This conduct of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person, in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law."

In the well-considered case of Maynard v. Buck, 100 Mass. 40, where the point was raised upon instruction to the jury, instead of the competency of the evidence, the court said that it was not proper to embrace in the instruction a statement that, if the defendant had done the things that persons of ordinary prudence in the same business ordinarily did, it was not negligence. But the court said: "It is evidence of what is proper and reasonable to be done, from which, together with all the other facts and circumstances of the case, the jury are to determine whether the conduct in question, in the case before them, was proper and justifiable." In *Nadau v. White River Lumber Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29, the

plaintiff offered to prove that it was customary in other sawmills to cover gearing of the kind in question. The court held: "This was clearly competent on the question as to whether the defendant was negligent in not covering it in its mills." A correct statement of the practice is found in *Richmond Locomotive Works v. Ford*, 94 Va. 640, 27 S. E. 309, to wit: "A witness having sufficient knowledge may testify as to the general practice of machine shops in moving such wheels, and the comparative safety of such methods; but it is not competent to show that the different method of another shop is better than that of defendant." In *Berberich v. Louisville Bridge Co.*, 46 S. W. 691, 20 Ky. Law Rep. 467, the question was incidentally considered by this court. The plaintiff in that case sued for an injury caused by defendant's negligence in failing to give him warning while he was working on their bridge that a train was approaching. While the court held that he was not prejudiced by the refusal of the trial court to allow him to show that such was the custom of bridges such as defendant's, because the witnesses did not qualify themselves to speak on the subject, it was added: "If the witnesses were sufficiently acquainted with bridges, substantially the same as the defendant's bridge, and with the customs and necessity of notice, they should have been allowed to testify in regard thereto."

The evidence complained of in the case at bar was touching technical skill in the handling of a highly dangerous product, one not commonly known and understood. By long experience those skilled in its manipulation had reduced the handling of molten iron and its dross to an art, it might be said. How it should be handled, so as to be reasonably safe to those engaged in the work, was technical knowledge. Without some such evidence explaining it, a jury would have been unable to say whether the care taken in the particular case was ordinary care or not.

The newly discovered evidence consisted in this: One Tom Williams, introduced as a witness, and about the last one introduced by appellant (defendant), on the first trial testified that he was present when the accident occurred, and that it happened because appellee dumped his cinder upside down on a wet spot, thus causing the pores to close, and the rapidly generating gas to explode the cinder. The case was then closed, and the verdict of the jury returned for appellant. On his motion for a new trial, appellee showed by half a score or more of witnesses that Williams was elsewhere when the accident occurred, and consequently could not have seen what he testified to. He was completely discredited, as well as thereby contradicted. Appellee showed his surprise at the fact of such testimony being introduced by appellant, as given by this witness. It is contended that a new trial is never granted to allow a witness to be impeached. That

is a general rule. But the effect of this evidence was more than to merely impeach the witness. But whether it was or not, he being the only witness who claims to have seen the accident, beside appellee, the materiality and controlling effect of the newly discovered evidence becomes perfectly apparent. As the granting of a new trial is a matter after all largely in the sound discretion of the trial judge, we cannot say it was abused in this instance.

The instructions given on the last trial, though criticised by appellant's counsel for supposed technical inaccuracies, are not erroneous. They submitted to the jury appellant's liability in this: If the place at which plaintiff was put to work was not reasonably safe for the performance of the work in which he was engaged, and its unsafe condition was known to the defendant, or its superior servants in charge, or could have been known to them, by ordinary care, and was unknown to the plaintiff, the law was stated to be for the plaintiff; or if known to the plaintiff, but if he notified the defendant's superior agents of the unsafe condition, and they promised to repair it, but failed to do it, and plaintiff was induced by such promise to continue the work, believing in good faith, at the time of the injury, that the defect had been repaired, that defendant was liable, and plaintiff was not affected by his own previous knowledge. The effect of this instruction, considered in connection with others given, was to present to the jury, as should have been done, the state of case that would relieve the plaintiff from the imputation of assumption of risk or contributory negligence in continuing to work on known defective premises. The unfit or dangerous condition of the premises is not an assumed risk by the servant. But if, with knowledge of their unfit and dangerous condition, he nevertheless undertakes to do the work thereat, he would assume the risk, unless the master promises to repair them, in which event the servant can for a reasonable time continue in the work without assumption of the risk, relying on the master's promise of repair. When the master has promised to repair, after the expiration of a reasonable length of time in which to do it, nothing appearing to indicate that he has not complied with his promise, the servant has the right to assume that it has been done, just as he had the right to assume in the first place that the master had provided a suitable and fit place in which to do the work. *Northern Pac. Ry. Co. v. Babcock* (U. S.) 14 Sup. Ct. 978, 88 L. Ed. 958.

Nor was the instruction as to the sufficiency of tools erroneous, as claimed by appellant. They did not constitute such an obvious danger as that none but a reckless person would have continued to work with them alone. On the whole, we think the instructions fairly and fully presented the case to be tried to the jury.

It is contended that the court erred in admitting the Wigglesworth Life Tables to the jury as evidence tending to prove the probable duration of appellee's life. It is argued for appellant that these tables are based upon lives of normal, healthy persons, showing the average of life of such; that at the trial appellee, because of these injuries, was not of the class of which the tables were compiled, and they were therefore misleading, for manifestly it was very improbable that a crippled, maimed, badly injured person would live so long as one of the same age, but in normal condition of body and health. The question of damages was not alone what plaintiff would in future be deprived of by reason of the injury, dating it from the time of the trial, but to what extent his money-earning capacity had been lessened or impaired (in addition to suffering), and the value thereof, dating the inquiry from the moment before the injury. Appellee's age and state of health then were the facts upon which his expectancy of duration of life was to be based. He was then in normal health and condition. Just what value the life tables would have for the jury in arriving at the damage done to plaintiff is hard to say. Their own observation and experience were doubtless more relied on by them. But the evidence in question was relevant as aid. Its reception does not imply, as argued, that if the life tables show a man of plaintiff's age, in normal health, would probably live so many years, that he would always be able to work, or to always get the same price for his work, as at the time of the injury when he was a young, robust man. There is nothing better known to men and jurors than that to the aged come bodily infirmity and failing capacity to labor. But this common knowledge must be presumed to be in the mind of the jury. If the life tables show that a man of appellee's age would probably live to be 70 years old, but for the injury, none are more competent than an average jury to say how many of these years would in such state of case have been available to labor, in all probability, and therefore how much in money should be assessed as compensation for the destruction, or for the impairment, of plaintiff's capacity to labor and earn money thereby. Such life tables were held admissible in *Greer v. L. & N. R. R. Co.*, 94 Ky. 169, 21 S. W. 649, 42 Am. St. Rep. 345, and *Ill. Cent. Ry. Co. v. Houchins*, 89 S. W. 530, 28 Ky. Law Rep. 499.

We see no error in the record prejudicial to appellant, and the judgment is affirmed.

**CARMAN'S ADM'R v. ILLINOIS CENT.
R. CO.**

(Court of Appeals of Kentucky. May 2, 1906.)
**MASTER AND SERVANT — FELLOW SERVANTS —
OPERATION OF RAILROADS.**

In an action for injuries to a brakeman in Tennessee, owing to the engineer having pro-

pelled a car too rapidly while making a "flying switch," it appeared that the switching of the car was done by order of the train conductor, and that in controlling the movements of the train on that occasion the engineer acted in obedience to the signals of the brakemen, and while the exact position of the conductor at the time the switching took place was not shown, it did not appear that he had left the train or was not in view of it while the switching was being done. *Held* that, it being the rule in Tennessee that the engineer and brakeman are ordinarily fellow servants, the facts did not show that at the time of the accident the engineer was in charge of the train, so as to render the master liable for the injuries.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 518.]

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Action by Pat Carman's administrator against the Illinois Central Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. J. Webb, R. E. Johnston, and B. C. Seay, for appellant. Robbins & Thomas, J. M. Dickinson, and Trabue, Doolan & Cox, for appellee.

SETTLE, J. Pat Carman, while acting as a brakeman in the employ of appellee, Illinois Central Railroad Company, was killed at Paducah Junction, in the state of Tennessee. The train upon which he was serving was a freight train, and he met his death in making what is called in railroad parlance a "flying switch." At Paducah Junction appellee's railroad is crossed by that of the Nashville, Chattanooga & St. Louis Railroad Company, and there are at that point what are called "Y's," or curved switches, which connect the two railroads, and are used for transferring cars from one road to the other. On December 21, 1903, the freight train on which decedent was a brakeman arrived at Paducah Junction going south, and having a car to be transferred to the track of the Nashville, Chattanooga & St. Louis Railroad Company, it was stopped just before reaching one of these "Y's," or curved switches, which connects its track with that of appellee, and uncoupled at or near the caboose, making the car to be transferred the hindmost one of that part of the train remaining attached to the engine.

Besides the engineer and fireman in control of the engine, it requires three brakemen to make the flying switch—one to set the switch, one to uncouple the car to be transferred, and the third to remain on the car, and during the switching stop it, by applying the brake, at the proper place, after it gets on the curved switch. With each employé at his post of duty, the engine and attached cars are put in motion, and given such speed as will enable the detached car to be transferred by its own momentum onto the switch. When the necessary speed is attained, the engine checks the train, to enable the brakeman charged with that duty, by means of the slack thus afforded, to remove the coup-

ling pin, and thereby detach from the others the car to be transferred. When this is done, the engineer again quickens the speed of the engine so as to get the cars that remain attached to it out of the way of the detached car behind, and after the last car of those attached to the engine passes the end of the switch, the brakeman on the ground must then throw the switch in time for the detached car, still following, to be thrown from the main track on the switch and there left, to be later connected with another train on the other road and carried to its destination. This way of switching cars seems to be the customary method obtaining among railroad employes everywhere.

The decedent was the brakeman left in charge of the car transferred to the switch, and, before he succeeded in stopping it, it collided with some coal cars that were standing some distance out on the switch, causing the telephone poles with which it was loaded to be thrown against the decedent with such force as to injure and kill him. Thereafter this action was instituted by appellant, as his administrator, to recover of appellee \$2,000 damages for his death. The trial in the lower court resulted in a verdict in appellee's favor, which was returned by the jury in obedience to a peremptory instruction from the court, given upon appellee's motion at the close of appellant's evidence. It was urged by appellant in his motion and grounds for a new trial, and he now insists, that the giving of the peremptory instruction was error, and this question is the only one presented by the appeal for our consideration.

It was alleged in the petition that the death of the decedent was caused by the negligence of the engineer in making the flying switch, by running the engine and cars attached at so great a rate of speed that the car upon which the decedent was acting as brakeman was thrown out on the switch with such momentum as to render it impossible for him, by applying the brake, to stop it in time to prevent its striking the coal cars; that the engineer was, at the time, in control of the train, and acting as the superior of the decedent and other brakemen thereon; and, further, that under the laws of Tennessee, in which state he was killed, the master is responsible in damages for an injury to, or the death of, one of his servants, caused by the negligence of another servant of the master, who at the time is the superior officer of the servant injured or killed in the master's service. By an amended petition it was also alleged that at the time decedent was killed the conductor of the train was absent. The answer of appellee contained a traverse of the averments of the petition, and interposed the further defense that if the decedent was injured, or his death caused, by the negligence of the engineer, as charged in the petition, under the laws of Tennessee the engineer and decedent were

fellow servants; that the conductor, who was the only superior of decedent connected with the train, was present and in control of the train when the latter received the injuries that caused his death; and, finally, that his injuries and death were caused by his own negligence.

Although there was some evidence that tended to prove that the decedent's death was caused by the negligence of the engineer, it is made manifest from the same state of facts established by the testimony of appellant's own witnesses, Mathews and Polk, the companion brakeman of decedent, that the engineer was not in charge of the train at the time decedent received his injuries, certainly not in the sense of authorizing or directing the transfer of the car to the "Y," or curved switch, or of controlling the brakemen in the work of switching. It is true he controlled the movements of the train, as he was in charge of the engine, intrusted with the duty of stopping or starting it, and regulating its speed; but, according to the evidence, the switching of the car by which appellant's decedent was injured and killed was by order of the train conductor previously given, and in controlling the mere movements of the train on that occasion, whether in starting or stopping it, in quickening its speed or lessening it, the engineer acted wholly and alone in obedience to the signals of the brakemen. The latter did not act under his orders, by his direction, or in obedience to his signals, but under the orders of the train conductor, and in accordance with the rules and regulations adopted by the appellee railroad company for their guidance in the management of trains.

We are not inclined to accept the conclusion of appellant's counsel that the train conductor was absent at the time of the accident in question. It is true the evidence does not show his exact position at the time of the switching; neither does it show that he had left the train for any purpose after its arrival at Paducah Junction, or that he was not in view of the train while the switching was in progress. It does, however, appear that in placing the car on the "Y" both the engineer and brakeman carried out the order of the conductor previously given them. The evidence does not show that his personal supervision of the switching was necessary, or that he violated any rule of the company in not supervising it after having given the order. As his place is usually in the caboose when the train is in motion, and the caboose on the occasion in question was cut loose from the rest of the train and left on the track where the train stopped, because the car to be transferred to the "Y" was next to it, it is more than probable that he remained in the caboose until the switching was completed; and if so, as according to the evidence there was no other car connected with the caboose, or between it and the rest of the train, it would do no violence to the

facts to presume that, being in view of the switching operations from the caboose, he was in a position to take such supervision of that work as was required of him by the rules of appellee, and that he was in a position to exercise his authority by the giving or receiving of signals. By Webster's Dictionary the word "absent" is defined as "being away from a place; withdrawal from a place; not existing." To justify the conclusion that the conductor was absent at the time referred to, there ought to have been some proof to the effect that he was so situated as to render him incapable, for the time being, of performing in the manner provided by the rules of the railroad company such duties as in the general control of trains are required of an employé in his position. We do not think there was any proof of the conductor's absence in this sense.

Upon the facts here presented, it remains to be determined whether a recovery was authorized under the law of the state of Tennessee. They would authorize a recovery in this state upon the facts established by appellant's witnesses, for with us it is well settled that the engineer is the superior of a brakeman of the same train; also that the fireman is the superior of the brakeman, when in charge of the engine during the temporary absence of the engineer. But this is not true in Tennessee, for it is there held that the engineer and brakeman of the same train are fellow servants. It is conceded by counsel for appellant that such is the general doctrine in that state, but argued that the rule there is otherwise when the conductor is absent and the engineer has entire control of the train. By agreement of the parties, proof of the law of Tennessee upon the question under consideration was furnished on the trial by exhibiting to the court and reading to the jury certain opinions of the Supreme Court of that state in cases that came before it for review, and these authorities are relied on by counsel for both appellant and appellee as sustaining their respective contentions in this case. But an examination of them will show that they extend the doctrine in question no further than to hold that the engineer is ordinarily only a fellow servant with the brakeman; but he may, under the rules or orders of the master, become the superior of the brakeman, with right and duty to control and direct him, and so assume and exercise towards the latter the authority thus conferred upon him as to become, for the time being, the representative of the master, and render him liable to the brakeman for his (the engineer's) negligence. *East Tennessee & W. M. C. R. Co. v. Collins*, 85 Tenn. 227, 1 S. W. 883; *L. & N. R. R. Co. v. Martin*, 87 Tenn. 398, 10 S. W. 772, 8 L. R. A. 282; *I. C. R. R. Co. v. Spence* (Tenn. Sup.) 23 S. W. 211, 42 Am. St. Rep. 907; *I. C. R. R. Co. v. Bolton* (Tenn. Sup.) 41 S. W. 442; *N. C. & St. L. R. R. Co. v. Gann* (Tenn. Sup.) 47 S. W. 493, 70 Am. St.

Rep. 687; *Ohio R. & C. Ry. Co. v. Edwards* (Tenn. Sup.) 76 S. W. 897.

In *Ohio R. & C. Ry. Co. v. Edwards*, *supra*, it was said by the Supreme Court of Tennessee: "The subject is further illustrated by the cases which hold that although one may be a vice principal pro tem., so to speak, he has power to give orders to those who are under him for the time being, yet he is not really vice principal as to matters occurring during that time, unless he in fact gives orders to his subordinates, and they act thereunder. This is illustrated by the case of an engineer who, at the time, is vice principal in the absence of the conductor, and has control of the train, yet when he in fact gives no orders, but both he and the brakeman employed upon the train follow out their regular line of duties, or pursue the orders previously given by the conductor, in such a case the engineer is not in fact, as to things done, the vice principal of the master, but only a fellow servant." In *Railroad Co. v. Wheelless*, 10 Lea (Tenn.) 741, 43 Am. Rep. 317, a brakeman was injured in an attempt to couple the cars, and his injuries charged to the negligence of the engineer in manipulating the train, which had broken apart. The engineer was backing the train in obedience to a signal from another brakeman to enable the injured brakeman to make the coupling, but moved the train too rapidly, and thereby caused the latter's injuries. According to the testimony, injury to the brakeman could have been avoided by a slower backing of the train. It was contended in that case, as in the case at bar, that the engineer was the superior of the brakeman, but this contention was not sustained by the Supreme Court of Tennessee. In discussing that question the court said: "The conductor has charge of the train, and it moves in accordance with his orders, but in many movements the engineer and brakeman act in accordance with general regulations and a general knowledge of their duties, and without any special orders. The conductor and engineer are both said to be in charge of the train and responsible for its movements. The conductor, engineer, fireman, and brakeman constitute the entire crew of a freight train. In coupling cars, or making up trains, the engineer acts upon signals communicated to him either by the conductor or brakeman, but generally he gives no orders in regard thereto. These are substantially the facts deposed by the witnesses. * * * In this view, we are of opinion that the facts do not show that the engineer was, in the sense we are considering, the superior of the plaintiff in this instance. They were engaged in a common service, each performing his particular part. They may both be said to have been acting under the orders, either express or implied, of the conductor. The engineer did not assume any supervision of the work, or give any orders in regard to it, and the plaintiff cannot in any fair sense be said to

have been acting in this particular matter under the orders, either express or implied, of the engineer, and the mere fact that the engineer was the superior of the plaintiff in position, skill, intelligence, and pay does not change the result." *Hopkins v. R. R. Co.*, 96 Tenn. 409, 34 S. W. 1029, 32 L. R. A. 354; *Railroad Co. v. Handman*, 13 Lea (Tenn.) 423; *Mining Co. v. Davis*, 90 Tenn. 718, 18 S. W. 387; *Knox v. Railroad Co.*, 101 Tenn. 375, 47 S. W. 491.

Under the authorities referred to and the facts of this case, there is no ground for holding that the engineer, of whom appellant complains, was in charge of the train at the time his intestate was injured, or that he was the superior of the latter in the performance of their duties as members of the train crew. This being our view of the case, the conclusion is inevitable that no error was committed by the lower court in the matter of granting the peremptory instruction.

Therefore the judgment is affirmed.

CENTRAL CONSUMERS' CO. v. PINKERT.

(Court of Appeals of Kentucky. May 2, 1906.)

1. NUISANCE—PRIVATE NUISANCES—INJURY TO PROPERTY—RIGHT OF RECOVERY.

Where, in an action for injuries to plaintiff's house and lot by water escaping from a pumping apparatus on defendant's adjoining land, the evidence showed that plaintiff's house had been injured by water escaping thereon, a right to recover some damages was established.

2. SAME—PETITION—CLAIM FOR PERMANENT INJURY TO PROPERTY—MEASURE OF DAMAGES.

Where the petition in an action for injuries to plaintiff's house and lot by water escaping thereon alleged that defendant's water apparatus constructed on an adjacent lot permitted the escape of water to plaintiff's lot, that the dampness thus produced injured the house, and that the unusual noise made by the pumping, together with the damp condition of the lot and building, caused such annoyance and discomfort to and so threatened the health of the inmates of the house as to make them remove, and at times leave the house vacant, and the evidence showed that the pumping apparatus was permanent, the measure of damages was the diminution in the fair market value of the property caused by the injury complained of; plaintiff seeking a recovery for a permanent injury, and the diminution in the rental value being but an incident of the permanent injury.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 118, 119, 125.]

3. SAME—LIABILITY OF PURCHASER.

A vendor constructed and operated a pumping apparatus on his property. The purchaser continued to operate the same, and caused water to flow on adjacent land, injuring the same. Held, that the purchaser was liable for maintaining a nuisance without a notice requiring the removal thereof; the nuisance resulting from the use of the pumping apparatus, rather than from the apparatus itself.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 41.]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Action by J. W. Pinkert against the Senn & Ackerman Brewing Company, in which the Central Consumers' Company was substituted as party defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Kohn, Baird & Spindle, S. E. Sloss, and Greene & Van Winkle, for appellant. F. Hagan, for appellee.

SETTLE, J. This action was originally brought by appellee against the Senn & Ackerman Brewing Company, but by amended petition the appellant, Central Consumers' Company, its vendee and successor, was made a defendant, and the action thereafter was abated as to the original defendant. The action as set forth by the petition and amendments was one to recover for alleged injury to appellee's house and lot, situated on Walnut street, west of Eighteenth street, in the city of Louisville, by the escaping of water thereon from a large tank situated on appellant's lot, adjoining that of appellee, whereby her yard, the walls of her house, and the walkway leading to and around same, were made and kept damp, to the injury of the property. It was in substance and effect averred in the petition, as amended, that the water tank was supplied with water from two wells, also situated on appellant's lot, only a few feet from the tank, the water being pumped by machinery and run through pipes from the wells into the tank, which rested on and was elevated by a supporting frame, situated so near and against appellee's lot and by the side of her house as to almost cause the tank to overhang her lot, or, at any rate, so near as to enable the water almost constantly leaking, overflowing, or otherwise escaping from it, and the pipes connecting it with the wells, to fall upon or run into her lot, and that the dampness thus produced injured her house, and the loud and unusual noise made, day and night, by the pumping of water into the tank, together with the damp condition of the lot and building, caused such annoyance and discomfort to, and so threatened the health of, the inmates of her house and lot as to make them remove, and at times leave the house vacant, and at times prevent her from renting the property. It further appears from the petition that the wells were drilled and tank erected, a year or more before they became the property of appellant, by the Senn & Ackerman Brewing Company, for supplying with water a brewery two squares distant it was operating, and of which appellant also became the owner, and that the latter had been operating the brewery and using the wells and water tank for about two years before it was sued by appellee. The answer of appellant specifically denied all affirmative matter contained in the petition, as amended, and interposed the further defense that, if there was any

injury to appellee's house and lot from the wells and tank, it was not chargeable to it, as they were made and erected by the Senn & Ackerman Brewing Company, its vendor, and, in addition, that it could not in any event be made liable in this case for the damage sustained to appellee's property by its operation of the pump or use of the wells and tank, as it had received neither complaint nor notice from appellee that her property had been, or was being, injured by its maintenance and use of the wells and tank, or been asked by her to discontinue their use or abate the nuisance. The trial in the lower court resulted in a verdict and judgment in appellee's favor for \$500. Appellant, having been refused a new trial, now asks of this court a reversal of the judgment in question.

Our reading of the record satisfies us that the peremptory instructions asked by appellant at the conclusion of appellee's evidence, and again after all the evidence was introduced, was properly refused by the trial judge; for there was considerable evidence tending to show that appellee's house and lot had been injured in the manner, if not to the full extent, claimed in the petition, and that such injury occurred and resulted during the two years of appellant's ownership and operation of the pumping plant. It is therefore safe to say that the evidence established her right to recover some amount in damages for the injury sustained to her property. It was the province of the jury to determine the amount, and in view of the fact that some of the witnesses fixed the damage as high as \$1,500, though the weight of the testimony placed it at a far smaller sum, we are not prepared to say that the amount awarded her was excessive. It was, however, liberal.

It is insisted for appellant that the jury was improperly instructed as to the measure of damages, as they were in substance instructed by the court, if they found for appellee, the measure of recovery was the diminution, if any, in the fair market value of her property caused by the injury complained of, whereas it is appellant's claim that she could only recover for loss of rents during such time, if any, as her property was rendered tenantless by the maintenance and use of the pump and water tank by appellant, or for the diminution of its rental value caused thereby. We think the jury were properly instructed as to the measure of damages. Fairly construed, the petition does not seek a recovery for loss of rents, or diminution of the rental value of appellee's property, but for the alleged permanent injury to same; the diminution in the rental value being but an incident of the permanent injury to the property. If she were seeking to recover for the diminution of its rental value alone, any future or additional injury to her property, and consequent diminution in its rental value, that might result from appellant's continued use of the pump and

water tank, would entitle her to sue and recover of appellant again, and as often as such additional injury might occur. As it is apparent from the evidence found in the record that the wells, water tank, and pumping apparatus, on the lot adjoining that of appellee, are of a permanent character, and will doubtless continue to be used, probably with like injurious results to appellee's property, it would seem eminently proper that all the damages claimable should be recovered in one action. In Wood's Law of Nuisances, 1005, it is said: "So, too, where a nuisance is of such a character that its continuance is necessarily an injury, and it is of a permanent character, so that it will continue without change from any cause but human labor, it is held that the damage is original, and may be at once fully compensated." In 4 Sutherland on Damages (3d Ed.) § 1046, it is said: "The apparent discrepancy in the American cases on this subject may, perhaps, be reduced by supposing that where the nuisance consists of a structure of a permanent nature, and intended by defendant to be so, or of a use or invasion of the plaintiff's property, or a deprivation of some benefit appurtenant to it for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury, and recover damages for the whole time, estimating its duration according to the defendant's purpose in creating or continuing it, or to treat it as a temporary wrong, to be compensated for while it continues; that is, until the act complained of becomes rightful by grant or condemnation of property, or ceases by abatement. The recovery of damages on a declaration alleging the permanency of the nuisance, on principle, would estop the plaintiff, not only from recovering future damages, but also from taking any steps to abate the nuisance during the period for which damages had been recovered. This is apparently the law in Kentucky, Illinois, Indiana, Missouri, Ohio, and Georgia. * * * While no infallible test can be applied to enable us to determine whether a structure is permanent or not, inasmuch as nothing is absolutely permanent, yet, when a structure is practically determined to be a permanent one, its permanency, if it is a nuisance and will necessarily result in damages, will make the damages original." 4 Sutherland on Damages (3d Ed.) pp. 3044, 3045, § 1043. This view of the matter, it seems to us, should not be objected to by appellant, and may be said to be favored by the law, which frowns upon a multiplicity of actions. Besides, having sued for the permanent injury to her property, appellee must be understood as having elected to recover all of the damages she had sustained, or might thereafter sustain, from the maintenance of appellant's water tank, pipes, and pumping apparatus, in one action.

It is contended by counsel for appellant that as the pumping plant was erected by

its vendor, Senn & Ackerman Brewing Company, and had been operated by that company for a year or more before it became the property of appellant, the latter cannot be held liable in damages for an injury to appellee's house and lot resulting from its continued operation, in the absence of a previous complaint thereof or request to discontinue its use. It is the general rule that if one who has erected a nuisance on his land conveys the land to a purchaser, who continues the nuisance, the vendor remains liable, and the purchaser is not liable, unless, on complaint or request, he does not remove it. *A. & E. Ency. of Law*, vol. 16, p. 980; *Wood's Law of Nuisances*, 968; *Ray v. Sellers*, 1 Duv. 254; *West v. L. C. & L. R. R. Co.*, 8 Bush, 404. But the doctrine is also recognized that the continuor of the nuisance is liable without a request to remove it, if by some positive act he adopts it, or the nuisance results from the use, rather than from the erection itself. *Wood's Law of Nuisances*, 969; *Whitenach v. Phila. & R. R. Co. (C. C.)* 57 Fed. 901; *Morris Canal Co. v. Reysseou*, 27 N. J. Law, 457. The injury to appellee's property complained of was, we think, such as resulted from appellant's use of its pumping plant, and not from its erection. Therefore, under the rule last stated, no complaint to it, or notice from appellee to abate the nuisance, was necessary before the institution of the action. We do not regard *Ray v. Sellers* and *West v. L. C. & L. R. R. Co.*, supra, cited by appellant's counsel, as in conflict with the conclusion herein expressed. They belong to the class of cases embraced by the first or general rule above indicated. In the *Ray* Case the defendant was sued for creating a nuisance by depositing a dead horse near the plaintiff's house. The defense was that the place where the dead horse was deposited had for a long time been used for that purpose without objection from plaintiff. In passing on the question of defendant's liability, the court said: "But if during several years before the act complained of plaintiff permitted the place in question to be used by the neighbors generally as a common receptacle for carcasses, the defendant had a right to infer that she consented to such use of it by him, and we believe it would be unjust to hold him liable for damages, unless she gave him some notice, or request, informing him of her dissent, of which there was neither proof nor allegation." In the *West* Case, a railroad company had erected on the plaintiff's land an embankment and culvert, and, the latter being insufficient to carry off the water, in flood time it was backed upon and overflowed plaintiff's land. The defendant railroad company, a remote vendee of the company that had created the nuisance, was sued by the plaintiff for the damage thereby sustained, and the court held it not liable, in the absence of notice requiring it to enlarge the culvert or otherwise abate the nuisance.

This decision of the question involved was undoubtedly correct. The defendant's continued use of the embankment in the condition in which it acquired title to it did not cause the injury to plaintiff's land, for such injury would have resulted without any use of it by defendant. The injury was caused by the insufficient culvert, which was constructed by the former owner of the railroad track and right of way, and therefore resulted wholly from the creation of the nuisance, and in no sense from defendant's use of the right of way; hence notice to the defendant was indispensably necessary to make it liable. The case at bar rests, as we have attempted to show, on a wholly different basis, and is unlike those supra.

Other alleged errors are presented by appellant, but, as they were not prejudicial and are not seriously relied on, we will not discuss them. The instructions of the trial judge seem to be free from error.

Finding no sufficient reason for reversing the judgment complained of, it is affirmed.

FOX et al. v. CORNETT.

(Court of Appeals of Kentucky. May 1, 1906.)

1. PUBLIC LANDS—RELEASE AND QUITCLAIM—OPERATION AND EFFECT.

A release and quitclaim by a patentee of public lands to certain named grantees and all others holding older titles of all his interest acquired by a patent in 1853, in so far as it covers land patented, held, or claimed by the parties of the second part under title older than the patent, is of no avail to one who is not shown to have been in possession of any land covered by the patent, and against whom is set up a patent issued in 1846 to the patentee who executed the release.

2. SAME—PATENTS—VALIDITY—DESCRIPTION OF LAND.

A patent of public lands, definite in its description of boundaries, is not void because it fails to refer to and exclude older patents included in it; those portions being excluded by operation of law.

3. QUIETING TITLE—TITLE TO SUSTAIN ACTION—POSSESSION.

Where a claim to have title quieted is asserted by a defendant as a counterclaim, and there has been an effort on the part of the person against whom the claim is asserted to deprive the defendant of his title by converting it to his own use, *Ky. St. 1903, § 11*, authorizing suit to quiet title by an owner in possession, does not apply, so as to require proof of possession by the defendant.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Quietening Title, § 55.]

Appeal from Circuit Court, Harlan County.

"Not to be officially reported."

Action by Mary A. Fox and others against A. B. Cornett. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Fox & Jackson, Chas. C. Fox, and W. F. Hall, for appellants. H. C. Clay, for appellee.

CARROLL, C. This suit was brought by appellants, plaintiffs below, to quiet the title

to an undivided one-third of 925 acres of land in Harlan county, to which they asserted title by virtue of a purchase from the heirs of Hezekiah Bransom, who obtained a patent for this body of land in 1851, under a survey made in 1848. The deed conveying this interest was executed in 1889 and recorded in 1890. Appellee filed an answer and counterclaim, traversing the petition, and alleging in the counterclaim that he was the owner of and in the possession of 421 acres of the 925 acres described in the petition. The part that he asserted title to included the land conveyed to appellants by the Bransom heirs. "He prayed that the plaintiff's petition be dismissed, that his title to said land be quieted, that plaintiffs be required to release to defendants any and all claims they have to said land herein described, and for costs and all proper relief."

Appellee's title to the land in controversy rests on a patent issued by the commonwealth to Boyd Dickinson, in 1846, for 17,200 acres of land; the patent being based on a survey made in 1845. In a reply appellants averred that in September, 1853, Dickinson, the patentee, released and quitclaimed to Hezekiah Bransom and others all interest he had in the land to which they assert title or ownership. The grantees in this deed are Hezekiah Bransom and 25 other named persons, "and all other citizens of Harlan county whose titles are older than Boyd Dickinson's patent, or who hold bona fide improvement rights under the laws of Kentucky, before the survey of Boyd Dickinson"; and it further provides "that the said Boyd Dickinson, for and in consideration of the sum of one dollar, to him in hand paid, the receipt whereof is hereby acknowledged, has bargained, sold, and by these presents doth bargain, sell, release, and forever quitclaim and confirm unto the party of the second part all the right, title, and interest which the said Boyd Dickinson acquired by a large survey of land made by him in the county of Harlan and state of Kentucky, on the waters of Cumberland river and tributaries, some years ago, and which he obtained on the 9th of October, 1853, and for which he obtained a patent from the commonwealth of Kentucky, so far as said patent and survey covers or conflicts with any land patented, held, or claimed by any and all of the party of the second part to this deed, which are older than the patent to this grantor."

Appellee by rejoinder controverted the allegations in respect to this deed, and denied that any deed affecting the land in controversy had ever been made. Pending this action, the heirs of Hezekiah Bransom filed their petition to be made parties and asserted title to the other two-thirds of the 925 acres, asking that the title thereto be quieted, but on their motion and before a submission of the case their petition was withdrawn. Proof was taken by the parties, and the court adjudged "that the defendant

in the original action and plaintiff in the counterclaim, A. B. Cornett, is, and was at the institution of this action, the owner and in the actual possession of the land described in his answer and counterclaim, * * * and that the title to said land be forever quieted against the claims of plaintiffs, and the plaintiffs are ordered to release unto A. B. Cornett all claim that they or either of them had or have to said land, or any part of same."

It appears from the evidence in the case that appellants had never been in possession of the land claimed by them, and that the 421 acres adjudged by the court to appellee lies within the lines of the 17,200 acres for which a patent was issued to Dickinson in 1846. Appellants assail the validity of the patent to Dickinson, and also rely on the deed of release before mentioned. This deed of release, which appellee denies was ever made, and attacks the sufficiency of for reasons not here necessary to mention, does not aid appellant, because there is no evidence that Hezekiah Bransom at the time this deed was made was, or ever had been, in possession of any part of the land embraced in this in this patent. The deed also shows on its face that it relates to land for which Dickinson obtained a patent October 9, 1853, while the Dickinson patent, relied on in this case by appellee, was issued in 1846. The patent issued to Dickinson in 1846 for this 17,200 acres of land does not mention or exclude any prior patents for land embraced within its boundary, although the surveyor whose evidence was taken for appellee, and who files a map of the Dickinson patent as a part of his deposition, testifies that there were several prior patents issued for land within the Dickinson boundary. For this reason appellants insist that the Dickinson patent is void; but in our opinion the failure of the Dickinson patent to mention or describe prior grants within the boundary does not render it void. The exterior lines of this patent are well described, and the surveyor testifies that he found no difficulty in locating them, and that the survey was unusually accurate to cover so large a boundary. The patent to Dickinson did not in and of itself affect the validity of prior patents within the boundary, and the appellee testified that he did not assert any claim to land within the boundary which is covered by patents of an older date.

In *Hall v. Martin*, 89 Ky. 9, 11 S. W. 953, the appellee claimed under a patent to McNew, the boundaries of which were definitely set forth by courses and distances, as are the boundaries of the Dickinson patent. The McNew patent excluded the land contained in prior grants, of which there were two. In that case, as in this, it was contended that the McNew patent was void because it failed to describe the excluded prior grants. The court in answer to this said: "There is no claim by the appellee of his right to recover any of the land held under

the elder grants; but the controversy is with the junior patentees, and the question of fact arising between these conflicting claims we will not consider, as the case must go back for another trial. The exclusions or elder grants within the boundary of the McNew patent, under which the appellee claims, are not identified or mentioned in the patent to McNew—neither described by boundary nor by the name of the patentee or grantee. The McNew patent proceeds to define the specific boundaries of the patent, as much so as the courses and distances in an ordinary deed, the number of acres as being 1,248, and excluding therefrom the number of acres contained in prior grants.

* * * If in every patent that contains exclusions it is necessary to describe the grant excluded, or to so identify it, either as to the number of acres, the boundary, or by giving the name of the grantee or the patentee of the elder grant, then the patent to McNew in this case is void, as it is silent as to the boundary, the number of acres, or the owners of the excluded land. We perceive no reason why such a grant should be held void, or the party under such a patent denied the right of showing title in himself to all but the exclusions contained in the grant. * * * If McNew had made the survey as accurate, and as specific, or even much less so than his patent shows, without mentioning any elder grant as being within his boundary, it will not be pretended that his patent would be void. The law would then exclude from his patent that which was paramount in title, and that which he has in this case excluded by the terms of his grant."

In the case at bar, although the patent does not mention prior grants, it is conceded that prior grants are contained within the boundary, and the law will exclude from the operation of the Dickinson patent the prior grants. There is some question as to whether or not appellee was in possession of the land in controversy, and it is insisted that, as his cause of action asserted in the counterclaim is for the purpose of quieting the title to the land, both the legal title and the possession are necessary under the provisions of section 11 of the Kentucky statutes of 1903 and the decisions of this court involving this question. *Cornellson v. Foushee*, 101 Ky. 257, 40 S. W. 680; *Packard v. Beaver Valley Land & Mining Co.*, 96 Ky. 249, 28 S. W. 779. But the principle laid down in these cases is not here applicable for two reasons: The appellant brought this suit to have the title to this land quieted, and the appellee by his counterclaim asserted ownership to the land and asked that his title to it be quieted, tendering an issue involving the question of superior title, and it was competent, as ruled in *Magowan v. Branham*, 95 Ky. 581, 26 S. W. 803, for the court to try and determine it; and for the further reason that this was an effort on

the part of appellant to deprive appellee of his title to the property by converting same to his own use. It is a wrongful seizure of his title that is the foundation of his action, and, as held in *Herr v. Martin*, 90 Ky. 377, 14 S. W. 356, in a case like this, a party can maintain his action although not in the actual possession of the property.

Several minor defects are pointed out in the chain of title by which appellee holds this land, but we do not deem it necessary to discuss them. It is sufficient to say that in our opinion they do not affect the validity of appellees' title in this controversy with appellant.

The judgment is affirmed.

KOGER et al. v. KOGER et al.

(Court of Appeals of Kentucky. May 1, 1906.)

1. DEEDS—DELIVERY—SUFFICIENCY.

Where a grantor delivered deeds to the scrivener to keep for him, and the scrivener afterwards handed them to a grantee, to be returned to the grantor, who then handed them to the grantee to have them examined by an attorney, and, if they were found all right, to be recorded, this did not constitute a legal delivery of the deeds.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 136-139.]

2. SAME—VALIDITY—CAPACITY OF GRANTOR—EVIDENCE.

In an action involving the validity of deeds by a grantor over 80 years of age, evidence held to show that the disposition made by the deeds was not such as he would have made if competent to understand the nature of the transaction and left to the exercise of his own judgment.

Appeal from Circuit Court, Wayne County.
"Not to be officially reported."

Action by Jefferson Koger and others against William Koger and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

J. P. Harrison, O. H. Waddle, W. R. Cress, and Sharp & Siler, for appellants. Stone & Stone, Joe Burtram, and W. S. Pryor, for appellees.

CARROLL, C. This controversy involves the validity of two deeds made by William Koger, Sr., to the appellants, William Koger, Jr., and Elijah Koger. William Koger, Sr., died in September, 1903, and at his death was about 88 years of age. On the 23d of November, 1901, for a recited consideration of \$100 cash in hand paid, he conveyed to appellant William Koger, Jr., about 600 acres of land, and on the same day, for a recited consideration of \$100, conveyed to Elijah Koger about 1500 acres of land. Both of these deeds were acknowledged on the day of their execution, but were not lodged for record until February 14, 1903. William Koger, Sr., left surviving him 12 children and two grandchildren, sons of a deceased daughter, all of whom, except the appellants, brought this suit in 1904 against the appellants for the purpose of partitioning the lands of William Koger,

Sr., among his heirs at law, ignoring the deeds made by him to appellants. Appellants in separate answers set up these deeds, and claimed title and ownership of all these lands under and by virtue of them. The appellees by reply assailed the deeds upon the ground that neither of them had been delivered; that there was no consideration for the execution of either of them; that they were procured by undue influence, and at the time of the execution the grantor did not have mental capacity sufficient to make them. The case was prepared for trial on these issues, and judgment rendered canceling the deeds, and directing that the land of decedent be partitioned among his heirs. From that judgment the appellants prosecute this appeal.

The judgment does not disclose the ground upon which the chancellor annulled the deeds, but counsel say that he was of the opinion that the deeds relied on by appellants had not been delivered. The evidence discloses this state of facts concerning this question: Both deeds were written by George A. Bell, who was at the time a deputy county clerk for Wayne county, and were acknowledged before him by the grantor. Bell testifies that after the deeds had been acknowledged the grantor delivered them to him to keep for him, and that after keeping them for several months he concluded to deliver the deeds to the grantor, and took them to the grantor's house for that purpose, but forgot to deliver them, and after leaving the house he gave the deeds to the appellant Elijah Koger, and told him to give them to his father, which Elijah Koger testifies he did, and Elijah Koger and William Koger testified that soon thereafter their father gave the deeds to William Koger to have them examined by an attorney, and, if they were all right, to have them put on record. Neither of the deeds were delivered to Bell to be held by him for the use or benefit of the grantees, or either of them, nor was he ever authorized by the grantor to deliver the deeds to the grantees; and it appears that his delivery of the deeds to Elijah Koger under the circumstances stated was without the knowledge or consent of the grantor. Under these facts, it is earnestly insisted by counsel for the appellees that there was no legal delivery of the deeds. If the testimony of Elijah Koger and William Koger is competent, it establishes the fact that the deeds were delivered to the grantor by Elijah Koger, who afterwards gave them to appellant William Koger. The delivery of a deed is essential to its validity. Until it is delivered, the title does not pass from the grantor. The placing of the deeds in the hands of Bell by the grantor did not divest him of dominion or control over them. He had the right at any time to recall the deeds and revoke or destroy them. They were held by Bell simply at the pleasure of the grantor, and subject to his authority, and the delivery of the deeds by Bell to the grantees without the knowledge

or consent of the grantor was not in contemplation of law a delivery, and legally they continued to remain in the hands of Bell until delivered by him to the grantor, or some other person by the grantor's direction. *Colyer v. Hyden*, 21 S. W. 868, 15 Ky. Law Rep. 101; *Nuckols v. Stone*, 87 S. W. 790, 27 Ky. Law Rep. 1043; *Barlow v. Hinton*, 1 A. K. Marsh. 97; *Cook v. Brown*, 34 N. H. 460. We are of opinion that the testimony in this case is not sufficient to show any delivery of these deeds; nor do we consider the statement in the will made on September 1, 1903, that the testator had deeded all his lands to Elijah and William Koger, as entitled to much weight under all the circumstances of this case.

A great deal of evidence was taken by both parties to this litigation, and the following facts are disclosed: That William Koger had been confined to his house for some 2 or 3 years before these deeds were executed, and from that time to his death. About 13 years previous to their execution he had been run over by a wagon and seriously injured, and from the time of this accident was not capable of much manual labor, and for several years before his death suffered severely from catarrh. He had been twice married, and his last wife died several years before he did. His daughter, Mrs. Thompson, lived with him until 1899 or 1900, when his son Elijah Koger moved into the house and lived with him from that time until his death. Just why Mrs. Thompson left does not clearly appear. His son William Koger, the appellant, lived a few miles distant on a part of the land owned by his father. Some of his other children lived in Wayne county, and others in Western states; but, after Elijah Koger moved into the house, he took complete charge of the business affairs, and, it might be said, the person, of his father, who, at that time, was a very old man, in feeble health, and with increasing years grew more infirm. A number of witnesses testify that he said to them at different times that he wanted all of his children to share equally in his estate, and there is no evidence that any bad feeling or unfriendliness existed between him and any of his children. Other witnesses testify that he expressed to them an intention of giving all of his land to his two sons, William and Elijah Koger, and there is much testimony showing upon the one hand that he was not mentally capable of making these deeds at the time of their execution, and, on the other, that, although his body was feeble, his mind was vigorous, and that he was entirely competent to make these conveyances. Upon the question of mental capacity, the evidence, although very conflicting, leaves the impression that this old man's mind, in sympathy with his body, had grown feeble, and, like many men of his age and infirmities, he was forgetful, would repeat questions, and in the middle of a sentence would begin to talk

about something else. The fact, however, remained undisputed that he did not make these deeds until after Elijah Koger came to live with him, and that from the time Elijah Koger moved into his house until his death he had exclusive charge of all his father's business. The evidence does not disclose any particular acts of undue influence, nor is it directly shown that any fraud was practiced to procure the execution of these deeds. It is extremely difficult to show by evidence the exercise of fraud or undue influence, and in almost every case where these questions arise they must be established, if at all, by circumstances.

It is admitted that, although the deeds state the consideration as \$100 cash, no consideration whatever was paid. Perhaps this evidence in itself would not be entitled to preponderating weight; but, taken in connection with the other facts and circumstances disclosed by this record, it illustrates a purpose on the part of the appellants and their advisers to mislead and deceive by inserting in a material part of the deeds an important statement as the truth that had no foundation in fact, and leaves the impression that the grantor in the deeds, by reason of his age and mental and physical condition, was a pliant tool in the hands of those who had control of him, and willing to insert in an instrument so solemn as a deed an idle statement like this. As said in *Smith v. Snowden*, 27 S. W. 855, 16 Ky. Law Rep. 353: "The recital of the false consideration carries with it the thought and purpose of designing and intentional concealment of the truth, and this falsehood and concealment are the highest evidence of the fraudulent intent with which the writings were procured—not necessarily of actual, but of constructive, fraud, assumed in view of their relation, and the superior contracting with the inferior, the independent with the dependent, and the strong with the weak. We may say generally that when the parties to a deed sustain fiduciary and confidential relations towards each other, or when one of the parties is subject to the influence of the other, the writing should contain a fair and truthful statement of the transaction."

It appears that William Koger, Sr., made three wills. The first will was dated December 8, 1898. In this will he gave the most of his real estate to the appellants, omitting, however, a portion of it, and to his other children he gave his personal property. A year or so afterwards he made another will, that William Koger testifies was stolen from his house. This second will made practically the same disposition of his property as the first, with the exception that in it he gave to his sons, the appellants, all of his real estate, including that portion which had been omitted from the first will. Again, on September 1, 1903, and a few days before his death, he made a third will, in which he

stated that he had deeded all of his real estate to his sons Elijah and William Koger, and devised his personal estate to his other heirs in equal portions, with only one material exception. This last will was probated in December, 1903. Both of the deeds and the first and second wills were written by George A. Bell, who appears conspicuously in this record as the friend of appellants, although there is no direct evidence showing any improper conduct on his part. It is insisted by appellants that these wills, taken in connection with the deeds, show a fixed and continuous purpose on the part of William Koger, Sr., to dispose of his property in the manner he did; and it is argued that this is convincing evidence of his mental capacity and a determined intention on his part to make his two sons the principal beneficiaries of his estate. The record, however, discloses that Elijah Koger, aided or assisted by George Bell, took an active part in procuring the execution of all these papers, and the same influence that secured one could easily procure the other. The reason assigned by the old man for making the last will and deeds was the apprehension that the first or second will he made would not stand the test of legal investigation, and in order to make things doubly sure he decided, not only to make the deeds, but to afterwards make his third and last will, in which was recited the fact that he had previously conveyed to his two sons all of his real estate. His son William Koger does not appear to have done any more for his father than his other children who lived in the neighborhood, and although Elijah Koger lived in the house with him, and gave him such attention as he needed, he had the control, use, and benefit of his property, and in this way was more than amply compensated for the care and attention that he bestowed upon his father, whose wants were few and simple. There is really no reason shown by the record why he should have practically disinherited his other children, some of whom were daughters and in humble circumstances, and all of whom appear to have been on the best of terms with their father. The personal estate that he gave to his other children by his will was insignificant compared with the real estate given to these two, appellants; the real estate being worth \$12,000 or \$15,000, and his personal estate probably sufficient to give each of his children \$150.

This unreasonable and unnatural disposition of his estate, taken in connection with his great age, mental and physical infirmities, and the manifest influence exercised over him, especially by his son Elijah Koger, leave little room for doubt that these deeds were not such a disposition as this old man would have made of his estate, if competent to understand the nature of the transaction and left to the exercise of his own judgment.

The judgment is affirmed.

MILLER et al. v. SMYTHE et al.

(Court of Appeals of Kentucky. May 1, 1906.)

1. EXECUTORS AND ADMINISTRATORS—INJUNCTION—BONDS—ACTION—PARTIES.

An action on a bond for an injunction restraining the defendant therein from removing timber from land was not properly brought after his death by his heirs, but should have been brought by his personal representative, or, if he refused to bring or join in the suit, he should have been made a defendant; Civ. Code Prac. § 24, providing that parties who are united in interest must be joined as plaintiffs or defendants, but that, if the consent of one who should be joined cannot be obtained, he may be made a defendant.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 301.]

2. INJUNCTION—BOND—EXTENT OF LIABILITY.

An injunction restrained defendant from removing timber from certain land or doing any act to deprive plaintiff of any timber on the same, and pending the injunction plaintiff cut and carried away timber. *Held*, that the damages sustained by defendant owing to the taking of the timber by plaintiff, were recoverable from the sureties in an action on the injunction bond, as the timber was taken under authority granted by the writ.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 542.]

Appeal from Circuit Court, Lee County.
"To be officially reported."

Action by John M. Smythe and others against Washington Miller and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed, and remanded for proceedings in conformity with the opinion.

H. L. Wheeler and Beckner & Jouett, for appellants. Gourley & Roberts and C. A. Gourley, for appellees.

CARROLL, C. In June, 1895, M. O. Goff and others instituted a suit in equity in the Lee circuit court against William T. Smythe, David Smythe, and Mitchell Smythe, in which they sought to recover from the defendants the possession of a tract of land, and in this action the plaintiffs, with Washington Miller and J. D. Simpson as their surety, executed an injunction bond, "enjoining and restraining the said Smythes, or either of them, from cutting or removing any timber, trees, logs, or lumber from said land, or from selling same, or doing any other act to deprive said Miller, Goff, or Prewitt, or either of them, of any timber, trees, logs, or lumber on said land, or to interfere with said Miller's, Goff's, and Prewitt's use and enjoyment of same." This injunction continued in force from the date of its issue in 1895 until January, 1902, when the action in which it was obtained was dismissed and the injunction dissolved. Pending this action, William Smythe, one of the defendants therein, died, and in November, 1902, James D. Smythe and Jesse Smythe, named as defendants in the injunction, and the other children and heirs at law of William Smythe, brought this suit on the injunction bond, alleging that by reason of the injunction they

were prevented and restrained from using and controlling the lands claimed and owned by them, and from taking and selling timber therefrom, and compelled to stand by and see their timber cut, carried away, and destroyed, and their property rights injured by the plaintiffs in the injunction suit, their agents and employes, who, after obtaining the injunction, entered upon the land and cut and carried away and converted to their own use timber of the value of \$6,000, which was owned by the plaintiffs, and they sought to recover the sum of \$6,000 and the further sum of \$125, attorney's fees and costs incurred in defending the injunction suit. The defendants, appellants here, filed special and general demurrers to the petition, which were overruled, and in an answer traversed the petition, and also averred that they were, when the injunction issued, the owners of and in possession of the land upon which the injunction operated, and from which the timber was taken, and had been in the actual, continuous, and adverse possession of the land for more than 15 years before the injunction was obtained. To this pleading a reply was filed, completing the issues, and upon a trial of the case before a jury a verdict was rendered against appellants for \$3,000, and \$25 costs expended in the injunction suit. From a judgment on the verdict, this appeal is taken.

The first question raised by appellants is that this action to recover damages on the injunction bond can only be prosecuted by the personal representative of William Smythe, who was the father of these appellees, and according to their testimony the owner of the land in controversy, and that his heirs, the appellees, cannot maintain this suit. We are of the opinion that the liability, if any, on the injunction bond to William Smythe, was a personal asset that on his death survived to his personal representative, and that the action to recover damages on the bond for all timber cut or carried away up to the time of the death of William Smythe should have been brought by his personal representative, and not by the heirs. In Newman on Pleading and Practice it is said that "the personal representatives have the right of action in relation to the personal property of the decedent, while the heirs only properly represent him in relation to his real estate. Although an action may be brought by the real party in interest, yet it cannot be maintained now, any more than formerly, unless the plaintiff has directly a legal or equitable interest or title in the subject of the action. An action cannot be maintained ordinarily by the heir to recover a debt due by the account of the ancestor, nor upon an ordinary bond or judgment for money payable to the deceased, without any stipulation that it should be paid to his heirs." *McChord v. Fisher's Heirs*, 13 B. Mon. 194; *Coons v. Nall's Heirs*, 4 Litt. 263; *Brunk v. Means*, 11 B. Mon. 214. No reason is assign-

ed why this action was not prosecuted in the name of the personal representative of William Smythe, nor why he was not made a party, either plaintiff or defendant, to the action. The recovery in a case of this kind being assets in the hands of the personal representative, the action should have been prosecuted in his name, or he should have been a party plaintiff. If he refused to bring or join in the suit, he should have been made a defendant. Civ. Code Prac. § 24; *Brown's Heirs v. Wilson*, 12 B. Mon. 100. The special demurrer should therefore have been sustained.

Appellants' next contention is that they, as sureties in this injunction bond, are not liable for any damages resulting from cutting and carrying away timber from the land and otherwise trespassing upon the premises. They insist that by the terms of the injunction bond they only undertook to be responsible for the damages which the defendants in that suit might sustain by reason of the injunction, if it was finally decided that the injunction ought not to have been granted, and that the damages claimed in this action were not sustained by reason of the injunction. The order of injunction was a comprehensive writ, not only restraining the defendants in the injunction from cutting or removing any timber from the land, but from doing any other act that might deprive the plaintiffs of the right to cut or remove any logs or timber. The purpose and effect of the injunction, as disclosed by what occurred after its issuance, was to prevent on the one hand the defendants from cutting and removing timber, and on the other hand to permit the parties who obtained the injunction to cut and remove timber from the land; and it seems clear that while this injunction was in force the plaintiffs in the injunction suit, or persons by their direction or authority, or acting for them, did cut and remove timber from the land. To that extent the injunction injured the defendants, and the damages they sustained were fully covered by the stipulation of the injunction bond that the obligors therein would pay to them all damages which they might sustain by reason of the injunction, if it ought not to have been granted. If any timber was cut or taken from the land by the plaintiffs, or their vendees or agents, in the injunction suit, it was taken under the authority granted by the writ of injunction, which prevented the defendants from in any way interfering with plaintiffs in cutting and removing the timber. In *Barton v. Fisk*, 30 N. Y. 166, a case very much like this, the plaintiff claimed to be the owner of personal property lying on defendants' land, and sued, procuring an injunction forbidding the defendant, who claimed the property, from asserting any right to it. On a trial of the case it was adjudged that the property belonged to the defendant, and not to plaintiff; but, pending the suit, the plaintiff carried off the proper-

ty and converted it to his own use. In an action on the injunction bond the obligors made the same argument that is made by appellants in this case. In answer to it the court said: "If the property had been carried away and converted by others, while the owners were prohibited from doing anything to protect it, the person who restrained them ought to make compensation. But, if he means to carry it off and convert it during the restraint which he had procured to be imposed, the efficient cause of the loss was inability of defendants, caused by the injunction, to take care of and preserve that which was theirs." Proceeding, the court said: "It matters not whether the injunction conferred upon the plaintiff the right to appropriate the property to his use. Assume that it did not. It necessarily impliedly authorized him to take possession of it, or countenanced him in doing so, inasmuch as it forbade all others to interfere with him in acquiring such possession. In this respect it is somewhat analogous to the bond in an action for replevin, and impliedly imposed upon the defendant the obligation to return the property in the event of an unfavorable determination of the suit. Having taken possession, it is lost to the defendants through his wrongful negligence. This is the very result against which the injunction was designed to protect the parties." The injunction deprived the owner of the right to protect the timber and land, and preserve it from destruction or invasion by others, and the loss of timber and other trespasses may be properly attributed to the injunction. In cases like this, courts will not be governed by arbitrary rules, but proceed upon equitable principles; the defendant in the injunction bond being entitled to such damages on the bond as are the necessary and proximate result of the deprivation of his property. *Alexander v. Colcord*, 85 Ill. 323; *High on Injunctions*, § 1673. And the action of the court in overruling the demurrer was proper.

Both parties claim to be the owners of the land from which the timber was taken by adverse possession, as well as paper title. The appellees concede that there is such a defect in their paper title as to render it unavailable, and there are also defective links in the chain of title offered by appellants. Recognizing these facts, the parties directed the principal part of their evidence toward an effort to establish that each had been in the adverse and continuous possession of the land for more than 15 years previous to the institution of the injunction suit. The lines and corners in controversy are so confounded by ambiguous calls in deeds and the conflicting statements of witnesses that we have not been able to determine with any degree of certainty where the correct lines are located, and it seems probable that the lower court labored under the same difficulty, as in the instructions submitted the question of ownership was made to rest upon posses-

sion alone. But on another trial the real question in this case, which is one of boundary, can be ascertained with more certainty, and much of the confusion that appears in this record cleared away, and in place of instructions 2 and 5 the court should determine from the evidence where the boundary of appellees' land, that is in dispute, is located, and define and describe it in an instruction, so that the jury will only be required to pass on the question whether or not appellants trespassed, or cut or injured timber, under the injunction, within the line of appellees' title, and, if so, the amount of damages sustained by reason thereof.

The judgment is reversed, for proceedings in conformity to this opinion.

SULLIVAN et al. v. SULLIVAN et al.

(Court of Appeals of Kentucky. May 1, 1906.)

1. EVIDENCE—ADMISSIONS AGAINST INTEREST—ADMISSIBILITY.

Where there was no consideration for a note executed by a mother to a son, except services rendered and to be rendered by the son, evidence of the son's statement, made to an arbitrator appointed in proceedings to determine the validity of the note, that he was not entitled to retain it because he had not done what he agreed to do as the consideration thereof, was admissible as an admission against interest.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 786-791.]

2. BILLS AND NOTES—FAILURE OF CONSIDERATION—DEFENSE PRO TANTO.

Where there was no consideration for a note given by a mother to a son, except services rendered and to be rendered by the son, and he failed to render the services contracted for, his recovery was limited to the fair value of the services actually rendered, the amount thereof to be in the same proportion to the amount of the note as the services which he rendered bore to the full amount of the services he agreed to render.

3. DESCENT AND DISTRIBUTION — ADVANCEMENTS—INTENT.

A person may by will regulate the matter of advancements between his children, whether the advancements have in fact been made or not; but where a person dies intestate the question of advancements is regulated by Ky. St. 1903, § 1407, and the declaration of intention of the intestate cannot control.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Descent and Distribution, § 402.]

4. BILLS AND NOTES—CONSIDERATION—SUFFICIENCY.

A mother executed an instrument reciting: "For value received I this day promise to pay my son * * * \$500, to be paid out of my estate before it is divided among my other children. This note is not to bear interest until my death." The son had not received \$500 less than the other children, and there was no consideration for the note. *Held*, that the note was invalid for want of a valuable consideration.

Appeal from Circuit Court, Hardin County.

"To be officially reported."

Action between John P. Sullivan and others and Thomas E. Sullivan and others. From a judgment for the latter, the former appeal. Reversed and remanded.

S. M. Payton, for appellants. Sprigg & Holbert, for appellees.

HOBSON, C. J. Mary F. Sullivan died a resident of Hardin county, leaving surviving her 10 children, and this suit was brought by her administrator for the settlement of her estate. The only question arising upon the appeal is as to the validity of three notes executed by her to three of her younger children, Thomas D. Sullivan, Samuel I. Sullivan, and Katie M. Pierce. These notes are as follows:

"For value received I promise to pay Thomas D. Sullivan five hundred (\$500) dollars due twelve months after date, but if same is not paid by me no interest is to be collected until after my death. This is not an advancement made by me but money due my son for services and kindness rendered me by him. This September 25, 1896.

"Mary F. Sullivan."

"For value received of him I this day promise to pay my son Samuel I. Sullivan five hundred (\$500) dollars to be paid him out of my estate before it is divided among my other children. This note is not to bear interest until my death. Dec. 20, 1901.

"Mary F. Sullivan."

"For value received I this day promise to pay to my daughter Katie M. Pierce five hundred (\$500) dollars to be paid her out of my estate before it is divided among the other children. This note is not to bear interest until my death. Aug. 28, 1902.

"Mary F. Sullivan."

The proof shows that Thomas D. Sullivan was a bachelor, living with his mother when the note to him was executed, and cropping the farm on which she lived as her tenant. She made an arrangement with him by which he was to stay with her and take care of her as long as she lived, and in consideration of his promise to do this she executed the note to him. Shortly after the execution of the note, however, he married. His wife and his mother did not get along together, and about the year 1898 he left her. They then had some disagreement as to whether he should give up the note, and had, or tried to have, an arbitration about it; but he did not give it up. Afterwards the mother executed to Samuel I. Sullivan and Katie M. Pierce the other two notes as advancements. These notes the old lady declared were executed because they had received this much less than the other children and she wished them made up equal. The circuit court enforced the notes, and the administrator of the estate appeals.

The administrator introduced Joel Jackson and proposed to prove by him that he was one of the arbitrators selected by Mrs. Sullivan and her son Thomas, and that Thomas D. Sullivan told him then that he held the \$500 note, but was not entitled to retain it, because he had not done what he agreed to do as the consideration of the note, which was that he was to live with his mother

and support her during the remainder of her life. This evidence should have been admitted. While a proposition of compromise passing between the parties themselves may not be proved, statements that either of the parties may make to an arbitrator may be given in evidence, just as any other admission against interest may be. There was no consideration for this note, except the services of Thomas D. Sullivan, and in lieu of the instructions which the court gave he should have instructed the jury to whom the case was submitted for trial that if they believed from the evidence the note was given in consideration of services rendered or to be rendered by Thomas D. Sullivan, and he failed to carry out the contract and render the services contracted for, they should find for him the fair value of the services actually rendered, the amount so found to be in the same proportion to the full amount of the note as the services which he rendered bore to the full amount of the services he agreed to render under the contract with his mother.

As to the other two notes a different question is presented. The proof taken on the trial is not sufficient to show that Samuel L. Sullivan or Katie M. Pierce in fact received \$500 less than the other children. In that event the notes would not be material. The notes executed to them are on their face testamentary dispositions of the estate. The language of both notes is the same, and while each contains a promise to pay they both provide that the \$500 is to be paid out of the estate before it is divided among the other children and is not to bear interest until her death. A testamentary disposition of the estate can only be made by will executed as provided by the statute and regularly admitted to probate. These papers are not so executed that they may be probated as a will under the statute. A person may by will dispose of his estate, and thus regulate the matter of advancements between the children, whether the advancements have in fact been made or not. But, if a person dies intestate, then the question of advancements is regulated by the statute (Ky. St. 1908, § 1407), and the declaration or intention of the parent cannot control the fact. *Shawhan v. Shawhan's Adm'r*, 10 Bush, 600. In *Chitty on Contracts*, p. 27, after a quotation from *Blackstone* as to what is a sufficient consideration for a deed, it is added: "We must observe, however, that the term 'good consideration,' as thus used in the case of deeds, does not apply to simple contracts, to support which mere relationship or natural love and affection is not a sufficient consideration." In 1 *Daniel on Negotiable Instruments*, § 179, the rule is thus stated:

"A valuable consideration is necessary to support any contract, and the rule makes no exception as to the character of the consideration respecting negotiable instruments when the consideration is open to inquiry.

Therefore a consideration founded on mere love and affection, or gratitude, is not sufficient to sustain a suit on a bill or note; as, for instance, when a bill or note is accepted or made by a parent in favor of a child, or vice versa, it could not be enforced between the original parties, the engagement being gratuitous upon what is called a good, in contradistinction to a valuable, consideration." In *Edwards on Bills, Notes and Negotiable Instruments*, § 456, it is said: "The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and bona fide purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient." See, to same effect, *Story on Promissory Notes*, § 188; *Richardson v. Richardson*, 148 Ill. 563, 86 N. E. 608, 28 L. R. A. 305; *Phelps v. Phelps*, 28 Barb. (N. Y.) 121; *Holley v. Adams*, 42 Am. Dec. 508; *Flint v. Pattee*, 66 Am. Dec. 742; *Parish v. Stone*, 25 Am. Dec. 378; *Fink v. Cox*, 9 Am. Dec. 191.

None of the Kentucky cases relied on are in point. It is true a note may be made payable at death, but it must be upon a valid consideration. A note may be delivered as a gift *causa mortis*, but these notes were not so delivered. In *Reynolds' Adm'r v. Reynolds*, 92 Ky. 556, 18 S. W. 517, the money belonged to the mother, and was in effect borrowed by the father, who executed his note to the daughter for it. The consideration there for the note was the money which belonged to the mother, and which the father retained upon his promise to pay it to the daughter. In *Fain v. Turner's Adm'r*, 96 Ky. 634, 29 S. W. 628, the note of the mother was based upon the consideration that the child forbore to bring a suit and thus lost a right of action which she had. In *Graves v. Graves*, 7 B. Mon. 213, the promise of each of the children was a sufficient consideration to support the promise of the other. The case of *Jennings v. Anderson*, 4 T. B. Mon. 445, rests upon the idea that the instrument was an acknowledgment of a marriage portion. In *Mark v. Clark*, 11 B. Mon. 44, the instrument sued on was not held enforceable. To uphold notes such as these would be to establish a very dangerous doctrine, and those who have access to the old would be given a great advantage over their brothers and sisters who are at a distance. All the salutary checks which the law has thrown around the disposition of property by will would be dispensed with; for no attesting witness is necessary to a note, and it may be obtained when no one is present to testify to the circumstances of its execution. Many old people may be induced to give a note payable out of their estate at their death, when they would not make a gift of the money if they had it, and would be un-

willing to make a will so devising their estates. We therefore conclude that the two notes to Samuel L. Sullivan and Katie M. Pierce are, under the evidence, without consideration and unenforceable, and that the court should have instructed the jury peremptorily to so find.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

DAVIS et al. v. FERGUSON.

(Court of Appeals of Kentucky. April 26, 1906.)

1. BILLS AND NOTES — ACTIONS — ANSWER — WANT OF FAILURE OF CONSIDERATION.

An answer, in an action on a note executed by a partner to his copartner on purchasing the firm assets and assuming the firm liabilities, which alleges that it was understood in the settlement of the firm assets that the firm books showed all the partnership liabilities, whereas there were omitted from them several accounts which the purchasing partner was compelled to pay; that the representations as to the firm's books showing the firm's indebtedness was fraudulently made by the selling partner; and that the selling partner had withdrawn from the firm goods and moneys which did not appear on the firm books were not considered in the settlement — though charging fraud, is broad enough to show that, if fraud did not exist, the facts alleged were a part of the consideration of the note, and, under Ky. St. 1903, § 470, could be shown in a suit thereon to defeat or reduce a recovery.

2. PARTNERSHIP — SETTLEMENT OF FIRM ASSETS.

Where partners on the dissolution of the firm both believed that the liabilities shown by the books were the only ones in existence, whereas they were not, there was a mutual mistake, which affected the consideration of the note given by the purchasing partner on purchasing the firm assets, which must go to reduce the amount of the note by one-half of the liabilities not included; the purchasing partner having paid them.

3. SAME.

Where a selling partner, who had kept the firm books, had withdrawn goods and cash which did not appear on the books and were not accounted for, and which were not considered in a settlement of the partnership affairs, the purchasing partner, giving a note on purchasing the firm assets, was entitled to have one-half of such amount deducted from the note.

4. ACTION—NATURE AND FORM—STATUTES.

Civ. Code Prac. § 113, allowing a pleading to contain as many causes of action, legal or equitable, and of matters of estoppel and of avoidance, total or partial, and as many traverses as there may be grounds for in behalf of the pleader, when considered with other sections relating to pleading, does away with rules of pleading existing at common law, confining actions to single issues and denying equitable defenses in actions at law.

5. TRIAL—DOCKETS—TRANSFER OF CAUSES—STATUTES.

Civ. Code Prac. § 14, providing for the transfer of an action properly commenced as an ordinary action to the equity docket on defendant pleading equitable defenses and executing a bond conditioned on the payment of any judgment rendered in favor of plaintiff, etc., when read in connection with section 13, providing for the transfer of equitable issues in an ordinary action, and section 113, authorizing one to plead as many defenses as he may have, and sections 363 and 364, regulating the time for trial of ordinary and equitable actions, indicates a purpose to prevent delays of trial of

ordinary actions, where there is an equitable defense interposed by transferring them to the equity docket, but does not deny one the right to plead an equitable defense, though unable to give bond for the performance of an adverse judgment.

6. SAME—TRIAL OF EQUITABLE ISSUES—ORDER.

In an ordinary action, properly commenced as such, a purely equitable defense must be tried by the court and disposed of before a judgment can be rendered.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 10.]

7. SAME — DOCKETS — TRANSFER OF CAUSES—DISCRETION OF COURT.

Where, in an ordinary action properly commenced as such, the equitable defense is of a character embraced within Civ. Code Prac. § 10, subsec. 4, as amended by the law of 1890, providing that the court may transfer an action to the equity docket, when the transfer is necessary because the case involves accounts, etc., the trial court has discretion to determine whether it will transfer the action to the equity docket for trial without the execution of the bond required by the express provisions of section 14.

8. SAME.

Where, in an ordinary action, the equitable issue raised by the answer related to the correction of a firm settlement, and the recasting of the accounts between the partners on a dissolution of the firm, the court under Civ. Code Prac. § 10, subsec. 4, as amended in 1890, providing for the transfer of an action to the equity docket, if necessary, because the case involves accounts, abused its discretion in refusing to transfer the action to the equity docket unless defendant executed the bond required by section 14, requiring the court not to transfer an action to the equity docket unless defendant executes a bond conditioned on the payment of an adverse judgment.

Appeal from Circuit Court, Edmonson County.

"Not to be officially reported."

Action by L. F. Ferguson against John D. Davis and others. From a judgment for plaintiff, defendants appeal. Reversed.

Nat. T. Howard, for appellants. Jas. S. Wortham and Milton Clark, for appellee.

O'REAR, J. Appellant John D. Davis and appellee, L. F. Ferguson, were partners in merchandising. They had each contributed \$1,000 to capital stock. The business was conducted principally by appellee, who was then the bookkeeper for the firm. They agreed on a dissolution and settlement in July of 1902, by which appellant assumed all partnership liabilities, paid appellee \$200 in cash, and executed a note for \$1,000—the one sued on in this action—for all the partnership assets. In this suit upon the note, appellant pleaded that it was understood in the settlement that the firm's books showed all the partnership liabilities, whereas there were omitted from them several accounts, amounting, it is said, to \$200 or \$300, which appellant was compelled to pay. He claims that the representation as to the firm's books showing all the firm's indebtedness was fraudulently made by appellee, and the truth that the liabilities exceeded the amount shown by the books was fraudulently con-

ceased by him. The answer also asserted that appellee made or allowed certain debts to the amount of \$300 or more to be made to the firm, which were insolvent, and which appellee agreed, when the partnership was formed, he would be personally responsible for. It was further charged in the answer that appellee had withdrawn from the firm, and had allowed his wife to do so, goods and money to the amount of several hundred dollars, which had not been paid, and which did not appear on the firm's books, and were not considered in the settlement when appellant bought out his partner's interest. This answer, although it charges actual fraud, is broad enough in its allegations to show that, even if the fraud did not exist as charged, these matters were a part of the consideration of the note, and, being so, under the statute (section 470, Ky. St. 1903), could be shown in a suit on the note to defeat or reduce a recovery upon it, as there would then be a total or partial failure of the consideration. Boiled down to its true import, the answer showed that the note was executed in settlement of a partnership venture, and that the settlement was not true, to the detriment of the maker of the note. To arrive at the true amount due involved a settlement of the partnership affairs. This was a purely equitable matter. While it was competent for the parties upon such dissolution to agree that one of them should take the stock of goods at an agreed valuation, even including all debts owing the firm, and to assume as part payment all liabilities of the firm, yet where it is shown, as we think it is in this case, that the parties both believed that the liabilities shown by the books were the only ones in existence, whereas in truth they were not, there was a mutual mistake which affected the consideration, which ought to have gone to reduce the amount of the note by one-half of the total liabilities not included; the purchasing member having since paid it off. Likewise it is true that where the selling member, who had been the firm's bookkeeper, had sold to his wife or personally withdrawn goods and cash, which did not appear on the firm books and were not paid for or repaid, and which had not been considered in the settlement, in which the note in suit was executed, there was, to say the least of it, a mutual mistake in the transaction, which in equity ought to be corrected, and one-half of it deducted from the note. The evidence tends to sustain appellant's contention in each of the claims just alluded to. But we have not been able, from the state of the record, which appellee admits is imperfectly transcribed by the stenographer who took notes of the testimony at the trial, to adjudge the true amount of these items. Whether appellee agreed to be responsible to the firm for bad accounts which he allowed to be made is not clearly proven.

Appellant moved the court to transfer the case to the equity docket, and to refer the

settlements of the accounts between the litigants to the master commissioner. Appellee resisted the motion, and filed his affidavit that he verily believed he would succeed in the action, and that the collection of his judgment would be endangered by delay arising from the transfer. The circuit court sustained the motion to transfer to equity, provided the movant would execute bond, with approved surety, that he would pay any judgment rendered in the action in favor of the plaintiff. Failing to do this, the court refused to order the transfer, and the case proceeded to a trial before a jury. This ruling of the court is the principal ground relied on by appellant for reversal of the judgment; the verdict of the jury having been adverse to appellant's defense. Section 113, Civil Code of Practice, allows a pleading to contain as many causes of action, legal or equitable, and of matters of estoppel and of avoidance, total or partial, and may present as many traverses, as there may be grounds for in behalf of the pleader. This section of the Code must be construed in connection with other sections limiting the broad rights enumerated, or conditioning them upon particular forms of procedure. The section was meant to do away with the rules of pleading existing at common law, confining actions to single issues and denying equitable defense in actions at law. Section 13 of the Civil Code of Practice provides for the transfer of equitable issues in an ordinary action. Section 14 reads: "In an ordinary action, properly commenced as such, if the defendant be entitled to the transfer of one or more issues to the equity docket, and move for such transfer, the plaintiff may file his affidavit that he verily believes he will succeed in the action, and that the collection of his claim, after judgment, will be endangered by delay arising from such transfer, and if such affidavit be filed, the court shall not grant the motion of the defendant to transfer, except upon condition that the defendant execute a bond, with good surety, approved by the court, that he will pay any judgment rendered in favor of the plaintiff: Provided, that no such bond shall be required, if the trial of the case or issue transferred take place during the term at which the transfer is made, nor until all issues not transferred are tried, or disposed of, in favor of the plaintiff." This section should not be regarded as a limitation upon the right named in section 113 to plead as many defenses as one may have, although it prescribes a condition upon which an equitable defense is to be tried in equity. It will be observed that the section does not deny the right, to make such defense. It merely regulates the matter of transferring the action to the equity docket for trial. Sections 363 and 364, Id., regulate the time for trial of ordinary and equitable actions. Section 14, supra, read in connection with the other sections noted above, indicates a purpose to prevent delays of trial of ordinary actions,

where there is an equitable defense interposed, by transferring them to the equity docket, where by that fact alone it might be necessarily further delayed. It is not to be supposed, however, that it was intended by these sections to deny a defendant the right to plead an equitable defense, if he should be unable to give bond for the performance of the judgment if it should be adverse to him.

What, then, was the correct practice in this case? A trial is a judicial examination of the issues of law or of fact in an action. Section 811, Civ. Code Prac. Issues of law must be tried by the court, while issues of fact, in ordinary actions, except for injuries to person or character, shall be tried by the court, unless a jury trial be demanded by the parties (section 812, Civ. Code Prac.); while other issues of fact shall be tried by the court, subject to its power to order any issue of fact to be tried by a jury (section 813, Civ. Code Prac.). But not every ordinary action is triable by a jury as a matter of legal right. Among such are matters of complicated account, where the items are so complicated and numerous as to render a jury trial impracticable. *O'Connor v. Henderson Bridge Co.*, 95 Ky. 683, 27 S. W. 251, 983; *Turner v. Johnson*, 35 S. W. 923, 18 Ky. Law Rep. 202. By an amendment to the Civil Code of Practice, adopted in 1890, constituting subsection 4 of section 10 of the Civil Code of Practice, it is provided: "The court may, in its discretion, on motion of either party, or without motion, order the transfer of an action from the ordinary to the equity docket, or from a court of purely common law to a court of purely equity jurisdiction, whenever the court before which the action is pending shall be of the opinion that such transfer is necessary because of the peculiar questions involved, or because the case involves accounts so complicated or such great detail of facts as to render it impracticable for a jury to intelligently try the case." If this amendment should be deemed inconsistent with section 14, as it would be in the particular kind of equitable defenses treated of by the former, and included also within the latter, if the latter required a bond before allowing a transfer to the equity docket, it repeals the latter by necessary implication, and vests the discretion in the trial court to transfer such actions without a bond.

Even before the amendment just quoted, it was intimated in *Harrell v. Howard*, 80 Ky. 51, that in an action properly begun as an ordinary action the court should have proceeded to a trial of the equitable defense, even though the bond required by section 14 was not given. Substantially the same provision existed under the old Code. *Myer's Code*, tit. 1, §§ 10, 11. Construing those sections and section 15 (which was the same as section 113 of the present Code), the court in *Bosley v. Mattingly*, 14 B. Mon. 89, said: "When an answer is filed, containing a valid equitable

defense, no judgment for the plaintiff can be rendered until some disposition has been made of the answer; and the issues that may arise upon it, which are exclusively equitable in their character, are to be tried in the manner such issues were tried before the adoption of the Code." From the foregoing the conclusion is that in an ordinary action properly commenced as such, a purely equitable defense must be tried by the court and disposed of before a judgment can be rendered; and this, whether the action is transferred to the equity docket or not. In such an action, where the equitable defense is of a character embraced by subsection 4 of section 10 of the Civil Code of Practice, the trial court has the discretion whether it will transfer the action to the equity docket for trial without the execution of the bond required of section 14, Civ. Code Prac. Under the facts of this case, it was an abuse of discretion, and was error, to have submitted to the jury the equitable issue, to wit, the correction of the settlement and the recasting of the partnership accounts between appellant and appellee. The matter ought to have been referred to the court's commissioner.

The instructions to the jury, furthermore, were erroneous in several particulars, unnecessary to be noticed in detail. The case should be referred to the master commissioner to settle the accounts of the partnership on this basis: Letting the sale from appellee to appellant stand as it was made; charge appellant with the \$1,000 note, with legal interest from its maturity; credit him by one-half of all firm indebtedness paid off by him since the dissolution that was not shown on the firm books when the firm dissolved; credit him by one-half of the account against appellee for goods sold to himself and wife, and for cash withdrawn by them from time to time, and not accounted for by him. Further proof may be heard as to whether appellee agreed to be responsible for merchandise debts to the firm which he allowed to be created. If it should be shown that he did, then one-half of their sum should also be credited on the note. The balance, if any, after these credits are allowed, will be the sum for which the judgment should be rendered.

The judgment should be reversed, and cause remanded for proceedings not inconsistent herewith.

MORGAN et al. v. LEWIS et al.

(Court of Appeals of Kentucky. April 23, 1906.)

1. PLEADING — NECESSITY FOR REPLY—JUDGMENT ON PLEADING.

In an action of trespass, where the answer did not assert title or possession of the land in the defendants, but alleged that a correct survey of the land owned by plaintiff would not include the land where the trespass was committed, judgment on the pleadings for failure of plaintiffs to reply was properly denied.

2. APPEAL — JURISDICTION—TITLE TO REAL PROPERTY.

In an action of trespass, where the answer denied that the land on which the trespass was committed was within the boundary of the tract owned by plaintiffs, the Court of Appeals has jurisdiction of an appeal from the judgment, though only \$60 in damages was awarded.

3. BOUNDARIES—EVIDENCE.

In an action of trespass, evidence held to show that a line, shown on a survey and mentioned in the patent of a tract as 294 poles long, was in fact only 194 poles long.

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action by Matilda Lewis and others against M. F. Morgan and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Wm. Lewis, J. H. Jeffries, and Greene & Van Winkle, for appellants. Hazelrigg & Hazelrigg, for appellees.

CARROLL, C. The appellees, claiming to be the owners and in the possession of a tract of land in Leslie county, brought this action against the appellants to recover damages for trespass committed by them on the land. The answer, after denying the commission of any trespass and traversing generally the averments of the petition, in the second paragraph alleged that defendants were the owners of the boundary of land, describing it by metes and bounds, upon which the alleged trespasses were committed. The third paragraph, while admitting that the appellees, plaintiffs below, owned a tract of land in the vicinity of the land described in their petition, denied that any part of the boundary actually owned by the appellees embraced the land upon which the trespasses complained of were committed, and further averred that the plaintiffs' land did not lie where they claimed it was situated, and that according to a correct survey of the land it would not conflict with the land owned by the defendants. No reply was filed to this answer, and appellants' first contention is that they were entitled to a judgment on the pleadings. To this we cannot assent. The answer of appellants did not assert either title or possession to any part of the land claimed by appellees. The substance of the second and third paragraphs of their answer is that the land upon which the alleged trespass was committed was not embraced in the boundary described in the petition, and that a correct survey of the land admittedly owned by appellants would disclose that it did not include the boundary where the trespass was committed, and which appellants claim to be the owners and in possession of. The real, and in fact the only, question in this case is, does the land owned by appellees, according to a correct survey thereof, include the land upon which the trespass was committed? Appellants' contention is that it does not, and upon this issue a large quantity of proof was taken. The lower court decided in favor of appellees, holding that the

trespasses complained of were committed within their boundary, and gave a judgment against the appellants for \$60 in damages, to reverse which this appeal is prosecuted. The title to land being involved, the smallness of the damages recovered does not deny this court jurisdiction of the appeal.

The appellees claim title under a survey and patent issued to John Gilbert in 1837. The survey and patent describe the land as follows: "Containing 100 acres, beginning on the north side of the Middle Fork of the Kentucky river at a beech and ash trees at the lower end of a cliff of rocks; thence down said fork as it meanders north, 40 poles, to a Spanish oak corner to a 100-acre survey made for said Gilbert; thence with a line of same north 49° east, 105 poles, to a stake; thence north, 20 poles, to a stake; thence north 66° west, 88 poles, to a stake; thence west, 10 poles, to a dogwood and two beach trees, an upper corner to a 200-acre survey made by said Gilbert; and thence with a line of same north 11° east, 70 poles, to two post oaks on a point on a ridge; thence south 46° east, 294 poles, to a stake; thence south 26° west, 124 poles, to a stake; thence west, 80 poles, to the beginning." There is really no controversy as to the beginning point of this survey, which as late as the pendency of this suit was a well-marked corner; the principal contention being the correct location of the "two post oaks" at the seventh corner from the beginning, and the length of the seventh line, the distance of which is described in the survey and patent as 294 poles. Mr. Robert L. Blakeman, a very competent surveyor and intelligent witness, and whose survey the lower court adopted in the judgment as the correct boundary of the land, testified that he could not find the "two post oaks" mentioned in the survey and patent. Appellants contend that these "two post oaks," as located in the patent, were situated on top of a ridge near Owl's Nest Branch, which is probably three-quarters of a mile north of corner No. 7 as located by Blakeman. If this contention could be sustained, then the land upon which the trespass was committed would not be embraced within this Gilbert patent, because the point where the trespass was committed is in the southern boundary of the Gilbert patent, and if the entire tract was moved by the survey three-quarters of a mile north, as it would be if the seventh corner was located on Owl's Nest Branch, the land upon which the trespass was committed would not be included in the Gilbert patent or in the boundary of land owned by appellants.

Appellant's second contention is that the line of the survey running from corner 7 to corner 8, and described in the survey and patent as being 294 poles long, is as a matter of fact only 194 poles long, and that in this respect there is an error in giving the distance of that line in the survey and patent. If this position be sustained, it would shorten

the line 100 poles, making this line 194 poles, and then, running the other lines substantially according to the courses and distances given in the patent, it would probably exclude the land upon which the trespass was committed. So that the real questions in the case are limited to two: First, is corner 7, at the "two post oaks," located on Owl's Nest Branch? and, second, if it is not, but is located at the point found to be its true location by Blakeman, is line No. 7 194 poles in length, in place of 294? After carefully considering the record and the briefs of counsel in support of their respective views, we have reached the conclusion that line No. 7 is in fact only 194 poles long, in place of 294, as mentioned in the survey and patent, and therefore the land in controversy in this case, upon which the trespass complained of was committed, is probably not embraced within the Gilbert patent.

Mr. Blakeman in his deposition gives it as his opinion that the surveyor who made the survey of this Gilbert patent in 1837 only ran one line of the survey, and also testified that the only established corner that he could find on the survey was the beginning corner, a beech and ash trees at the lower end of a cliff of rocks, and that this is the beginning corner there is no serious doubt. With the exception of the first line from the beginning, which he correctly ran with the meanders of Middle Fork, and without reference to the course called for in the patent, he ran all of the succeeding lines, except the last line, according to the bearings and distances of the patent. The last line mentioned in the patent is "thence west, 80 poles, to the beginning." This line Blakeman ran "north 61° west, 200 poles, to the beginning," making this line 120 poles longer than the patent. Running the lines of the patent according to the courses and distances therein, with the exception of the first line, which differed a little in bearings, but not in distance, he found it necessary to extend the last line 120 poles to make the survey close, and the patent as surveyed by Blakeman contained 160 acres, or 60 acres more than the patent called for. The last line of the survey by Blakeman lies south of and almost parallel with the line that is 294 poles long. If the calls are reversed, and run backwards from the beginning point 88 poles, or 8 poles more than the distance mentioned in the patent, and 100 poles is taken from the 294 pole line, the boundary will contain a fraction over 103 acres, and all of the other courses and distances would be the same as mentioned in the patent; and, in addition to this, the distances will correspond with the plat filed with the original survey, the only substantial difference being that in this survey the distance of the seventh line is 294 poles, whereas according to this method it would be 194 poles, and the figure of the original plat filed with the original survey shows on its face that the surveyor evident-

ly made a mistake in putting this line down as 294 poles long, because the length of the line as indicated by the original plat in comparison with the other lines on the plat show that it is not 294 poles long. The plat filed with the original survey is a matter of record of equal dignity with the survey itself, and is entitled to as much weight as evidence; and where the plat shows on its face, as in this case, that the surveyor must have made a mistake in putting down the distance of one line, the plat will control. *Steele's Heirs v. Taylor*, 8 A. K. Marsh. 225, 18 Am. Dec. 151. It is well settled that courses and distances must give way to natural objects mentioned as boundaries or corners when there is a conflict between them. *Vaughn v. Foster*, 47 S. W. 333, 20 Ky. Law Rep. 682. But the difficulty in this case is that there is only one corner fixed by a natural object, and that is the beginning corner, and therefore the courses and distances cannot be controlled by natural objects.

It is insisted by counsel for appellee that, although the distance of the last line of the survey as run by Blakeman is 120 poles more than the distance mentioned in the patent, the line must run from the last corner to the beginning, regardless of the course and distance, citing in support of this view *Simpkins' Adm'rs v. Wells*, 42 S. W. 848, 19 Ky. Law Rep. 881. This rule is undoubtedly correct within reasonable bounds, and when there are natural objects at different points on the boundary by which the survey can be located; but in this case there is only one well-marked corner, and that is the beginning, and the excess in the distance of the last line is too great, in view of the absence of natural objects to fall within the rule mentioned in that case. In ascertaining the correctness of the survey, when the boundary is uncertain and there is lack of natural objects by which it can be located, it is not necessary to begin the survey where the original survey commenced and follow the lines of the surveyor, it is proper to reverse the lines of the survey when by so doing the true course of the survey can be better determined, and that construction must prevail which is most against the party claiming under an uncertain survey. It is his duty to show and establish his corners. *Thornberry v. Churchill*, 4 T. B. Mon. 29, 16 Am. Dec. 125; *Pearson v. Baker*, 4 Dana, 321. In *Creech v. Johnson*, 76 S. W. 185, 25 Ky. Law Rep. 657, this court, in an opinion by Judge Hobson, said: "The survey is made by the patentee, and the patent is issued on his application. The grant is therefore strictly construed against the grantee, where its terms are uncertain or doubtful. The calls may be reversed when by so doing the quantity or land embraced will more nearly harmonize with that called for in the grant, but the courses and distances as given in the survey should be followed when reversing the calls

would not have that effect. Quantity aids in ascertaining the premises of a grantee when they are not described by known and established boundaries."

In this case the courses and distances in the original survey do not correspond with the distances in the plat filed with and as a part of the survey. To make the survey close according to the courses and distances mentioned in the patent, it is necessary, not only to materially change the course of the last line, but to extend its distance 120 poles. In addition to this, the survey will contain 60 acres more land than the patent calls for. If the view is adopted that the seventh line is 100 poles too long, and the boundary is surveyed on this theory, the courses and distances, with the exception of two lines, will correspond with the courses and distances mentioned in the patent, and the boundary contains only 3 acres more land than was granted to the patentee, and the plat of the land will correspond with the plat filed with the original survey on which the patent issued. We have therefore reached the conclusion that there was an error made in the length of the seventh line of the patent, and that the correct boundary of the Gilbert patent "begins at a beech and ash trees N. 31° E., 40 poles; thence N. 49° E., 105 poles; thence N., 20 poles, corner to Hurts branch; thence N. 66° W., 88 poles, crossing the Middle Fork to a stake; thence W., 10 poles, to where a dogwood and two beeches are called for; thence N. 11° E., 70 poles, recrossing the Middle Fork; thence S. 40° E., 194 poles; thence S. 26° W., 124 poles; N. 82° W., 88 poles, to the beginning." There is some question as to whether or not this boundary includes the land where the trespass was committed, but this fact can be ascertained and determined by the lower court, and judgment entered in conformity to the rights of the parties as they may appear when the Gilbert patent is surveyed as indicated.

The judgment is reversed, with directions to conform to this opinion.

TOWN OF CENTRAL COVINGTON v. BEISER.

(Court of Appeals of Kentucky. May 1, 1906.)

1. MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS—DAMAGES FROM DRAINS.

Parties interested in the use of an alley placed a drainpipe therein. The city, subsequently improving the alley, left the pipe where it was found. *Held*, that the pipe became a part of the improvement, requiring the city to maintain the same and keep it open.

2. LIMITATION OF ACTIONS—MUNICIPAL CORPORATION—DRAINS—OBSTRUCTION.

A city negligently permitted the drainpipe to become filled up causing the surface water to flow onto property abutting on the alley and injuring the same. *Held*, that limitations did not begin to run from the completion of the alley, but a recovery might be had for injuries

received within five years prior to the institution of the action.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 304, 305.]

3. MUNICIPAL CORPORATIONS—DRAINS—OBSTRUCTION—DAMAGES.

A city negligently permitted a drainpipe in an alley to become filled up causing surface water to flow onto land abutting on the alley, and injuring the same by damaging a stone wall of a house on the property. *Held*, that the owner was entitled to recover the actual damages sustained.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1802.]

4. SAME—PLEADING—PROOF.

A petition in an action against a city alleged that plaintiff's property was injured in consequence of the city improving an alley and filling up a drainpipe therein. The proof showed that the damage resulted from the filling up of the drainpipe. *Held*, that the proof supported the cause of action stated in the petition.

Appeal from Circuit Court, Kenton County.
"To be officially reported."

Action by Mary Beiser against the town of Central Covington. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Orlando P. Schmidt, for appellant. B. F. Grawiana and James P. Tarvin, for appellee.

PAYNTER, J. In May, 1895, Mrs. Vallandigham and her husband conveyed to appellee a lot in the Franklin subdivision in Central Covington, Ky., fronting 23 feet on the west side of Center street and extending up a hillside 87 feet to an alley 10 feet wide. Jackson street runs east and west from Center street to and beyond the alley. Prior to 1892 there was a gully extending from a point west of the alley down the hillside to Center street and passing over a lot adjoining and south of the appellee's lot. The board of trustees of Central Covington passed an ordinance providing for the improvement of the alley from the south line of Jackson street southwardly to John Wolfe's north line by grading and paving and providing that a gutter be constructed in the middle of the alley. The work seems to have been completed in 1893. It will be observed that the improvement of the alley was accomplished two years before the appellee purchased the property. At the time the alley was constructed there was a drainpipe which had been placed in the gully by persons interested in the use of the alley, and had been covered up so as to enable persons to drive over the alley at that point. The mouth of the drainpipe was on private property two feet above the alley and the lower end was on private property two feet below the alley. The evidence conduces to show that the pipe was sufficient to carry off the water which accumulated at that point down the gully. When the city improved the alley the drainpipe was left where it was found. Shortly after the alley was constructed the drainpipe became stopped up, which prevented the flow of water

through it, thus diverted the flow of the surface water across the alley, and onto the property of the appellee to her damage. The appellee instituted this action in 1902 by which she seeks to recover damages which she alleges she sustained by the overflow of her property by the water which accumulated near the mouth of the drainpipe, and by reason of it being stopped up.

The city seeks to avoid a recovery principally upon two grounds: (1) Because the mouth and lower end of the drainpipe were on private property and the city was not authorized or bound to keep it open as it was not placed there by the city, therefore; (2) that the action was based upon the theory that the construction of the alley caused the injury, and that it was a permanent structure, and that five years had elapsed since its completion before the institution of the action, and that the statute of limitation bars a recovery thereon. If the city, before the drainpipe had been placed there, had improved the alley and, in doing so, it filled up the gully and thus diverted the flow of the water onto and over appellee's premises and she had been thereby injured, she could have maintained an action against the city. Instead of the city finding an open gully when it began to improve the alley, it found a drainpipe in the gully and the gully filled on the pipe. When it began to improve the alley it adopted the work which had been done by the interested parties and constructed the alley over the drainpipe, thus adopting and making it a part of the city's improvement of the alley. The drainpipe thereby became as much a part of the improvement of the alley, as if the city had placed it there. Thereafter it was the duty of the city to maintain the drainpipe under the alley and to see that it was kept open. If the conditions with which it found itself confronted required that an opening should be made in the alley to clean out the pipe the city should have done so and not allowed it to become closed up and thus produce damages to the property of the appellee.

The construction of a street or alley is of a permanent character, and if negligently constructed and damage results to the property owner by reason of the improvement of the street, a cause of action arises upon the completion of the improvement for damages resulting therefrom. *Hay v. City of Lexington*, 71 S. W. 867, 24 Ky. Law Rep. 1495. The evidence conduces to show that there was no negligence in the construction of the alley, but tends to show that the sewer pipe was ample to carry off the water and avoid its diversion upon the property of appellee. The stopping up of the sewer is not necessarily a permanent and continuing nuisance. The expenditure of a small amount of labor and money would clean out the

sewer and thus cause the water to flow through its natural channel. If there was no way to remedy the condition complained of, then the court would be inclined to hold that it was a permanent nuisance and there could be but one recovery for past damages sustained and probable future damages to be sustained. The evidence does not tend to show that it was the construction of the alley that diverted the flow of the surface water to the premises of appellee. If that had been true from a proper construction of the alley, then the doctrine of the *Orr Case*, and similar cases would apply and the five-year statute of limitations would have barred a recovery. In view of the fact that the injury resulted from the negligence of the city in failing to keep the sewer open, the statute of limitation did not begin to run from the completion of the alley, but a recovery may be had for injuries received within five years prior to the institution of the action. The court's instruction on the next trial should conform to this view of the statute of limitations.

Instruction No. 4 reads as follows: "If the jury should find for the plaintiff the criterion of the damages should be the depreciation in the reasonable market value of said property caused by said injuries, if any, not exceeding \$1,000." This instruction was predicated upon the idea that the nuisance resulting from the closing up of the sewer was of a permanent nature, and the appellee was entitled to a recovery of the entire damages which had resulted in the past or would probably occur in the future, for the court allowed the jury to fix her damages by the depreciation in the market value of her property. The evidence tends to show that her house was actually damaged by the water flowing against and into part of it and so damaged a stone wall back of it that it became necessary to remove and rebuild it. She should be entitled to recover the actual damages to her property resulting from diverting the surface water from its natural channel upon her property.

Counsel for appellant urges that the appellee failed to make out her cause of action, because it was averred in substance in the petition as amended, that the injury resulted from the improvement of the alley and the filling up of the drainpipe, when the proof tended to show that the damage resulted from the filling up of the drainpipe. We think counsel is in error in this contention. Although appellee many have failed to show that the manner of constructing the alley caused the damages, she did show that it was occasioned by allowing the drainpipe to become filled up.

The judgment is reversed for proceedings consistent with this opinion.

POWERS v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 2, 1906.)

1. CRIMINAL LAW—TIME FOR TRIAL—DISCRETION OF COURT—REVIEW.

Ky. St. 1903, § 964, provides that criminal cases shall be heard at but three terms in each year in any county, to be fixed by order of court, unless in an emergency the court may otherwise direct. *Held*, that the action of the trial court in finding that an emergency existed, and in causing a criminal case to be tried at a term prior to the one regularly fixed, will not be disturbed on appeal, unless an abuse of discretion appears.

2. CRIMINAL LAW—EVIDENCE—RES GESTÆ.

On a prosecution for murder, it was proper to admit evidence that persons who arrived at the scene of the conflict found deceased upon the accused, whose back was upon the ground, with a knife in his left and a pistol in his right hand, and that they jerked the deceased away from accused and grabbed his hands and disarmed him, and that in so doing accused attempted to injure one or more of the persons with his knife. *Held*, that such evidence was competent as a part of the *res gestæ*.

3. HOMICIDE—SELF-DEFENSE—EVIDENCE.

The evidence was admissible to show the condition or state of mind of defendant at the time and to contradict his theory that he was acting in his necessary self-defense.

4. SAME—MOTIVE.

On a prosecution for murder, it was proper to admit evidence that prior to the killing defendant had been heard to say that he did not like deceased.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, § 321.]

5. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

The fact that an instruction required the jury to believe beyond a reasonable doubt that defendant acted in self-defense before they could acquit him was not prejudicial to defendant, where he was only convicted of voluntary manslaughter.

6. SAME—CONFLICTING EVIDENCE.

Under Cr. Code Prac. § 340, declaring that a judgment of conviction shall be reversed for an error of law where, upon consideration of the whole case, the court is satisfied that the substantial rights of the defendant have been prejudiced, the Supreme Court has no power to reverse a conviction where there is any evidence to show defendant's guilt.

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Hiram C. Powers was convicted of voluntary manslaughter, and he appeals. Affirmed.

Heavrin & Woodward and J. S. Glenn, for appellant. N. B. Hays and C. H. Morris, for appellee.

NUNN, J. In the month of March, 1905, the appellant killed one Renfrow, by shooting him with a pistol. He was indicted for murder by the grand jury at the May term, 1905. The case was set for trial at that term, but upon his motion it was continued. He asked for a continuance to the next regular term of the court at which criminal and penal cases could be regularly tried. The court refused his request, and set the case for trial on a named day in August. The terms fixed by law of the Ohio circuit court at which criminal cases shall be tried are March, May, and November. The appellant

claims that the court erred to his prejudice in compelling him to try his case at the August term, which was fixed by order of court for the trial of civil cases only. Section 964 of the statute as amended (Ky. St. 1903) provides that criminal and penal cases shall be heard at but three terms, in each year, in any county, unless in an emergency the court may otherwise direct. The court, in its order in continuing the case and setting it for trial at the August term, made the following recital: "It appearing to the court that an emergency exists demanding that this case be not postponed until the next November term, and being now sufficiently advised, this case is set for trial on the third day of the next August term of this court." In our opinion, under the language of the statute, it was in the province of the court, exercising a reasonable judgment, to determine whether an emergency existed which authorized the trial of the case at a time other than at a regular term at which criminal cases were directed by law to be tried. This court should not interfere with the action of the lower court in a matter like this, unless it be made to appear that the court abused its discretion, and which operated to the prejudice of the substantial rights of the person on trial; and this is not made to appear in this case, and, in addition, it is shown in the record that an affidavit by the commonwealth's attorney was produced to the court and filed showing the emergency.

The trial of the appellant resulted in his being convicted of voluntary manslaughter, and his punishment fixed at 21 years in the penitentiary. It is not necessary to relate the facts and circumstances of the killing, as it is not contended that there was no evidence authorizing the jury to convict him. His plea was not guilty, but it was admitted that he fired the fatal shots which took the life of Renfrow. There was some little evidence that he acted in self-defense, but his real defense was insanity. The appellant complained that the court erred in permitting witnesses to state what occurred after the conflict was over and while appellant was being disarmed. This contention is based upon the following state of facts: Several persons, when they arrived at the scene of the conflict, found the deceased upon the appellant, whose back was upon the ground, with a dirk in his left and a pistol in his right hand. They jerked the deceased off of him, and grabbed his hands, and disarmed him. In doing so, appellant attempted to injure one or more of them with his dirk. This was a part of the *res gestæ*, and was competent. It occurred instantly after the separation of the parties, and while the deceased was upon the ground a few feet away, dying. It also tended to show the condition or state of mind of the appellant at the time, and to contradict his theory that he was acting in his necessary self-defense.

The appellant complains that the court per-

mitted incompetent evidence to be introduced, in that witnesses were permitted to testify that prior to the killing they had heard appellant say on different occasions that he did not like the deceased, Renfrow. In this the court did not err, for it tended to show a motive for the commission of the crime.

Appellant complains of instructions Nos. 2 and A. No. 2 was upon the question of voluntary manslaughter, and in the usual form, except with a slight variance, which appellant contends required the jury to believe, beyond a reasonable doubt, that he acted in self-defense, before they could acquit him. This criticism of the instruction is very technical. The jury could not have so understood it. The court by that instruction told the jury what they must believe from the evidence beyond a reasonable doubt before they could convict him of voluntary manslaughter; and by the next two instructions the court gave to the jury the law of self-defense. The three instructions, considered together, could not have been misunderstood by the jury; but if the instruction was defective, as contended, it did not prejudice appellant, as the jury only convicted him of voluntary manslaughter. If appellant had been convicted of murder, the alleged error might have been material.

Instruction A was in the usual form, with reference to appellant's commencing the conflict by assault, etc., and depriving him of the right of self-defense if he did so commence it. The court also gave the counterpart of it, by stating that although they might believe he commenced the conflict as stated, yet if he in good faith abandoned it, and Renfrow continued to assault and menace him, then his right of self-defense revived. The court did not err in giving this instruction, as there was some evidence upon which to base both theories contained in it.

Appellant's real defense was insanity. The court's instructions upon this question have been approved by this court in several cases. In our opinion, the preponderance of the evidence introduced upon this point showed that appellant was not rational and responsible for his acts when he killed the deceased. Several eminent physicians, who had made a study of, and who had had practical experience in the treatment of, the insane, testified, after repeated examinations of the appellant, that he was insane, and not responsible for his conduct, when he shot Renfrow. But, notwithstanding the preponderance of the evidence was in favor of appellant upon this point, this court is not authorized to reverse the case. This court has repeatedly decided, in construing section 340 of the Criminal Code of Practice, that this court has no power to reverse a criminal case when there was any evidence introduced tending to prove the defendant's guilt. In this case there was some evidence produced from which the jury might have concluded that the

appellant was responsible for his act in the taking of Renfrow's life.

For these reasons, the judgment of the lower court is affirmed.

NATIONAL LIFE INS. CO. OF UNITED STATES OF AMERICA v. ANDERSON.

(Court of Appeals of Kentucky. May 9, 1906.)

1. INSURANCE—AGENT—COMPENSATION.

Under a contract whereby plaintiff was employed by a life insurance company as manager of a specified territory for at least one year for a certain commission, his compensation being guaranteed to exceed a certain amount per month, but the company reserved the right to withdraw from the territory, where the company withdrew from the territory before the expiration of the year, the plaintiff was not entitled to compensation for the balance of the year.

2. SAME—REBATING PREMIUMS.

Where an insurance company permitted an agent to rebate parts of premiums in violation of Ky. St. 1903, § 856, making the act of rebating a crime, it could not recover from the agent the premiums which he ought to have collected from the insured.

3. SAME.

Where an insurance company continued to accept the services of an agent with knowledge that he rebated premiums, they cannot thereafter forfeit his rights to compensation for legitimate services after the illegal acts were done.

Appeal from Circuit Court, Graves County.
"To be officially reported."

Action by L. B. Anderson against the National Life Insurance Company of the United States of America. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Robbins & Thomas and L. A. Stebbins, for appellant. W. J. Webb, for appellee.

BARKER, J. In August, 1903, the appellant, the National Life Insurance Company of the United States of America, entered into a written contract with the appellee, L. B. Anderson, by which it employed him as its manager for a district in southwestern Kentucky containing several counties. Under this contract his remuneration was to be on a commission basis, but was guaranteed by the company to amount to \$125 per month for the first 4 months, and to \$100 per month for the remainder of the period. The contract commenced on the 1st day of September, 1903, and extended to the 1st day of September, 1904, and thereafter until ended by 30 days' notice from either party to the other. On the 1st day of May, 1904, the corporation withdrew from the state of Kentucky, and has done no business here since, of which withdrawal it gave appellee due notice. Thereafter it refused to pay him any part of his salary, and to recover it, this action was instituted. A trial resulted in a judgment in favor of appellee for \$400 of which appellant corporation is now complaining.

So much of the contract as we deem pertinent to the issues involved herein is as follows:

"This agreement, made and entered into this third day of August in the year one thousand nine hundred and three, by and between the National Life Insurance Company of the United States of America, Washington, D. C., principal branch office Chicago, Illinois, party of the first part, and Lawrence B. Anderson, of Paducah, in the county of McCracken and state of Kentucky, party of the second part, witnesseth:

"First. That said party of the first part does hereby appoint the said party of the second part manager for said company for the purpose of procuring in person, or through agents, applications for insurance on the lives of individuals and forwarding same to said company for approval or disapproval, and for collecting and forthwith forwarding premiums, according to the terms and conditions of this contract, and for no other purposes, whatsoever. The said party is hereby authorized to operate in the following district, to wit: The counties of Davless, McLean, Muhlenberg, and Todd, in the state of Kentucky, and all territory lying west thereof in said state.

"Second. Said company reserves the right to withdraw from said district at any time, without previous notice to said party of the second part; in which event, this contract, so far as it relates to procuring or soliciting new business, shall cease and determine without incurring any liability on the part of the said company; but nothing herein shall be construed to release said party of the second part from any liability whatsoever which the said party may have incurred at or before the date of such withdrawal. * * *

"Twenty-First. It is agreed that if said party of the second part shall sell or offer to sell directly or indirectly to any person or persons, policies for insurance to be issued by said party of the first part hereunder at any reduction from the regular table as furnished to said party of the second part by said party of the first part, said sale or offer of sale shall work an immediate termination of this agreement and a forfeiture of all rights and interests hereunder to said party of the first part.

"Twenty-Second. It is agreed that this contract shall run for a term of one year, beginning September 1, 1903, and terminating September 1, 1904, and thereafter may be terminated by either party 30 days after giving the other party notice to that effect.

"Twenty-Third. The said party of the first part hereby guaranties and agrees to pay the party of the second part the sum of one hundred and twenty-five dollars per month for four months, the first payment being due and payable on October 1, 1903, and one hundred and twenty-five dollars on the first

day of each succeeding month for four months. And the party of the first part hereby further agrees to pay the said party of the second part the sum of one hundred dollars per month for eight months, beginning with January 1, 1903, and ending September 1, 1904, the said first sum of one hundred dollars being due and payable on February 1, 1903, and the subsequent one hundred dollars on the first of each succeeding month; all of the above guaranties or salary to be charged against commissions.

"Twenty-Fourth. The party of the first part hereby agrees to pay to the party of the second part the sum of twenty-five dollars per month for twelve months for office rent, due and payable on the last day of each month."

The first error complained of by the appellant is the refusal of the trial court to instruct the jury that it had a right, under the second section of the contract, to withdraw from the district for which it had employed the appellee to act as its agent, at any time, and that from the date of such withdrawal its liability to him under the contract was to cease. On the part of appellee it is insisted (and such was the opinion of the trial court) that sections 22 and 23 provide for a continuance of the contract and payment of appellee's salary for a year, without reference to section 2 and although the company might withdraw from the state, still appellee's salary would go on during the contract year. This construction we deem unsound. It is an elementary rule for the construction of contracts, that all of their provisions shall, if possible, be given full force and effect, and that their different stipulations shall be harmonized, unless they are irreconcilable. It is difficult to see of what value section 2 would be to the company, if appellee's contention as to the effect of sections 22 and 23 be correct. The only possible value of section 2 to the company was that it enabled it to discontinue the salary of its agent if it determined to withdraw from further business in the state. If the salary continued after the withdrawal of the company from the state, this section was a nullity. On the contrary, it seems to us that there is no conflict between sections 22 and 23 on the one hand and section 2 on the other. The former provide for the employment of appellee for a year, at a stipulated compensation, provided the company continued to do business in the district for which he was employed; but if it determined to withdraw from the district, then appellee's right to solicit insurance and earn commissions and salary was at an end. On no other hypothesis can all of the contract be given full force and effect. It will be observed that, primarily, appellee's remuneration is to be by commissions; the salary stipulated for is only a guaranty on

the part of the company that the commissions shall amount to, at least, \$125 per month for the first four months, and \$100 per month afterwards. By the provisions of section 2, the right to earn commissions by soliciting new business was to cease and determine without incurring liability on the part of the company at any time that the company saw fit to withdraw from the district. This language is utterly inconsistent with appellee's construction of sections 22 and 23. We conclude, therefore, that the court erred in failing to instruct the jury, substantially, as requested by appellant as to the effect of section 2 on the rights of appellee.

The court correctly submitted the question whether or not the appellant company agreed to the rebate of premiums admitted to have been made by appellee as its agent. Appellant insists that, although it may have agreed to the unlawful rebating of premiums, it was entitled to collect the whole premium which the agent ought to have received from the insured, and this on the theory that the contract between it and the agent permitted the rebating is void, being in contravention of section 656 of the Kentucky Statutes of 1903 which makes the act of rebating a crime. We quite agree with appellant, that any contract which contravenes a penal statute is void. The trouble we have with its contention is that it insists that the agreement in which the rebating was done was void in so far as the appellee was concerned, but should be effectuated as a legitimate transaction as to it. We do not so understand the law. If the insurance company agreed with its agent, that in any given case the premium which should have been paid was rebated contrary to the statute, then that whole contract of insurance was as to the guilty parties void, void in whole and in every part; and the law will not assist either party in enforcing it as against the other; nor will it undertake to construct a legitimate contract out of a vicious agreement by eliminating the obnoxious features. It will neither collect for the company the premium which the agent ought to have re-

ceived, or require him to pay over that which he actually received. It leaves the guilty parties where it finds them, not because it desires to protect one against the other, but because it refuses to have anything to do with either.

The contract between the parties to this litigation is upon its face a fair and lawful one. No illegitimate acts done outside of its terms will vitiate it; but if the parties step aside and do an illegitimate act in regard to insurance, this act is not done in pursuance of the contract, but outside of it. Any contract of insurance, in which rebating is done in violation of the statute, stands as if it had no existence so far as its enforcement for the benefit of either party is concerned; and it, therefore, necessarily follows, if our conclusions on this subject are correct, that if the appellant corporation agreed to the rebating done by its agent, and with guilty knowledge issued the policies at the reduced rates, in any settlement made between it and its agent of their civil rights under the contract, these illegitimate transactions should be considered as having no existence either in law or in fact. No effort was made by the corporation to forfeit the contract during its existence for the rebating done by its agent. We think the proposition to retroactively forfeit rights under the contract after its existence has ceased comes too late. Appellant cannot accept appellee's services as agent after the rebating was done, and then say, in a suit to recover his salary, that the agent was guilty of rebating during the life of the contract, and, therefore, it owed him nothing for the legitimate service it received after the illegal act was done. Especially is this true if it agreed to the acts upon which the right of forfeiture is based.

The trial court correctly ruled that the appellee was only entitled to recover of appellant the sum of \$10 under the provisions of section 24; that being the whole amount expended for office rent while appellee acted as agent.

For the reason given, the judgment is reversed for proceedings consistent herewith.

NICHOLSON et al. v. HOPPER et al.
(Court of Appeals of Kentucky. May 9, 1906.)
BOUNDARIES — ESTABLISHMENT — TRIAL — INSTRUCTION.

In a boundary suit, where the deed of both parties called for a straight line from corner to corner, and there was nothing in the evidence warranting the conclusion that the division line was crooked, an instruction requested by defendants that, if the jury believed from the evidence that in a certain division of the land a line was marked that divided the land in controversy, they should adopt the marked line as shown by the evidence, even though it conflicted with the courses and distances called for on the deed, was properly refused as misleading.

Appeal from Circuit Court, Carlisle County.

"Not to be officially reported."

Action by Mary Hopper and others against Ed. Nicholson and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Shellbourne & Kane and Jno. W. Lockett, for appellants. J. D. White and Nichols & Nichols, for appellees.

CARROLL, C. The only question in this case is the true location of a division line between lots Nos. 2 and 3 in the division of the lands of William Thomas, deceased. Lot No. 2 is owned by appellees, who are children of Susan Coyle, a daughter of William Thomas, and to whom this lot was set apart in the division of his estate. Lot No. 3 is owned by appellant Powell, who purchased from the vendees of G. A. Thomas, a son of William Thomas, to whom it was allotted in the division. The appellees brought this suit in ejectment against the appellants, alleging that they had wrongfully taken possession of a part of lot No. 2, containing four or five acres along the division line between it and lot No. 3. Appellants denied that they were in possession of any land owned by appellees, and asserted ownership to the strip of land in controversy, claiming that the same was within their boundary and that they had been in possession of it for more than fifteen years. On a trial of the case, the jury found for appellees.

Appellants insist that errors prejudicial to their rights were committed by the trial court in refusing to properly instruct the jury, and that the verdict is flagrantly against the evidence. It appears from the deeds made to lots Nos. 2 and 3 in the division of William Thomas' estate that the eastern corner of the division line between lots Nos. 2 and 3 was located at two white oaks and a hickory in Webb's line; this corner being called for in both deeds. From this corner the division line between these two lots runs westerly 237 poles, and the location of this corner is well established by the testimony of several witnesses, although the trees have disappeared. Mr. Atkins, a surveyor whose plat of this line the jury accepted as correct, ascertained by surveys and measurements the location of the corners

on the east and west ends of the division line between lots Nos. 2 and 3, and found that the corner on the east between these two lots was the point marked by the location of these trees, and that the division line between the two lots was located in the place claimed by appellees. A circumstance entitled to some weight is the fact that the commissioner's deed to lot No. 2 calls for 91 acres, and the deed to lot No. 3 for 76½ acres. If the line found by the jury to be the correct one is established, lot No. 3 will contain 76 acres and 100 poles, and lot No. 2 87 acres. If the line contended for by appellant is established, lot No. 3 will contain 79 acres, and lot No. 2 about 85 acres. In other words, if the line established by the jury is the correct one, the quantity of land contained in lot No. 3 will be about the same as that mentioned in the deed under which the appellant holds, while lot No. 2, owned by appellees, will contain some four acres less than the deed calls for. On the other hand, if the line is located where appellant claims it should be, his lot will contain 79 acres, or 3 acres more than his deed calls for, and lot No. 2 will contain 85 acres, or 6 acres less than the deed calls for.

It appears that there was located along the division line between lots 2 and 3 two gums and a hickory that were marked as fore and aft trees, and it is contended by appellants that these are line trees on the division line between lots Nos. 2 and 3. It is admitted by appellees that these trees are marked as fore and aft, but they deny that they are on the line; and they are not on the line if the two white oaks and hickory is the true corner between lots Nos. 2 and 3, because a line run from these two white oaks and hickory according to the courses and distances of the deeds will not run to or near these trees. About the time appellant purchased lot No. 3 in 1890, appellee S. B. Coyle pointed out to him the trees marked as fore and aft trees as being on the line between the lots, but soon thereafter, when a surveyor was procured to run the line by these line trees, it was ascertained that one end of it would run some distance into lot No. 2 and farther in on this lot than the appellee Powell ever claimed his line run; and the evidence leaves the impression that, when Coyle made the statements that these fore and aft trees were line trees, he was not fully acquainted with the line and was laboring under a mistake as to its correct location.

Complaint is made of the instructions given to the jury and the failure of the court to give an instruction asked by appellants, defendants below, saying to the jury that if they believed from the evidence that in the division of the land between the heirs of William Thomas a line was marked that divided lot No. 2 from lot No. 3, they should adopt the marked line as shown by

the evidence, even though it conflicts with the courses and distances called for in the deed. There is no dispute about the legal proposition that courses and distances must yield to marked natural objects, and if it was shown that these fore and aft trees were located in the line and that no other natural objects in conflict with these trees were located and recognized by all parties as corners, an instruction in substance like that asked by appellant might properly have been given, but this case did not turn on the question whether course and distance should give way to marks found on the ground, but on the question of which marks on the ground indicated the true location of the line. The instruction asked would have been misleading. The deeds of both parties call for a straight line from corner to corner. There was nothing in the evidence warranting the conclusion that the division line was crooked. To have sustained the jury in finding that the division line was crooked, and not straight, there should have been evidence that the line was so run. But there was no such evidence, and the line running with these trees would run up so far into Coyle's field that it cannot reasonably be believed it was intended as the division line. We therefore conclude that appellant was not prejudiced by the instructions of the court, and that they presented fairly to the jury the real issue in the case, which was, as stated by the court, "the true location of the line between lots Nos. 2 and 3 in the division of the lands of William Thomas, deceased." The jury found that the correct line between these lots was the line running from A to B on the map made by J. S. Atkins and introduced as evidence in the case, and we are not disposed to disturb their finding upon this question.

The judgment of the lower court is affirmed.

SMITH v. WOODSON et al.

(Court of Appeals of Kentucky. May 8, 1906.)

VENDOR AND PURCHASER—VALIDITY OF CONTRACT—FRAUD—INADEQUACY OF CONSIDERATION.

A purchaser with knowledge of the vendor's title essayed to represent the state of the title and failed to make full disclosures of the facts. He paid a grossly inadequate consideration. *Held*, that he was guilty of fraud, authorizing the setting aside of the conveyance.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 61-64.]

Appeal from Circuit Court, Hart County.
"Not to be officially reported."

Action by J. W. Woodson and others against G. W. Smith. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. C. Martin and J. S. Lay, for appellant.
D. A. McCandless, for appellees.

O'REAR, J. Appellant obtained a conveyance from appellees A. E. Woodson and Emma Harlow and their husbands of a two-thirds interest in a lot of land in Rowletts, Hart county. This suit was brought by the appellees to cancel the conveyance upon the ground of deceit practiced by appellant in its obtention. The circuit court granted the relief upon the evidence.

Aside from the testimony of appellees, tending to show active misrepresentation by appellant at the time when he procured the deed to be executed, of which there was probably enough to sustain the finding of the chancellor, the record discloses that appellees, married women, were the undoubted owners of a two-thirds interest in the lot in dispute. They had been made parties to a suit brought against their brother, another one-third owner, by his vendee, Frazier, in which a judgment was rendered decreeing a sale of the brother's one-third. His interest was sold and bought in by appellant. It was so reported by the commissioner, but by mistake the deed conveyed the title to the whole lot, including that of appellees. Appellees were actually unaware of the nature of the conclusion of the suit, and when exhibited the deed of the court's commissioner to appellant (which he had procured to be made to a relative, purporting to convey to him the entire tract), they, in ignorance of their rights, executed a deed to him under the mistaken belief that they were merely relinquishing their title to their brother's part of the lot. Appellant was fully aware that he had acquired title to only one-third of the lot, although he says that when he bought it he thought he was buying the whole lot; but he discovered otherwise before he tried to get the conveyance from appellees. He evidently knew that they were unaware of the fact that their interest had not been sold under the judgment. Having this knowledge, and essaying to represent to appellees the state of their title, it was incumbent upon him to make full disclosure of the facts in his possession. Failing to do this, and paying to appellees a grossly inadequate consideration for their conveyance, amounts in law to a fraud upon them. We conclude that the circuit court properly canceled the conveyance.

Judgment affirmed.

TREADWAY v. DANIELS.

(Court of Appeals of Kentucky. May 8, 1906.)

1. SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—INSTRUCTIONS.

Under Ky. St. 1903, § 4445, providing that the contract between a school teacher and the school trustees shall not be entered into before the 1st of July of the calendar year in which the school is to begin, a contract made prior to that date is void.

2. INJUNCTION—INTERFERENCE WITH OCCUPATION.

One having a valid contract with a school district for the teaching of a school may have an injunction restraining one claiming under an invalid contract from molesting plaintiff in performing his contract.

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Action by J. Henry Daniels against Lucien Treadway. Judgment for plaintiff, and defendant appeals. Affirmed.

J. B. White and White & Roberts, for appellant. O. H. Pallards, Sutton & Hurah, and S. P. Stamper, for appellee.

NUNN, J. This is the second appeal of this case. On the former appeal the case was dismissed. See 60 S. W. 412, 22 Ky. Law Rep. 1275. On the return of the case it was tried, and a final judgment was rendered, from which appellant again appeals.

Each of the parties claimed a contract with the trustees of school district No. 4, Lee county, to teach a school in that district. Appellee instituted an action against appellant to have the court enjoin and restrain him from interfering with or molesting the appellee in the teaching of the school. The necessary allegations were made in the pleadings. Appellant contends that he held the only valid contract for the teaching of that school. In this he is in error, for it appears that his alleged contract was made some time in April or May. Section 4445, Ky. St. 1903, provides that: "The contract between the teacher and trustees shall not be entered into before the first of July of the calendar year in which the school is to begin." The appellant's contract was made prior to July 1st, and was therefore not valid, and he had no right to teach the school.

Appellant also contends that appellee had no right to institute and maintain this action; that, if the right to do so existed, it was in the trustees of that district. This court has in several cases upheld the right of a teacher to institute and prosecute an action like this. See the case of Scott v. Pendlly, 114 Ky. 606, 71 S. W. 647. The appellee in this case was the real party in interest, and the appellant was attempting to deprive him of a valuable right, and we can see no reason why he should not be permitted to maintain an action for the redress or prevention of the wrongs perpetrated or being perpetrated upon him by the appellant.

The judgment of the lower court is affirmed.

BARROW v. COMMONWEALTH.

(Court of Appeals of Kentucky. May 9, 1906.)

ELECTIONS—VIOLATION OF ELECTION LAWS—REFUSAL TO PERMIT A VOTER TO VOTE—LIABILITY OF CLERKS OF ELECTION.

Ky. St. 1903, § 1583, prescribing a punishment for any officer of election knowingly refusing to receive the vote of a qualified voter, when considered in connection with other provisions of the section making it an offense for any election officer to receive or record a vote at an unlawful place, and with section 1484, authorizing the sheriff to act as umpire when the judges of election shall disagree as to the qualification of one seeking to vote, and with section 1577, prescribing a punishment for election officers violating a duty imposed on them by law, does not apply to the clerks of election.

Appeal from Circuit Court, Logan County.

"To be officially reported."

James L. Barrow was convicted of preventing a voter from voting at a general election, and he appeals. Reversed.

J. C. Browder, for appellant. N. B. Hays, Atty. Gen., and C. H. Morris, for the Commonwealth.

BARKER, J. James L. Barrow was indicted for knowingly preventing F. A. Bell from voting at the general election in 1903, held in Cave Spring precinct No. 17, in Logan county, Ky. To this indictment he pleaded not guilty, but upon a trial before a jury he was found guilty, and his punishment fixed as the statute provides. From the judgment based upon this verdict he is here on appeal.

At the election under consideration the appellant was clerk. F. A. Bell presented himself and offered to vote, but a question was raised as to his right so to do. The judges differed as to this, and the sheriff decided with that judge who favored the applicant's right to vote. Although we think the evidence is vague and uncertain as to whether or not appellant refused to prepare and deliver a ballot to Bell after a majority of the judges had decided in favor of his right to vote, it may be conceded after a verdict of guilty that there was evidence sufficient to convict him. The first question arising on the record is whether or not that part of section 1583, Ky. St. 1903, under which the indictment was found, applies to clerks of elections. The section is as follows: "Any officer of election who shall receive, or assent to receive, or record a vote at an election at a time or place known by him not to be the time and place lawfully appointed, or who shall knowingly receive the vote of any other than a qualified voter, or so refuse to receive the vote of a qualified voter, shall, for every such offense, be fined from fifty to five hundred dollars, forfeit any office he then holds, and be disqualified from ever holding any office."

Observe that three distinct offenses are here created and punished: (1) The hold-

ing of an election at an unlawful place or time; (2) knowingly receiving an unlawful vote; (3) knowingly refusing to receive a lawful vote. The language as to the first includes all the officers of election, shown by denouncing the illegal exercise of the duties of each. It is made an offense to receive, or assent to receive, or to record, a vote at an unlawful time or place. Here the word "record" shows the inclusion of the clerk, because to record the votes is his particular duty. The unlawful receiving or assenting to receive votes includes only the judges and sheriff who discharge this duty. But the word "record" does not occur in describing the second and third offenses, and the omission is pregnant with significance. In these the illegal acts consist in knowingly receiving illegal, or knowingly refusing to receive legal, votes. The omission of the word "record" in connection with these offenses shows that the clerk was not intended to be included, because to record, or refuse to record, compasses his whole duty in the premises. This is entirely consonant with reason. All the officers are forbidden to participate in an illegal election, and each is therefore forbidden to exercise his particular duty with reference thereto. To hold an illegal election all must participate, and therefore, to prevent an illegal election, the exercise of the duty of each in reference thereto is made a crime. Not so as to the second and third offenses. With the receiving or refusing to receive votes, the clerk has no voice under the statute. The decision as to the right of suffrage is primarily with the judges. If they disagree, then the sheriff acts as umpire between them. Section 1484, Ky. St. 1903. Suppose the clerk should believe the proposed voter qualified, but the judges decided him unqualified; must the clerk, in the face of the decision of those having the right to decide this question, override their judgment and record the vote in spite of it? Of what avail is the provision of the statute that the judges must decide the question of the voter's right to suffrage, if the clerk may veto their decision? And yet to this position we are driven if the clerk is included in the meaning of the statute under which this indictment was found. If a voter presents himself, who is known by the clerk to be a qualified voter, but who the judges decide is unqualified, the clerk is placed in this position: If he refuses to give the voter a ballot and receive his vote, he is guilty of knowingly refusing to receive the vote of a qualified voter; if he gives the voter a ballot and records his vote, he overrides the opinion of the judges that the applicant is not qualified.

Such a construction of the statute would throw the holding of an election into chaos; and to escape so obvious an anomaly we

conclude that the clerk had nothing to do with the receiving or refusing to receive votes, and is not included in the language of the statute under which the appellant is prosecuted. If the clerk refuses to obey the order of the judges, he may be punished under section 1577, Ky. St. 1903, which is as follows: "Any public officer upon whom a duty is imposed under this chapter, and no penalty provided for the violation thereof, who shall willfully neglect to perform such duty, or who shall willfully perform it in such a way as to hinder the objects of this law, shall be punished by a fine of fifty dollars and imprisonment in the county jail for two months." Our conclusion is that that part of section 1583 under which appellant was indicted does not apply to the clerks of election, and the demurrer to the indictment herein should have been sustained.

The judgment is reversed for proceedings consistent herewith.

TORPEY v. NATIONAL LIFE INS. CO. (Court of Appeals of Kentucky. May 9, 1906.) **INSURANCE—EVIDENCE OF CONTRACT.**

There can be no recovery of life insurance, there being no evidence of a contract of insurance, except the statements of witnesses that the local insurance agent told them he had written insurance for deceased, which was properly excluded, and it appearing that deceased merely made application, and had a medical examination, and neither paid nor secured the first premium, and that the application and medical examination, though deposited in the mail for the company, were not forwarded, but were withdrawn on the local agent learning of the death of the applicant.

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Action by Magdoline Torpey against the National Life Insurance Company. Judgment for defendant. Plaintiff appeals. Affirmed.

J. M. Beatty and J. B. White, for appellant.
Jn. Smith Hays, for appellee.

CARROLL, C. The appellant, who was the plaintiff below, brought this suit against the appellee to recover from it \$1,000 that she alleged she was entitled to as the beneficiary in a contract of insurance made on May 19, 1903, between the appellee and her husband, Michael W. Torpey. Upon a trial of the case the court peremptorily instructed the jury to find a verdict for appellee, and of this ruling and judgment thereon the appellant complains.

The record shows that on the 19th of May, 1903, Michael W. Torpey applied in writing for \$1,000 insurance in the appellee company, and on the same day was examined by the medical examiner of the company. On the 22d day of May, 1903, Torpey, who at the time he made the application was in sound health, was suddenly stricken and died;

and at the time of his death neither the application nor the medical examination had been received by the company, nor had any policy of insurance been issued to him, nor had any part of the premium of \$38.06 been paid. There is attached to his application a blank receipt for the first premium. The printed matter on this receipt shows that "it must be executed and given to the applicant in case the premium is paid to secure the insurance if the risk is accepted; otherwise, it must not be detached"—and also states that, "if the application is approved, policy will be issued and in force from this date; if not approved, the sum collected shall be returned without deduction." There is also printed in this application this agreement: "I hereby agree that this application and the answer made to the medical examiner and the policy applied for shall constitute the entire contract between the parties hereto." On the medical examination there is a statement, signed by Torpey and attested by the medical examiner, which states that "I [Torpey] have read all the statements and answers in this application and warrant, and agree on behalf of myself and of any person who shall have or claim any interest in any contract issued hereunder, that any policy issued on this application shall not take effect until the first premium thereof shall have been actually paid to the company during my lifetime and good health."

The evidence is conclusive that no part of the premium was ever paid, nor was any note or obligation of any kind executed for any part of it. In fact, there is no dispute about this. It appears that after the local agent had deposited in the post office, addressed to the company, the application and the medical examination, and before the letter had been forwarded by the postal authorities, the agent learned of the death of Torpey, and withdrew the application and the medical examination from the office, and consequently neither of them were ever delivered to the appellee. It was the duty of the local agent to take the application and forward

it and the medical examination to the company, when, if approved by the company, the policy was issued by it. Appellant introduced witnesses and offered to prove by them that the local agent said that he had written insurance for Torpey, and also that the agent had taken out of the post office the envelope containing the medical examination and the application, and that the witnesses had taken out insurance with this agent who did not require of them a payment of the first premium in cash, but gave them time to pay it. This evidence was excluded from the jury on motion of appellee, and counsel insists that it was competent for the purpose of showing that the contract had been made between Torpey and the company, acting through its agent. Under the facts of this case, we cannot agree to this view.

There is no evidence that any contract of insurance was made, except the statements before mentioned that the agent said to witnesses that he had written insurance for Torpey, and which was properly excluded by the court. On the contrary, the evidence is conclusive that no binding contract of insurance had been made. All that Torpey did was to apply for insurance. The facts of this case fall far short of bringing it within the rule laid down in *National Life Ins. Co. v. Tweedell*, 58 S. W. 699, 22 Ky. Law Rep. 881, *Lee v. Union Central Life Ins. Co.*, 41 S. W. 319, 19 Ky. Law Rep. 608, and *Connecticut Indemnity Association v. Grogan's Adm'r*, 52 S. W. 959, 21 Ky. Law Rep. 717, in each of which cases the first premium had either been paid or secured to be paid to the satisfaction of the local agent, and the policies had been issued by the companies, but are fully covered by the case of *Horine v. New York Life Ins. Co.*, 87 S. W. 274, 27 Ky. Law Rep. 893, in which it was held, in a case very similar to this, that there could be no recovery, and by the principles of law announced in *St. Louis Mutual Life Ins. Co. v. Kennedy*, 6 Bush, 450.

We find no reason for reversing the judgment of the lower court, and it is affirmed.

CLUB LAND & CATTLE CO. et al. v. WALL.¹

(Supreme Court of Texas. March 26, 1906. On Rehearing, May 23, 1906.)

1. ADVERSE POSSESSION—PAYMENT OF TAXES.

In trespass to try title, brought in April, 1904, it appeared that defendants had been in possession for five years up to December, 1903, but they had not paid the taxes for the year 1903, at the time of the commencement of the suit. *Held*, that defendants had not acquired title by adverse possession under the five-year statute of limitations, for there was a period in which they could have paid the taxes before the commencement of the suit.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 504, 525-527.]

2. SAME.

In trespass to try title, it appeared that an undivided half interest had been conveyed to a defendant for his own use and that the other half interest had been conveyed to him for the use of a firm of which he was a partner. Possession of the land had been held for five years under the deed and defendant had paid taxes on his undivided half interest for five years before the commencement of the suit. *Held*, that defendant had acquired a half interest by adverse possession under the five-year statute of limitations, though the taxes on the other undivided half had not been paid during the five years.

3. TRESPASS TO TRY TITLE—PAYMENT OF PURCHASE PRICE.

A vendor's lien was foreclosed and a third person purchased the same at the foreclosure sale. Subsequently the assignee of the vendor under an assignment for the benefit of creditors conveyed the land. *Held*, that one claiming under the purchaser at the foreclosure sale was entitled to recover the land in trespass to try title without paying the purchase price.

4. ADVERSE POSSESSION—POSSESSION UNDER DEED—DESCRIPTION OF DEED—SUFFICIENCY.

A deed which locates a corner and gives courses and distances is sufficiently definite to sustain the five-year statute of limitations by reason of the grantee's possession for five years, though it refers to an unrecorded deed.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 463-467.]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by J. W. Wall against the Club Land & Cattle Company and others. Judgment of the Court of Civil Appeals (88 S. W. 534) reversing a judgment for defendants and rendering one in favor of plaintiff. Defendants bring error. Reversed and judgment ordered.

Matlock, Miller & Dycus, for plaintiffs in error. Montgomery & Hughes, for defendant in error.

BROWN, J. On April 11, 1904, Wall filed this suit in trespass to try title against the Club Land & Cattle Company, A. L. Matlock, George E. Miller, and F. E. Dycus, to recover 119 acres of land situated in Archer county. The defendants pleaded by general demurrer, not guilty, and the statute of limitations of three and five years, with other special pleas

not necessary to mention here. At the trial the court in its charge submitted only the issue of the statute of limitations of five years to the jury. Verdict was returned for the defendants and judgment entered accordingly, which judgment was by the Court of Civil Appeals reversed, and judgment rendered for Wall for the land, 88 S. W. 534.

The facts which are pertinent to the issue presented here are, E. B. Harold and E. H. East are the common source from which both parties claim title. Harold and East conveyed the land to W. A. Squires and T. F. Hurley, retaining a vendor's lien for the unpaid purchase money. In 1896, Harold and East, being insolvent, made a statutory deed of assignment conveying their property including the note of Squires and Hurley and embracing all vendor's liens to M. Harold, assignee, for the benefit of the creditors of the said Harold and East. Hurley died, leaving his wife surviving, and a will in which his wife, Fredericka, was the sole devisee and executrix, to administer the estate under the orders of the county court. Mrs. Fredericka Hurley qualified as executrix of the estate. M. Harold, the assignee, brought suit against Squires and Fredericka Hurley as executrix upon the vendor's lien note, and secured a judgment for \$679.54, foreclosing the vendor's lien upon the land in controversy. The judgment directed an order to issue for the sale of Squires' half interest in the land and, as to Mrs. Hurley executrix it should be certified to the county court for enforcement. An order of sale was issued, Squires' interest in the land was sold regularly and bid in by Mrs. Mary A. King on the first Tuesday in January, 1897, the deed being executed January 5, 1897. No steps appear to have been taken against the estate of Hurley in the county court. On December 24, 1896, Mrs. Hurley in her own name and right made a quit claim deed to her interest in the land to Mary A. King. On December 5, 1898, M. Harold, as assignee of E. H. East, conveyed the land to E. B. Carver, which deed was filed for record on December 14, 1898, and on the same day Carver leased the land to the Club Land & Cattle Company, who, on the same day, took possession thereof and continued in possession holding under Carver and his subsequent vendees up to the filing of this suit. November 23, 1899, Carver conveyed an undivided one-half interest in the land to F. E. Dycus, the deed being recorded November 30, 1899, and on July 2, 1902, Carver conveyed the other half interest in the land to F. E. Dycus for the benefit of himself and his partners, Matlock and Miller, which deed was recorded January 17, 1902. The possession of the land was held for five years up to December 14, 1903, and E. B. Carver and Dycus paid all taxes on the land as they accrued for the years 1898, 1899, 1900, 1901, 1902, and F. E. Dycus paid taxes on his one-half for 1903 before this suit was instituted, but the taxes on the

¹Corrected opinion. For former opinion, see 81 S. W. 772.

other half of the land for the year 1903 were not paid until after the institution of this suit. The land was described in the deed from Harold to Carver and in the deeds of Carver to Dycus as follows: "Second tract: 100 acres being a part of the J. Ostane survey, No. 83, and described as follows: Beginning at S. E. Cor. of the 280-acre tract, deeded by Harold and East to J. S. Scott in the S. W. Cor. of said survey; thence north, 1,340 varas, to N. E. Cor. of said 280-acre tract; thence east, 420 varas; thence south, 1,340 varas; thence west, on south line of said survey, 420 varas, to the beginning." "Third tract: All the right, title, and interest of said assigned estate, including the superior title held by the assigned estate of E. H. East to the following described tract of land, situated in Archer county, Tex., and being a part of said Ostane survey, containing 119 acres, beginning at the S. E. Cor. of said 100-acre tract on the south line of said survey; thence north, 1,340 varas, to N. E. corner of said tract; thence 500 varas east; thence south, 1,340 varas, to the south line of said survey; thence west, 420 varas, to the beginning." The last tract is in controversy in this case.

The Court of Civil Appeals held that the statute of five years' limitation was not available to the defendants below for any part of the land, because the taxes for the year 1903 on one-half undivided interest in it were not paid before the institution of this suit. We are of opinion that in this holding the court committed error as to that undivided one-half interest which was claimed by F. E. Dycus individually, but that the holding was correct as to the half interest which was claimed by the firm composed of Matlock, Miller & Dycus. The plaintiffs in error claim that because the period of limitation expired before the time at which the state could have forced the claimants to pay the taxes for 1903, the title vested without the payment of the taxes, and that the subsequent payment made was sufficient. It is true that if the period of limitation of five years had expired prior to the 1st day of October, 1903, the defense could have been maintained in this case without the payment of the taxes for that year, because no taxes could be paid upon the land prior to October 1st, therefore, at the expiration of the five years, the title would have vested without the payment of the taxes for 1903. *Mariposa L. & C. Co. v. Silliman* (Tex. Civ. App.) 27 S. W. 773. *Halbert v. Brown* (Tex. Civ. App.) 31 S. W. 535. The reason for holding that it is unnecessary to pay the taxes under such circumstances is, that the claimants could not have paid them before the expiration of the period of limitation; but in this case there was a period of time from the 1st day of October until the ——— day of November, in which the plaintiffs in error might have paid the taxes for 1903, and it

was their duty to make the payment. The indulgence by the state to the 1st of March did not relieve the taxpayer of the duty to pay at any time between the 1st of October and the 1st of March. When this suit was instituted the possession of the half interest which belonged to the firm had continued for full five years and more, but the title had not been divested out of the true owners of the land because the taxes on that half interest for 1903 had not been paid, and, there being no title in Matlock, Miller & Dycus at the date of the institution of this suit, no act of theirs done thereafter could divest the title out of the plaintiff.

The court erred, however, in entering judgment for the defendant in error for the entire tract, because under the facts F. E. Dycus was entitled to a judgment for one-half interest therein by virtue of his title by limitation of five years. The Court of Civil Appeals held that he could not avail himself of the statute of limitations because the taxes had not been paid upon the entire tract of 119 acres. But in this the court failed to distinguish between the one-half interest which was held personally by F. E. Dycus and the rights of the partnership in the other half. The two rights were just as distinct after the second deed was made by Carver to Dycus, conveying one-half interest in the land to the partnership, as it was before. While it is true that Dycus owned one-third of the one-half conveyed to the firm, it is also true that the other members of the firm owned no part of his half, and the mere fact that one party had an interest in both does not have the effect to consolidate and blend them as a whole. Suppose, for instance, that Dycus had failed to pay the taxes for the year 1903 on his half of the land, but that the taxes on the firm's interest had been paid, would the failure of Dycus to pay on his half interest prevent the firm from pleading limitation as to their half? We think that such a contention would not be made, and yet, it serves most definitely to show that the two interests were distinct, and that the principle applied by the Court of Civil Appeals is not applicable to a case of this kind. The case of *Kelly v. Medlin*, 26 Tex. 48, upon which the ruling of the court must rest, is entirely different in its facts from this case. In that case the deed purported to convey 320 acres of land, and the proof showed payment of taxes on less than that amount. In this case Dycus' deed showed a conveyance of one-half interest in 119 acres, and the proof showed a payment on 59½ acres of the land, so that all of the land which was described in the deed—59½ acres—was rendered for taxes and the taxes paid regularly for five years. This entitled Dycus to judgment against the plaintiff below for the one-half interest in the land.

The plaintiffs in error claim that the defendant in error, Wall, should not be allowed

to recover without paying the purchase money of the land. That doctrine does not apply to the facts of this case. When M. Harold, acting as assignee of East, conveyed the land to Carver, no title whatever passed to the latter, because the interest of East in Squire's half had been sold under a judgment foreclosing the vendor's lien, and had been purchased by Mrs. King, under whom Wall claimed, by which sale East's title to the land sold passed out of the assignee. By this proceeding the assignee elected to enforce the lien, and, having sold part of the land, he could not disaffirm the sale for the remainder. *Gardener v. Griffith*, 93 Tex. 355, 55 S. W. 814. Therefore, the plaintiffs in error never acquired the interest of either of the original vendors, East or Harold, in this land. To the contrary, the title was vested in Wall through the deed from Mrs. Hurley to Mrs. King and the purchase of Mrs. King of Squire's interest at the foreclosure sale.

The defendant in error, Wall, claims that the deed from the assignee, Harold, to Carver is not sufficiently definite in its description of the land to sustain the statute of limitations, because it calls to be taken out of a tract of 280 acres, deeded by Harold and East to J. C. Scott out of the J. Ostane survey No. 83, and because it is not shown that the deed to Scott was recorded the description is defective. The facts of this case are quite different from those in *McDonough v. Jefferson County*, 79 Tex. 535, 15 S. W. 490, where the deed under which the statute of limitations was prescribed contained no description of the land whatever, but referred to another deed which was not of record, therefore, there was no such deed to the land on record as was required by the statute. The deeds introduced in this case were sufficiently definite to sustain the five years' limitation.

It is ordered that the judgment of the Court of Civil Appeals be reversed and that judgment be here entered in favor of J. W. Wall against Matlock, Miller & Dycus and the Club Land & Cattle Company for an undivided half interest in the land in controversy, and that F. E. Dycus recover of Wall an undivided half interest in the said land. It is further ordered that Wall recover of Matlock, Miller & Dycus and from F. E. Dycus and the Club Land & Cattle Company all costs, except the costs of this court which will be adjudged against J. W. Wall.

On Motion for Rehearing.

In the original opinion we said that the sale under decree of foreclosure passed East's title "in the land," when it should have been "in the land sold." We have corrected that error, and have stated more fully the grounds on which the conclusion is based.

We see no reason to change our judgment, and the motion is overruled.

WESTERN SUPPLY & MFG. CO. v. UNITED STATES & MEXICAN TRUST CO.*

(Court of Civil Appeals of Texas. Jan. 27, 1906.
On Rehearing, Feb. 10, 1906.)

1. CORPORATIONS—BONDS—VALIDITY—CONSTITUTIONAL PROVISIONS.

Const. art. 12, § 6, declaring that no corporations shall issue bonds except for money paid, labor done, or property actually received, does not require that the corporation shall receive a dollar in money for each dollar of indebtedness, but that the amount received shall bear some reasonable approximation to the amount of indebtedness.

2. APPEAL — PRESUMPTIONS — EVIDENCE TO SUPPORT FINDINGS.

On appeal, it will be presumed, in the absence of the evidence, that there was evidence to support the trial court's findings.

3. CORPORATIONS—BONDS—AUTHORITY OF CORPORATION TO PLEDGE.

Authority to a corporation to issue bonds for money and property is authority, not only to sell them, but to pledge them for such consideration.

4. SAME — ACTION TO ESTABLISH VALIDITY — FINDINGS—SUFFICIENCY.

In an action to establish the validity of certain railroad bonds and to foreclose a mortgage securing them, it was proper for the court to find that the bonds had been issued and negotiated, and were acquired for value and good faith, without determining either the amount due on the bonds or who held them, especially where the court reserved the right, and made provision therefor in the decree, to allow the bondholders to come in afterwards and prove up their ownership and indebtedness.

5. SAME.

In an action to determine the validity of certain railroad bonds and to foreclose a mortgage securing them, the court having found the amount due a certain bondholder, it was not necessary to state the number of bonds he held.

6. SAME—FORECLOSURE—METHOD OF PROVING INDEBTEDNESS.

One holding bonds pledged as collateral security is entitled to prove them up, to the extent of their face value, and have a distribution out of the funds accruing from a sale under a foreclosure, on the basis of the bonds, to the extent of the amount of his primary debt and interest, instead of on the basis of the debt secured.

7. SAME—FINDINGS—SUFFICIENCY.

In an action to determine the validity of certain railroad bonds issued and pledged by the corporation, it was proper for the court to decree the validity of certain of the bonds, without stating the amount of the debt for which they had been pledged.

8. SAME—FOREIGN CORPORATIONS — RIGHT TO DO BUSINESS—WHAT CONSTITUTES.

Where a railroad company of Texas executed a mortgage to a Missouri trust company to secure bonds, and the trust company issued trust certificates, and it did not appear that the certificates were issued in Texas, or that the trust company did business there, and the deed of trust was delivered in Missouri, the trust company could sue to foreclose and for a receiver, etc., in Texas, without having taken out a permit to do business therein.

On Rehearing.

9. APPEAL — PRESUMPTIONS — PLEADINGS TO SUSTAIN JUDGMENT.

On appeal, it will be presumed, in the absence of the pleadings, that they were sufficient to sustain the judgment.

*Writ of error denied by Supreme Court March 8, 1906.

Error from District Court, Harrison County; Richard B. Levy, Judge.

Action by the United States & Mexican Trust Company against the Western Supply & Manufacturing Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

F. H. Prendergast, for plaintiff in error. Cook & Gossett, T. S. Miller, and A. H. McKnight, for defendant in error.

BOOKHOUT, J. This was a suit brought by the United States & Mexican Trust Company in the district court of Harrison county, Tex., against the Texas Southern Railway Company, to establish the validity of 792 bonds of the said railway company, of the par value of \$1,000 each, to foreclose a mortgage made and executed by the said railway company to secure the said bonds, and to have a receiver appointed to take charge of the mortgaged property of the railway company pending the litigation. The petition was filed on July 11, 1904, on which date a receiver was appointed, and on September 22, 1904, a judgment was rendered declaring the 792 bonds valid and existing obligations of the Texas Southern Railway Company foreclosing the mortgage, and ordering the property covered thereby sold, classifying a number of claims presented on the part of interveners, and ordering the road operated by the receiver, who had been theretofore appointed. The mortgage sought to be foreclosed was executed by the Texas Southern Railway Company to the United States & Mexican Trust Company, and dated July 1, 1902, to secure bonds which were to be thereafter issued by the railway company in the sum of \$5,000,000, or so much thereof as the railroad commission of Texas should allow. Pursuant to the authority of the railroad commission, 792 bonds adjudged by the court to be valid and existing obligations of the railway company, were issued. Certain of these bonds were issued and sold to the parties named in the decree, and certain of them were issued and pledged as collateral security. The bonds that were pledged as collateral security were issued under a contract with the Delaware Western Construction Company, and the Texas Southern Railway Company, and were for indebtedness incurred and money loaned or other value received at the time the pledges were made, and the pledges were made in good faith. The United States & Mexican Trust Company issued its certain certificates, called "Collateral Trust Certificates," to the amount of \$175,000, payable to bearer and running three years and bearing interest at the rate of 7½ per cent. per annum. These certificates evidence the primary loans for which some of said bonds were pledged as collateral security, and others were pledged for other loans and indebtedness.

The first question raised by the appeal

is were the bonds issued for a consideration deemed valuable in law? The decree recites that the allegations of plaintiff's petition are true. The allegations in the petition are in substance that the Texas Southern Railway Company issued its first mortgage bonds in the amount of \$792,000 and that they are valid. The decree recites that these bonds were issued under the authority and approval of the Railroad Commission of Texas, and are valid and existing obligations of the defendant; that some of the bonds are held and owned by various persons, named in the decree, in absolute ownership, and were acquired for value and in good faith. There is no statement of facts in the record. The decree recites that it was rendered after hearing of evidence and the several reports of the master in chancery, and after the court had been fully advised in the premises. The contention insisted upon by plaintiff in error seems to be that the bonds were not valid, in that they were not issued for money paid, labor done, or property actually received. The Constitution provides that "no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received and all fictitious increase of stock or indebtedness shall be void." Const. art. 12, § 6. This provision of the Constitution does not require that the corporation shall receive a dollar in money for each dollar of indebtedness, but that the amount received shall bear some reasonable approximation to the amount of indebtedness. *Northside Ry. Co. v. Worthington*, 88 Tex. 573, 30 S. W. 1055, 53 Am. St. Rep. 778. The decree showing that the bonds are valid obligations of the Texas Southern Railway Company, and that the owners acquired them for value and in good faith, it will be inferred, in the absence of a statement of facts, that the trial judge had before him evidence that they were issued for a consideration authorized by the Constitution and statutes.

Did the railway company have authority to pledge its bonds as collateral security for money, or property actually received? The railway company had power under the Constitution to issue its bonds, and we think the authority is broad enough to embrace a pledge, as well as a sale of its bonds. When the bonds were pledged and money or property actually received as a result of such pledge, the bonds were in effect "issued for" such money, and property. *Illinois Trust Co. v. Pac. Ry. Co.*, 117 Cal. 332, 49 Pac. 197; *Duncomb v. Railway Co.*, 84 N. Y. 190; *Nelson v. Hubbard*, 96 Ala. 288, 11 South. 428, 17 L. R. A. 375; *Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595; *Atlantic Trust Co. v. Canal & Irrigation Co. (O. C.)* 79 Fed. 842; *Railway Co. v. Manhattan Trust Co.*, 92 Fed. 428, 34 C. O. A. 481; *Firth v. Loan & Trust Co.*, 122 Fed. 571, 59 C. C. A. 73. The decree recites that "the court doth find and doth order, adjudge, and decree that the following of said mortgage bonds

have been issued, and are now held in pledge made by the defendant by and with the Delaware Western Construction Company for indebtedness incurred thereon and money loaned or value received at the respective times said pledges were made and in good faith, and that said bonds are now held by the following named persons and the following owners." It then recites the names of the pledgees, the amount of the bonds, and the amount of the debts which they secure. The railway company had the right to pledge its bonds as collateral security for money or property actually received as a result of such pledge. The decree shows four bonds were issued, one to Jacob Kline, one to E. E. Barton, one to J. H. Penner, and one to L. E. Walker and 12 to L. E. Walker, trustee, and that said bonds were issued for value, have been negotiated, and are held in absolute ownership and were acquired for value and in good faith. As stated, there being no statement of facts in the record, and, as the judgment of the court shows that it was rendered after hearing, the evidence and the several reports of the master in chancery, it will be conclusively presumed that the necessary facts were before the court to support its judgment. It was proper for the court to find that bonds had been issued and negotiated and were acquired for value and in good faith without determining either the amount due on the bonds or who held them, especially where, as in this instance, the court reserved the right, and made provision therefor in the decree, to allow the bondholders to come in afterwards, and prove up their ownership and indebtedness.

Complaint is made that the court erred in paragraph 10 of said decree, in subdivision "b" thereof, in adjudging that there was due F. M. Hubbell \$49,927 on certificates numbered from 6 to 27, which makes only 22 certificates; each certificate being for \$1,000. The material question to be settled by the decree was the amount due F. M. Hubbell and this it correctly states as \$49,927. It was not necessary to state the number of certificates he held, and if there is a clerical error, as there seems to be, in stating the number, it becomes immaterial, in view of the fact that the amount of his debt is correctly shown. The master's report copied in the record shows the correct number of certificates held by Hubbell, and gives their numbers. These remarks apply to the fourth and fifth assignments and the same are overruled.

It is contended that the court erred in adjudging that persons named in the decree who hold bonds as collateral security should pro rate in the proceeds of the sale of the road on the basis of the collateral held, and ~~not~~ on the basis of the debt secured. The court adjudged that the holders of the bonds pledged as security for their indebtedness against the railway company should participate in the proceeds of the sale of the mortgaged property until their primary indebted-

ness was paid, on the basis of the bonds, and not on the basis of the debt. The decree further provides that when such primary indebtedness is paid said bonds shall be redelivered to defendant railway company. In this respect the decree is correct. One holding bonds pledged as collateral security is entitled to prove them up to the extent of their face value and have a distribution out of the funds accruing from the sale under a foreclosure, on the basis of the bonds to the extent of the amount of his primary debt and interest. 5 Thompson on Cor. § 6265; Rice's Appeal, 79 Pa. 168; Duncomb v. Railway Co., 84 N. Y. 190.

The eighth assignment of error is, the court erred in subdivision 2 of paragraph 10, in adjudging that the primary debt due F. M. Hubbell and named in (a), (b), (c), (d), and (e), in subdivision 2 of paragraph 10, are to be paid out of the proceeds of the sale of the road, when there is no finding that said debts are due by the Texas Southern Railway Company. There is no proposition presented under this assignment, nor does it clearly appear in the assignment wherein there is error in the paragraph of the decree complained of. The suit was brought by the United States & Mexican Trust Company against the Texas Southern Railway Company, a corporation. It alleged the execution and issuance of \$792,000 of bonds by the Texas Southern Railway Company, and alleged facts showing that said bonds were legally issued. The decree finds that the allegations of the petition are true. It recites that \$792,000 in bonds have been issued, and are valid and existing obligations of the defendant. The decree fairly adjudges these bonds are debts due by the Texas Southern Railway Company. These remarks apply to the eighth, tenth, and eleventh assignments which are overruled.

The court did not err in decreeing that the City National Bank of Kansas City should pro rate on the basis of 25 bonds, held by it as collateral, when its debt was only \$6,800, and which amount was further secured by the notes of the Enid Bank. The court adjudged that four bonds were originally issued and delivered to Scott, Jones & Company, and that three of the same were held at the time of the decree by John M. Gardner, and that 13 bonds were held at the time by D. H. Scott. It was further stated that the nature of the holding of these bonds was not at the time ascertainable. Jurisdiction of the cause was specially retained for the purpose of hearing and determining the ownership of bonds classifying claims, etc. The court did not err in decreeing that these bonds were valid, without stating the amount of the debt for which the same were pledged as security.

The court in the decree classified all the claims as follows: Class A was receiver's debts; class B was labor liens; class C, statutory liens; class D, the bonds; class E,

floating debts. It is contended that the court erred in subdivision 2, paragraph 10, in decreeing that F. M. Hubbell has collateral bonds to secure \$8,597.62 due on pay checks, assigned to class E, inferior to the bonds, because this gives him a double security, as class E has certain rights separate from class D, which is the bonds, and the same is not consistent with that part of the decree assigning that amount to class E, and refusing to put same in class C or B. We are of the opinion there is no error in the decree in this respect. F. M. Hubbell held pay checks amounting to \$8,597.62, which debt was placed in class E. This indebtedness was secured by bonds pledged to him as collateral. The bonds were valid obligations of the Texas Southern Railway Company.

It is contended in the fifteenth assignment that the court erred in rendering judgment on the collateral trust certificates, and on the bonds held as pledge or collateral security, and on the debt for which the bonds and certificates were held as security, because there was no pleading in the cause justifying or supporting such a judgment. The petition alleged that bonds to the number of 792, of the face value of \$1,000 each, were issued by the railway company, and were outstanding obligations against it. No personal judgment in favor of the plaintiff was asked on these bonds, there being no personal debt due the plaintiff as trustee, nor did the court render such judgment. The petition prayed for a judgment decreeing bonds to be valid, and existing obligations and a foreclosure of the mortgage, and the court so decreed. The judgment shows that various interventions had been filed in the cause and that the main case and these interventions were tried as a consolidated case. The pleadings of these interveners are not contained in the record. The decree was rendered on the pleadings of plaintiff and defendant, and that of the interveners, together with the reports of the master in chancery, and the evidence adduced. In this condition of the record we conclude there is no merit in the fifteenth assignment and it is overruled.

It is insisted that the United States & Mexican Trust Company is not shown to have any authority to transact business in Texas, and therefore the collateral trust certificates issued by it are void, and the amount adjudged to it in said decree is error. It does not appear that the United States & Mexican Trust Company issued the certificates in Texas, or that it transacted business in Texas. The record shows that the mortgage deed of trust was delivered in Kansas City, Mo. The United States & Mexican Trust Company is a Missouri corporation. It could prosecute this suit without taking out a permit to do business in Texas. Security Co. v. Bank, 98 Tex. 575, 57 S. W. 22.

We conclude that no reversible error is shown in the record, and the judgment is affirmed.

On Motion for Rehearing.

BOOKHOUT, J. The plaintiff in error, in its motion for rehearing, complains of the statement in the opinion, that "the judgment shows that various instructions had been filed in the cause, and that the main case and these interventions were tried as a consolidated case." The recitation in the decree is: "Now on this 22d day of September, A. D. 1904, comes plaintiff, The United States & Mexican Trust Company by Cook and Gossett, its attorneys and counsel, and comes the defendant by Eberhart and Barnwell, its attorneys and counsel, and comes S. P. Jones, the receiver herein appointed on July 11, 1904, by John M. Gardner, his attorney and counsel, and also comes the various interveners and parties in causes consolidated with this cause, by their respective attorneys and counsel, and this cause being regularly called and coming regularly on for trial upon the pleadings, and the evidence, and the several reports of Y. D. Harrison, the master in chancery herein appointed, upon various of the matters referred to him, etc." The record contains only the pleadings of the plaintiff and defendant. Those of the interveners and those of the parties in causes consolidated with this case are not contained in the record. In this condition of the record it will be inferred in support of the decree that the pleadings before the court were sufficient to sustain the judgment.

The motion for rehearing is overruled.

McFADDEN v. MISSOURI, K. & T. RY. CO. OF TEXAS et al.

(Court of Civil Appeals of Texas. Jan. 13, 1906. Rehearing Withdrawn Feb. 9, 1906.)

1. WATERS — SURFACE WATER — OBSTRUCTION — NEGLIGENCE.

Where a railway company caused an excavation to be dug on its right of way, without so constructing it as to enable the water to pass off according to the natural lay of the land, or the flow was obstructed by the railroad's embankment and caused to become stagnant, to the injury of an adjoining owner, the railroad company was liable for such damages as were sustained thereby, whether the company exercised ordinary care in the premises or not.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 7; vol. 48, Cent. Dig. Waters and Water Courses, §§ 128-130.]

2. SAME—INSTRUCTIONS—FORM.

An instruction that if the jury believed the defendant railroad company was not responsible for certain ponds on its right of way, and used ordinary care to prevent such condition, or if the natural lay of the land was such that if any water thus accumulated would be reasonably drained and carried off the right of way, or if plaintiff's damage was caused by stagnant water not on defendant's right of way, then plaintiff could not recover, was objectionable as submitting the question of the railroad company's responsibility for the alleged nuisance without a statement of facts which would show such responsibility.

3. SAME—LIABILITY FOR INJURIES.

Where a railroad company provided its roadbed with sufficient culverts to allow surface

water to flow off its right of way according to the natural lay of the land, and did not obstruct the flow by a ditch or excavation on its right of way, it was not liable for injuries from water naturally accumulating on such right of way.

4. NUISANCE—JOINT ACTS—SEVERAL LIABILITY.

While a railroad was not liable for the existence of stagnant ponds near plaintiff's residence, not on the railroad company's right of way, to the creation and existence of which no act of the railroad company contributed, yet if such ponds existed and constituted a nuisance, and a nuisance of like character existed at the same time through the act of the railroad company on its right of way, and the two combined, resulted in complainant's injury, the railroad company would be liable for such portion of the injury as resulted from the nuisance created by it.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 39-41; vol. 48, Cent. Dig. Waters and Water Courses, § 129.]

5. WATERS—ROADBED—CONSTRUCTION—DRAINAGE—ACTIONS—INSTRUCTIONS

In an action for injuries to an adjoining property owner by alleged improper drainage on defendant railroad's right of way, a requested instruction that it was the duty of the railroad company to construct necessary culverts and sluices in its roadbed, required by the natural lay of the land for necessary drainage thereof, and if it failed so to do it would be liable to plaintiff for such damages as is sustained by reason of such failure, was improperly refused.

6. SAME—NOTICE—EVIDENCE.

In an action for injuries from stagnant water permitted to remain on defendant railroad's right of way, evidence that a year and a half before the bringing of the suit, plaintiff notified defendant's section boss and station agent of the stagnant water on the right of way at the point in question, etc., was admissible to show notice to the railroad company that plaintiff claimed he was being injured by the condition of the right of way.

7. APPEAL—MOTION FOR NEW TRIAL—GROUNDS.

The refusal of instructions and the admission of evidence may be reviewed on appeal, notwithstanding the attention of the trial court was not directed thereto by motion for a new trial.

Talbot, J., dissenting in part.

Appeal from District Court, Hill County; O. L. Lockett, Judge.

Action by A. B. McFadden against the Missouri, Kansas & Texas Railway Company of Texas and others. From a judgment for defendant railway company, plaintiff appeals. Reversed.

Ivy & Derden, for appellant. T. S. Miller, Ramsey & Odell, and A. P. McKinnon, for appellee.

TALBOT, J. Appellant brought this suit to recover of appellee, the Missouri, Kansas & Texas Railway Company of Texas, damages alleged to have been sustained by him on account of a nuisance claimed to have been created by the railway company by permitting water to stand and become stagnant on its right of way near appellant's homestead. It was alleged, in substance, among other things, that appellant and his family resided

on their homestead premises situated immediately east of and adjacent to the right of way of defendant railway company; that said defendant's railway along and near appellant's homestead is laid on an artificial embankment which is its roadbed; that said embankment and roadbed are constructed in such a manner as to interrupt the natural flow of water which runs over the adjoining lands and on and over said right of way; that said railway company had negligently failed to construct in said roadbed such culverts, and supply its right of way with such ditches as the natural lay of the land required for the drainage of said lands and right of way. It was further alleged in effect that there was an excavation or ditch, on the right of way of defendant railway company near appellant's homestead about eight feet wide; that the railway company had permitted weeds, grass and vegetation to grow and stand upon said right of way near to and in said ditch, and had permitted and caused the sewage and water from the Home Ice Company's plant and the Hill County Mill & Elevator Company's plant, located in the city of Hillsboro, to be conducted to its right of way and flow over same and into said ditch and excavation; that because of said roadbed, insufficient culverts and ditch, said water was obstructed and diverted from its natural course, caused to accumulate and stand on said right of way, become stagnant, produced many mosquitoes and emitted noisome, unwholesome, and offensive gases and odors and malarial poisons, causing injury and much sickness to himself and family, and depreciating the rental value of his property. Appellee, railway company, pleaded a general denial, and specially that, if any water stood in the ditch or on its right of way at any of the times referred to in appellant's petition, and which is alleged to have caused injury to him, the same was water discharged into said ditch and on its right of way from the Home Ice Company's plant and factory owned and operated by the estate of George Walters, deceased, with Lewis Habberzettie, as administrator, and the Hill County Mill & Elevator Company's plant, located in the city of Hillsboro, Tex.; that if appellant was damaged in any of the respects alleged in his petition, such damage was caused by and due to the negligence of the owners, operators, and agents of said Home Ice Company and mill and elevator company. Said companies and the managers thereof were made parties to this suit, and the railway company prayed that, in the event appellant recovered judgment against it in any sum, that it have judgment over against each and all of said parties for a like amount. When the evidence was closed the court's instruction was to return a verdict in favor of the Hill County Mill & Elevator Company, and submitted the case upon the issues made by the pleading as to appellant, the railway company, and the Home Ice Com-

pany. The jury returned a verdict in favor of the defendant in the case and judgment was entered that appellant take nothing and that appellee, the railway company, recover of him its costs; that said railway company take nothing as against said Home Ice Company and the Hill County Mill & Elevator Company, and that said companies recover of the railway company the costs incurred by them. The plaintiff, McFadden, alone has appealed.

The following paragraph of the court's charge is assigned as error: "If you believe from the evidence that the defendant railroad company caused or permitted waters to accumulate on its right of way or to gather in ponds on the same or to stand on the ground on its right of way until the same became saturated, and it became stagnant water, and caused or produced poisonous and obnoxious vapors and odors, or if it caused vegetation to decay on the right of way of the said defendant railroad company, or that it caused great numbers of mosquitoes, and that in consequence and on account of either or all of such conditions thus produced and that the said defendant railroad company did not use ordinary care such as an ordinary prudent person would have used under the same or similar circumstances to prevent or avoid such conditions, and that in consequence of such condition or either of them thus produced, if they were produced, the value and use of the plaintiff's said residence was impaired or diminished and that plaintiff and his said wife were made sick thereby, as hereinafter charged you, then you will find for the plaintiff as against the defendant railway company; but unless you so believe you will find for the defendant railway company." The objection urged to this charge is, that it not only required the jury to believe and find that the railway company caused the existence of a nuisance on its right of way resulting in damage to appellant, but also made appellant's right of recovery depend on the fact of negligence causing such nuisance; the contention being that proof of such nuisance and injury to appellant by reason thereof authorized a verdict in his favor for such damages as he had thereby sustained, whether the railway company had or had not used ordinary care to prevent the conditions producing such nuisance. We think the objection well taken. Negligence on the part of the railway was not an essential element of liability. If the railway company caused a ditch or excavation to be dug on its right of way without so constructing it as to enable the water, flowing and falling upon said right of way, to pass off according to the natural lay of the land, or the flow of such water was obstructed by reason of insufficient culverts in said railway company's railroad embankment, and was thereby caused to collect and stand in said excavation or on said right of way, and the same became stagnant, producing decaying substances, noxious, poisonous, and malarial

gases, etc., resulting in the sickness of appellant and other members of his family or impaired the use and enjoyment of his home, the said railway company was liable to appellant for such damages as he suffered in consequence thereof, irrespective of the question of negligence on its part in creating such nuisance. In ascertaining whether or not an act, omission, or use of property constitutes a nuisance, it is not necessary to inquire into the intention accompanying such act, omission, or use of the property. And when it is proved that a nuisance actually exists, the person responsible therefor cannot escape liability, by showing that he exercised ordinary care to prevent it. *Texas & Pacific Ry. Co. v. O'Mahoney*, and authorities cited (*Tex. Civ. App.*) 50 S. W. 1049; *Lockett v. Railway Co.*, 78 Tex. 211, 14 S. W. 564; *Adams v. Railway Co.* (*Tex. Civ. App.*) 70 S. W. 1006; *Wood on Nuisance*, §§ 27, 127, 485. The fact that negligence on the part of the railway company was alleged does not, we think, change the rule.

Appellant's second assignment of error complains of the following clause of the court's charge: "On the other hand if you believe that the defendant, the railway company, was not responsible for the said ponds or the accumulation of water on its right of way and that it used ordinary care to prevent such condition such as a man of ordinary prudence would have used under the same circumstances or if from the natural lay of the land and the natural drainage thereof was such that any water thus accumulated, if there was any, would under ordinary conditions be reasonably drained and carried off of said right of way, or that said damage suffered by plaintiff, if any was suffered, was caused by stagnant water or poisonous gases or odors or that the said mosquitoes were created and caused proximately by ponds of water, if any there were, that was not upon the right of way of the defendant railway company, then in either event you will find for the defendant company." The various grounds upon which complaint is made of this charge will be sufficiently indicated in our discussion of it. We have held in disposing of appellant's first assignment of error, that negligence on the part of appellee railroad company, was not an essential fact to be considered in determining its liability for such damages as appellant may have suffered on account of the nuisance charged to have been created by it, and hence the clause of the court's charge here under consideration is erroneous, in that it authorized a verdict for appellee in the event they found that it had exercised that degree of care that a person of ordinary prudence would have used under the same circumstances to prevent the conditions causing such nuisance. Where it is shown that a nuisance actually exists, it is no defense in law, that the party responsible for its existence did in fact exercise ordinary care.

to prevent it. This charge is also subject to criticism, in that the jury is thereby left to determine the question of the railway company's responsibility for the alleged nuisance, without a statement of the facts, which would show such responsibility. Inasmuch, however, as such facts were grouped and set forth in the preceding paragraph of the court's charge, probably this error would not require a reversal of the case. That portion of the charge complained of wherein the jury was told in effect, that "if from the natural lay of the land and the drainage was such that any water thus accumulated, if there was any, would under ordinary conditions, be reasonably drained and carried off of said right of way to find for the railway company," states substantially a correct proposition of law. If the railway company provided its roadbed with sufficient culverts to allow the water to flow off of its right of way, according to the natural lay of the land, and did not obstruct such flow by cutting a ditch or making an excavation on said right of way, thereby causing such water to be stored and held therein, then a verdict should have been in its favor.

It was not the legal duty of the railway company to ditch its right of way, and make openings in its roadbed for the purpose of draining or removing from said right of way, such water as accumulated and stood thereon, because of the natural lay of the land. Where a nuisance is charged "no recovery can be had, unless the injury can be attributed to the act of man rather than natural causes, and in order to make a nuisance, it must be shown that it is the result of human agency in some form, for no man can be made liable for injuries resulting from natural causes purely, but if man has done some act which interferes with the natural condition of things, and through his interference therewith produces injury to another, he is liable for all the consequences that can be traced to his wrongful act." If, therefore, the water charged to have accumulated on the railway company's right of way was gathered and held there by reason of a natural depression in the land, or by the natural lay of the land, and not because of some act of the railway company, or its agents, which interfered with the natural drainage and flow of the water going upon and passing over its said right of way, then appellant would not be entitled to recover. In other words, if the water complained of would have accumulated and stood on the right of way of the railway company, regardless of its roadbed, or the excavation or ditch, if any, referred to by appellant, then, and in that case, no cause of action accrued to appellant by reason of the accumulation of such water and the injury resulting to him therefrom, and no recovery can be had therefor. If, on the other hand, the railway company failed to construct in

its roadbed such culverts or sluices as the natural lay of the land required for the drainage of its right of way or cut a ditch or excavation on said right of way, by reason of either of which said water was obstructed and caused to stand in holes or ponds upon said right of way, and become stagnant and emitted noxious odors, stenches or malarial gases, then said railway company would be liable to appellant for such damages as he sustained as a proximate result thereof. We think the charge substantially correct, wherein the jury are told, in effect, that if the damages suffered by appellant, if any, were caused by stagnant water or poisonous gases or odors, or that the mosquitoes complained of were caused proximately by ponds of water, if there were any, that were not upon the right of way of the railway company, it would not be liable therefor. It does not appear, as we understand the evidence, that the railway company was in any way responsible for the existence of any such ponds. If, as a matter of fact there were ponds of water near appellant's residence, not on the railway company's right of way, to the creation and existence of which no act of the company contributed, then the company would not be responsible for any injury resulting to appellant therefrom. Or, if such ponds existed, and constituted a nuisance emitting and diffusing over and about appellant's premises obnoxious and poisonous gases and smells, and a nuisance of like character existed at the same time through the act of the railway company on its right of way, and the two combined, resulted in the injuries complained of, said company would not be relieved of liability, but would be liable only for the portion of the injuries which resulted from the nuisance created by it. *Neville v. Mitchell* (Tex. Civ. App.) 68 S. W. 579.

There was no error in refusing to give appellant's special charge, made the basis of his fourth assignment of error. This charge, in our opinion, as framed, did not contain a correct proposition of law applicable to the facts of this case. Appellant requested the court to charge the jury, in substance, that it was the duty of the railway company to construct in its roadbed all necessary culverts or sluices, as the natural lay of the land required for the necessary drainage thereof, and if it had failed to do so it would be liable to appellant for such damages alleged, as he had sustained by reason of such failure. This charge contains a correct abstract proposition of law, and we are inclined to think it should have been given. We are not certain that it was so conclusively established by the evidence that this law had been complied with by the railway company, that the court was justified in refusing the requested instruction.

Appellant offered to show on the trial in the court below by his own testimony that

a year and a half before the bringing of his suit he told the section boss of the railroad company, defendant, and also the station agent at Hillsboro, Tex., of the defendant railroad, that the right of way of the railroad company at the point just adjoining his premises, and at the point about 75 yards southwest of his house, was in a bad condition, that there was stagnant water at both of said points on the right of way, and rotting weeds in same, and that same smelled very bad and was very offensive to himself and family, and asked them to have the same cleaned up. This testimony was objected to on the ground that same was irrelevant, immaterial, and self-serving, and on the ground that exemplary damages were not claimed in plaintiff's petition, and that any notice given by plaintiff to defendant as to the condition of the right of way was not material. The objection was sustained and the testimony excluded. The majority of the court are of the opinion that this evidence was admissible, for the purpose of showing notice to the railway company that appellant claimed that he was being injured by the condition of appellee's right of way. It was not admissible to show that appellee had, by the excavation for its right of way, caused water to accumulate and stand thereon, for the reason that it was self-serving. It would have been proper, upon its admission for the court to restrict it to the sole question of notice to the railway company of plaintiff's claim that he was being injured.

The writer does not concur in this conclusion of the majority. There being no claim for exemplary damages set up, nor question of negligence, essential in fixing liability on the part of appellee, involved, he is of the opinion the testimony was immaterial, in part at least self-serving, and was properly excluded. The extent of appellant's recovery, if entitled to recover at all, was under the pleadings, limited to the actual damages sustained by him. This right was in no way dependent upon the notice, to appellee, of appellant's claim of injury on account of the condition of its right of way, nor could the amount of such damages be increased or aggravated by proof of such notice. The testimony, in my opinion, would have been prejudicial to appellee, and inasmuch as it did not tend to prove or elucidate any issue in the case, was inadmissible. The case was tried before a jury, and the record shows that appellant's motion for a new trial was not filed within two days from the date of the judgment rendered against him, and does not show that it was filed after that time by leave of the court upon good cause shown. In this state of the record, it is contended by appellee that the jurisdiction of this court cannot be invoked by appellant to review the action of the trial court in rendering judgment upon the verdict. It has been held that motion for a new trial, filed after the

time within which such filing is authorized by law, without leave of the court upon good cause shown why it was not filed within such time, will not be considered, and in the case of the Western Union Telegraph Company v. Mitchell, 89 Tex. 441, 35 S. W. 4, Judge Brown, of the Supreme Court, says: "It has been held by this court that it would not, upon appeal or writ of error, consider assignments based upon the insufficiency of the evidence to support the verdict unless that ground was specified in the motion for a new trial. King v. Gray, 17 Tex. 62; Clark & Loftus v. Pearce, 80 Tex. 151, 15 S. W. 787. But this ruling has not been applied to those matters upon which the trial court has directly acted, and which are made properly to appear in the record of the case." The distinction is shown in the following language of Judge Gaines, in the case of Clark & Loftus v. Pearce, supra. He says: "In regard to the ruling of the court upon exceptions to the pleadings, the admission of evidence, and in the giving or refusal of instructions, a different rule prevails. Having once acted, it is not to be presumed that the judge will change his ruling, and hence, in order to appeal from such action, it is not necessary that it be made ground for new trial; but it is always optional and proper to do so." The rulings of the trial court sought by appellant to have reviewed in this case relate to the giving and refusal of certain instructions and the exclusion of testimony. Under the authorities mentioned, this may be done, notwithstanding the attention of the lower court may not have been directed to the errors here insisted upon, by motion for a new trial.

For the errors indicated, the judgment as to appellee railway company is reversed, and the cause remanded.

ALLEN v. HOUCK & DIETER CO. et al.*
(Court of Civil Appeals of Texas. Jan. 17,
1906. On Rehearing, Feb. 8, 1906.)

1. INTOXICATING LIQUORS—LIQUOR DEALER'S BOND—ACTION—LIABILITY.

There being no statute giving a liquor dealer's bond any retroactive effect, no action lies upon the bond for a violation of the terms thereof by acts committed before its filing.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 89.]

2. SAME—DATE OF FILING—EVIDENCE—QUESTION FOR JURY.

In an action on a liquor dealer's bond, evidence examined, and held sufficient to present a question for the jury on the issue as to the date of filing of the bond.

3. SAME—ASSIGNMENT—LIABILITY FOR ACTS OF ASSIGNEE.

Under Gen. Laws 1901, p. 315, prescribing, among other conditions of a liquor dealer's bond, that the dealer will not "rent or let" any part of the place in which he sells liquors to any person for the purpose of running any game prohibited by the laws of the state, there is no liability on the bond for independent acts of a

*Writ of error denied by Supreme Court March 1, 1906.

vendee of the obligor committed after a sale of the premises.

[Ed Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 89.]

4. SAME—BURDEN OF PROOF.

In an action on a liquor dealer's bond, the burden of proof is on plaintiff, who must establish all the facts necessary to his recovery by a preponderance of the evidence.

5. SAME—FILING—EVIDENCE—PRESUMPTIONS—INSTRUCTIONS.

Where, in an action on a liquor dealer's bond, there was evidence on the issue as to the date of the filing of the bond, no reference should have been made in an instruction to the presumption that the bond was filed on the day of its date; such presumption being one of fact.

On Rehearing.

6. SAME—APPROVAL OF BOND—EFFECT.

Under Sayles' Rev. Civ. St., art. 5080c, prescribing as a prerequisite for a license to sell intoxicating liquors the filing of a liquor dealer's bond with the clerk, no liability exists under the bond until the filing thereof; the approval of the same being insufficient to create such liability.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by M. W. Allen against the Houck & Dieter Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Sam B. Gillett and Patterson, Buckler & Woodson, for appellant. Turney & Burges and W. M. Coldwell, for appellee.

JAMES, C. J. The action is on a liquor dealer's bond. The petition alleged that Houck & Dieter Company on or about April 23, 1904, executed a bond to the state, according to the statutes, for the purpose of procuring a license to sell spirituous, vinous, and malt liquors in quantities of one gallon or less, to be drunk on the premises; that said bond was approved by the county judge of El Paso county on April 25, 1904, and that said bond is now on file with the county clerk of El Paso county and was recorded on September 15, 1904; that Houck & Dieter Company, in violation of their bond, permitted certain boys, minors, sons of plaintiff, to enter and remain in the Washington Park House, which was their saloon and place of business, on certain days in May, June, and July, 1904, and to gamble and play at a certain slot machine in said place, and prayed judgment against defendants, the principal and sureties on the bond. In his trial amendment plaintiff alleged that defendant company on April 2, 1904, made application for the license, and paid to the tax collector the tax, to enable it to carry on said occupation at Washington Park in said county, and on April 23d made and delivered to the county clerk the aforesaid bond, and from that date carried on said business at said place, although, as plaintiff was informed and believed, said company did not take out a formal license until about September, 1904. Besides a general denial, defendants alleged that the bond was not executed until September 15, 1904, and that prior

to any of the acts complained of Houck & Dieter Company, for a valuable consideration, sold, transferred, and assigned its entire interest in Washington Park and saloon therein conducted to Fred Lemley, and defendants at the time of the wrongs complained of had no interest in or control of said park or saloon. There was a verdict for defendants.

It may be observed that following questions are raised: (1) One of fact, whether the bond was executed in April or in September; (2) one of law, whether or not it made any difference if the bond was not delivered to the clerk until after the infractions, plaintiff contending that the bond being given in compliance with law and to enable Houck & Dieter Company to carry on the saloon at Washington Park, and they having paid the tax on April 2d, and owned the license until September 15, 1904, and, the bond being applicable to the business which was being conducted at Washington Park, it would under these circumstances relate back to its date; and (3) another question of law indicated by the following proposition: The bond being that of Houck & Dieter Company and given to enable them to engage in the liquor business at Washington Park, and providing that they would not permit the prohibited things at such place, and they having paid the tax and being the grantee of the license for conducting such business, the court erred in submitting the question of their being owners of the saloon at the times of the infractions.

We think the third of these propositions is clearly not maintainable. The license was not issued until the 15th of September, which is the date the bond was filed marked by the county clerk. So the proposition must depend upon the facts that Houck & Dieter Company made application in April, paid the tax in April, and a saloon business was carried on at the designated place from that time on. These facts alone would not support an action on the bond. Houck & Dieter Company were not entitled to a license before they had filed the bond, and could not be dealt with upon any theory of license before that time. Without the bond they were not placed in a position to be entitled to a license. If any such business was carried on by any one at the designated place under such circumstances, it would be a violation of the penal laws of the state. Therefore there is nothing in the third proposition, unless the bond was in fact on file when the alleged infractions took place, or unless, as contended in the second proposition, its subsequent filing related back.

The court took the view that a license was not essential to defendant's liability on the bond, but that it was essential for the bond to have been filed prior to the acts complained of, and that, if filed afterwards, it would not relate back to include past acts that would be contrary to its conditions. It is

not necessary for us to decide whether or not it was essential to a recovery on the bond that a license had in fact issued before the acts complained of, because here the verdict was for defendant, and such a ruling would afford only an additional reason for the verdict. The view taken by the trial judge as to the license was the one most favorable to appellant. We think that prior to the filing of the bond the business was unlawful and punishable, and could only be claimed to be authorized after its filing. There is no statute giving the bond any retroactive effect. Its conditions relate to the future. It seems to us too plain for discussion that such a bond has no relation whatever to acts committed at a time it was withheld from filing, and hence not in force.

We come to the question of the time of filing the bond. This was a matter of fact which was submitted to the jury. The question is, was there evidence to support a finding that it was not delivered to the clerk for filing until September 15th. The bond bears date April 23, 1904. It is marked: "Approved this 25th day of April, 1904. Jos. U. Sweeney, Judge County Court, El Paso County, Texas." Indorsements thereon as follows: "Transferred to J. S. Martin & Co." "Filed for record the 15th day of September, 1904, at 4:10 o'clock p. m. and recorded in Book —, page —. Park W. Pittman, Clerk County Court, El Paso County, by C. Aranda, Deputy." Plaintiff alleges that it was recorded September 15th. Mr. Aranda testified: That he had been deputy county clerk for several years. That, as shown by indorsement, he had filed the bond on September 15, 1904. That it was the rule or custom of the office to file all papers the very minute and hour and day they were left for filing and have the indorsement show it, and he believes it was so in this instance. Sometimes papers would be left not for filing, but to be kept until something should happen and then be filed at the time requested by the persons leaving them. That he never remembered seeing this bond before September 15, 1904, he might be mistaken, the bond might have been left in the office before that day. That whenever an application was filed for a liquor dealer's license it was the custom of the office to charge all the fees that would accrue, not only for the filing of the application, but for the filing and recording of the bond and the issuance of the license, even though the bond had not been filed, nor the license issued. That in this particular case the office on April 23d had charged for the issuance of a license and Houck & Dieter Company paid the bill on the 26th day of May, although no license was in fact issued until September 15th, at the very time Houck & Dieter assigned the license to J. S. Martin & Co. The witness testified, also, that the books of the office showed that Houck & Dieter Company were charged on April 23, 1904,

for the filing of the application, for the issuance of license, and with the filing and recording of the bond, and that Houck & Dieter had paid the bill on May 26th. He testified further that he did not know that the bond was filed on September 15th, but believed it was because it was marked filed on that day, and that frequently liquor dealer's bonds are actually left in the office and not marked filed for some time afterwards. It was testified by the county clerk that the deputy Aranda generally attended to the filing of such papers, and by Mr. Gillette, counsel for plaintiff, that he saw the bond in the county clerk's office on or about July 10, 1904, and made a copy of it at that time, and on cross-examination he stated that he was interested in any recovery that might be had in this case. We think that from the above testimony it could not be said as a matter of law at what time the bond was delivered to the clerk for record, whether before or after the acts complained of. It was a question of fact that was susceptible upon the evidence of being resolved either way by the jury, and was properly left to them.

It is also contended that the court erred in admitting testimony tending to show a transfer by Houck & Dieter Company to Fred G. Lemley on April 15, 1904, of the saloon and business at Washington Park. The following charge is complained of in this connection: "You are further instructed that if as a matter of fact the said Houck & Dieter Company before the time of the alleged infractions of the said bond, as alleged by them, had sold their business at Washington Park to Fred Lemley, and that at the time of said alleged infractions the said Lemley was the bona fide owner of the said business and conducting the same for himself, and not for the said Houck & Dieter Company, then, and in that event, the said Houck & Dieter Company would not be liable for any violation of the law which the said Lemley may have committed, if any, in permitting minors to loiter, if he so did, in and about said saloon, or permitting minors to gamble by the use of a slot machine in or about the said saloon, if he so did, and the bondsmen who signed the said bond, together with the said Houck & Dieter Company, would and could in no way be responsible for the infraction, if any, of the law by the said Lemley, a third party." This question became material if the jury found, as they may have done, that the bond was filed before the acts alleged were committed. The testimony of Dieter and of Lemley was that about the middle of April, 1904, Houck & Dieter Company sold to Lemley all interest in their lease of Washington Park, including the saloon and supplies, for a valuable consideration, reserving no interest therein; that from that time until about September 1, 1904, Lemley for himself carried on the business; when he ceased to do so, that Houck & Dieter agreed to

sell the license to Martin & Co. and took it out on September 15th, in order to sell it to them. This testimony shows that Houck & Dieter Company had no connection whatever with the business after the middle of April, and did not commit or permit the acts complained of.

The cases relied on by appellant are *Horan v. Chief Justice*, 27 Tex. 226, which was a case where a licensee leased to another a part of the premises in which he had obligated himself not to permit gaming, with the understanding that it was to be used for that purpose, and *Grady v. Rogan*, 2 Willson, Civ. Cas. Ct. App. § 265, where the licensee sold to another, but identified himself by lending his name and his credit to the business carried on by his vendee. The cases are not applicable here.

Some condition of the bond must have been violated by the obligor in order to justify a recovery upon it. The statute (Gen. Laws 1901, p. 815) prescribing the condition of the bond provides, among other things, that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell liquors to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of the state; thus incorporating into the statute the ruling in *Horan v. Chief Justice*. There is no prohibition against his selling the place or the business to another, and the only acts for which he and his bondsmen are liable are acts done or permitted by him. To extend his and their liability to the independent acts of his assignee would be extending the conditions of the bond beyond what they stipulated. An out and out sale made to a third party, the vendor retaining no interest in or control over the premises or business, is not prohibited. If he sells out and ceases to do business, we can perceive nothing in the bond, or in public policy, to hold him and his sureties accountable for what may be afterwards done by his vendee. The testimony that was admitted, and the charge, were proper.

There is an assignment of error complaining of the following instruction: "The burden of proof in this case rests upon the plaintiff, and before he can recover he must establish all the facts necessary to his recovery by a preponderance of the evidence." This charge correctly stated the general rule applicable to the case.

Another assignment in this connection complains of the refusal of the following charge: "The burden of proof in this case is on defendants to show that the bond sued on was not filed or placed in the county clerk's office until after the dates of the alleged wrongs, before plaintiff's recovery will be defeated on the ground that said bond was not on file in said county clerk's office." There is no doubt that the burden of proof was upon plaintiff generally. The

point made is that there was a presumption of the delivery of the bond (that is, in this instance, its filing) as of the day of its date, and therefore defendants had this presumption to rebut, and the burden was upon them to do so. The presumption that obtains in such or similar cases is one of fact, and no reference ought to be had in the charge to such a presumption or its effect, where there is other evidence to consider on the issue. This question is discussed in *Gurguln v. Boone* (Tex. Civ. App.) 77 S. W. 631. The judgment is affirmed.

On Rehearing.

We think the decision in *Brockway v. Petted* (Mich.) 45 N. W. 61, 4 L. R. A. 740, is unsound, at least it is not applicable to our statutes. We think the case of *Southard v. Green* (Tex. Civ. App.) 59 S. W. 839, states the correct rule. The statute prescribes as a prerequisite for a license to sell that the bond shall be filed with the clerk. Article 5060c, Sayles' Rev. Civ. St. Suppose the bond had after its approval never been filed. It could not reasonably be contended in such a case that it would have bound the sureties at all. Hence the approval of the bond alone cannot be said to create any liability under it. Until it was filed the business, if carried on in the meantime, would be unlawful, and punishable as an offense. The bond and its obligations carry with them the idea that the dealer is conducting a business that the statute authorizes, and they are given and proceed upon that theory. The bond has, we think, no force whatever until both approved and filed.

The motion is overruled.

INTERNATIONAL & G. N. R. CO. v. HALL et al.

(Court of Civil Appeals of Texas. Dec. 21, 1905. Rehearing Denied Feb. 7, 1906.)

1. RAILROADS—PERSONS ON TRACKS—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an action for the death of a person, struck by a locomotive in the streets of a town, defendant pleaded contributory negligence in that plaintiff's decedent was at the time of his death walking on an unfinished track, where his attention was absorbed by the necessity of looking where he was stepping, and that there was a good sidewalk along the street. There was evidence in support of the allegations of the answer. *Held*, that a requested charge to find for defendant if a person of ordinary prudence would not have walked on the railroad track in its then condition and such action on the part of deceased contributed to his death should have been given.

2. SAME—OPERATION OF TRAINS—DEGREE OF CARE REQUIRED.

A railroad, in operating its engines or trains in the streets of a town, is required only to exercise, for the safety of persons in the streets, such a degree of care as would be exercised by a person of ordinary prudence under the same or similar circumstances.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1221-1235.]

Appeal from District Court, Falls County; Sam R. Scott, Judge.

Action by Angeline Hall, for herself and as next friend of her minor children, against the International & Great Northern Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

See 81 S. W. 82.

N. A. Stedman, Martin & Martin, and Waller S. Baker, for appellant. Rice & Bartlett and Tom Connally, for appellees.

EIDSON, J. This is a suit brought in the court below by Angeline Hall for herself and as next friend for her minor children, appellees, against the International & Great Northern Railroad Company, appellant, for \$7,500 actual damages and \$10,000 exemplary damages, alleged to have been sustained on account of the death of Dave Hall, alleged to have been carelessly and negligently killed by one of appellant's locomotives backing over him, in the town of Marlin, Falls county, Tex. Appellant pleaded in the court below a general demurrer, general denial its right to operate its trains in the town of Marlin, and contributory negligence on the part of the deceased. A trial before court and jury resulted in a verdict and judgment for appellees in the sum of \$8,000 actual damages.

Appellant's third assignment of error complains of the action of the court below in refusing to give to the jury its special charge No. 3, which is as follows: "If you find from the evidence that the track upon which Dave Hall was walking at the time, was being worked upon, and was in an unfinished state, and the ties between the rails were exposed to such an extent as to require the attention of the said Dave Hall in determining where to step, and that this attracted his attention at the time he was killed; and you believe from the evidence that a person of ordinary prudence, situated as Dave Hall, under the same or similar circumstances, would not have walked upon said railroad track in its then condition, if such you find to be; and you believe that such action upon the part of Dave Hall contributed to his death, then you will find for the defendant." Appellant in its answer pleaded that the deceased was guilty of contributory negligence in "that its track at the time and place of said accident was being worked upon, and was in an unfinished state, in that piles of gravel were thereabout, and the ties were exposed, all of which the said Dave Hall knew, and that there was a good sidewalk along said street, and this he knew; that he also knew that it was dangerous to walk on said track in the condition it then was, in that it was necessary for him to look where he was stepping, thus attracting his attention." The undisputed testimony showed that deceased, at the time of the accident, was at a point a little north of opposite the front gate of a house in which Tom Spencer lived at the time. W. W.

Hunnicut testified: "At the time of the accident, the surface of Falls street was torn up some, but it was used by pedestrians. People walked up the track in going to and from that portion of town. I have seen them frequently coming right up the track. There was a sidewalk on the east side of the street, but none on the west. * * * At the time of the accident, there was a sidewalk on the east side of Falls street, but not a first class one; there were holes in it where it was worn down, and that got muddy in wet weather, and there were places that were slanting. It was a fair sidewalk, though, and was used. The sidewalk led along in front of the Hazelwood property where Spencer lived and on up to Live Oak street." Hutchings testified: "My house was a block below where Tom Spencer lived, south of it, he living on the east side of the track and I on the west side. * * * There was but one sidewalk and that was on the east side of the street. There was a good many washes and low places in the sidewalk, and during rainy weather it was especially bad. There were bad places along at intervals. There was a bad place in front of the livery stable, and a bad place near the Spencer property near the corner of the street and the alley. The sidewalk was low along there and would hold water. They were working on the track for several months, grading and raising the track from that crossing at that street near Spencer's on down below where I lived. They used considerable filling along there; were working on the track at the time of the accident, is my recollection, so that walking on the track was not good. It was new track. * * * It is a fact that right about the Spencer place, opposite it, the track was torn up at the time of the accident, and they were working on it raising it. They commenced right along there raising the track, and below there they raised it a good deal more. At the time of the accident there had been considerable gravel dumped along on each side of the track above and below and at the place of the accident, which was for the purpose of raising the track. * * * At the time the accident occurred, walking on the track was not good, not as good as it is now—not very good. At the time of the accident, the dirt had been taken from between the cross-ties for the purpose of raising the track; that is my recollection, that they had dug the dirt out from between the cross-ties and left considerable opening in between the ties at the time of the accident, and there were piles of gravel on each side of the track that had been dumped there were the purpose of raising the track. * * * From the Spencer property north, the walking on the sidewalk was better than south of the Spencer property." Swan testified: "I can tell you why I thought they were going to kill him. He had his hands in his pockets, or else behind him, I could not tell which, and my recollection is that he was smoking, and was walking along apparently

paying no attention to anything in the world and just coming right up the track, and the engine at that time looked to be right on him, but it could not have been right on him, because I turned around the second time before he was killed. * * * When I looked the first time, it looked to me like it had him then, and then when I looked the second time he was gone. His head was down. He was walking north and the train was backing north." From this testimony it appears that there were at the time of the accident two ways being traveled by the public—one the sidewalk on the east side of the street, and the other the railroad track in the street, either of which might have been taken by the deceased, and he selected the latter. So far as danger from an engine or train was involved, the sidewalk would have been absolutely safe. Appellant's pleading and the testimony quoted raised the issue as to whether the deceased, in view of the condition of the track, and the fact that there was a sidewalk over which he could have traveled was, in selecting the track over which to travel, acting as a man of ordinary prudence would have acted under the same or similar circumstances; and the special charge refused would have presented this issue to the jury fairly and pertinently. *Railway Co. v. Gasscamp*, 69 Tex. 545, 7 S. W. 227; *Railway v. McGlamory*, 89 Tex. 639, 35 S. W. 1058; *Railway v. Ayres*, 83 Tex. 268, 18 S. W. 684; *Railway v. Hall*, 85 S. W. 786, 12 Tex. Ct. Rep. 377 and *Railway v. Kiersey*, 86 S. W. 744, 12 Tex. Ct. Rep. 793. We do not think the main charge of the court, nor any of the special charges given at appellant's request properly or directly apply to the subject embodied in the special charge refused. Hence its refusal, in our opinion, was error.

Appellant by its fifth assignment of error complains of the action of the court below in giving to the jury the following special instruction at the request of appellees: "You are instructed that it is the duty of the employees of a railroad company in operating its engine or train of cars to use ordinary care to discover and avoid injuring persons who may be upon its track, the degree of care being such as a person of ordinary prudence would commonly exercise under the like circumstances, and varying as the known probability of danger may vary along the different portions of the route over which such trains may run; and a failure to use such care by its employees is negligence on the part of said company for which it is liable in damages for the injury resulting from such negligence, unless such liability is defeated by contributory negligence, as defined in the main charge." Appellant's contention is that the language "and varying as the known probability of danger may vary along different portions of the route over which such train may run," imposed upon the appellant the duty to exercise a higher degree of care than ordinary care under the same or

similar circumstances. Without holding this charge erroneous, we would suggest that it would be safer upon another trial for the court, in instructing the jury as to the degree of care required of appellant in operating its engine or train of cars, to omit the language quoted. In the case of *Railway Co. v. Gormley*, 91 Tex. 399, 43 S. W. 878, 66 Am. St. Rep. 894, the Supreme Court says: "The degree of care does not vary with the increase or diminution of danger; it continues to be ordinary in degree, but the quantum of diligence to be used differs under different conditions." And in *Railway Co. v. Smith*, 87 Tex. 354, 28 S. W. 522, that court says: "Ordinary care will require the exercise of a very great degree of vigilance under some circumstances, and the amount of vigilance and caution to be used will vary according to the situation of the parties and the surrounding circumstances. But the standard by which the acts are to be judged does not change; it remains the same." Hence, in our opinion, a charge should not be given to the jury that would be calculated to indicate to them that a higher degree of care would be required of a railroad company in the operation of its engine or trains than such as would be exercised by a person of ordinary prudence under the same or similar circumstances.

We have carefully considered all of appellant's other assignments of errors, and are of opinion that none of them is well taken. For the error indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

INTERNATIONAL & G. N. RY. CO. v. BRISENIO.*

(Court of Civil Appeals of Texas, Jan. 10, 1906. Rehearing Denied Feb. 7, 1906.)

1. COURTS—TRANSFER OF CAUSES—JURISDICTION.

Under Gen. Laws 1890, p. 113, c. 75, authorizing the district judges of the different district courts in a certain county to transfer any suit from one district court to another, a judge of one district court may transfer to another district court a suit to set aside a judgment rendered by the former court, and thereby invest the latter court with the jurisdiction inherent in the former to set aside the judgment in question.

2. JUDGMENT—CONCLUSIVENESS—AUTHORITY TO SUE.

Where an action purporting to be brought on behalf of a minor by her mother as next friend is not in fact brought by the mother, or is brought in her name but without her knowledge or consent, neither she nor the minor is bound by the judgment rendered therein.

3. APPEAL—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

Where the jury were instructed that a certain judgment was conclusive against plaintiff, and to find for defendant, if the suit was brought with plaintiff's knowledge and consent, it was not reversible error to refuse a further request to charge that the question at issue was not whether the cause in which the judgment was rendered was prosecuted to the best advantage, but whether it was prosecuted with plaintiff's knowledge and consent.

*Writ of error denied by Supreme Court March 8, 1906.

4. APPEAL—HARMLESS ERROR—ARGUMENT OF COUNSEL—INFLAMMATORY REMARKS—CORRECTION BY COURT.

In an action for the death of plaintiff's father, the action of plaintiff's attorney in urging the jury to consider what they ought to do for the little girl that lost her father, and admonishing them not to place the stamp of infamy upon the child by driving her out of the courthouse as a fraud, and calling on the jury, as fathers, brothers, and citizens, to protect the girls of the country is not reversible error, where the court stopped counsel and instructed the jury not to consider the argument, and counsel withdrew the remarks, and there was sufficient evidence to support the verdict, and nothing to show that the jury were inflamed or influenced by counsel's language.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4135.]

Appeal from District Court, Bexar County; A. W. Seellgson, Judge.

Action by Vicenta Brisenio against the International & Great Northern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. A. Stedman, Jno. M. King, and Hicks & Hicks, for appellant. J. D. Childs, for appellee.

JAMES, C. J. The character of this action is shown by the opinion delivered on the former appeal. *Briseno v. Railway Co.*, (Tex. Civ. App.) 81 S. W. 579. It is now asserted by appellant that the district court of the Fifty-Seventh judicial district was without jurisdiction to annul and vacate the judgment rendered in 1890 by the district court of the Thirty-Seventh judicial district.

It appears that a suit was brought upon the same cause of action in the latter court by Eufemia Brisenio, the widow of Manuel Brisenio, Angel Brisenio, the mother of Manuel Brisenio, and by Vicenta Brisenio, a minor, who sued by her next friend, Eufemia Brisenio, her mother, against appellant, for damages, the result of the death of said Manuel, caused by injury received in appellant's service. The decree rendered therein was for defendant and its then receivers. It appears that the present action was brought in the district court of the Fifty-Seventh district by the minor, Vicenta, through her next friend, the said Eufemia, for the damages sustained by the loss of her father, without any reference to the aforesaid judgment. In the amended petition, upon which the cause was heard, she alleges that since the filing of this suit she and her said next friend learned for the first time of the said former suit and judgment; that said suit was wholly without authority or knowledge of either of them; that neither of them authorized its bringing, or employed or authorized attorneys or any one else to bring it; that said suit was without their knowledge, consent or authority; that they were not present at any time during the trial, had no knowledge whatever of the proceedings, and that said proceedings were a fraud upon the plaintiff; and further that they were

without knowledge, consent, or authority of either Eufemia Brisenio or Angel Brisenio, either individually or as next friend of the plaintiff; and prayed that it be held for naught as to plaintiff. It appears further that, after this suit was filed in the Fifty-Seventh district court, plaintiff, by her said next friend, filed in the Thirty-Seventh district court a direct proceeding to set aside the judgment, which suit was later transferred to the Fifty-Seventh district court by an order duly entered. In the Fifty-Seventh district court the causes were consolidated and tried together; a verdict and judgment being given for plaintiff in the sum of \$3,000.

The district judges of the three district courts in Bexar county were authorized, in their discretion, to transfer any suit or cause of action, civil or criminal, from one district court to another. Gen. Laws 1899, p. 113, c. 75. Under this enactment, the transfer of the suit to annul the judgment transferred the jurisdiction of the Thirty-Seventh district court to try it to the Fifty-Seventh district court. That the former court was the one with jurisdiction to try a suit to set aside its own judgment, and that a domestic judgment of a court, having jurisdiction of the subject-matter and the parties, cannot be collaterally attacked, are propositions we concede. But, under the statutes of the state, the jurisdiction of the Thirty-Seventh district court, and by force of the order transferring the cause, its jurisdiction followed the case to the other court; or we might say the statute in such circumstances vested the other court with jurisdiction to hear and determine the cause.

The fifth assignment of error complains of the refusal of this charge: "If you believe from the evidence that Fisk and Haltom prosecuted said cause No. 4,303 (the original cause) with the knowledge and consent of Eufemia Brisenio, or Angel Brisenio Lopez, you will find for the defendant." Two propositions are submitted; one being that the charge of the court submitted this issue only in a negative way, and defendant was entitled to its presentation in an affirmative way. The court charged the jury in the first paragraph that the judgment was conclusive of the rights of plaintiff, and to return a verdict for defendant, unless they found from a preponderance of the evidence that Eufemia Brisenio did not authorize J. G. Fisk and Ed Haltom, or either of them, to institute or prosecute said suit. The second paragraph of the charge was: "If you believe from a preponderance of the evidence that said suit No. 4,303 was instituted and prosecuted without the authority or consent of Eufemia Brisenio, then, in that event, you will proceed to consider the other issues in the case. We cannot conceive of how the jury would have the issue more directly and plainly presented to them by an affirmative statement of it. However, the court gave defendant's requested charge No. 1, which submitted the issue

in an affirmative form. The second proposition is that it was not necessary for all of the plaintiffs in cause 4,303 to have authorized and agreed to the filing of the said cause, provided it was brought by authority of one of the plaintiffs for the benefit of all. The instructions of the court proceeded on the idea that, to bind this minor by said judgment, it was necessary that only Eufemia, her mother, who sued on behalf of the minor, should have authorized or known of the proceeding. It seems that counsel for appellant asked charges, the first and third special charges, upon this theory. It would further seem that counsel had the same idea until after they had their original brief printed, when they prepared a supplemental brief, which added the proposition now under consideration. However, we are of opinion that the proposition ought not to be sustained on its merits. The petition in the original case contains nothing which shows that it was brought on the part of Angel Brisenio for the benefit of anybody but herself. No action was brought or purported to be brought on behalf of the minor, except by her mother, Eufemia, as next friend. If not brought by Eufemia, or if brought in her name, but without her knowledge or consent, neither she nor the minor would be bound thereby.

The sixth assignment complains of the refusal of the following charge: "The question for you to determine, in considering the plea of defendant of a former trial, is not whether the attorneys prosecuted said cause No. 4,303 to the best advantage, but whether or not they prosecuted said cause with the knowledge and consent of Eufemia Brisenio." This charge might very well have been given, but was it at all necessary for the guidance of a jury of ordinary intelligence, who were instructed in positive terms that the judgment was conclusive against the plaintiff, and to find for defendant without considering anything else, if they found that Eufemia did not authorize the attorneys to institute or prosecute the suit, as was charged in the first paragraph of the court's charge; or (as put by the first requested charge which was given) if they believed that the attorneys, or either of them, who filed and prosecuted said cause, did so with the knowledge and consent of Eufemia Brisenio, the minor would be bound by the judgment and to find for defendant? We think not. The requested instruction would have added nothing more than elaboration or emphasis to the instructions given, which could not have been mistaken by the jury.

The seventh assignment alleges that the preponderance of the evidence shows that the cause No. 4,303 was prosecuted without the knowledge or consent of Eufemia Brisenio. The proposition, statement, and argument, which we find in the brief under this assignment, do not deal with the above question at all, but with the question and jurisdiction which we have already dismissed.

The eighth objects to the charge on the measure of damages, which we find to contain no error.

The other assignments complain of language employed by plaintiff's counsel in the argument to the jury. The remark which is the subject of the first and second assignments we think was so clearly insufficient cause for a reversal that we deem it unnecessary to discuss it. That which is the subject of the third and fourth assignments is of a more serious nature. It was as follows: "When you go to make up your verdict, think what you ought to do for the little baby girl who lost her father, under the circumstances, and, when you go to write your verdict, think what it would be if you would drive her out of this courthouse and say she was a fraud. Gentlemen, I ask you as fathers, I ask you as brothers, I ask you as citizens of this country, that, when you go to write your verdict, do not place the stamp of infamy upon this child, and think, gentlemen, that the girls of this country are entitled to protection, and so write your verdict." The use of this language was objected to at the time, upon the ground that it was improper and calculated to inflame the minds of the jury, and the court stopped the speaker and instructed the jury not to consider the argument, and counsel then withdrew the remarks. There was ample evidence to support the verdict, and the amount of the verdict does not suggest that the jury were inflamed or influenced as the effect of the remarks. Under the circumstances, it would not be proper to set aside the judgment on that account. *Railway v. Irvine*, 64 Tex. 535; *McLane v. Paschal*, 74 Tex. 27, 11 S. W. 837.

There is an assignment that the verdict was excessive, but this cannot be sustained.

MULLEN v. GALVESTON, H. & S. A. RY. CO.*

(Court of Civil Appeals of Texas, Jan. 10, 1906. Rehearing Denied Feb. 7, 1906.)

1. APPEAL—ASSIGNMENTS OF ERROR—BILL OF EXCEPTIONS—SUFFICIENCY.

Assignments of error relating to the admission of certain testimony based on a bill of exceptions, which fails to state what the answers to the questions objected to were, will not be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2905.]

2. EVIDENCE—BODILY APPEARANCE.

In an action against a railroad for injuries to a passenger occurring through defendant's alleged negligence, testimony as to the appearance of plaintiff after the accident, as to whether or not he seemed to be suffering, and as to what he was doing, was admissible.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2238-2240.]

3. APPEAL—OBJECTIONS—PRESENTATION IN TRIAL COURT—NECESSITY.

Objections to evidence, not presented in the court below, will not be considered on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1258-1259.]

*Writ of error denied by Supreme Court March 3, 1906.

4. SAME—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The exclusion of evidence is not prejudicial, where the party has the full benefit of the same evidence from several other witnesses.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4184.]

5. SAME—CONFLICT IN RECORD.

Where statements of a witness were repeated several times in the evidence as contained in a statement of facts agreed to as correct, it will not be held on appeal that the evidence was excluded, though assignments of error are based on such exclusion; the statement of facts and the statements in the bills of exceptions being of equal dignity.

6. APPEAL—HARMLESS ERROR.

In an action against a railroad for injuries to a passenger, the exclusion of testimony of plaintiff's physician, that "I thought it was an injury to the sciatic nerve caused by a bruise or pressure," was not prejudicial; such witness having also testified, "I thought it was an injury to the sciatic nerve," and "The injury produced pain in the sciatic nerve," and "The sciatic nerve was bruised," and two other witnesses testifying to practically the same facts.

7. EVIDENCE—EXPERT WITNESS.

In an action against a railroad for injuries to a passenger, a witness, who had been in a railway service as switchman, brakeman and conductor for 12 years, was qualified to testify that the force with which a coupling of cars, alleged to have been negligently made, was made, was not unusual.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2323, 2350.]

8. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.

In an action against a railroad for injuries to a passenger, an instruction limiting plaintiff's recovery for medicines and medical attendance to such sums as he necessarily expended or incurred, was correct.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 243, 554.]

9. CARRIERS—PASSENGERS ON FREIGHT TRAIN—LIABILITY OF RAILROAD—DEGREE OF CARE REQUIRED.

Although a railroad company owes the same degree of care to passengers on its freight trains as on regular trains, a passenger, in boarding a freight train, acquiesces in the usual incidents and conduct of a freight train managed by prudent and competent men.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1098-1192.]

10. APPEAL—INSTRUCTIONS—HARMLESS ERROR.

In an action against a railroad for injuries to plaintiff while riding on a freight train under a stock pass, failure of an instruction to confine the assumption of risks to such matters as were known by plaintiff was not prejudicial; there being evidence that he had been engaged in riding on trains with stock for many years, and was acquainted with the mode of handling stock trains.

11. CARRIERS—INJURY TO PASSENGER—ACTION—TRIAL—REMARKS OF COUNSEL.

In an action against a railroad for injuries to plaintiff received while riding on a stock train, remarks of defendant's counsel that "the reason plaintiff had not been able to earn as much in shipping and selling mules since his injury as he was before, was because there had been a bad horse market, and that plaintiff was trying to make the railroad company pay for it," was not ground for reversal.

12. APPEAL—PRESUMPTIONS AS TO EFFECT OF ERROR.

Where there is evidence to sustain a verdict, the presumption that it was obtained by improper remarks of counsel does not prevail.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Francis M. Mullen against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Keller & Keller, for appellant. Newton & Ward, W. B. Teagarden, Baker Botta, and Parker & Garwood, for appellee.

FLY, J. Appellant sued appellee for damages alleged to have accrued through the negligence of appellee. It was alleged that appellant was a passenger in the caboose of a stock train, traveling with live stock shipped by him from Texas to Mississippi, and that the caboose collided with another car, through the negligence of appellee, and threw appellant from his seat to the floor with such violence as to seriously and permanently bruise, injure, and cripple him in his left leg and hip. The cause was tried by jury and resulted in a verdict and judgment for appellee. Appellant was a passenger on the freight train of appellee by virtue of a shipper's pass, and we conclude from the evidence, in deference to the verdict, that there was no negligence upon the part of appellee which caused any injury to appellant. The jury was also justified in finding that appellant was not injured while a passenger in the caboose of the train, but if injured at all it was from some other cause than the negligence of appellee.

The first, third, fifth, seventh, ninth, eleventh, thirteenth, fifteenth, seventeenth, nineteenth, twentieth, twenty-second, and twenty-third assignments relate to the admission of certain testimony as to the appearance and condition of appellant after the alleged injury. All of them are based on one bill of exceptions, which fails to state what the answers were to the question objected to, and of course this court is unable, without searching the whole of the evidence, to ascertain what the answers were. "In the absence of a bill of exceptions distinctly stating what testimony was objected to, we cannot revise the action of the court below in admitting the evidence." *Railway v. Leak*, 64 Tex. 654; *Railway v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608.

Under 12 assignments of error relating to the admission of certain testimony are the following propositions: "Answers in depositions relating to matters of opinion or giving the conclusions of a witness may be objected to when offered in evidence," and "objections to an interrogatory and answer in a deposition may be made orally at the trial when the answer is not responsive, or is uncertain and evasive." Why these propositions should be presented does not appear as they do not seem to have any connection whatever with the assignments of error and there is nothing in the record

that indicates that the evidence to which objection was made was admitted because objection was not made before the trial began. Everything stated in those two propositions may be taken as settled law and yet it has no pertinence in this case. If the different assignments of error can be construed to be propositions in themselves we are of the opinion that the testimony of the different witnesses as to the appearance of appellant, as to whether he seemed to be suffering, and as to what he was doing was properly admitted. The witnesses were not stating opinions but facts. The presentation of objections to the evidence in this court which were not presented in the court below will not be countenanced or permitted.

The twenty-fifth and twenty-sixth assignments relate to the rejection of evidence on the part of J. K. Watkins, that it looked to him as though appellant was suffering from pains in the hip and that "he had to use a stick." The statement of facts shows that Watkins testified that appellant was "crippled up" and "hopping about" and that "he twisted over to one side when he tried to walk, and limped a good deal." Brock swore that appellant was crippled and limping and that he used a stick. Other witnesses testified to practically the same facts. Appellant could not have been injured by the exclusion of the evidence mentioned in the two assignments of error as he had the full benefit of the same evidence from several other witnesses. *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40.

The twenty-seventh and twenty-eighth assignments of error present that the court erred in excluding the statements of the witness, William Schmalkoke "that the brakeman of the train had said shortly after the injury, that the accident occurred because of a defective brake" and that "the brakes were out of fix on the stock car." We find from the statement of facts that William Schmalkoke swore that the brakeman said that "the brake was out of fix and we could not help it." And also that the brakeman said that the "brakes on that car that bumped into the caboose was out of fix and he could not help it." That statement is repeated several times in the evidence as contained in the statement of facts, which was agreed to as being correct by appellant. The statement of facts and the statements in the bills of exception being of equal dignity this court cannot hold that the court excluded the evidence. *Ramsey v. Hurley*, 72 Tex. 194, 12 S. W. 56.

The twenty-ninth assignment of error complains of the rejection of the latter part of the following evidence of Dr. Turner: "I thought it was an injury to the sciatic nerve caused by a bruise or pressure."

As Dr. Turner swore, "I thought it was an injury to the sciatic nerve," and "The injury produced pain in the sciatic nerve," and "The sciatic nerve was bruised which caused it to become inflamed and tender," appellant could not have been injured by the rejection of the testimony. Drs. Shropshire and Lankford swore to practically the same facts.

The thirtieth, thirty-first, thirty-second, thirty-third, and thirty-fourth assignments complain of the rejection of evidence as to statements made by appellant, a number of days after he was hurt and as to his appearance and manner of locomotion. An inspection of the record shows each one of the witnesses offered for that purpose swore to the substantial facts that the assignments assert were excluded. Portions of the rejected testimony were opinions of the witnesses without the basis of any fact to support them.

The statement under the thirty-fifth assignment of error is of no practical benefit to the court. The assignment of error relates to the testimony of R. J. Woods to the effect that the coupling, at the time appellant was injured, was made with about the usual force, and for statement the whole of the evidence of Woods and parts of the petition are copied into the brief. In order to ascertain what testimony is complained of, the whole of the evidence must be read. However, the witness had been in the railway service, as switchman, brakeman, and conductor, for 12 years and was qualified to state, as he did, that "the force at which the coupling was made was not unusual."

The complaint embodied in the thirty-sixth assignment of error is that the court erred in limiting the recovery of appellant for medicines and medical attention to such sums as he "necessarily expended or incurred." In what respect the limitation is incorrect is not stated by appellant and we think it correct. If it were not, the error would be valueless to appellant in view of the fact that the jury found that he was not injured through the negligence of appellee.

Appellant, when hurt, was riding in the caboose of a train loaded with cattle, and the court correctly instructed the jury that appellant could not recover if he was injured by such jerking and jarring of the car as was necessary and proper in the handling, operation, and transportation of the car. A railway company owes the same degree of care to passengers on its freight trains as on regular trains, but in taking a freight train the passenger acquiesces in the usual incidents and conduct of a freight train managed by prudent and competent men. *Crine v. Railroad Co.*, 84 Ga. 651, 11 S. E. 555; *Railway v. Ivy*, 71 Tex. 409, 9 S. W. 346. In the Texas case it was held that the person traveling in the caboose of a cattle train was a passenger

and assumed the increased risk arising from riding on a freight train. This proposition of law is not attacked by appellant, the only complaint being that the court should have confined the assumption of risks to such matters as were known by appellant. The failure to do so could not have prejudiced the cause of appellant, as he was shown to have been engaged in riding on trains with stock for many years and was acquainted with the mode of handling stock trains. There was evidence that tended to show that the train was handled in the usual manner.

Counsel for appellee in his speech to the jury said "the reason appellant had not been able to earn as much in shipping and selling mules, since his injury as he was before, was because there had been a bad horse market, and that plaintiff was trying to make the railroad company pay for it." The remarks were objected to by appellant and he contends that they must have influenced the jury against him. The remarks may not have been entirely in consonance with the facts, but we do not believe that they had any possible effect upon the verdict of the jury. The remarks had no bearing except upon the amount of the verdict and as appellant did not recover anything we can see no causal connection between the remarks and the verdict. The presumption does not prevail in cases where there is evidence to sustain a verdict that it was obtained by improper remarks, and the case of *Blum v. Simpson*, 66 Tex. 84, 17 S. W. 402, does not support appellant's proposition that such presumption prevails.

The judgment is affirmed.

PINTO v. RINTLEMAN.

(Court of Civil Appeals of Texas. March 17, 1906. Rehearing Denied April 14, 1906.)

1. APPEAL—REVIEW—FINDINGS BY COURT.

Where, in an action for damages for breach of a contract to lease premises to plaintiff, a special verdict merely established the making of the contract and the measure of damages, but the court found that the contract was oral, and the case was appealed on the special verdict and such finding, without any statement of facts, it must be deemed established that the contract was oral.

2. STIPULATIONS—EFFECT—JUDGMENT.

A stipulation of counsel that the court might render such a judgment on the findings of the jury as the law authorizes neither added to or took anything from the power of the court to enter such judgment as warranted by the special verdict and undisputed facts not in conflict therewith.

3. FRAUDS, STATUTE OF—LEASES.

An oral contract to lease premises for the term of five years is within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 90-93.]

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by James Pinto against A. G. Rintleman. From a judgment for defendant, plaintiff appeals. Affirmed.

Jno. W. Wray, for appellant. R. L. Carlock and J. E. Burton, for appellee.

STEPHENS, J. Appellee agreed with appellant to lease to him for a term of five years certain real estate in the city of Fort Worth at a stipulated price per month, payable in advance, obligating himself within a reasonable time to execute and deliver to appellant a written lease with the usual covenants. Within a reasonable time thereafter, appellant demanded of him the execution of the lease, tendering the first month's rent. Appellee not only declined to accept the money and execute the lease, but let the premises to another. This suit was subsequently brought to recover damages for a breach of the contract, and resulted in a judgment on a special verdict, denying a recovery on the ground that the contract for a lease, being oral, was within the statute of frauds. The special verdict merely established the making of the contract and the measure of damages for its breach. The court, however, found from the undisputed evidence that this contract was oral, and the case is brought here on the special verdict, supplemented with this finding of the judge, without any statement of facts. The fact that the contract was oral must therefore be treated as established. *Featherstone v. Brown*, (Tex. Civ. App.) 88 S. W. 470, in which writ was refused.

There is another feature of the record, however, which may be noticed, and that is the agreement of counsel, copied in the transcript, to the effect that the court might "render such a judgment on the findings of the jury as the law authorizes." Without determining whether this part of the transcript should be treated as a part of the record of the proceedings in the court below, we have concluded that it added nothing to, and took nothing from, the power of the court to enter a judgment on the special verdict and the undisputed facts not in conflict therewith.

The question to be determined by the appeal, then, is whether or not an oral contract for a lease of real estate for a longer period than one year is valid, and this question we find easy of solution, since the case comes clearly within the terms of our statute on that subject.

The judgment is therefore affirmed.

MOGAUGHEY et al. v. AMERICAN NAT. BANK OF AUSTIN.*

(Court of Civil Appeals of Texas. Dec. 21, 1905. Rehearing Denied Feb. 7, 1906.)

1. HOMESTEAD—DESIGNATION—SEGREGATION FROM LARGER TRACT.

Where the head of a family is residing on a tract of more than 200 acres of rural land, and subjecting the whole of such tract to uses which impress it with the character of

*Writ of error denied by Supreme Court.

a homestead, he may determine for himself what particular 200 acres of such tract shall be exempt from mortgage or forced sale as his homestead; but he cannot exclude from the exemption his mansion house and the appurtenant lands and improvements used in connection therewith, and he must exercise his right in good faith, and so as to substantially secure to himself and family the benefit of the exemption law, and cannot use the right of designation as a cloak to enable him to evade the law prohibiting the mortgage of a homestead.

2. SAME—SUFFICIENCY OF EVIDENCE.

Where a husband and wife executed and recorded a designation of a homestead from a larger tract of rural land, and used and occupied the designated premises as a homestead for a number of years, and made declarations tending to show a continuation of the use of the land as a homestead, the court was authorized in finding that the land designated was impressed with a homestead character, notwithstanding formal defects in the recorded designation.

3. SAME—DESIGNATION ON MORTGAGED LAND.

A homestead may be designated upon mortgaged land.

4. APPEAL—REVIEW—FINDINGS OF COURT—CONCLUSIVENESS—HOMESTEAD—GOOD FAITH OF DESIGNATION.

Whether a husband, in designating a homestead on mortgaged land, acted in good faith, *held*, under the evidence, a question of fact for the trial court.

5. HOMESTEAD—DESIGNATION BY HUSBAND—CONCURRENCE OF WIFE.

Under Sayles' Rev. Civ. St. 1897, arts. 2403-2405, authorizing the head of a family to designate a rural homestead not exceeding 200 acres, and to file with the clerk of the county court an instrument signed and acknowledged by him, describing the land designated, a husband may designate a homestead without the knowledge of his wife, and it is not necessary for the wife to join in or acknowledge the instrument of designation.

6. EVIDENCE—SECONDARY EVIDENCE—CERTIFIED COPIES.

Where a husband and wife executed an instrument designating a homestead, and failed, after being notified, to produce the original instrument of designation, a certified copy thereof was admissible in evidence.

7. SAME—ADMISSIONS—WRITINGS.

Letters containing admissions by a husband as to the land designated by him as a homestead out of a larger tract were admissible in evidence, in a suit to foreclose a deed of trust on other land in the same tract.

8. MORTGAGES—FORECLOSURE—ISSUES—VARIANCE.

In a suit to foreclose a deed of trust, defendant cannot avail herself of the fact that she signed the instrument without being aware of certain recitals contained therein, in the absence of an allegation of mutual mistake or fraud in the execution or procurement of the deed of trust.

9. SAME—VALIDITY—IGNORANCE OF FACTS.

In order to avoid the effect of a deed of trust, on the ground of the grantor's ignorance of certain provisions thereof, it must be shown that the beneficiary had knowledge of that ignorance, and that the mistake in its execution was mutual, or that such execution was procured by fraud.

10. HOMESTEAD—ESTOPPEL—RECITALS IN MORTGAGES.

Where, at the time of the execution of a deed of trust, a tract covered by the deed was in the actual possession of the grantor and his wife, and was being used as a homestead previously designated by them from a larger tract, a recital in the deed of trust that the

land was not used as a homestead did not estop the grantor's wife from claiming the tract in question as a part of the homestead.

11. SAME—MORTGAGE OF HOMESTEAD—VALIDITY.

Land embraced within a deed of trust, which was occupied, used, and enjoyed by the grantors in the deed as a part of their homestead at the time of the execution of the deed, was not subject to the mortgage lien.

Appeal from District Court, Travis County; V. L. Brooks, Judge.

Action by the American National Bank of Austin against A. A. McGaughey and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

The statement of the nature and result of the suit contained in appellant's brief, and which is accepted as practically correct by appellee, is as follows: "This suit was instituted in the district court of Travis county on the 1st day of December, 1903, by the American National Bank of Austin, Tex., as plaintiff, against W. L. McGaughey, John D. McGaughey, and Mrs. A. A. McGaughey, wife of W. L. McGaughey, and George W. Littlefield, as defendants, to recover from the defendants W. L. McGaughey and John D. McGaughey the amount due on two promissory notes, and to foreclose against all of the defendants a deed of trust made by the defendants W. L. McGaughey and his wife, A. A. McGaughey, to the defendant George W. Littlefield, as trustee, on a tract of land in Hood county, Tex., to secure the payment of the two promissory notes. The defendants W. L. McGaughey and John D. McGaughey filed an answer, consisting of a general demurrer and a general denial. The defendant A. A. McGaughey, wife of W. L. McGaughey, filed a separate answer for herself, consisting of a general demurrer, general denial, a special plea setting up facts to show that the tract of land on which plaintiff was seeking to foreclose the deed of trust was a part of the homestead of herself, and W. L. McGaughey and herself, at the time of the execution of the deed of trust, which rendered it void, and by way of reconvention and cross-bill prayed for decree canceling the deed of trust as a cloud upon her homestead interest in the lands. The defendant George W. Littlefield filed an answer admitting the right of the plaintiff to foreclose the deed of trust against him. Plaintiff filed a first supplemental petition in reply to the original answer of the defendant A. A. McGaughey, consisting of a general demurrer, general denial, and a special plea setting up a designation of homestead by defendants W. L. McGaughey and his wife, A. A. McGaughey, on the 5th day of June, 1899, and other facts upon which it is alleged that the defendant A. A. McGaughey was estopped to claim as a part of her homestead the land upon which it was seeking to foreclose its lien. On the 18th day of October, 1904, the case was tried by the court without a jury, and resulted in a judgment for the plaintiff against W. L.

McGaughey and John D. McGaughey for the amount due on the two promissory notes and all costs of suit, and against all the defendants foreclosing the deed of trust on all the lands embraced in it, containing about 160 acres, less some small tract previously sold out of it, and less also 50 acres off the south end of the tract, which the court decided was embraced in the homestead of defendants W. L. McGaughey and his wife, A. A. McGaughey."

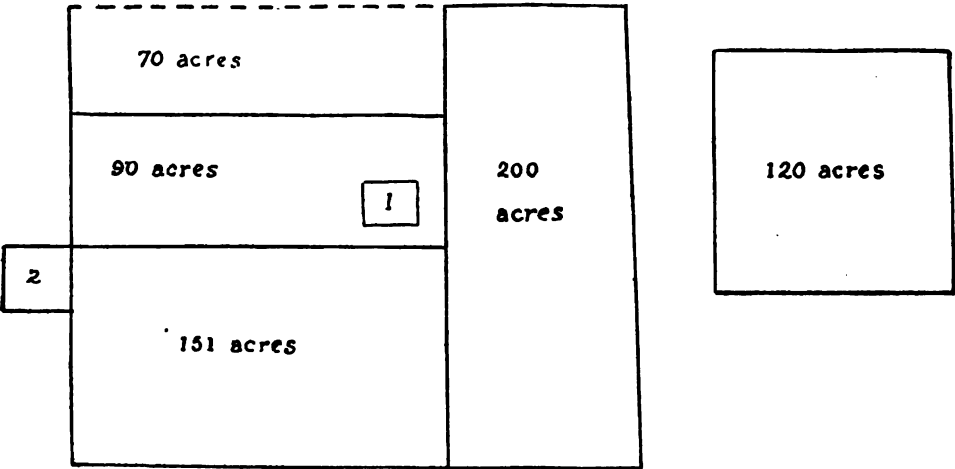
The court below filed findings of fact and conclusions of law, which are as follows:

"Findings of Fact.

"Defendant W. L. McGaughey is, and has continuously been since the year 1872, a farmer, residing with his wife, the defendant A. A. McGaughey, on a tract of 511 acres of rural land situated in Hood county, Tex. Said land and another tract of 120 acres of rural land, separated about one-half mile therefrom in the same county, were during all of said period the community property of said defendants. The following is a correct plat of said two tracts of land, viz.:

sided in a dwelling house situated at the spot marked '1' on the plat. Contiguous to their dwelling were the stables, barns, other outhouses, a well, and orchard used by them in connection with their said dwelling. On said date they were negotiating with a loan company for a loan of money to be secured by deed of trust on all or part of said 120-acre tract of land. Being informed by the agent of the loan company that they, in order to obtain said loan, should designate their homestead on land other than the land to be embraced in the proposed deed of trust to the loan company, they, for said purpose, on said date, caused to be prepared, jointly executed, and had recorded, in the office of the county clerk of Hood county, a certain written instrument, designating 200 acres out of said 511-acre tract as their homestead. The 200 acres so designated consist of a tract in rectangular form, embracing the 151-acre tract shown on the plat, and a rectangular strip of 49 acres off the south end of the 90-acre tract immediately north of said 151-acre tract. The residence of said defendants, its ap-

North.



South.

"All of said land, except the 70 acres on the north end of said 511-acre tract, indicated on the plat by dotted lines, is, and has for said time been, inclosed by fence. Part of the inclosed land is in pasture, but most of it is in cultivation. The evidence does not disclose the exact amount of each or its relative location on said tracts. But about 70 acres are in cultivation on the south 100 acres of the 511-acre tract, and practically all of the 120-acre tract is in cultivation. None of the uninclosed 70 acres is in cultivation. This condition as to cultivation and inclosures existed at and between all of the dates hereinafter mentioned. "On the 5th day of June, A. D. 1889, defendants W. L. and A. A. McGaughey re-

putenant outhouses, the orchard, and garden were all situated on the 200-acre tract so designated. At some date subsequent to the making and recording of said designation, and prior to the execution of the deed of trust in suit, said defendants acquired title to and moved upon the small tract of land marked '2' on the plat. They occupied on said tract a residence with appropriate and necessary outhouses, garden, etc., and were so residing there at the time of the execution of the deed of trust in suit. Said new residence is on land owned by defendants, and is immediately contiguous to the 200-acre tract of land designated as their homestead in 1889. During all of the time that said defendants have re-

sided in either of said residences, they have cultivated, used, and enjoyed portions of all of the land shown on the plat as their homestead. The most of the cultivated land embraced in said plat has during all of said time been cultivated by tenants, to whom said defendants have rented it from year to year. The land directly and personally cultivated or used by defendants, at and just prior to the execution of the deed of trust in suit, consisted of patches of sorghum of small extent and of a small orchard near their first residence. Neither the extent nor location of the patches of sorghum is shown, but the extent thereof is not considerable. The orchard is located on the 200 acres designated as homestead in 1889. Neither the orchard, the old dwelling, nor the new dwelling is located on any part of the property embraced in the deed of trust here sought to be foreclosed. The removal of said defendants from the old residence to the new did not cause any change in their method of using any of the land shown on the plat, except that after said removal they ceased to use the old residence and its appurtenances as a residence for themselves.

"On November 19, 1895, defendants W. L. and A. A. McGaughey made, executed, and delivered to C. H. Silliman, trustee for the Land Mortgage Bank of Texas, Limited, and the next day caused to be recorded in the office of the county clerk of Hood county, Tex., a deed of trust to secure the payment of their certain promissory note for the principal sum of \$2,400, the same day made, executed, and delivered by them to said bank. The lien of this deed of trust was by them attempted to be made to embrace all of the lands shown on the plat, except the 70 and 90 acre tracts shown on the plat, and about 40 acres, the location of which is not shown by the evidence.

"On August 12, 1901, defendants W. L. and John D. McGaughey made, executed, and delivered to the plaintiff their promissory note for the principal sum of \$4,500, as alleged in plaintiff's petition, and there is now due and unpaid by said defendants on said note, including attorney's fees, the sum of \$2,804.52. In December, 1901, defendant W. L. McGaughey, wishing to procure an extension of the indebtedness evidenced by said note, and wishing to borrow more money from plaintiff, wrote to plaintiff offering for himself and wife to give a deed of trust on the land here sought to be foreclosed on as consideration for the desired extension and new loan. In this letter said defendant stated that no part of the land which he proposed to mortgage was his homestead, and he inclosed with said letter a duly certified abstract of title to said land, which also showed that there was of record in Hood county no homestead claim against said land. During the progress of said negotiations, George W. Littlefield,

president of plaintiff bank, visited the home of plaintiff in Hood county, and remained there attending to said business and other business for two nights and one day. There is no evidence that Littlefield, while at defendant's home or elsewhere, prior to the execution and delivery of said deed of trust, ever saw anything or learned from any source anything which put him on notice that the land proposed to be mortgaged was part of the 200 acres which defendants W. L. McGaughey and A. A. McGaughey claimed to be exempt as their homestead. On the contrary, W. L. McGaughey told Littlefield, while he was present at the former's home in Hood county, that said land was no part of the 200 acres which he and his wife claimed to be exempt as homestead. There is no evidence that defendant A. A. McGaughey knew, prior to the execution and delivery of the said deed of trust in suit, of any of the written or verbal declarations made by her husband to Littlefield to the effect that the property that he proposed to embrace in said deed of trust was no part of the 200 acres which they claimed to be exempt as homestead.

"On January 15, 1904, and while said indebtedness due Silliman was still outstanding and unpaid, defendants W. L. and John D. McGaughey made, executed, and delivered to plaintiff their joint and several promissory note for the principal sum of \$1,918.20, as alleged in plaintiff's petition, and there is now due and unpaid on said note, including attorney's fees, the sum of \$2,333.84. On said date plaintiff advanced to defendants the money represented by said note, and agreed to extend the time of payment of the first note mentioned above as said defendants desired, to June 25, 1903. As consideration for this loan and extension, defendants W. L. and A. A. McGaughey, on same date, made, executed, and delivered to George W. Littlefield, trustee, their certain deed of trust as alleged in plaintiff's petition. In this deed of trust said defendants and each of them recite that neither the land therein described, nor any part thereof, is or has ever been or formed their homestead or any part thereof. The defendant A. A. McGaughey testified that she did not read said deed of trust before signing same, and that she did not know at said time that it contained said recital. But as there is no basis in the pleadings for the admission of this evidence, or evidence tending to show that plaintiff knew at or prior to the acceptance of said trust deed of her failure to read the instrument, said evidence has not been considered by me.

"Neither Littlefield nor any other officer or agent of plaintiff ever examined the records of Hood county prior to advancing said second loan, and granting the extension on said first note, to defendants, and no such officer or agent had actual knowl-

edge either of the existence of said homestead designation, or of such deed of trust to Silliman. Said second loan of money and said extension of the time of payment of said first note were granted by plaintiff to defendants on the faith and full belief by plaintiff's officers and agents in the truth of defendants' (W. L. and A. A. McGaughey's) representations that they claimed no part of the land embraced in the deed of trust in suit as their exempt homestead, and would not have been granted by plaintiff, but for the belief induced by said representations. The homestead designation made by defendants W. L. and A. A. McGaughey in the year 1889 was made for the sole purpose of obtaining the said loan on said 120-acre tract that they did obtain in said year, and said loan was by them fully paid off and discharged prior to the year 1895. The recital as to homestead made in the trust deed to Silliman was made for the sole purpose of obtaining the loan from said land mortgage bank, and said indebtedness was outstanding and unpaid at the time of the execution of the trust deed in suit.

"Conclusions of Law.

"(1) Plaintiff is entitled to recover of defendants W. L. and John D. McGaughey judgment for the sum of \$5,138.38, with interest thereon from date at the rate of 10 per cent. per annum.

"(2) When the head of a family is residing on a tract of more than 200 acres of rural land, and subjecting the whole of such tract to uses which impress it with the homestead character, he has, as a general rule, the right to determine for himself what particular 200 acres of such tract shall be exempt from mortgage or forced sale as his homestead. The limitations on this rule are: (1) This right of designating the exempt 200 acres cannot be so exercised by such head of a family as to exclude from the exemption his mansion house and the appurtenant lands and improvements actually and directly used in connection therewith by himself and family, not exceeding 200 acres, for the purpose of making same their home; and (2) such head of the family must exercise said right in good faith and so as to substantially secure to himself and family the benefit which the exemption law was intended to give them—he cannot use said right of designation for the purpose of a cloak to enable him to evade the law prohibiting the mortgage of his homestead.

"During the negotiations which led up to the loan in suit, and at the date of said loan, defendant W. L. McGaughey and wife were actually residing on and using as their homestead much more than 200 acres of rural land. They in good faith, and with no purpose of evading the homestead law, designated a certain part of said land as no part of their homestead exemption, and mortgaged

said part to plaintiff, who, for a valuable consideration, and on the faith of their representations, accepted said mortgage and made the advance of money and extension of credit called for by its terms. The land described in the mortgage did not in fact embrace the mansion house of said defendant, or any of the contiguous land or improvements actually and directly used by them for the purposes of a home. It was no more their homestead than any other part of said land shown on the plat; and there can be doubt of the validity of plaintiff's mortgage thereon, unless same is rendered invalid in whole or in part, either (1) by the designation of homestead executed in 1889, or (2) by the fact that nearly all of the remaining land of said defendants was under mortgage at the date of the execution of the deed of trust to plaintiff.

"It is earnestly insisted by counsel for defendants in argument that the designation of homestead made by defendants W. L. and A. A. McGaughey in 1889 was erroneously admitted in evidence, and should not be considered for any purpose. They say that same was made and placed of record in an entirely independent transaction long before the execution of the deed of trust in suit, and that it is of no legal effect, because not made out and acknowledged as the statute requires. If I could bring myself to agree with this argument of defendants, I would have no difficulty in arriving at the conclusion that the deed of trust in suit is valid as to all of the land attempted to be embraced in it. But I cannot agree to the soundness of the argument. Whatever may be the formal defects of the designation in question, it certainly amounts to an unequivocal declaration by both defendants W. L. and A. A. McGaughey that, in the year 1889, they claimed the 200 acres therein described as their exempt homestead. The fact that this declaration was made at a time when none of their land was incumbered, and when they were entirely out of debt, affords strong presumptive evidence that it was made in good faith and without intent to evade the homestead law. The further fact that their use and occupation of the designated homestead, and of the entire premises shown on the plat, remained unchanged in all relevant particulars from the time of the execution of said designation until the date of the execution of the deed of trust in suit, and the fact that they never in any manner attempted to change said designation or to substitute same with a new one, lead me to the conclusion that the 200 acres designated as their homestead in 1889 remained their homestead at the date of the execution of the deed of trust in suit. It is true that they, in the meantime, had mortgaged part of this same 200 acres, and represented, in order to procure a loan, that it was no part of their homestead. But I am unable to see

that this action should be regarded as in any degree more effective to change the boundaries of their actual homestead, previously designated, than would be their declarations to Littlefield, made in the deed of trust to him, to the effect that no part of the land described in the deed of trust to him was homestead.

"I further cannot agree to the proposition that, as a matter of law, the head of a family cannot designate mortgaged property as his homestead so long as he has unincumbered land that might be so designated.

"My conclusion is that plaintiff is entitled to a foreclosure of the lien of its deed of trust on all of the land therein described, except such part thereof as is also described in the designation of homestead executed by defendants W. L. and A. A. McGaughey in 1889. As to this latter land, I conclude that plaintiff's alleged lien is void, and that a foreclosure should be denied."

Walton & Walton, D. W. Doom, and D. H. Doom, for appellant. Jas. H. Robertson, for appellee.

EIDSON, J. (after stating the facts). The findings of fact of the court below are supported by the evidence contained in the record, and its conclusions of law, in view of such findings of fact, are correct, and we adopt such findings of fact and conclusions of law. We do not construe the holding of the court below, that the land described in the designation of homestead, made by W. L. McGaughey and appellant in 1889, was the homestead of appellant and her husband at the date of the execution of the deed of trust sued on in this case, as an adjudication that said designation was binding upon appellant and her husband as a statutory designation of their homestead at the date of the execution of said deed of trust; but we regard such holding as the judgment of the court below, based upon and authorized by the act of her husband and appellant designating said land as their homestead in 1889, and their use and enjoyment of same at the time as their homestead, and their acts and declarations subsequent thereto and up to the date of the execution of the deed of trust involved in this suit, consistent with, and tending to show, a continuation of the use and enjoyment of said land as their homestead, as shown by the evidence adduced upon the trial. The evidence in the record does not show a designation of a homestead by W. L. McGaughey and appellant at the time of executing the deed of trust to Silliman. That deed of trust simply recites: "The land herein conveyed aggregates 470 acres, save and except about 40 acres reserved to make the full complement of 200 acres homestead." This recital, not attempting to in any manner describe the 200-acre homestead, nor even locate the 40 acres thereof stated to be included in the land conveyed by the deed of trust, evidently was given little thought, and deemed of no

material importance, and should not be permitted to affect a designation evidently deliberately made; as the land intended to be made the homestead by the designation of 1889 is properly described, and the instrument designating same is signed and sworn to by both husband and wife; and especially in view of the acts and declarations of the husband testified to by appellee, tending to show that the land embraced in the deed of trust sued upon was not his homestead. In our opinion, the testimony was sufficient to warrant the court below in holding that the husband, W. L. McGaughey, had, in good faith, impressed with the homestead character the land described in the designation of 1889. This he could do without the knowledge of the wife. *Brin v. Anderson* (Tex. Civ. App.) 60 S. W. 778; *Evans v. Daniel*, Id. 1012; *Holliman v. Smith*, 89 Tex. 362; *Freeman v. Hamblin*, 1 Tex. Civ. App. 163, 21 S. W. 1019.

What is said above disposes of appellant's first, fourth, and fifth assignments of error.

Appellant's second, third, and sixth assignments of error contend that the court below erred in holding that W. L. McGaughey had the right to designate his homestead on mortgaged land, notwithstanding he owned at the time 200 acres of land unincumbered. The law authorizes a homestead to be designated upon mortgaged land. *Wheatley v. Griffin*, 60 Tex. 211; *Swearingen v. Bassett*, 65 Tex. 273; *Thompson on Homesteads*, § 170. The question as to whether W. L. McGaughey designated his homestead upon mortgaged land in good faith was one of fact for the determination of the court below, and its finding the same in the affirmative is supported by the evidence. The evidence shows that the 470 acres embraced in the deed of trust to Silliman, which included the 200-acre homestead, as designated in 1889, were worth from \$30 to \$45 per acre. Hence, 270 acres at this valuation would be worth from three to six times the amount of the debt.

We overrule appellant's seventh assignment of error. The finding of fact complained of in this assignment of error is amply supported by the evidence contained in the record. It appears from the evidence that the house in which defendants resided at and prior to the execution of the deed of trust sued upon was on a separate tract of land from the 630 acres made up of the several tracts. The tract on which the house and necessary outbuildings were located adjoined the 151-acre tract on the west, and this tract only touched the tract conveyed by the deed of trust at its southwest corner. When the loan was applied for, defendants W. L. McGaughey and John D. McGaughey wrote to plaintiff that the land offered as security was not a part of their homestead; that they owned about 600 acres of land in excess of this, on which their homestead was located. They furnished an abstract of title, in which it

was certified that there was no homestead claim upon the 160 acres offered as security. George W. Littlefield testified that W. L. McGaughey told him that the land offered was no part of his homestead; that his homestead was off to the south and east of his house. This testimony we think sufficient to support the finding of the court complained of.

Appellant's eighth assignment of error is not well taken. We are of the opinion that the certified copy of the homestead designation, made in 1889 by W. L. McGaughey and appellant, and the two letters written by W. L. McGaughey and son to George W. Littlefield, were properly admitted in evidence. We think the substance of a proper acknowledgment for record is embodied in the instrument of designation itself, which is sufficient to admit same to record. The husband having the right to designate the homestead, it was not necessary for the wife to join in the instrument designating same, nor to acknowledge the same. *Sayles' Rev. Civ. St.* 1897, arts. 2403-2405; *Brin v. Anderson* (Tex. Civ. App.) 60 S. W. 780; *Brownson v. Scanlan*, 59 Tex. 229; *Beaumont Pasture Co. v. Smith*, 65 Tex. 457; *Thurmond v. Brownson*, 69 Tex. 597, 6 S. W. 778; *Butler v. Brown*, 77 Tex. 342, 14 S. W. 136; *Monroe v. Arledge*, 23 Tex. 473. However, it was proven on the trial by the testimony of defendants W. L. and A. A. McGaughey that they executed the instrument which, in view of the pleadings and the fact that notice had been given them to produce the original, would authorize the admission of the copy. The two letters of W. L. McGaughey and son were admissible in evidence as admissions of W. L. McGaughey tending to show the particular land designated by him as his homestead out of the larger tract; he having this authority.

We overrule appellant's ninth assignment of error for the reasons already stated, and the further reason that, if it be true that appellant signed the deed of trust sued on without knowing that it contained the recital that the land conveyed was not the homestead of herself and husband, she cannot avail herself of such fact in this suit, because she has not alleged mutual mistake or fraud in the execution or procurement of the execution of said deed of trust. *Mortgage Co. v. Scripture* (Tex. Civ. App.) 40 S. W. 210; *Moerlein v. Investment Co.*, 9 Tex. Civ. App. 415, 29 S. W. 162, 948.

Appellant's tenth assignment of error contends that the court erred in refusing to consider the testimony of A. A. McGaughey, to the effect that, at the time she signed the deed of trust to the plaintiff, she had not read, or had read to her, said instrument, and that she did not know that it contained a clause stating that no part of said land had ever been, or was not now, any part of her homestead, or she would not have signed the same. As already indicated, we are of opinion

that the court below was justified in refusing to consider said testimony, upon the ground that there was no basis for the admission of the same in appellant's pleadings; and we are of opinion that the court was also warranted by the evidence in finding as a fact that plaintiff did not know at or prior to the acceptance of the trust deed that appellant did not read the instrument, or did not know of its contents. In order to avoid the effect of the instrument, appellant would be required to plead and prove mutual mistake in its execution, or fraud in its procurement; and knowledge of such facts upon the part of plaintiff would also be required to be shown.

What has already been said disposes of appellant's eleventh assignment of error.

Appellee, by a cross-assignment of error, contends that the court below erred in excepting from the operation of the lien of the deed of trust sued on the 50 acres on the south end of the 160-acre tract conveyed by said deed of trust, and in refusing to give judgment for plaintiff foreclosing the lien upon the entire tract. We are not prepared to say that the court below was without evidence to support its finding that this 50-acre tract on the south end of the 160-acre tract was a part of appellant's homestead at the date of the execution of the deed of trust, and at that time being occupied, used, and enjoyed by her and her husband as a part of their homestead. If at the time the deed of trust was executed this tract was in the actual possession of appellant and her husband, and then being used as a part of their homestead, designated previously to that time out of a larger tract, the recital in the deed of trust that it was not so used would not estop appellant from claiming same as a part of the homestead. *Land & Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12; *B. & L. Ass'n v. Guillemet*, 15 Tex. Civ. App. 650, 40 S. W. 225; *Freeman v. Hamblin*, supra. We think the fact that W. L. McGaughey and appellant in 1889 made a designation of their homestead, which includes the 50 acres above mentioned, and placed same upon record, and the fact that since that time, and up to the date of the execution of the deed of trust sued upon, they had occupied, used, and enjoyed said 50 acres in a manner consistent with its being a part of their homestead; and the fact that said 50 acres adjoins the residence and outbuildings occupied and used by appellant and her husband at the date of the execution of said deed of trust, constitute evidence supporting the idea that, at the date of the execution of said deed of trust, appellant and her husband were in the actual possession of, and using and enjoying, said 50 acres as a part of their homestead. Hence, we overrule appellee's cross-assignment of error.

Finding no reversible error in the record, the judgment of the court below is affirmed.

JONES v. WRIGHT.*

(Court of Civil Appeals of Texas. Jan. 10, 1906.
Rehearing Denied Feb. 7, 1906.)

1. APPEAL—EVIDENCE—PREJUDICE.

Where all the testimony which could be produced to prove defendant's third ground on which her application for a change of venue was based was admitted to establish the second ground of such application, defendant was not prejudiced by the court sustaining plaintiff's exceptions to such third ground.

2. VENUE—CHANGE—BURDEN OF PROOF.

Where defendant applied for a change of venue, the burden of proof was on her to show the existence of at least one of the grounds on which such change was sought.

3. JURY—QUALIFICATION OF JURORS—MEMBERSHIP IN ORGANIZATIONS.

Where, in trespass to try title, jurors were otherwise qualified, the fact that they were members of an organization known as "Actual Settlers" did not disqualify them.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 433.]

4. TRIAL—MISCONDUCT OF COUNSEL—INSTRUCTIONS.

Where counsel makes an improper statement in his argument, and the court sustains an objection thereto, such misconduct will not constitute error, in the absence of a request for a special instruction that the statement is not proper for the jury's consideration.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 312-316.]

5. TRESPASS TO TRY TITLE—SCHOOL LAND—ACTUAL SETTLEMENT.

Where, in trespass to try title to school lands, defendant claimed under a prior sale from the state to her as an actual settler, which sale plaintiff claimed was invalid because defendant was not a bona fide settler, evidence concerning the inhabitability of the only house located on what defendant claimed was her home section, and tending to show that during the time she claimed to be a bona fide resident on the land she resided with her father at another place, was admissible on the issue of the good faith of defendant's settlement.

6. TRIAL—ORDER OF PROOF—DISCRETION.

It was a proper exercise of the court's discretion to permit such evidence to be introduced after defendant had closed her case.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 159, 160.]

7. PUBLIC LANDS—SCHOOL LANDS—ABANDONMENT—DURESS.

Under Acts 27th Leg. p. 294, § 3, providing that when an actual settler on public land is compelled to temporarily yield his possession from a well-grounded fear of death or bodily injury, such absence shall not work a forfeiture provided by law for nonoccupancy, where there was evidence in trespass to try title that plaintiff abandoned the land under a well-grounded fear of death or serious bodily injury, an instruction defining temporary abandonment to mean such abandonment as continued no longer than the facts justifying the abandonment in the first instance existed was proper.

8. SAME—ACTUAL SETTLEMENT—INSTRUCTIONS.

In trespass to try title to certain school lands, an instruction that in determining whether defendant was an actual settler on the survey designated as her home section, the jury should look to all the facts and circumstances in evidence concerning her acts and conduct in relation to such settlement, if any, for a reasonable time before and after the date of her application to purchase additional lands, was proper.

*Writ of error denied by Supreme Court March 1, 1906.

9. SAME—ADDITIONAL LANDS.

Where defendant was not an actual settler on a survey designated as her home section on an application to purchase additional land, the award of such additional land to her was ineffective.

10. SAME—PRESUMPTIONS—INSTRUCTIONS.

Where, in trespass to try title to certain school lands, plaintiff claimed that a prior award of the land to defendant was void because she was not an actual settler on her home section, it was not error for the court to refuse to charge that the act of the Commissioner of the General Land Office in awarding the land to defendant was prima facie evidence that she complied with all the law in purchasing the lands and was, at the date of her application to purchase, an actual settler on her home section.

Appeal from District Court, Schleicher County; J. W. Timmins, Judge.

Action by A. T. Wright against Lizzie Jones. From a judgment for plaintiff, defendant appeals. Affirmed.

Hill & Lee, Brightman & Upton, and E. Cartledge, for appellant. Wright & Wynn, Brown & Silliman, and Rector & Brown, for appellee.

NEILL, J. This is the second appeal from a judgment in favor of appellee. On the first, the judgment was affirmed by this court (31 S. W. 569), and, on error, reversed by the Supreme Court (84 S. W. 1053). As the nature of the case is fully stated in the opinions on the other appeal, we will only repeat so much of such statement as, in connection with our conclusions of fact, may be necessary to an understanding of the issues involved upon the trial which culminated in the judgment from which this appeal is prosecuted. The appellee brought this suit in the ordinary form of an action of trespass to try title, against appellant to recover sections 60, 61, 82, west half of 59, and east half of 71, in Schleicher county. The appellant, defendant below, answered by pleading not guilty. The judgment appealed from was upon a verdict determinative of the issues of fact submitted by the court to the jury.

Conclusions of Fact.

It is undisputed that the land in controversy, prior to March 28, 1891, belonged to the public free school fund of the state of Texas, and had been classified as "dry grazing lands" and appraised at \$1 per acre; that on April 26, 1902, all the unsold school lands situated in Schleicher county had been revalued and appraised at \$2 per acre, and the county clerk notified to make the change upon the records of his office accordingly; that on March 28, 1901, the appellant made application to purchase the west half of section 59, accompanied with her affidavits and obligations therefor, which were in due form of law, and filed them in the General Land Office on March 30, 1901, and the Commissioner of the General Land Office, on April 25, 1901, on said application, awarded said half

section to her; that on March 30, 1901, appellant likewise filed in the General Land Office her applications, affidavits, and obligations, in due form of law, to purchase sections Nos. 61, 82, 90 and the west half of 71 as additional lands to her home or base section, the west half of 59, and, on April 25, 1901, the Commissioner of the General Land Office, on said applications, awarded said lands to her. She also proved by a certificate from the commissioner that her purchase of said lands appeared in his office to be in good standing. In support of his claim to the lands in controversy, appellee introduced in evidence a certified copy from the General Land Office of his application to purchase section 61 as an actual settler thereon, together with his affidavit and obligation therefor, at \$2 per acre, which were all in due form of law; certified copies from the General Land Office of his four separate applications and obligations to purchase sections 60, 82, west half of 59 and east half of 71 as additional land to his home section No. 61; the same being the lands in controversy, which additional lands were applied for at \$2 per acre. Each of such applications, affidavits, and obligations was in due form of law; each of appellee's applications above referred to was, on May 12, 1902, by him filed with the county clerk of Schleicher county, and by him duly recorded; the necessary fees being paid to the clerk. At the same time, appellee paid the clerk one-fortieth of the purchase price for said lands in cash. All of said applications were filed in the General Land Office on May 16, 1902, and each was by the commissioner rejected on May 31, 1902. It was also shown that the State Treasurer, on May 19, 1902, received the sum of \$128 as first payment to the credit of appellee on his applications to purchase the lands in controversy, which money was returned to the clerk on June 19, 1902.

The controverted issues of fact were: (1) Was appellee, on the 12th day of May, 1902, an actual settler in good faith on section No. 61 of the land in controversy for the purpose of making the same his home, and continue to reside thereon until some time in July, 1902? (2) If so, was his abandonment of said land in July, 1902 (the abandonment being undisputed) temporary and caused by a well-grounded fear of death or serious bodily injury? (3) Was the appellant, Lizzie Jones, on March 28, 1901, an actual settler, in good faith for a home, on the west half of section 59 of the land in controversy? These issues of fact were submitted by the court to the jury, and it found the first two in the affirmative and the third in the negative; and, from reading and considering the testimony, we have concluded that the evidence is reasonably sufficient to support the finding. In our conclusions of law we will state the evidence which tends to support the findings of the jury.

Conclusions of Law.

As the second ground of appellant's application for a change of venue was comprehensive enough to include the third, being such that evidence which would support the one would necessarily sustain the other, and as all the testimony which could be produced to prove the third was admitted to establish the second, appellant could not have been prejudiced by the court's sustaining appellee's exceptions to appellant's third ground of her application for a change of venue. The testimony upon the application for change of venue was such as to warrant the trial court in finding that none of the grounds in the application was proven. The burden of proof was on the appellant to show the existence of at least one of the grounds upon which the change of venue was sought (*G., H. & S. A. Ry. v. Bernard* [Tex. Civ. App.] 57 S. W. 686; *G., H. & S. A. Ry. Co. v. Miller*, *Id.* 702), and, as the evidence does not, as a matter of law, show the existence of any one of the alleged grounds, but strongly tends to show the nonexistence of all, we are not warranted in disturbing the ruling of the court upon the application (*G., H. & S. A. Ry. v. Nicholson* [Tex. Civ. App.] 57 S. W. 694).

The court did not err in refusing to sustain appellant's challenge to anyone of the five jurors referred to in assignments from 9 to 18 inclusive. Each of the jurors, being otherwise qualified, swore before he was impaneled that he had no bias or prejudice against or in favor of either party, and that he had no such opinion as would influence him in his verdict. In view of this, that he was a member of the organization known as the "Actual Settlers" did not disqualify him as a juror. This is a generation of organizations, embracing all kinds of men, women, and children from those who can twang a jew's-harp to those who think they can play the harps of angels. To find a man fit to serve on a jury who does not belong to some organization or another, a sheriff would have to supplement the light of the noonday's sun with a stronger lantern than Diogenes carried in his search for an honest man.

The fourteenth, fifteenth, sixteenth, and thirty-ninth assignments complain of certain remarks made by counsel for appellee. While it may be that all the remarks were improper, and those covered by the fifteenth and sixteenth assignments certainly were, we are not prepared to say, in view of the evidence, that they furnish sufficient reason for a reversal of the judgment. *McLane v. Paschal*, 74 Tex. 20, 11 S. W. 837; *Hickey v. Behrens*, 75 Tex. 488, 12 S. W. 679; *Missouri Pac. Ry. v. White*, 80 Tex. 209, 15 S. W. 808; *Belknap v. Groover* (Tex. Civ. App.) 56 S. W. 252. Besides, the court sustained appellant's exceptions to the remarks embraced in the first three assignments, orally instructing the jury to disregard them, and no written

charge was requested by her counsel at any time during the trial, instructing the jury to disregard any of them. The rule seems to be that where counsel makes an improper statement in his argument, and the court sustains an objection thereto, there is no ground for reversal in the absence of a request for a special instruction that such statement was not proper for the consideration of the jury. *Bonner v. Glenn*, 79 Tex. 534, 15 S. W. 572; *I. & G. N. Ry. v. Irvine*, 64 Tex. 535; *G., C. & S. F. Ry. Co. v. Johnson*, 83 Tex. 632, 19 S. W. 151; *Hogan v. Railway Co.*, 88 Tex. 685, 32 S. W. 1035.

The fourth assignment complains of the court's admitting in evidence, over appellant's objection that it was immaterial, irrelevant, and too remote, the following testimony of appellee: "I was at the little house on the west half of section 59 of the land in controversy in July, 1901. The house had no chimney or stove, and no place for exit of a stovepipe. The grass grew right up to the door of the little house and all around the house. I looked into the house through the window; it contained only a bedstead, on which were a mattress and bedspread. There was no barrel for water and no water there. There was no woodpile at the little house. I did not see any ashes where any fire had been built." The fifth assignment complains of the court's admitting in evidence, over the same objections, the following testimony of appellee: "The defendant Lizzie Jones, prior to March 28, 1901, lived with her father at Christoval." And the sixth and eighth complain of the court's admitting in evidence, over the same objections, the following testimony of the witness W. H. Williams: "I lived near Christoval, about six miles north of Christoval, during the year 1901. I am acquainted with defendant; have known her for a great many years. I was a pretty regular attendant at Sunday school at Christoval during the year 1901, up till I moved from Christoval, which was some time in the fall of 1901. About every time I was at Sunday school, I saw defendant there. She was our secretary. I would see her coming to Sunday school from towards her father's house, about one mile from Christoval, and would see her go back in the same direction. I had to pass her father's house going to Christoval from where I lived, and frequently saw her at her father's house. The defendant lived with her father, W. G. Jones, about one mile north of Christoval all during the year 1901. I was at the little house on the west half of section 59 in controversy, testified about by plaintiff, in July, 1901. The house had no chimney or stove, and there was no flue for a stove and no place in the house for the exit of a stovepipe. The grass grew right up to the door of and all around the little house. I looked in through the window. It contained only a bedstead on which were a mattress and bedspread. There was no barrel for water and no water. There was no

woodpile at said little house. I did not see any ashes where a fire had been built." In addition to the objections made to all the testimony covered by these assignments, it was urged as an objection that "plaintiff, having rested, had no right at this time [when defendant had closed her evidence] to reopen the case." Proof that the prior award or sale of the land by the Commissioner to appellant was void, was absolutely essential to appellee's recovery of the land in controversy. The validity of the sale to her primarily depended upon whether she was, on March 28, 1901, the time she filed upon the land and applied for its purchase, an actual settler thereon, or, in other words, whether, at that time, she desired to purchase the land for a home,* and had in good faith settled thereon. For the land was subject to sale to "actual settlers only," and it was necessary for her application to purchase to show that she desired to purchase the land for a home, and had in good faith settled thereon. If she was not an actual settler on the land, and did not desire to purchase it as a home, the award and sale to her by the commissioner was unauthorized by law. And it was also one of the essentials to her obtaining patent from the state that she should reside upon the land for three years.

We think, therefore, that all the evidence complained of in these assignments tended to show that appellant was not an actual settler upon the land, and did not desire to purchase it as a home at the time she filed her application to purchase and when it was awarded to her. Especially do we think so, in the absence of any proof, save her bare affidavit (if that be evidence to go before the jury upon the issue of actual settlement), that she was ever actually on the land at all. 'Tis true, a part of the evidence is purely circumstantial, but is very cogent. If there was ever any other building or structure upon the land, save the "little house" referred to in the testimony complained of, in which a man or woman could live, it cannot be seen in the light of the record before us. If she ever lived a day or night in that "little house," the evidence wholly fails to disclose it. It was remote from settlements; and food, fire, and water would have been necessary to an actual settler there. The testimony complained of shows that within four months of the time appellant claims to have been an actual settler upon the land there was no evidence that the "little house" had been actually occupied by any one as a home. As it is the only house or structure, shown by the evidence, on the west half of section 59 (claimed by appellant as her home section) susceptible of actual occupancy as a home, the jury, it seems to us, was authorized in finding, on the evidence complained of, that she was never an actual settler on the land, in the absence of any testimony from her upon the trial that she ever occupied it at all. The objection to a part of Williams' testi-

mony, that after plaintiff had rested and defendant had introduced her testimony plaintiff had no right to reopen his case, cannot be sustained. As to whether such testimony should be admitted at that stage of the trial was a matter within the sound discretion of the trial judge, and its exercise, unless a manifest abuse of such discretion, is not subject to review upon appeal. There was no abuse of such discretion in admitting such testimony, for it is manifest that justice was conserved by it.

The court, after instructing the jury that one of the essential requisites to plaintiff's recovery was for him to prove that in July, 1902, when he left or abandoned the land in controversy, such abandonment was temporary and was caused by a well-grounded fear of death or serious bodily injury explained "temporary abandonment" as follows: "By 'temporary abandonment,' as used in this charge, is meant such abandonment may continue as long but no longer than the facts which justified the abandonment in the first instance existed. That is, if plaintiff abandoned the land under a well-grounded fear of death or serious bodily injury, and the facts, if any, that justified said abandonment have continued since said time to the present time, such abandonment would be considered temporary, unless plaintiff has abandoned the land permanently." It is urged, in objection to the part of the charge which explains the meaning of "temporary abandonment" as used in the charge, that it is not a correct definition of temporary abandonment, and is directly upon the weight of the testimony. We do not think either objection tenable. The part of the charge complained of was directly applicable to the peculiar facts in the case; for the evidence upon the issue of abandonment was such as to warrant the conclusions that appellee was compelled to yield his possession of the land, after he had fled upon it, by a well-grounded fear of death or serious bodily injury, and that such well-grounded fear continued to exist up to the time of the trial. When an actual settler upon public school land is "compelled to temporarily yield his possession from a well-grounded fear of death or serious bodily injury, such absence shall not work the forfeiture provided by law for non-occupancy." Acts 27th Leg. p. 204, § 3. If such fear as in law justified plaintiff in temporarily yielding his possession continued since the abandonment (and this was a question of fact for the jury), he would not, while under such fear, be required to resume his possession in order to prevent a forfeiture of his rights. For, if it would have such effect, all an adverse claimant would have to do to defeat his claim would be to place him in such fear as would justify him in yielding temporarily his possession, and keep him under the influence of such fear until the expiration of the three years' time that he otherwise would have been re-

quired to actually occupy the land as his home. This, it seems to us, would be a mockery of the law, whose chief end and aim is to protect the individual in his rights.

In this connection we will say that there was no error in the court's refusal to give appellant's special charge No. 8, for the reason that it was substantially embraced by the general charge. We will also observe that what we have said in reference to the part of the charge complained of disposes of the assignment of error which complains of the court's refusal to give special charges Nos. 15, 16, and 17 requested by appellant. Nor was there any error in the part of the charge complained of in the thirty-fourth assignment; for, when it is taken in connection with the part of the charge immediately preceding it, it cannot be said to "assume that plaintiff had made a settlement on his home section." The preceding paragraph expressly tells the jury that, in order to find a verdict for plaintiff, they must believe from the evidence the following facts: "(1) That on the 12th day of May, 1902, plaintiff, A. T. Wright, was an actual settler in good faith on section No. 61, block M, G., H. & S. A. Ry. Co. land for the purpose of making the same his home, and that he continued to so reside on said land until some time in July, 1902," and then follows an enumeration of the other essential facts necessary for him to prove before he could recover. Besides, if the charge could be construed as assuming that plaintiff made a settlement on his home section, it would not be error, for the evidence is uncontroverted and conclusive that he did make such settlement.

There was no error in the court's instructing the jury, at appellee's request, as follows: "In determining whether or not the defendant, Miss Lizzie Jones, was an actual settler in good faith upon the survey designated as her home section for the purpose of making it her home, you are charged that you may look to all the facts and circumstances in evidence concerning the defendant's acts and conduct in relation to such settlement, if you find any such settlement, for a reasonable time before and after the date of her application." Nor did it err in refusing to instruct the jury, at appellant's request, as follows: "You are charged that the act of the Commissioner of the General Land Office in awarding the land in this suit to Lizzie Jones is prima facie evidence that the defendant, Lizzie Jones, complied with all the law in purchasing said lands and was at the date of her said application to purchase the same an actual settler upon her home section, and before you can find a verdict in favor of the plaintiff in this case, he must overcome such presumption by a preponderance of the testimony, and, if you believe in this case that the plaintiff has not overcome such presumption, it will then be your duty to find a verdict in favor of the defendant, and so say by your verdict."

If appellant was not an actual settler within the meaning of the law, on the survey designated as her home section, the award to her was of no force. *Lewis v. Scharbauer* (Tex. Civ. App.) 76 S. W. 225. While the burden was upon plaintiff to prove that she was not such an actual settler, such proof could be made by circumstantial evidence, and, certainly, in determining the issue the jury could look to the facts and circumstances in evidence in relation thereto. Unless a presumption is one of law, whose very nature is to exclude all proof against what it assumes to be true, the courts of this state are not, ordinarily, authorized in stating in their charges what presumption arises from a given state of facts; for to do so would be to charge upon the weight of evidence, which is prohibited by statute. *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963.

The opinion of the Supreme Court on the prior appeal shows that the principal issue of fact in this case is the sufficiency of appellant's settlement upon the land, and, if found in her favor, she is entitled to a judgment. She offered no evidence in rebuttal of appellee's testimony, which strongly tended to show that she never was an actual settler upon the land. She never even testified herself, or offered the testimony of any member of her father's family, with whom witnesses swore she lived during the entire year of 1901, to show that she had ever been on the land; but relied solely upon her ex parte affidavits to show that she was, by seeking to have the court to charge, in effect, that such affidavits made out a prima facie case in her favor upon this paramount issue.

We have considered all the assignments of error and believe what we have said demonstrates that none of them is well taken. Therefore the judgment is affirmed.

SANTA ROSA IRR. CO. et al. v. PECOS RIVER IRR. CO. et al.*

(Court of Civil Appeals of Texas. Jan. 3, 1906. Rehearing Denied Feb. 7, 1906.)

1. WATERS AND WATER COURSES—DIVERSION TO NONRIPARIAN LANDS—INJUNCTION.

One interested in the waters of a stream may enjoin the diversion of waters thereof to surveys having no riparian rights therein, if injured thereby.

2. SAME—APPROPRIATION—CONSTITUTIONAL LAW.

Gen. Laws 1888-89, p. 100, c. 88, and Gen. & Sp. Laws 1893, p. 47, c. 44, providing for appropriation, without compensation, of waters of a stream for irrigation of nonriparian lands, are not unconstitutional, so as to invalidate such an appropriation, except so far as vested rights are concerned; and so are effectual against riparian lands owned by the state at the time of the appropriation, and nonriparian lands, the owners of which have no interest in the water.

3. SAME—AFTER-ACQUIRED TITLE.

In a suit to enjoin interference with water rights, title of a plaintiff acquired after com-

mencement of the suit may be shown; it having been acquired before the filing of the amended petition by which he is made a plaintiff, so that as to him it is not an after-acquired title.

4. LANDLORD AND TENANT—LEASES—DESCRIPTION.

A lease describing the property as "314 acres out of the southern part of" a section is sufficient to convey an interest in the south half of the survey.

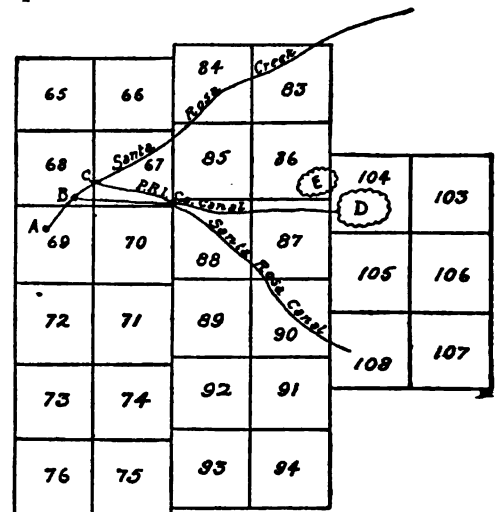
5. WATERS AND WATER COURSES—PRESCRIPTIVE RIGHT.

A stream flowed through section 68 and then through section 67. Plaintiff constructed a ditch therefrom from a point in section 68 which ran through section 67, and diverted all the water from the stream; the same being used to irrigate surveys below such sections. *Held*, that though use for 10 years might give a prescriptive right against the sections to maintain the dam, headgate, and canal thereon, it did not give a prescriptive right to all the water as against them: the canal becoming to all intents and purposes the stream, with such sections constituting upper riparian lands, to which the use would not be hostile.

Error from District Court, Pecos County; B. C. Thomas, Judge.

Action by the Pecos River Irrigation Company and others against the Santa Rosa Irrigation Company and others. Judgment for plaintiffs. Defendants bring error, plaintiffs making cross-assignments. Affirmed.

The following is the plat referred to in the opinion:



Cobbs & Hildebrand and J. F. McKensie, for plaintiffs in error. W. M. Peticolas and O. W. Williams, for defendants in error.

JAMES, C. J. The case was tried on a third amended original petition of the Pecos River Irrigation Company, joined by A. P. Wooldridge and Jasper Wooldridge as plaintiffs, which alleged in substance as follows: That in February, 1890, the Pecos River Irrigation Company, a corporation existing under the laws of Texas, filed a water appropriation under the act of 1889 (Gen. Laws 1888-89, p. 100, c. 88) appropriating the water of Santa Rosa creek for the purpose of

*Writ of error denied by Supreme Court March 8, 1906.

constructing a canal to carry water from said creek for irrigation purposes, from a headgate stated by mistake in said appropriation to be on survey or section 67, but which is situated on the adjoining survey 68 at and near the point where said creek crosses the common boundary of 67 and 68. That within 90 days after filing said appropriation it constructed the canal across sections 67, 88, 87, and into section 104, as shown on the annexed map, and thereby appropriated the water of said creek. That by the use of said canal lands were cultivated on sections 86 and 104, and that such use has been maintained by plaintiffs for more than 10 years, and that such possession and use thereof has been continuous, quiet, peaceable, and adverse. That for more than 10 years the headgate and dam had backed the water up on section 68 and submerged a portion thereof. That Pecos county, where said lands are situate, is in the arid district; "that Jasper Wooldridge, as trustee, holds the legal title to the franchises and rights of way of the Pecos River Irrigation Company, in its various canals, and Jasper Wooldridge and the Pecos River Irrigation Company hold and own the title and franchises and rights of way used by the Pecos River Irrigation Company, and its various canals in so far as the same are not held and owned by Jasper Wooldridge as substitute trustee"; and alleged further that defendants have surveyed and constructed a canal to a point in section 68 above plaintiffs' headgate, and are about to divert the water of said creek into same, etc., which will take all the water and will leave none for plaintiffs. That defendants are about to build said canal from its headgate through sections 88 and 90 and to 108; that if defendants were to use said water only on sections riparian to said creek above plaintiffs' headgate, and the unconsumed waters were returned to the creek above plaintiffs' headgate, a large quantity of water would still run into plaintiffs' canal. That sections 88, 90, and 108 do not border on Santa Rosa creek, and are distant therefrom, and not within the watershed of Santa Rosa creek, and have no riparian rights therein. That the construction of defendants' canal and diversion of water thereto will work irreparable injury to plaintiffs, etc. That if defendants divert the water as they propose, it will be impossible for them to return any portion of it to the creek above plaintiffs' headgate. Plaintiffs prayed for an injunction perpetually restraining the defendants from constructing a dam across said creek and from diverting the water therefrom.

Defendants in their second amended answer first set up a plea in abatement to the effect that plaintiffs' original and first amended petition alleged that A. P. Wooldridge as trustee held the franchise, rights of way, etc., of the Pecos River Irrigation Company, and by the third amended petition

Jasper Wooldridge is alleged to hold said franchises and rights of Pecos River Irrigation Company, as substitute trustee and individually, and therefore A. P. Wooldridge was not properly a party plaintiff. They further alleged that plaintiffs' third amended petition sets up a new cause in that Jasper Wooldridge is alleged to be a co-owner with Pecos River Irrigation Company, wherefore they prayed that the suit abate as to Jasper Wooldridge. Which plea in abatement was overruled by the court except as to A. P. Wooldridge, who was ordered dismissed from the case, and all costs up to the date of the filing of the third amended petition were taxed against the plaintiffs. Defendants further answered by general exception; special exception that plaintiffs are not riparian owners; special exception that defendants are upper riparian owners and have a right to irrigate all the lands adjoining Santa Rosa creek, and special exception that the acts of March, 1889, and 1893 (Gen. & Sp. Laws 1893, p. 47, c. 44) are unconstitutional. The case was tried by the court without a jury, and judgment was rendered that the temporary injunction be modified, and as modified be perpetuated. The defendants Santa Rosa Irrigation Company and J. M. McKenzie were therefore enjoined from diverting the waters of Santa Rosa creek onto sections 70, 88, 90, 108, and commanded that if they used said waters on section 68 and do not use them on section 67, to return the water to the creek above the head of Pecos River Irrigation Company's ditch, and if they also used said waters on section 67 they shall return the surplus water not used for irrigation or stock raising and domestic purposes into the ditch of the Pecos River Irrigation Company, if that be practicable. It was further ordered that A. P. Wooldridge take nothing by his suit. The defendants answered by general demurrer, five special exceptions, a general denial, and further pleaded that all of the sections through which they proposed to run their canal are riparian to said Santa Rosa creek. That they own or lease all of said sections. That the use of which they propose to put said water is reasonable, and all land that they propose to irrigate are in the arid district of Texas. That said Santa Rosa creek begins on section 69, runs through section 68, and then spreads out and forms ponds or tulle beds on adjoining sections. That section 68 borders on section 67, and that all the other sections through which they intend to run said canal are connected with said section 68 or with each other. That on the 13th of April, 1903, J. M. McKenzie went before a notary public in Pecos county and made an affidavit of his intention to construct a canal through sections 67, 68, 88, 90, 108, and take out 80 cubic feet of water per second from said Santa Rosa creek. That said headgate of said canal was established on section 68.

Under appellants' first assignment of error, which complains of the overruling of a general demurrer to the petition, we have the following propositions:

"(1) A lower riparian owner has no rights in the waters of a stream, and cannot interfere with the use of it by an upper riparian owner. (2) The acts of March 19, 1889, and March 29, 1893 are contrary to the Constitution of the state because they attempt to take from the owner property in waters of natural streams without first making compensation. (3) In order for the plaintiff to establish a prescriptive right, it is necessary to show that during the prescriptive period the servient estates were owned by persons free from legal disability. (4) A lower riparian owner cannot gain a prescriptive right to the use of waters of a stream against an upper riparian owner. (5) When an act of the Legislature is designed to constitute a complete whole, and one part would not have been enacted except in connection with the other part, if one part is unconstitutional the other is also.

The petition alleged that surveys 88, 90, and 108 did not border on Santa Rosa creek and are distant therefrom, and have no riparian rights in the stream. That these surveys from their situation are not riparian is settled by the decision in *Watkins Land Co. v. Clements*, 86 S. W. 733, 12 Tex. Ct. Rep. 716. This being so, a person or corporation interested in the water of the stream would have a right to enjoin the diversion of the water of the stream to such surveys 88, 90, and 108, if injuriously affected by such diversion. Therefore, so far as conducting the water in defendants' canal over and upon said three surveys is concerned, the allegation that all the water of the creek was thereby taken from the stream stated a case for injunction. The fact that said surveys are nonriparian with reference to this creek disposes of first and fourth of the above propositions, so far as said three surveys are concerned.

As to the second and fifth propositions, we are of opinion that the legislative acts are valid, when they may be applied without detriment to vested property rights. It has been held that where the riparian lands affected by the appropriation were at the time lands of the state, the appropriation would be effectual. *Irr. Co. v. Hudson*, 85 Tex. 590, 22 S. W. 398. So, also, must it be effectual against nonriparian surveys, where the owners of such surveys have no interest in the water. *Watkins Land Co. v. Clements*, 86 S. W. 733, 12 Tex. Ct. Rep. 716. As said, the three surveys had no riparian rights. The allegation that plaintiffs had no title to the water by prescription would seem to apply only to surveys involved that were riparian to Santa Rosa creek, and those surveys along defendants' canal which were of that character according to the petition were sur-

veys 67 and 68. The allegation as to these was as follows: "That there are no farms or cultivated lands or houses of any character upon said surveys 68, 67, 89, 90, or 108 which are to be crossed by said defendants' proposed canal, and only a very small portion of survey 68 can be irrigated from said proposed canal. That survey 67 is not owned by the defendants, and that to permit water to be diverted from Santa Rosa creek as proposed by the defendants will convey the waters to lands in no way riparian to said creek." Certainly, if plaintiffs had a right to the use of their canal as they alleged, defendants would not have a right to appropriate all the water of the creek by a canal conducting same to remote surveys, nor would defendants have the right, in order to irrigate a small part of 68, to cut the water entirely off from plaintiffs' canal. It seems to us that the general demurrer was properly overruled. Even though the lower riparian owner may not ordinarily prescribe against an upper riparian owner, there was enough in the petition, irrespective of prescription, to make it good against a general demurrer. It was alleged, however, that plaintiff Pecos River Irrigation Company had maintained its dam and headgate on said survey 68, backing the water of the creek upon said survey 68, for more than 10 years prior to July 23, 1903 (the date defendants commenced their surveys), continuously, peaceably, and adversely. That such an easement may be prescribed is well settled (*Baker v. Brown*, 55 Tex. 381; *Shepard v. Railway*, 2 Tex. Civ. App. 535, 22 S. W. 267) and the allegation was sufficient to admit proof of every fact necessary to be shown to establish the prescriptive right.

We overrule the second assignment involving a special demurrer, because the right of plaintiff corporation to the use of water was not dependent on its owning land irrigated by its canal. This seems to reach also what is claimed by the third assignment.

The fourth concerns a special demurrer, and asserts again the unconstitutionality of the acts above referred to.

The fifth assignment is that the court erred in admitting a contract between Mrs. Rosa Thomasson and A. P. Wooldridge, dated November 30, 1904, because it was error to admit evidence of a title acquired after the institution of the suit, unless such title is pleaded by amendment. The amended petition upon which the case was heard was filed April 6, 1904. Jasper Wooldridge came in by this pleading as a party plaintiff. The suit had been instituted on July 23, 1903. At the trial defendant showed a sheriff's deed dated April 12, 1904, of the Pecos River Irrigation Company's properties to C. F. Thomasson. To meet this plaintiffs introduced said contract, it being a contract made pending the suit to sell said Thomasson's interest to A. P. Wooldridge, and also intro-

duced proof showing that under said contract the Thomasson title had vested in Jasper Wooldridge. Now this contract with Mrs. Thomasson was made and Jasper Wooldridge's title thereunder accrued before the amended petition was filed; therefore it seems to us clear the Jasper Wooldridge being admitted as a party plaintiff, it was no after-acquired title to him, or any interest he represented.

The sixth assignment complains of the introduction in evidence of a judgment which was a link in Jasper Wooldridge's said title; the objection being that it evidenced an after-acquired title. What was said under the fifth is applicable here. The seventh and eighth assignments raise the same question. The ninth questions again the constitutionality of the act of 1889. We think what has been said disposes of all the assignments presented.

The testimony developed that sections 88, 90, and 108, at the time of the appropriation, were state lands, and the decree qualifies the injunction as to sections 67 and 68 so as to insure riparian rights in the same.

Appellee has several cross-assignments:

The first asserts "that the lease from White to McKenzie was insufficient to give defendants any riparian rights in section 67, because it described the property leased as '314 acres out of the southern part of section 67.' This description was sufficient to convey an interest in the south half of the survey; it being a conveyance between individuals.

The second cross-assignment is immaterial, as the result of the trial shows that defendants were not prejudiced by the matter it presents.

The third insists that the proof showed conclusively that limitations of 10 years have given plaintiffs title to all the water as against sections 67 and 68. This is not the case. The water of Santa Rosa creek was entirely diverted by plaintiffs' canal, which became to all intents and purpose the stream of that creek. The surveys 67 and 68 were originally riparian. Plaintiffs' use of the dam was to irrigate lands below surveys 67 and 68. In such user plaintiffs would occupy the same position as if they were the owners of lower riparian land using the waters of the creek. Such use would not itself be hostile to the rights of upper riparian land. *Irrigation Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078. We may concede that plaintiffs acquired the right to maintain its dam and headgate and canal on survey 68 by prescription, but it does not follow that such prescription easement affected in any way the rights of either 67 or 68 in the use of the water. The court, we think, did not err in according those surveys the right to water.

We attach to this opinion the plat which was a part of the petition.

Judgment affirmed.

STALEY v. STONE et al.*

(Court of Civil Appeals of Texas. Jan. 6, 1906.
Rehearing Denied Feb. 3, 1906.)

1. VENDOR AND PURCHASER—RESCISSON OF CONTRACT—ABANDONMENT BY VENDEE.

Where a vendor retained a lien on land sold by him, and soon after the sale the vendee apparently abandoned the land and asserted no claim thereto, and the vendor again resumed dominion and control over it and continued so to do, the jury could properly find, at the expiration of from 20 to 25 years from the abandonment of the land by the vendee and after the death of all the witnesses to the original transaction, that the vendee had consented that the vendor take the land back, and that the contract be rescinded.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 144.]

2. TRESPASS TO TRY TITLE—PRESUMPTIONS.

One claiming land under a vendee who never paid the purchase-money note, and who had abandoned the land and had not been in possession thereof, and had laid no claim thereto, was not entitled to a presumption from lapse of time that the note was barred by limitations.

3. TRESPASS TO TRY TITLE—INSTRUCTIONS—APPLICATION TO ISSUES.

In trespass to try title, where defendant specially answered, claiming title through vendees of the common source of title, and plaintiffs in reply alleged that they and those under whom they claimed had elected to cancel the contract of sale on which defendant relied, and that the vendees of such contract had abandoned the same and had never paid the purchase-money notes, a charge that if the vendees in the contract referred to surrendered the land to their vendor with the mutual understanding that the sale was canceled, plaintiffs should recover, was within the issues, and was not reversible error.

4. SAME.

In trespass to try title, where defendant specially answered setting up title under a vendee of the common source of title, and plaintiff replied alleging an abandonment of the contract of purchase by the vendee and the failure of the latter to pay the purchase-money note, a charge, supported by the evidence, that if the vendee after a certain event ceased to assert or exercise any claim or control over the land and abandoned the same, and plaintiffs rescinded the sale, leased out the land, rendered it for taxes, openly claimed and took possession thereof so as to indicate that they were claiming in repudiation of the sale, the jury should regard the sale as canceled, was proper, although the facts stated therein were not specifically pleaded.

5. SAME—INSTRUCTIONS ON EVIDENCE.

Nor was the charge on the weight of the evidence.

6. VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NOTICE.

Where it appeared from the record of a deed that the grantor had retained a lien on the land to secure part of the purchase money, a purchaser from the heirs of the grantee was charged with notice that the title remained in the grantor, or was at least bound to inquire whether or not the purchase money had been paid, and in the absence of the exercise by him of any diligence in that respect he stood in no better attitude than the original grantee and his heirs.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 508.]

7. TRESPASS TO TRY TITLE—EVIDENCE—RELEVANCY—COLLATERAL MATTERS.

In trespass to try title, testimony that witness had purchased land from the common source of title, that vendor's lien notes were re-

*Writ of error denied by Supreme Court March 8, 1906.

tained, that the same had been paid, that no release had been taken, and that plaintiffs were threatening to revoke the conveyance, related to a collateral matter, and was not admissible in support of a defense based on a purchase from heirs of the vendee of the common source of title against whom a vendor's lien had also been retained.

8. ADVERSE POSSESSION — ADMISSIBILITY OF EVIDENCE—PAYMENT OF TAXES.

In trespass to try title, tax receipts showing the payment of taxes on the land by plaintiffs were admissible in support of plaintiffs' claim that they had asserted title to the exclusion of the title under which defendant claimed.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 674, 675.]

9. SAME—FENCING OF PREMISES.

In trespass to try title, where plaintiffs claimed possession of the land and used the fencing of a witness to enable them to inclose the land in question under a claim of right to such use, testimony that witness had never agreed to permit plaintiffs to use his fence was immaterial as to the rights of defendant, and was inadmissible.

10. SAME—EXECUTION OF LEASES.

In trespass to try title, leases to the land in question, executed by plaintiffs, were admissible to show that plaintiffs were asserting ownership.

11. TRESPASS TO TRY TITLE—IMPROVEMENTS—GOOD FAITH.

One who acquires land with the hope that he may perfect title by the statute of limitations does not act in such good faith as to entitle him to reimbursement for improvements made by him.

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by Heber Stone and another, individually and as independent executors of the estate of A. M. Giddings, deceased, against W. H. Staley. From a judgment for plaintiffs, defendant appeals. Affirmed.

Sam. R. Frost and Richard Mays, for appellant. Callicutt & Cail, for appellees.

RAINEY, C. J. This suit was instituted by Heber Stone and wife, for themselves and as independent executors of the estate of Mrs. A. M. Giddings, deceased, against W. H. Staley, the appellant, to recover 82 acres of the Anderson survey in Navarro county; the original petition being in form of trespass to try title. Staley pleaded not guilty, and specially answered, claiming title through J. M. and W. F. Barnes, and setting out that said land was in 1877 sold to J. M. and W. F. Barnes by J. D. Giddings, the then owner, in consideration of \$410, of which \$150 was paid in cash and a note executed by said Barnes for \$260, and that, if said note was never paid, such a length of time has elapsed that the right to rescind has elapsed and the claim of plaintiff is a stale demand and barred in law and equity; and, in the alternative, that, if plaintiff's claim still exists, he is ready and willing to pay off and discharge said note, and tenders for such purpose the sum of \$1,100; further, that he had made improvements in good faith, and asked judgment therefor. A trial was had before a jury, and

resulted in a verdict and judgment for plaintiff, from which this appeal is prosecuted.

The evidence shows that on and prior to November, 1877, J. D. Giddings, of Brenham, Washington county, Tex., was the owner of the H. G. Anderson 1,280-acre survey of land in Navarro county. He contracted to Collum Bros. about 1,100 acres of this land, which contract was rescinded and the land returned to Giddings in 1883. On November 10, 1877, Giddings conveyed 100 acres of the Anderson survey to S. L. Chambliss, and on November 29, 1877, Giddings conveyed 82 acres of said survey to J. M. and W. F. Barnes; the consideration recited in the deed being \$410, of which \$150 was paid in cash and the balance was evidenced by a note for \$260 of same date of deed, payable to J. D. Giddings, or order, and due 12 months from date. The vendor's lien was retained in the deed until the final payment of the promissory note hereinbefore set forth. This deed contained the usual covenant of warranty, and was duly acknowledged and filed for record in Navarro county, February 2, 1878. In January, 1878, J. M. and W. F. Barnes conveyed the said 82 acres to J. B. Johnson and F. M. Beardsley. The consideration was part cash and part on time, and a lien was reserved to secure the deferred payment. This deed was recorded in February, 1878. Johnson and Beardsley took possession of the land and made some improvements thereon, and lived there until some time early in 1879, when they left for parts unknown, under suspicion of violating the criminal law. After they left, in 1879, W. F. Barnes during that year cut and hauled wood from it. After this he moved to another part of the county, and after a few years left the county and never returned, and there is no evidence that he ever afterwards asserted or claimed any control or ownership of said land. In 1878, J. M. Barnes removed from Navarro county, and there is no evidence that he ever afterwards asserted or claimed any control or ownership of the land. In June, 1878, J. D. Giddings died, leaving an independent will and naming as legatees his widow, Ann M. Giddings, and his daughter, Louise Giddings, who afterwards married Heber Stone. W. R. Bright, then living in Corsicana, acted as agent for J. D. Giddings in selling said 82 acres of land to the Barneses. He received the consideration; that is, the cash and the note. After deducting his commissions he advised Giddings that he held the balance of cash to Giddings' credit and would retain the note for collection without further charge, unless suit became necessary. W. R. Bright died in 1895.

In 1880, Heber Stone, the husband of Louise Giddings, acting for the legatees, took charge of the estate of J. D. Giddings, and in 1883 he leased to W. R. Bright for 10 years the land described as follows: "1180 acres of land lying in the county of Navarro and state aforesaid, being the unsold portion of the H.

G. Anderson 1280-acre grant." Under this lease there was to be cultivated not less than 100 acres in the year 1884, and not less than 50 acres additional each succeeding year, and provided for the building of houses, fences, etc., and the lessee was to pay to the lessor one-half the gross receipts of the place. This lease was canceled by mutual consent at the close of 1887, and another lease was made by the said widow and daughter and her husband to S. J. T. Johnson, for five years, beginning January 1, 1888, and ending December 31, 1892; the consideration being the payment of \$500 yearly. The land described in this lease was as follows: "1180 acres of land lying in the county of Navarro and state aforesaid, being the H. G. Anderson survey, less 100 acres conveyed by J. D. Giddings to S. L. Chambliss." Johnson under this lease took actual possession of the land and inclosed it. In 1885, the office of W. R. Bright was destroyed by fire, and with it a great many of his notes and papers. J. D. Giddings paid taxes in 1878 on 80½ acres. J. D. Giddings' estate paid taxes for 1879 on 80 acres; for 1880 on 80 acres; for 1881 on 80 acres; for 1882 on 1,180 acres; for 1883, 1884, and 1885 on 1,280 acres; and from this date to and including 1894, on 1,198 acres; then for the next four years, including 1898, on 1,098 acres, and since the last date on 1,190 acres. In 1901, and since, W. H. Staley has paid taxes on 100 acres of the survey. At the time of the trial J. M. Barnes and W. F. Barnes had been dead for several years. Mrs. Fannie White, daughter of J. M. Barnes, survived her father. There were two children of W. F. Barnes who survived him, Myrtle Henderson and J. M. Barnes, Jr.

W. H. Staley procured deeds conveying to him the land in controversy from these survivors of J. M. and W. F. Barnes, as follows: From Myrtle Henderson and husband, September 7, 1900; from J. M. Barnes, July 18, 1901; from Fannie White, April 5, 1904. The deeds made by Mrs. Henderson and Mrs. White purport to convey the land and also their interests therein by virtue of the vendor's lien note for \$150, executed in favor of their ancestors by Johnson and Beardsley. In 1900 and subsequently, but prior to this suit, Staley fenced the land, built a dwelling house and placed other improvements thereon. The land is now worth \$25 per acre. The discovery of oil and improvement of other lands in the vicinity has to some extent enhanced its value. The Barneses were never in actual possession of the 82 acres of land. They lived on 100 acres adjoining said 82 acres. The deed from Mrs. Fannie White, the daughter of J. M. Barnes, to appellant, recites a consideration of \$20. She testifies she never received a cent. Mrs. Myrtle Henderson, a daughter of W. F. Barnes, recites in her deed to appellant a consideration of \$40, though she testified she thought the consideration was only \$10. The consideration for the deed from J. M. Barnes,

Jr., is not shown. Appellant could not say (or would not) what he paid Barnes. The original deed from J. D. Giddings to J. M. and W. F. Barnes was in the possession of appellees at the time of the trial. The \$260 note given by the Barneses to J. D. Giddings is lost, no one living being able to account for it; all the parties to the original transaction being dead.

We conclude that the said note was never paid; that the sale of the land was either rescinded by the parties or was abandoned by the Barneses and repudiated by Giddings; that the circumstances of the purchase by appellant show him not to be a purchaser in good faith. About 1901, the Anderson survey was surveyed, when it was discovered that there was an excess of 100 acres. Mrs. Giddings died in 1902, and left her property to her daughter, Mrs. Stone.

Conclusions of Law.

Appellant's first assignment of error is: "The court erred in the third paragraph of the main charge given the jury, in that the jury are instructed as follows: 'The land was sold by J. D. Giddings to J. M. and W. F. Barnes, November 29, 1877, for \$150 cash, and a note for \$260 due one year later, with interest at 10 per cent. per annum. Plaintiffs claim that the note was never paid, and that therefore they are entitled to recover the land; that they rescinded the sale on account of nonpayment of the note, and they also claim that the vendees under Giddings failed to pay the note, turned back the land, and that the plaintiffs thereupon treated the land as their own, and that for these reasons the defendant, who claims under the heirs of Barnes, acquired no right to hold the land, and that defendant's right to pay the note and occupy the land is barred.'" The contention, as shown by the proposition under this assignment, is: "There being no allegation in the pleading of plaintiff that J. M. Barnes and W. F. Barnes had 'turned back' or relinquished the land in question to their vendor, J. D. Giddings, or to his representatives after his death, the instruction of the court to the jury advising that such issue was tendered by the plaintiff's pleadings was error, in that it was misleading, and was calculated to induce the jury to consider certain of the circumstances in evidence as applicable to, and sustaining such assumed issue, and to base their verdict thereon." We do not think the expression "turned back" the land in the charge complained of was such as to mislead the jury. The suit was based on the theory that the note never having been paid the title to the land remained in Giddings, and as the Barneses had abandoned the land and the Giddings having elected to cancel the trade they were the rightful owners of the same. Under the evidence the jury were authorized to presume that the land had been "turned back." The witnesses to the original transaction being all

dead and the Barneses asserting no claim to the land after 1879, and the Giddings asserting dominion and control over it, warranted the presumption that the Barneses were more than willing to consider the contract of sale as at an end, and that Giddings might take the land back. And they were authorized to go further and presume that the Barneses had consented to the rescission. But if the contention of appellant, that plaintiffs' plea was stated broader than the plea warranted, is correct, it was more burdensome for plaintiff, and appellant should not complain.

The court instructed the jury as follows: "The plaintiffs occupy the same attitude to the same as would J. D. Giddings were he alive and prosecuting the suit, and the defendant has exactly whatever title and interest Barnes' heirs could now assert under the deed from Giddings, had they not made deeds to defendant." The contention is: "The appellant, W. H. Staley, having purchased from the heirs of the Barneses and in pursuance to such purchase gone into possession more than 20 years after the maturity of the note made by the Barneses to J. D. Giddings, without any knowledge of its nonpayment, if, in fact, it had never been paid, should be considered with more favor in the adjustment of the equities set up by him in the support of his title than if the Barneses or their heirs were the defendants presenting the same defensive pleas as those averred by Staley." We think there is no error in giving this charge. Defendant held the Barnes' title, and the Barneses nor their heirs not being in possession of the land, nor making any claim thereto, no presumption arose in favor of defendant, that the note was barred by limitation.

Appellant assigns as error the following paragraph of the court's charge, to wit: "If you find that the note has not been paid, and further believe from the evidence that the Barneses and Johnson and Beardsley, to whom they made a deed, surrendered the land to Giddings, or plaintiffs, with intent and mutual understanding that the sale was canceled and full right and title in the land vested in Giddings, or plaintiffs, and that by reason of such agreement and relying thereon plaintiffs, or Mrs. Giddings, rendered the land for taxation, paid taxes, made leases of the land, and had the same occupied by their lessees, and that there was no offer to pay the note until the land had greatly increased in value (if such is a fact), then you will find for the plaintiffs, the land; and in that case, if you believe from the evidence before you that the defendant made permanent improvements on the land, enhancing its value, and that such improvements were made by the defendant in good faith with an actual and reasonable belief that he was the owner of the land, then you will find from the evidence and state in your verdict the market value of the land at this time with the im-

provements made thereon by defendant, and such value without such improvements, and find for the defendant the difference." The contention is that "there being no allegation in the pleading of plaintiffs to the effect that J. M. Barnes and W. F. Barnes, or either of them, or that Johnson and Beardsley ever, at any time, surrendered the land in question to either J. D. Giddings or to the plaintiffs, with the mutual intent or understanding that the sale made of the land by Giddings to the Barneses was canceled, and there being no evidence in support of such issue had it been made by the pleadings, the court was not authorized to submit such issue to the consideration of the jury." Plaintiffs' suit was a straight action of trespass to try title. By supplemental petition in reply to defendant's special defenses interposed, plaintiffs plead as follows: "That they and those under whom they claim have long since elected to cancel said executory contract shown by said deeds referred to in defendant's answer, and now here rescind said executory contract, and have long ago, about 1878, rescinded same; and Barnes and Barnes and Johnson and Beardsley and those who have right to claim under them abandoned their said contract, and abandoned said land in controversy, if they ever asserted any interest in the land in controversy. Plaintiffs say the \$200 note was never paid by any one, and that the title to the land is and has always been in these plaintiffs and those under whom they claim; said note being barred by the statute of limitation; have long since exercised their right to rescind said executory contract and took their lands." Under this pleading the court did not commit reversible error in telling the jury that if the Barneses and others surrendered the land to plaintiffs with mutual understanding that the sale was canceled, the plaintiffs should recover. While the plea does not, when strictly construed, convey the idea that there was a direct understanding to surrender the land, yet there was evidence that showed the parties had abandoned the trade, the effect of which was that they had surrendered the land and consented for plaintiffs to take it back. The charge, if anything, was more onerous on plaintiff than was required, in that it required the jury to believe more than was strictly necessary under the facts, and we cannot perceive that the defendant was in any way injured by it.

The appellant assigns as error the following paragraph of the court's charge, to wit: "If you believe from the evidence that the \$200 note was never paid, and that shortly after the Barneses conveyed to Johnson and Beardsley the latter abandoned the land without paying anything on their purchase, and that never after that the Barneses or their heirs asserted or exercised any claim or control over the land and abandoned the same altogether, and that within 10 years after the note became due and after such

abandonment the plaintiffs rescinded the sale to Barnes, leased out the land, rendered it for taxes and openly claimed and took possession of the land so as to reasonably indicate that they were claiming in repudiation of the sale to Barnes, you will regard the sale to Barnes by Giddings as canceled and find for plaintiffs the land." The contention that the pleadings and evidence did not authorize this charge is not well taken, in that the facts submitted were not necessary to be pleaded, and the evidence authorized it. The facts stated were very pertinent in determining the rights of the parties, and no error was committed in grouping and submitting them to the jury. Nor is the charge subject to the criticism that it is on the weight of the evidence.

There was no error in the court's refusing defendant's special charge to the effect that the record showed that Giddings had sold the land to the Barneses, and nothing to show the land had been reconveyed to Giddings, and that plaintiffs were not in actual possession of the land, and that defendant bought in good faith, then to find for defendant. This charge was not applicable to the facts. The records showed that Giddings had retained a lien on the land to secure part of the purchase money. This alone appearing from the record, it was notice to the defendant that the title was still in Giddings, or it was at least sufficient to put defendant on inquiry to ascertain whether or not the purchase money had been paid. There is not a particle of evidence to show that defendant exercised any diligence to ascertain the situation as to said recital in the deed, and, having failed to do so, he is in no better attitude than the Barneses or their heirs. *Runge v. Gilbough* (Tex. Civ. App.) 87 S. W. 832.

There was no error in excluding the testimony of G. B. Walker that he had purchased land from J. D. Giddings in which two vendor's notes were retained; that the same had been paid, but no release had been taken, and that plaintiffs in this suit were threatening to revoke the conveyance, claiming said notes had not been paid. This testimony pertained to an entirely different transaction to the one in controversy. It was a collateral issue in no way germane to the controversy, and was not a legitimate inquiry.

There was no error in the court admitting in evidence tax receipts showing the payment of taxes on the land by plaintiffs. This evidence was pertinent as a circumstance showing the claim of plaintiffs that they had asserted claim to the land to the exclusion of the Barnes title.

There was no error in excluding the testimony of A. Clark to the effect that he had never agreed to permit the plaintiffs or lessees or tenants to use his fencing for the purpose of enabling them to inclose the Anderson survey. If Clark's fencing was thus used and plaintiffs were asserting the right

to so use, and were in possession of the land, it does not affect the right of plaintiffs' possession, and Clark's objection becomes immaterial as to the rights of defendant.

There was no error in the court's admitting the contract of lease from A. M. Giddings et al. to W. R. Bright, nor that to S. J. T. Johnson. These leases tended to show that plaintiffs were asserting ownership to the land.

What we have said on first and third assignments of error disposes of the fourteenth assignment.

The complaint that the judgment is not supported by the evidence is without merit. In fact, we are of the opinion that no other proper judgment could have been rendered. All the facts and circumstances show that the Barneses had failed to pay the purchase-money note for \$260, had abandoned the land, and were asserting no claim thereto; that plaintiffs had acquired possession, and while it seems they were not in actual possession at the time defendant bought, they were asserting ownership over same. The facts further show, in our opinion, that defendant did not obtain the land in good faith, expecting to secure a perfect title, but that he acquired it hoping he might perfect title in himself by the statute of limitation. The good faith entitling defendant to pay for improvements is wanting in this case, and the jury properly denied it to him.

Finding no reversible error in this case, the judgment is affirmed.

RUTHERFORD et al. v. MOTHERSHED.*

(Court of Civil Appeals of Texas. March 17, 1906. Rehearing Denied April 14, 1906.)

1. VENDOR AND PURCHASER—REMEDIES OF ASSIGNEE OF VENDOR.

A vendor of land took notes for the purchase price and retained a lien therefor. He subsequently assigned the notes and conveyed his interest in the land to the assignee, who brought suit on the notes and to foreclose the vendor's lien. On the statute of limitations being pleaded in bar, he changed the action to one of trespass to try title. *Held*, that the suit on the notes did not affirm the contract, and deprive plaintiff of the right to assert his superior title in trespass to try title.

2. SAME.

The assignee's right to recover the land could only be defeated by the payment or tender of the balance of the purchase money represented by the unpaid notes.

3. SAME.

An assignee of notes given for the purchase price of land secured by a vendor's lien, who takes a conveyance of the vendor's interest, has the same right to recover the land on the nonpayment of the notes as the original vendor would have.

4. EXECUTION—PROPERTY SUBJECT TO EXECUTION—VENDOR'S LIEN.

The interest of a vendor in land sold by him on a credit, and a lien expressly retained to secure the payment of the purchase price, is not such interest as is subject to levy and sale under execution until there has been a rescission of the sale.

*Writ of error denied by Supreme Court.

5. APPEAL—FINDINGS—CONCLUSIVENESS.

A finding of the court supported by evidence will not be disturbed on appeal.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3979-3982.]

6. HOMESTEAD—PERSONS ENTITLED TO CLAIM HOMESTEAD—FAMILY RELATION.

A family composed of a man and his illegitimate daughter is such a family as entitles him to assert homestead rights.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 18-20.]

Appeal from District Court, Franklin County; P. A. Turner, Judge.

Action by J. P. Mothershed against J. L. Rutherford and others. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Stringer and R. T. Wilkinson, for appellants. Leach & Sheppard, R. E. Davenport, and L. L. Wood, for appellee.

TALBOT, J. On March 25, 1893, J. M. Tallafarro sold the land in controversy to W. A. Pogue for \$1,200, for which Pogue executed his 5 promissory notes in the sum of \$240 each, bearing interest at the rate of 10 per cent. per annum, and payable to the said Tallafarro, respectively, on the 1st day of January, 1894, 1895, 1896, 1897, and 1898. Tallafarro executed a deed to Pogue for the land, in which the vendor's lien was expressly retained to secure the payment of said notes. The first of said notes was paid by Pogue, and after the maturity of the others they were assigned to appellee. W. A. Pogue died intestate before the institution of this suit, and left, surviving him, appellants Mrs. Flora Pogue, his widow, Jim Pogue, Tom Pogue, and Hughie Pogue, as his only heirs. The Pogues and other appellants, Rutherford and Dutton, were in possession of said land, claiming the same, and on February 19, 1901, appellee filed this suit against them to establish his debt, evidenced by the said four notes mentioned, and to foreclose his vendor's lien. Appellants answered, pleading the statute of four-year limitation. This plea was available against all the notes, as shown by appellee's petition, except the last one falling due. Upon the coming in of this plea, appellee, on November 11, 1901, secured a conveyance from Tallafarro of all his title and interest in the land, and by an amended petition changed the action to one of trespass to try title to recover the same. To the action of trespass to try title appellants answered by plea of not guilty; that the deed from Tallafarro to W. A. Pogue, dated March 25, 1893, was made for the purpose of defrauding the creditors of the said Tallafarro; that said deed was a mere sham; that it was not intended by the said parties thereto that the title to the land described therein should pass; and that appellee had notice of the fraud and character of said deed. Appellants also pleaded the statutes of limitation of three and five years. To appellants' answer, charging that the deed from J. M. Tallafarro to W. A. Pogue was fraudulent, etc., appellee replied

that the land therein conveyed, and which is the land, or a part thereof, in controversy in this suit, was the homestead of the said Tallafarro and family when said deed was executed, and not the subject of a fraudulent conveyance. The case was tried by the court without a jury, and judgment rendered in favor of appellee for the recovery of the land, and appellants have appealed.

Appellants' proposition under the first assignment of error is as follows: "This being an executory contract, before J. M. Tallafarro could rescind and recover the land, he would have to tender back what he had received on the land; in other words, he would have to rescind in toto. This rule would apply strictly where other parties had acquired rights in the land before rescission." This contention cannot be sustained under the authorities in this state. By the terms of the transaction between Tallafarro and Pogue, the superior title to the land remained in J. M. Tallafarro until it was conveyed by him to appellee on November 11, 1901. This conveyance vested in appellee such title, and the mere bringing of the suit upon the notes and to foreclose the vendor's lien, as was originally done, did not have the effect to affirm the contract. Appellants, by their plea of limitation, which would have defeated a recovery on the notes and a foreclosure of the vendor's lien, authorized appellee to assert his superior title in an action of trespass to try title, and his right to recover the land could only be defeated by appellants paying or tendering the balance of the purchase money represented by said notes. This, they did not do, and cannot now be heard to complain that judgment for the land was rendered against them. *White v. Cole*, 87 Tex. 500, 29 S. W. 759; *Id.* (Tex. Civ. App.) 29 S. W. 1148; *Sanders v. Rawlings* (Tex. Civ. App.) 77 S. W. 41. That the assignee holding the notes and a conveyance from the vendor of the superior title has the same right to recover the land as the original vendor would have as the holder of said notes and title is affirmed by the case of *White v. Cole*, supra; and in that case it is said: "Cole, having forced her [Mrs. White] by plea of limitation to rescind the contract and resort to her superior title in a suit of trespass to try title, and having in such suit joined issue and rested his case upon a question of title without offering to perform his part of the contract, is in no position to ask that the cause be remanded, to enable him to plead equities."

Appellants' second assignment of error is as follows: "The court erred in holding that the plaintiff is entitled to recover the land in controversy, because at the time that J. M. Tallafarro attempted to convey the said land to the plaintiff all his right, title, and interest had passed to the defendants J. L. Rutherford and H. O. Dutton by the judgment, execution sale, and sheriff's deed mentioned in the court's ninth finding of fact; and further,

because at the time of such attempted conveyance said defendants had acquired the title of the heirs of W. A. Pogue in the land by an agreed judgment, and Tallafarro could not defeat the rights of the said defendants by such conveyance, the amount that the said defendants paid having gone to satisfy a debt of said Tallafarro, and the plaintiff not being a purchaser for value." This assignment is predicated upon the following facts established by the evidence: The deed from J. M. Tallafarro to W. A. Pogue expressly reserved a vendor's lien to secure the payment of the purchase money notes mentioned therein. One of said notes was paid off by W. A. Pogue, after which a creditor of Tallafarro, who had obtained a judgment against him, levied an execution on the land as the property of Tallafarro, and had it sold at sheriff's sale. Appellants Rutherford and Dutton became the purchasers of the property at said sale, and received a deed therefor from the sheriff May 1, 1894. Afterwards they brought suit against the said W. A. Pogue to recover the said land, and a compromise judgment was entered awarding and setting it apart to them. The proposition of law asserted in this assignment is that the title which remained in J. M. Tallafarro was the subject of sale under execution; that appellants Rutherford and Dutton had acquired that title by virtue of their purchase at the sheriff's sale made in 1894, and, having secured W. A. Pogue's interest in the land by compromise judgment entered in their said suit against him, Tallafarro could not defeat their title thus acquired by the subsequent conveyance made to appellee. This proposition is not sound. It has been definitely settled by decisions of this state that the interest of a vendor in land which has been sold by him on a credit, and a lien expressly retained to secure the payment of the purchase money, is not such interest as is subject to levy and sale under execution until there has been a rescission of the sale. It has been expressly so held by the Court of Civil Appeals of the Second District in the case of *Willis & Bro. v. Somerville*, 22 S. W. 781, and to the same effect is the holding of the Supreme Court in the case of *Douglass v. Blount*, 95 Tex. 360, 67 S. W. 484, 58 L. R. A. 699, in which the case of *Willis & Bro. v. Somerville*, supra, is cited with approval. These cases are directly in point, and decide the question under consideration adversely to appellants' contention.

The trial court found, and the evidence supports the findings, that the four notes executed by Pogue to Tallafarro for the land in controversy were assigned to appellee after maturity; that at the time Tallafarro sold the land to W. A. Pogue, he (Tallafarro) owed debts, and by the sale of said land and other lands he rendered himself insolvent, and remained so up to the time of the trial of this suit; that the sales of these lands were made by Tallafarro with intent to defraud his creditors, and that Pogue knew that fact

when he bought. In view of these facts and other evidence in the case, appellants contend that appellee was not entitled to recover. That, having bought the notes after maturity, he was chargeable with notice of the fraudulent purpose on the part of Tallafarro and Pogue in the sale and purchase of said land, and therefore judgment should have been rendered in their favor. This contention cannot be sustained, for the reason that, at the time of the sale of the land to Pogue, Tallafarro was the head of a family, and the property constituted his homestead. It is well settled that creditors have no interest in homestead property, and that it is not the subject of a fraudulent sale. But appellants insist that the court erred in holding that the land was the homestead of Tallafarro, because (1) the evidence fails to show such occupancy by Tallafarro as would invest said land with the homestead character; (2) because Tallafarro's family was composed solely of himself and his illegitimate daughter, and hence did not constitute such a family as entitled him to the homestead exemption under the laws of this state; (3) that, if Tallafarro ever acquired a homestead in the land, he abandoned it as such before the conveyance to Pogue.

We are of the opinion that the court did not err in either of the respects mentioned. The court's finding that the land had not been abandoned by Tallafarro, and was his homestead at the time he conveyed it to Pogue, is supported by the evidence, and, under the well-established rule of practice in this state, we would not be authorized to disturb it; and while the law will not recognize as a family entitled to the homestead exemption in this state a man and woman living together in adultery, yet it has been held that there rests on the father of illegitimate children a natural obligation to support them, and they, living with him, constitute such a family as may assert homestead rights. *Lane v. Phillips*, 69 Tex. 240, 6 S. W. 610, 5 Am. St. Rep. 41. Nor did the court err in holding that the sale of the land by Tallafarro to Pogue was real and not fictitious. The burden of proof on this issue rested upon appellants, and we are not prepared to say that sufficient evidence was adduced to authorize a conclusion different from that reached by the trial judge.

Finding no reversible error in the record, the judgment of the court below is affirmed.

BALL v. CARROLL et al.*

(Court of Civil Appeals of Texas. March 17, 1906.) On Rehearing, April 10, 1906.)

1. TRESPASS TO TRY TITLE — EVIDENCE OF TITLE — SUFFICIENCY.

A plaintiff in trespass to try title, who claims under a grantee in a deed conveying that portion of an original grant which had not been previously conveyed, must, in order to show title to the land in controversy, prove that it

*Writ of error denied by Supreme Court May 2, 1906.

was not included in the lands mentioned in the deed as having been previously disposed of.

2. TAXATION—SUIT FOR DELINQUENT TAXES—PARTIES.

In a suit under the delinquent tax act, all parties owning or claiming any interest in the property must be made parties, and be served with citation.

3. JUDGMENT—CONCLUSIVENESS—ACTION FOR TAXES.

A judgment foreclosing the state's lien in a suit under the delinquent tax act is conclusive against all persons who were parties to the suit and who were served with citation, whether they were named in the judgment or not.

4. TAXATION—DELINQUENT TAX SALE.

A suit to foreclose a delinquent tax lien was brought against a person named, or his unknown heirs, and all persons claiming any interest in the land. The foreclosure was in general terms, and there was nothing to indicate that only the title of the person named and his heirs was intended to be foreclosed. *Held*, that the judgment foreclosed the tax lien against all of the parties to the suit, and a purchaser at the tax sale must be deemed as claiming under the unknown owners, as well as under the unknown heirs of the person named.

5. SAME.

The fact that the deed from the sheriff at the tax sale only purported to convey the interest of the person named and his unknown heirs did not affect the right of the purchaser to claim under the unknown owners.

6. TRESPASS TO TRY TITLE—EVIDENCE OF TITLE—SUFFICIENCY.

In trespass to try title, the evidence showed that the heirs of a deceased owner conveyed all of the land embraced in the original grant not previously conveyed. The grantee in such deed conveyed to plaintiff by metes and bounds a tract of a specified number of acres out of the original grant. There was no evidence showing that the land in controversy was a part of the tract so conveyed. *Held*, that plaintiff failed to show title sufficient to warrant a judgment in his favor.

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Action by P. Dec Bell against J. L. Carroll and another. From a judgment for defendants, plaintiff appeals. Affirmed.

P. N. Springer, for appellant. Thos. B. Greenwood, for appellees.

PLEASANTS, J. This is an action of trespass to try title to a tract of 139 acres of land in Anderson county, brought by appellant against the appellees, J. L. Carroll and Alen Brown. The petition, in addition to the usual allegations in trespass to try title, sets up title in plaintiff under the statute of limitations of 10 years, and further alleges, in substance, that the defendants are asserting claim to, and have entered into possession of, the land by virtue of a void sheriff's sale and deed made under a void judgment for taxes rendered by the district court of Anderson county in a suit brought by the state of Texas against J. W. Zacharie et al. The grounds upon which said judgment and sale are attacked are thus summarized in appellant's brief: "(1) Because said sale was based upon a suit and judgment against unknown heirs, which was not authorized by

law. (2) Because said sale was based upon a judgment rendered in a suit against J. W. Zacharie and C. E. Zacharie, and they were both dead before said suit was ever instituted. (3) Because said sale was based upon and made under a judgment rendered for the taxes alleged to be delinquent and due upon said land for the year 1894, which was not authorized by law. (4) Because said sale was based upon and made under a judgment rendered against two different sets of defendants, both of which sets could not have had any interest in the subject-matter of said suit at one and the same time, and the same was therefore void for uncertainty. (5) Because said judgment under which said sale was made was rendered upon a petition that proceeded against, and a citation that cited in the alternative as defendants, the said J. W. Zacharie and C. E. Zacharie, or the unknown heirs of said parties, and said judgment was therefore void for uncertainty. (6) Because said judgment under which said sale was made was rendered by default against nonresident defendants on a citation by publication, which gave no notice that the state had or sought to foreclose a lien against said land, and the court was therefore without jurisdiction to render said judgment. (7) Because said sale was made under a judgment rendered in a suit against unknown heirs, and, even if such suit was authorized by law, the citation on which said judgment was rendered was not published for eight consecutive weeks previous to the return day thereof, as required by law, and was therefore void. (8) Because said sale was made under a judgment rendered upon a petition and citation naming as defendants in the alternative J. W. Zacharie and C. E. Zacharie, or the unknown heirs of said parties, and said judgment was rendered against all of them jointly, and the same was therefore unauthorized by the pleadings, and void. (9) Because said judgment was rendered for, and said sale was made to pay, the aforesaid items of cost, which were illegal, and not authorized by law. Said items referred to were set out in the petition, and were as follows, to wit: J. Y. Gooch, the attorney appointed by the court to represent said defendants, cited by publication, \$50; Glideon J. Gooch, for dividing the land into lots, and making a map thereof, \$150; fee of the district clerk in said case, \$47; fee of H. M. Cook as sheriff, \$47; fee of W. T. Sadler as county attorney, \$94—total, \$388. (10) Because said sheriff executed said deed to said Carroll after said lot 43 had been sold to the state, and after the expiration of said order of sale. The prayer is for the recovery of the title and possession of the land, and for an order vacating and annulling said judgment and sheriff's deeds as a cloud upon plaintiff's title. The defendants answered by general and special exceptions, plea of not guilty, and special plea, setting up the statute of limitations of four years in bar of plaintiff's

suit to vacate the judgment described in his petition. Defendant Carroll further answered by cross-bill, claiming title to the land, and praying for its recovery against plaintiff. The trial in the court below was without a jury, resulted in a judgment that plaintiff taking nothing by his suit, and that defendant Carroll have and recover of plaintiff the title and possession of the land and all costs of suit.

The land in controversy is a part of a grant of 11 leagues, made by the states of Coahuila and Texas to Manuel Rionda. The whole of the grant was conveyed by Rionda to William Moore prior to 1840. On June 12, 1841, Moore conveyed the entire grant to J. W. Zacharie. On October 21, 1902, the heirs of Zacharie and his wife, C. E. Zacharie, conveyed a portion of the grant to J. A. Stewart. Appellant claims under Stewart, who conveyed to him 7,886 acres of the land by deed of date December 14, 1902. The deed from the heirs of J. W. and C. E. Zacharie to J. A. Stewart purports to convey portions of said Rionda grant. The whole 11-league grant is accurately described, but the only description of the portions conveyed by the deed is as follows: "This deed conveys without warranty all the lands we own as heirs at law of James W. Zacharie and his wife, Caroline E. Zacharie, and by purchase of the said grant, which is estimated to be thirty thousand (30,000) acres, remaining at the death of J. W. Zacharie, June 1, 1870, unsold, uncompromised, not donated, or lost in suit by himself or his wife; reference being hereby made to the several deeds of record on the records of deed of Anderson and Freestone counties, and to the U. S. District Court at Austin, Texas, for the number of acres sold, compromised, and lost in suit." There was no evidence showing that the land in controversy was not a part of the lands mentioned in the deed to Stewart as not included in the conveyance thereby made. The deed from Stewart to appellant conveys by metes and bounds a tract of 7,886 acres out of the Rionda grant, and there is no evidence showing that the 139 acres of land in controversy is a part of this 7,886 acres.

Appellant offered no evidence in support of his claim of title by limitation. On October 1, 1897, the state of Texas brought suit in the district court of Anderson county to recover delinquent taxes due upon a part of the Rionda grant, described in the petition as containing 24,354 acres, less a number of small tracts, which had been sold by J. W. Zacharie. The 139 acres is a part of the land upon which the tax lien was foreclosed in this suit. The suit was brought against "J. W. Zacharie and his wife, C. Zacharie, or the unknown heirs of said parties, and all other persons who may be owners of or having any interest in the hereinafter real estate, and who are unknown to the attorney for the state, and after due inquiry cannot be ascertained." Upon affidavit of the attorney for

the state, citation by publication was issued and published for eight weeks. This citation was to "J. W. Zacharie and wife, C. Zacharie, and the unknown heirs of said parties, and all persons owning or having or claiming any interest in the land." On the 16th day of May, 1898, judgment was rendered in this suit in favor of the state for the taxes sued for, and foreclosing a tax lien upon the lands described in the petition. Under an order of sale issued upon this judgment, the land in controversy was sold by the sheriff of Anderson county at public sale, and appellee Carroll became the purchaser. The only defendants mentioned in the judgment are the two Zacharies and their unknown heirs, and judgment is rendered against them for the taxes found to be due. The foreclosure is then decreed in the following terms: "It is further decreed that the plaintiff has established a valid tax lien upon the lands hereinafter described to secure said money judgment, interest, penalty, and costs, and that the same be and is hereby foreclosed." The deed from the sheriff to Carroll conveys "the right, title, and interest of J. W. and C. Zacharie or their unknown heirs," and does not, in terms, convey the interest of any and all persons claiming said land. Zacharie and his wife both died several years prior to the institution of the tax suit. The return of the sheriff on the order of sale is so written as to leave it doubtful whether the 139 acres of land was sold to Carroll or to the state. It appears, however, from evidence introduced by Carroll that he in fact bid in the land at the sale, and it was struck off to him. He did not pay the amount of his bid, and the deed to him was not executed until four months after the sale, and after the order of sale had expired and had been returned; but it was shown that he had made repeated requests of the sheriff to execute the deed, and such request was refused up to the time the deed was executed.

We think the trial court properly held, under the facts before stated, that plaintiff had failed to show title to the land, and therefore judgment was properly rendered in favor of defendants. The grantors in the deed to Stewart only undertake to convey that portion of the Rionda grant which had not been previously conveyed by their ancestors, and in order for appellant to show title to the land in controversy under this deed he must show it was not included in the lands mentioned in the deed as having been previously disposed of by the Zacharies, and which by the express terms of the deed were not conveyed to Stewart. This proof was not made nor attempted to be made. *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 604, 14 Sup. Ct. 458, 38 L. Ed. 279; *Corinne Co. v. Johnson*, 156 U. S. 575, 15 Sup. Ct. 409, 39 L. Ed. 537; *Waggoner v. Dodson* (Tex. Sup.) 73 S. W. 518. Appellant contends that this deficiency in his evidence was supplied by the showing that defendants claim under the

heirs of Zacharie as common source, and therefore he was not required to show title in said heirs, or that the land in controversy had not been conveyed by or recovered from Zacharie and wife prior to the conveyance by the heirs of their interest in the grant to Stewart. We are of opinion that the tax judgment under which defendants claim, if valid, foreclosed, and the sale made thereunder passed the title of the unknown owners of the land, as well as the title of the unknown heirs of Zacharie; and defendants, claiming under said judgment and sale, cannot be held to be claiming under a common source with plaintiff.

The proceeding in a tax suit brought under the delinquent tax act is one in rem, and the object and purpose of the act is to enable the state to condemn, seize, and sell all lands upon which taxes are due and unpaid. All parties owning or claiming any interest in the property are required to be made parties to the suit and to be served with citation, and when this has been done a judgment establishing and foreclosing the state's lien upon the property is conclusive against all persons who are parties to the suit and have been served with citation, whether they are named in the judgment or not. This judgment recites that the taxes sued for were due by the Zacharies and their heirs, and renders judgment against them therefor. Of course, no judgment could have been properly rendered against the Zacharies, the evidence showing that they were dead at the time the suit was instituted; but the validity of the judgment is not material to the question we are now considering. The foreclosure is in general terms, and there is nothing to indicate that only the title and interest of the Zacharies and their heirs was intended to be foreclosed. As before stated, we think this judgment foreclosed the tax lien against all of the parties to the suit, and the defendants who claim under said judgment are claiming under the unknown owners, as well as under the unknown heirs of the Zacharies. The claim under such unknown owners is not affected by the fact that the deed from the sheriff only purports to convey the interest of the Zacharies and their unknown heirs. *Carlton v. Miller* (Tex. Civ. App.) 21 S. W. 697; *Hendricks v. Stone*, 78 Tex. 358, 14 S. W. 570; *Rippetoe v. Dwyer*, 1 Posey, Unrep. Cas. 506; *Willis v. Smith*, 66 Tex. 43, 17 S. W. 247; *Clothing Co. v. Bisco* (Tex. Civ. App.) 40 S. W. 559.

If our conclusion that appellees' claim under this judgment does not show a claim under the heirs of Zacharie as common source is not sound, the judgment of the court below must nevertheless be affirmed, because the conveyance to appellant from Stewart, under which he claims title from the alleged common source, describes a tract of 7,888 acres of land, and it is not shown by any evidence that the 139 acres in controversy was a part of the land conveyed by the Stewart deed.

Appellant having wholly failed to show title to the land, no other judgment than one in favor of defendants could have properly been rendered, and it is therefore unnecessary for us to pass upon the assignments raising questions affecting the validity of the tax judgment and sale under which appellees claim.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

On Rehearing.

In our opinion filed in this cause on the 17th of March, 1906, we say that the citation in the tax suit in which the judgment under which appellees claim was rendered, was to "J. W. Zacharie and wife, O. Zacharie and the unknown heirs of said parties," etc.

This statement is erroneous, said citation having in fact been issued to "J. W. Zacharie and wife, O. Zacharie or the unknown heirs of said parties and all persons owning or having or claiming any interest in the land."

We have carefully considered the motion for rehearing and with the correction above made adhere to our former conclusions.

DOUGLAS v. WALKER et al.

(Court of Civil Appeals of Texas. March 2, 1906. Rehearing Denied April 5, 1906.)

1. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.** D. & Co. sued defendant D. on a claim amounting to \$1,343.46 in G. county, where D. resided, but shortly thereafter dismissed the suit, and procured their attorneys to prepare a transfer of the account to plaintiff for \$1,209.12; D. & Co. guarantying payment of the account to the amount of the consideration and interest, and agreeing to reimburse plaintiff for the cost of suit and reasonable attorney's fees in case he was compelled to sue thereon, it being also stipulated that the guaranty was performable in H. county. Plaintiff offered concessions in the way of a compromise, which being refused, he brought suit in H. county, D. & Co. being joined as guarantors. They appeared, and admitted the truth of plaintiff's allegations; their answer being prepared by plaintiff's attorney, who represented them, as well as plaintiff, at the trial. D. filed a plea of privilege, attacking the transfer as fraudulent to confer jurisdiction on the courts of H. county. Plaintiff admitted that he had no property subject to execution, was, in the main, a borrower, and that he paid the consideration for the transfer in cash at the time it was made, and stated that he either went to one of two banks specified and drew out the sum required, or sent his clerk therefor. The clerk was not called, and judgment was entered against D. and also against D. & Co. on their guaranty. *Held*, that it was error to deny a new trial for newly discovered evidence of the officials of the banks, to the effect that plaintiff had had no account in one of them for several years prior to the transaction, and that his account in the other was overdrawn at the time, and that no transaction corresponding to that testified to by him was handled by either bank on the date in question.

2. **SAME—DILIGENCE.**

It appearing that the trial occurred more than a year after the date to which the testimony was addressed, D. was not negligent in

falling to produce the bankers' testimony at the trial.

3. ASSIGNMENTS—VALIDITY—FRAUD.

A fictitious transfer of a claim to a mere nominal or colorable party, to confer jurisdiction on a court of a county other than that in which the defendant resides, the original claimants being the the real parties in interest, is insufficient for the purpose designed.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by I. W. Walker against F. M. Douglas and another. From a judgment in favor of plaintiff against both defendants, defendant Douglas appeals. Reversed.

I. M. Stancifler and S. R. Perryman, for appellant. Baker, Botts, Parker & Garwood, for appellees.

GILL, C. J. Dorrance & Co., of Houston, Tex., a firm engaged in the buying and selling of cotton, bought 179 bales from F. M. Douglas at 9¼ cents per pound on a middling basis. The cotton was shipped by Douglas from Van Alstyne, Tex., to the purchasers at Houston, and drafts made on Dorrance & Co. for the purchase price. These drafts were paid before the arrival of the cotton. Dorrance & Co. claimed that a part of the cotton classed much below the classification on which the price was fixed and paid, that the difference amounted to \$1,343.46, and this sum he demanded of Douglas. This demand was refused, whereupon Dorrance & Co. promptly brought suit against him in Grayson county, where Douglas resided. Shortly thereafter the suit was voluntarily dismissed by Dorrance & Co. Thereupon they went to their attorneys, and had a written transfer prepared, purporting to sell and transfer the account to I. W. Walker of Houston, Tex., for a consideration of \$1,209.12, guarantying the payment of the account to the extent of \$1,209.12 and interest, and agreeing to reimburse Walker for cost of suit and reasonable attorney's fees in case he had to sue. It was stipulated in the writing that the guaranty was performable in Harris county. This assignment between Walker and Dorrance & Co. was consummated on July 31, 1904. Thereupon Walker wrote Douglas that if the latter would settle he (Walker) would make some concessions in the way of compromise; otherwise he would sue at once in Harris county. Douglas refused to treat with him, and this suit was brought in Harris county, Dorrance & Co. being joined as guarantors. Dorrance & Co. appeared and answered, admitting the truth of Walker's allegations. Walker's attorneys prepared their answer, and represented them and Walker jointly at the trial. Douglas in due form interposed a plea of privilege, setting up his right to be sued in the county of his residence, and attacking the transfer to Walker as simulated, and made alone for the fraudulent purpose of conferring jurisdiction on the courts of Harris county. Evidence was heard upon that issue and upon the merits. Both issues were found

against Douglas, and judgment followed for the full sum sued for. Judgment was also rendered against Dorrance & Co. for \$1,209.12 and interest and \$200 attorney's fees. From that judgment Douglas has appealed, and here insists the judgment should be reversed because the verdict on the plea of venue is against the manifest truth of the case, and because the court erred in overruling the motion for new trial based upon that contention and upon newly discovered evidence.

We are of opinion that the assignment assailing the action of the trial court in overruling the motion for new trial is meritorious. Without entering into a detailed comment on the testimony of the plaintiff and the member of the firm of Dorrance & Co., who testified upon the issue, we may safely say it was of the most unsatisfactory character. It was attended with circumstances and abounded in statements which reflected upon its truth. In addition to this, Walker, who admitted he had no property subject to execution and was not a money lender, but, in the main, a borrower, and who also admitted that Dorrance & Co. were amply solvent, testified on cross-examination that he did not pay the money by check but in cash at the time the deal was consummated in Houston. He could give no satisfactory account of how he came by the money, but in response to persistent cross-examination he stated that he either went down to House's Bank or the First National Bank of Houston, and drew out that sum, or else sent his clerk, Womack. This clerk was not called as a witness. On motion for rehearing, defendant offered as newly discovered evidence the affidavits of officials of the First National Bank and House's Bank to the effect that Walker had not had an account with the First National Bank for several years prior to January 31, 1904; that he had an account with House's Bank on that date, but it was not only overdrawn, but no check or transaction corresponding with that described by Walker was handled by House's Bank either on the 30th or 31st of January, 1904. While this testimony may be capable of explanation, the fact remains that Walker did not undertake to meet it, and, standing alone, it is calculated to command a heavy weight against Walker's statement. We cannot say it would not probably have changed the result.

Appellees contend that appellant should have had the testimony at the trial, basing the contention upon the fact that the trial occurred in Houston, and the two banks in question were situated there. We think the effective answer to this is that the trial occurred more than a year after the date to which the testimony was addressed. To ascertain the state of the banks' books required time and an investigation by the bank officials. It is a fair inference that defendant would not have known without outside inquiry what official to summon. It is equally true that he could not foresee what Walker's

testimony would be. We think, therefore, the defendant cannot be held to have been negligent in failing to ask for process for the bank officials on the mere chance that they would contradict the plaintiff.

We can sustain none of the objections of Douglas to the charge of the court on this issue. It seems to be well settled that, if the transfer of the account is actual and for a valuable consideration, the motives which actuated the parties become immaterial. The rule is thus stated in *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552: "If the transfers of the judgment to the complainant were fictitious, the plaintiffs therein continuing to be the real parties in interest, and the complainant but a nominal or colorable party, his name being used only for the purpose of jurisdiction, then the objection to the jurisdiction of the circuit court would be well taken; but if the transfers were absolute, and the judgment creditors parted with all their interest for good consideration, then the mere fact that one of the motives of the purchase may have been to enable the purchaser to bring suit in the United States Court would not be sufficient to defeat the jurisdiction." *Bank v. Foley*, (Tex. Civ. App.) 66 S. W. 249.

The assignments assailing the part of the court's charge on the measure of liability cannot be sustained. It is not open to the objection urged. It is, however, inaccurate; a fact we mention in view of another trial.

For the reasons given, the judgment is reversed, and the cause remanded.

Reversed and remanded.

WAGGONER v. MISSOURI, K. & T. RY. CO. et al.

(Court of Civil Appeals of Texas, March 3, 1906. Rehearing Denied April 7, 1906.)

1. APPEAL—BRIEFS—SUFFICIENCY.

Where appellant's briefs in arguing an assignment of error set out a statement purporting to give the substance of the testimony of several witnesses, without any reference to the pages of the record, and there is no statement of facts in the transcript, which contains 60 pages of questions and answers, the briefs will not be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3095.]

2. TRIAL — INSTRUCTIONS — WEIGHT OF EVIDENCE.

In an action for injuries to live stock in shipment there was no error in a charge in failing to impose on the carrier a higher degree of care in carrying live stock than in carrying dead freight, since such a charge would have been on the weight of the evidence.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by W. T. Waggoner against the Missouri, Kansas & Texas Railway Company and

others. From the judgment, plaintiff appeals. Affirmed.

Hunter & Hunter, for appellant. T. S. Miller and Spoons & Thompson, for appellee.

STEPHENS, J. Appellant shipped 18 cars of cows from Electra, Tex., to National Stock Yards, Ill., over the Fort Worth & Denver City Railway and the Missouri, Kansas & Texas Railway. On account of delays, rough handling, etc., a claim for damages was made against the latter company in the sum of \$737.50, which was declared on in this suit as amounting to \$1,411; but it was reduced by the verdict and judgment appealed from to \$137.50.

The first assignment of error complains of the charge of the court on the measure of damages, and the second complains of the court's refusal to grant a new trial "because the verdict of the jury was contrary to and against the undisputed evidence" in the seven different particulars therein specified. Both assignments are submitted together, but do not raise the same question, and are followed by a single general proposition, asserting that, "the evidence being undisputed as to the amount of the damages, as stated in the assignment, the jury had no right to cut down the amount below what the undisputed evidence established." This is followed by a statement which purports to give the substance of the testimony of several witnesses, without making any reference whatever to the pages of the record. There is no statement of the facts in the transcript, and in order to properly consider the evidence bearing on the amount of the verdict we would have to read the whole stenographer's transcript of the evidence, sent up under late act of the Legislature, containing 60 pages of questions and answers. We are therefore of opinion that the objections made by appellee to the manner in which these assignments have been briefed should be sustained.

The only remaining assignment complains of the charge because it did not impose on the railway company a higher degree of care in carrying live stock than in carrying dead freight. But if it had done so, it would have been a charge on the weight of the evidence. While it is doubtless true that a person of ordinary prudence would exercise more care in the one instance than in the other, the standard fixed by law is the same in both—that is, the care of a person or ordinary prudence—which, of course, varies with the circumstances of each case. Besides, the charge complained of bore only on the issue of liability, which was determined in favor of appellant.

Judgment affirmed.

CONNER, C. J., not sitting.

HOUSTON & T. C. R. CO. v. ORAM et al.

(Court of Civil Appeals of Texas. April 7, 1908.)

1. MASTER AND SERVANT—INJURIES TO SERVANTS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action for the death of a switchman, who was run over owing to his foot becoming caught in a frog while he was between moving cars, it was the theory of plaintiff that deceased went in between the cars some distance from the frog, and that the cars kept moving owing to the engineer's failure to stop on a signal, and he was obliged to keep moving between the cars until he reached the frog, but there was evidence tending to show that he went in between the cars directly at the frog, and immediately got his foot caught therein, and it appeared that none of the frogs had ever been blocked, which was known to deceased. *Held*, that it was error to refuse a requested instruction that, if deceased stepped in between the cars at the frog, and there got his foot caught, and that the cars were moving at the time he stepped in between them, and that he knew it, and intended and expected that they should be, plaintiff could not recover.

2. NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS.

A requested instruction that "proximate cause" means the nearest, the direct, the immediate, or efficient cause which produces the accident was properly refused as not a correct definition.

3. SAME — WHAT CONSTITUTES PROXIMATE CAUSE.

By "proximate cause" is meant such an act wanting in ordinary care as actively aided in producing the injury as a direct and existing cause, and it need not necessarily be the last or sole cause, but it must be a concurring cause, such as might have been contemplated as involving the result under the attending circumstances.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 69-75.]

4. SAME—INSTRUCTIONS.

Where the jury were told that the negligence of defendant must have been the direct cause of the injury, there was no error in failing to give a charge defining "proximate cause."

5. MASTER AND SERVANT—INJURIES TO SERVANTS—ASSUMPTION OF RISK—INSTRUCTIONS.

In an action for the death of a servant, an instruction that he did not assume any risks or dangers arising from the negligence, if any, on the part of defendant or of the engineer operating the engine at the time he was killed, unless, etc., was not erroneous as permitting the jury to enter a field of conjecture as to defendant's negligence.

6. TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

In an action for the death of a switchman, an instruction that if the jury "believe that deceased went in between the ends of cars, and if they further believe that the cars continued to move backward until they reached an unblocked frog," was not on the weight of the evidence, as assuming that deceased entered between the cars at a place other than that at which the frog was situated, as claimed by defendant.

Appeal from District Court, Grayson County; J. M. Pearson, Judge.

Action by Nellie M. Oram and others against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Nellie M. Oram and her four children brought this suit in the district court of Grayson county on the 1st day of February, 1905, to recover judgment against the Houston & Texas Central Railroad Company on account of the death of Ben F. Oram, husband of Nellie M. Oram, and father of her four co-plaintiffs, minors, respectively, one, three, six, and eight years of age, which was caused by the said Ben F. Oram's getting his foot caught in one of defendant's frogs in its yards at Sherman, Tex., on the 10th day of December, 1904, while he was acting as switchman, and being run over by a car which he was attempting to uncouple from another while the two with another were being pushed backward by an engine. Negligence was charged against the defendant in that the frog was unlocked, and the coupling apparatus was old, worn, and out of repair; that signals were established by which the engineer was to operate his engine; that it was his duty to obey all signals; that when signals were given him on this occasion to stop his engine he failed to obey them, but continued to propel the cars backward. Defendant answered by general denial, and by pleas of assumed risk and contributory negligence on the part of Ben Oram. The case was tried before a jury, and resulted in a verdict for \$18,000, apportioned, \$6,000 to the widow and \$3,000 to each of the children. From that judgment, motion for new trial having been overruled, this appeal is taken. Ben Oram when injured was a switchman working for defendant, the Houston & Texas Central Railroad Company, in the city of Sherman, where he had been so engaged for about three years. On the 10th day of December, 1904, while engaged in his duties as switchman, one of his feet was caught in a frog, under circumstances hereinafter shown, and he was run over by the rear wheels of a car being switched, and immediately killed. His foot was caught in an unblocked frog. It was proved that this frog was in the same condition that it had been all the time that deceased had been working in the yards in Sherman; that defendant had none of its frogs blocked, but all were maintained in an unblocked condition, and had been so maintained during the years Oram had been working in the yards as switchman. The frog is made of two rails approaching each other at an angle. Three feet back from the closest point of approach they are about two feet apart, but the rails approach to within two inches of each other. The yard crew with which Oram was working consisted of himself, I. D. Hundley, another switchman, C. S. Smith, foreman, Walter Kitson, engineer, and W. H. Lawrence, fireman. A freight train came into the yard from the south. It was the rule, custom, method, and practice in defendant's yards when trains came in for the inspectors to proceed to inspect the cars. When the cars came into the yard, a flag

was put on them while the inspectors were at work, indicating that so long as the cars were being inspected, and so long as the flag was up, they must not be handled by the switch engine. They could not, during the time they were being inspected and the flag was up, be so handled or moved without permission of the inspectors. The method of handling the cars by the switch engine was as follows: They were moved under the directions of the foreman. The foreman would go to the freight office, get a switching list, which would show what was to be done with the various cars, and he would then tell the members of the crew who followed the engine where the cars were to be placed. When permission was obtained from the inspector to move any of the cars out of a train of cars before his inspection was completed, it could be done. On the day of the accident the train of cars, commonly called the 'string' of cars, there being no engine with it, was standing on the house track. It was desired to move the three north cars in the string, so as to let two of them in on the lead track. At this time a blue flag was on the north of the string. Permission was gotten from the inspector to take down the flag and move the three cars as desired. Smith, the foreman of the switching crew, directed Hundley and Oram (the message being delivered to Oram by Hundley) to attach the switch engine to the north end of the string, carry the three cars north, and then come back and drop the two south cars in on the lead track, which is west of the house track, cutting them loose, so as to leave one car attached to the engine. The instruction being communicated to Oram, he removed the blue flag, and the switch engine was attached to the north of the string. The three north cars were cut loose, carried forward northward by the engine, then backward for the purpose of placing the two south cars on the lead track, and it was while in the execution of this order that Oram met his death. The cars that were being operated were PDD 2,102, which was next to the engine, H. & T. C. 10,384, next to this, and, further south, H. & T. C. 40,097. The inspectors had inspected these cars before permission was given to interfere with them. The cars were connected with automatic couplers. The pin which held together the couplers were operated by a lever extending to the side of the car, and the connection between the pin and lever was made by a lift chain. The inspectors in inspecting the car found that a link was gone out of the lift chain on car 10,384. The condition was such that the pin could not be lifted by means of the lever, but the hand would have to be used in lifting the pin, so as to disconnect the couplings. This was the condition at the time Oram attempted to make the uncoupling, as hereinafter shown. The inspector wrote in chalk on the northeast corner of the car (the corner on the side from which Oram walked in between the cars) "B. O.

Lift Chain." The meaning of this, in railroad parlance, was that the lift chain was in bad order, which indicates to the switchman handling the car that it is in bad order, and also that the car repairers are to repair it before it is carried out in another train. This marking was on the car when Oram went in to make the uncoupling. The time of the accident was about 10 o'clock in the morning. At about the place of the accident, the situation of the tracks was such as to make something of a curve, so that an engineer on the engine could not see the signals of a man, unless he was standing out from the cars.

Baker, Botts, Parker & Garwood and Head, Dillard & Head, for appellant. Wolfe, Hare & Maxey, for appellees.

BOOKHOUT, J. (after stating the facts). The eleventh assignment of error complains of the action of the court in refusing the special charge requested by appellant, reading: "If you believe from the evidence that Ben F. Oram stepped in between the cars at the frog, and there got his foot caught, and that the cars were rolling at the time he stepped in between them, and that he knew this, and intended and expected that they should be so rolling, and they were moving as he so intended and expected, then you are instructed to return a verdict for defendant." Plaintiffs' right of recovery depended solely upon the negligence of the engineer in failing to obey the signal given by Oram to bring the car to a stop. At the time of the injury, the engineer, Kitson, was backing the engine, which was pushing three cars south, two of which were to be placed on the lead track. The paragraph of the charge upon which a recovery for plaintiff was had reads: "Now, bearing in mind the above and foregoing instructions, if you find and believe from the evidence that, on the 10th day of December, 1904, the occasion on which said Oram was killed, he (Oram) with other members of the switch crew to which he belonged were engaged in switching and moving cars, and that while so engaged, and when said cars and engine were being moved backwards, the said Ben F. Oram gave to the engineer operating said engine a stop signal; and if you further believe from the evidence that, immediately after giving said signal, said Oram proceeded to go to said car for the purpose of making an uncoupling of the same; and if you further believe from the evidence that, on account of the lift chain attached to the lever on one of said cars being disconnected from the pin of said coupling apparatus, said uncoupling could not be made by the said Oram with the use of said lever; and if you further believe from the evidence that, on account of the condition of the said lift chain, said Oram went in between the ends of the cars where the uncoupling was to be made for the purpose of pulling the pin with his hands and make the uncoupling; and if you further believe from the evidence

that said cars continued to move backward until the same reached an unblocked frog, and that said Oram's foot became caught or fastened in said frog, and that he was run over by one of said cars and killed; and if you further believe from the evidence that, by the use of the appliances he had at hand to stop the engine and cars, the engineer in charge of the engine could, after said stop signal was given, have stopped said engine and cars before the said Oram reached said frog in which his foot became fastened, if you find it did get so fastened; and if you further believe from the evidence that, under the usual and customary method of doing such work in defendant's yards, said engineer should have stopped said engine and cars before Oram reached said frog; and if you further believe from the evidence that, in failing to stop said cars and engine after said stop signal was given before said Oram reached said frog, said engineer was guilty of negligence, as that word has been hereinbefore explained to you; and if you further believe from the evidence that such negligence, if you find that said engineer was so negligent, was the direct and proximate cause of the death of said Oram—then you will return a verdict in behalf of plaintiffs, and assess their damages under instructions hereinafter given you, unless you should find for the defendant under other instructions given you." It will be seen from this charge that it was the theory of plaintiffs that Oram went in between the cars north of the frog, that the cars kept backing, and that Oram, to keep from being run over, kept moving south between the cars until he reached the frog, when his foot was caught therein, and he was run over and killed. There was testimony tending to show, and which was sufficient to raise the issue, that Oram went in between the cars directly at the frog, and immediately got his foot caught therein. If this theory is correct, the jury might infer that the unblocked frog was the proximate cause of the injury, and not the negligence of the engineer in failing to obey the stop signal. If the engineer was negligent in this respect, and yet such negligence was not the proximate cause of the injury, but the act of Oram in stepping in between the moving cars at the unblocked frog was the proximate cause of the injury, then the plaintiffs could not recover. It was shown that none of the frogs in defendant's yards were blocked, and that this was known to Oram. The requested charge announced a correct proposition, and presented appellant's theory of the case, and its refusal was error.

The paragraph of the court's charge above set out is complained of as assuming that Oram entered between the cars at a place different from which defendant contended he entered, and for this reason is on the weight of the evidence. The charge does not assume this fact, but leaves it to the jury for their determination. As stated by Justice Denman

in *Railway Co. v. Casseday*, 92 Tex. 527, 50 S. W. 125, a fact is not assumed by a charge if it is left to the jury to be found or believed from the evidence. See, also, *Railway Co. v. Lehmburg*, 75 Tex. 66, 12 S. W. 838, and *Railway Co. v. Waldo* (Tex. Civ. App.) 32 S. W. 784.

It is contended that the court erred in refusing appellant's special charge defining "proximate cause." The requested charge reads: "By 'proximate cause' is meant the nearest, the direct, the immediate, or efficient cause which produces the accident. If, however, you believe from the evidence that the unblocked frog was the sole proximate cause of the accident by which Ben Oram lost his life, you will return a verdict for the defendant." This is not a correct definition of "proximate cause," and it was not error to refuse the charge. This charge defines "proximate cause" as the nearest cause to the injury. This language was condemned in the case of *Gonzales v. City of Galveston*, 84 Tex. 7, 19 S. W. 285, 31 Am. St. Rep. 17, wherein it is said: "By 'proximate cause' we do not mean the last act of cause, or nearest act to the injury, but such act wanting in ordinary care as actively aided in producing the injury as a direct and existing cause." By "proximate cause," as we understand it, is meant such an act wanting in ordinary care as actively aided in producing the injury as a direct and existing cause. It need not necessarily be the last or sole cause, but it must be a concurring cause, such as might have been contemplated as involving the result under the attending circumstances. This definition was approved in *Railway v. Sweeney*, 6 Tex. Civ. App. 178, 24 S. W. 947, and is supported by the following cases: *Eames v. Railway Co.*, 63 Tex. 664; *Jones v. George*, 61 Tex. 358, 43 Am. Rep. 280; *Seale v. Railway Co.*, 65 Tex. 277, 57 Am. Rep. 602; *Gonzales v. Galveston*, supra. The requested charge, although not correct, suggested to the court the giving of a correct charge, defining "proximate cause" if it was not sufficiently explained in the main charge. The main charge required the jury to find that the act of the engineer in failing to obey the stop signal, if he did fail to obey it, was negligence, and that such negligence was the direct and proximate cause of the injury to Ben Oram. The jury having been told that the negligence of defendant, if any, must be the direct cause of Oram's injury, we do not think they could have been misled by the failure to give a charge defining "proximate cause." While we are of the opinion that it was not reversible error for the court to fail to prepare and give a correct charge defining "proximate cause," yet, in view of another trial, we suggest that, under the facts as proven, such a charge would be proper.

It is insisted that the court erred in the following part of the seventh paragraph of the main charge: "He did not assume any risks or dangers arising from the negligence,

if any you find there was, on the part of the defendant or of the engineer operating the engine at the time he was killed, unless," etc. It is contended that this charge was error, in that it permitted the jury to enter the field of conjecture, and find for plaintiffs on account of any act of negligence on the part of defendant they may have found or supposed to exist. The charge announced a correct proposition, and we do not think it subject to the criticism made.

For the error in refusing to give the special charge first above set out, the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. FUNK.

(Court of Civil Appeals of Texas. April 4, 1906.)

1. CARRIERS—CONTRACT OF SHIPMENT—WRITTEN CONTRACT—EFFECT.

Where the agent of a carrier verbally agreed with the shipper to furnish cars for the shipment of cattle at a certain time, and to deliver them at their destination in time for a particular market, a written contract signed by the shipper at the time the cattle were loaded and shipped, which provided that the carrier only undertook to deliver within a reasonable time, was not binding on the shipper, in the absence of anything to show that at the time he made the verbal contract he knew that he would be required to sign the written contract, or that he knew the contents of the writing.

2. EVIDENCE—HEARSAY.

In an action against a carrier for damages to a shipment of cattle owing to delay in transportation, the testimony of a witness as to the schedule time of the railroad was not objectionable as hearsay.

3. JUSTICES OF THE PEACE—PLEADINGS—COMPLAINT.

If the language of a written complaint filed in a justice court is insufficient, it may be supplemented by oral pleadings.

4. TRIAL—INSTRUCTIONS—AMOUNT OF RECOVERY.

In an action against a carrier for damages to a shipment of cattle, there was no error in a charge that if the jury found for plaintiff the damages should not exceed the amount claimed in the petition, especially as the verdict was for much less than that amount.

Appeal from Tom Green County Court; Milton Mays, Judge.

Action by Ike Funk against the Gulf, Colorado & Santa Fé Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and A. H. Culwell, for appellant.

EIDSON, J. This suit was originally brought in the justice's court by appellee, and from a judgment rendered therein an appeal was taken to the county court, in which court verdict and judgment was rendered and entered in favor of the appellee for the sum of \$100. The suit was for damages growing out of the shipment of a car of cattle from San Angelo to Ft. Worth.

Appellant's contention under its first assignment of error is that the verdict of the

jury is contrary to the evidence, in that the same conclusively shows that the shipment of cattle was made under a written contract, whereby appellant only undertook to deliver the cattle at destination within a reasonable time, and that it complied with such contract. While the evidence shows that appellee at the time the cattle were loaded and shipped signed a contract which provided that appellant only undertook to deliver the cattle at their destination within a reasonable time, there is uncontroverted testimony in the record to the effect that the shipment was made under a prior verbal contract, whereby appellant, through its agent, agreed to furnish cars for appellee's cattle at a certain time, and to deliver said cattle at their destination in time for a particular market; and there is testimony tending to show that the terms of said verbal contract were not complied with, and there is no testimony in the record tending to show that at the time appellee made the verbal contract he knew that he would be required to sign the written contract, nor does it appear from the testimony that he knew the contents of the written contract. Hence we overrule this assignment. *Railway Co. v. Hume*, 87 Tex. 219, 27 S. W. 110; *Railway Co. v. Williams* (Tex. Civ. App.) 57 S. W. 883.

Appellant's second assignment of error is not well taken. The testimony tends to show that appellant's failure to comply with its contract caused the cattle to be delayed in course of shipment from 12 to 16 hours, and on that account they suffered a shrinkage and loss in weight of from 30 to 50 pounds each, and that if it had not been for this delay they could have been placed on the market a day earlier, when the market for such cattle was from 15 to 25 cents per hundred higher than on the day they were sold. There were 62 head of the cattle, and the damages on account of shrinkage and loss in weight and fall in the market price, according to this testimony, amounted to fully the sum of \$100—the amount of the verdict and judgment.

There was no error in the action of the court below in permitting the witness Felix Mann to testify what the schedule time was on the Ft. Worth & Rio Grande Railway, and what time the train would have arrived at Ft. Worth had the same left San Angelo at a given time. Appellant's objection to the admission of this testimony is that it was hearsay. The witness testified that "the trains on the Ft. Worth & Rio Grande Railroad at that time were scheduled to leave Brownwood at about 10 o'clock in the night, and had the cattle left Brownwood at 10 o'clock on the night of January 11th they would have reached Ft. Worth in time to have been sold on the market of January 12th." This was not hearsay testimony, but was testimony with respect to a matter within the personal knowledge of the witness, in so far as the testimony showed.

This suit was brought in the justice's court, where written pleadings are not required, and we cannot say from the record that appellee's pleadings were not sufficient to authorize him to make proof of the matters complained of in appellant's fourth assignment of error. If the language of the written complaint lodged in the justice's court was insufficient to admit the testimony complained of, appellee could have supplemented same by oral pleadings which would admit such testimony, and there is nothing in the record to show that such oral pleadings were not made.

Appellant's fifth assignment of error complains of the admission by the court below of the testimony of appellee and the witness Felix Mann as to the verbal contract with appellant's agent to furnish cars and to deliver the cattle at their destination at a particular time, upon the ground that such testimony tended to vary and contradict the written contract under which appellant claimed the cattle were shipped. Appellee's cause of action was based upon the verbal contract, which was made prior to the written contract, which was not executed until the cattle were loaded and shipped. The verbal contract required appellant to furnish cars at a particular time and to deliver the cattle at their destination in time for a particular market, and, as before stated, there is no testimony in the record showing that appellee knew at the time the verbal contract was made that he would be required to sign the written contract, or that he knew the contents thereof. The suit having originated in the justice's court, the plaintiff's pleadings were sufficient to authorize the admission of the evidence.

There was no error in that part of the charge of the court which instructed them to the effect that, if they found in favor of the plaintiff for any amount of damages, the same should not exceed the amount claimed in his petition; especially as the verdict was for much less than that amount.

The judgment of the court below is affirmed.

HOUSTON & T. C. R. CO. v. CRAIG.

(Court of Civil Appeals of Texas. April 4, 1906.)

1. TRIAL — INSTRUCTIONS — REQUESTS—NECESSITY.

The parties waived the giving by the court of a charge to the jury, but reserved the right to ask special charges and to make objections to the giving and refusal of such charges. The court at the request of one of the parties gave a special charge, which was not positively erroneous. This charge did not undertake to instruct the jury as to the proper measure of plaintiff's damages. *Held* that, if the adverse party desired a proper charge on that subject, it should have requested it.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 628.]

2. APPEAL—ERROR IN ADMITTING EVIDENCE—CURED BY INSTRUCTIONS.

Error in admitting evidence is rendered harmless by an instruction directing the jury not to consider it.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4179.]

3. TRIAL—INSTRUCTIONS — FORM — SUFFICIENCY.

The use of the word "evidence" instead of the word "testimony" in an instruction directing the jury not to consider the evidence of certain witnesses was not misleading.

4. COSTS—COSTS ON WRIT OF ERROR.

Where defendant in error concedes error in the judgment by offering a remittitur, the costs in the appellate court will be taxed against him.

Error from Williamson County Court; Chas. A. Wilcox, Judge.

Action by H. G. Craig against the Houston & Texas Central Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

S. R. Fisher, J. H. Tallichet, and Baker, Botts, Parker & Garwood, for plaintiff in error. Nunn & Ward and Cooper Sansom, for defendant in error.

EIDSON, J. This is an action by defendant in error against plaintiff in error for damages. Plaintiff in error's first assignment of error complains of the special charge given to the jury by the court below at the request of the plaintiff, upon the ground that same does not instruct the jury as to the measure of damages in this case. It appears from the record that the parties to this suit in writing waived the giving by the court of a charge to the jury, but each party reserved the right to ask special instructions, and reserved all right of exception and objection to the giving and refusal of such charges, and to the matter of such charges as may be given at the instance of the opposite party. There is no positive error in the charge of which complaint is made. The court did not undertake in this special charge to instruct the jury as to the proper measure of damages, and if plaintiff in error desired a proper charge given on that subject it should have requested same.

We are inclined to the view that the testimony of the witness Sedgwick, in connection with that of A. G. H. White, to the effect that he made the record that Sedgwick testified about, and that it was correct, was admissible. However, if its admission was error, such error was rendered harmless by the instruction of the court to the jury not to consider same; and the use of the word "evidence" by the court in said instruction, instead of "testimony," was not misleading.

There was no error in the special instruction complained of in the fourth assignment of error. It was not susceptible of the construction that the jury were required to consider any allegations of negligence embraced in the petition which were not supported by evidence.

The defendant in error in his brief states that he remitted \$3 of the amount of the judgment in his favor in the court below, and offers to remit an additional amount of \$15 in this court. We do not find in the record an entry of such remittitur in the court below, but we construe the statement in defendant in error's brief as being an intention to remit \$18 of the amount of the judgment recovered in the court below. With the amount of this remittitur deducted from the judgment of the court below, we are of the opinion that the verdict and judgment are supported by the evidence, and the judgment of the court below, less the sum of \$18, remitted as above stated, will be affirmed; but the costs of this court will be taxed against the defendant in error, as by his remittitur he concedes error in the judgment of the court below to the amount of such remittitur.

Affirmed.

FRENCH, FINCH & CO. v. HICKS et al.
(Court of Civil Appeals of Texas. March 31, 1906.)

1. CORPORATIONS—ACTION BY FOREIGN CORPORATION—PETITION—ALLEGATIONS AS TO INTERSTATE COMMERCE.

In an action by a foreign corporation, a petition alleging that plaintiff employed defendant to travel for it in Texas, and sell goods which it manufactured in another state, was sufficient to show that the goods were to be shipped to Texas from such other state, and that plaintiff was therefore engaged in interstate commerce, though there was no direct allegation to this effect.

2. SAME — FOREIGN CORPORATIONS — INTERSTATE COMMERCE—NECESSITY OF PERMIT.

The employment of an agent in this state by a foreign corporation to secure orders for goods to be shipped here from another state is interstate commerce, and the corporation is not required to obtain a permit.

3. SAME — ACTION ON BOND — CHANGE OF NAME—SUCCESSION TO RIGHTS—PLEADING.

In an action by a corporation on a bond executed to another corporation, allegations that the name of the obligee in the bond was lawfully changed to that of the plaintiff, and that the two corporations were in fact the same, were sufficient to show that the plaintiff had the right to sue.

Appeal from Kaufman County Court; H. M. Cosnahan, Judge.

Action by French, Finch & Co. against J. A. Hicks and others. From a judgment for defendants, plaintiff appeals. Reversed.

T. L. Camp, A. H. Dashiell, and Joel A. Lipscomb, for appellant. Thomas R. Bond, for appellees.

RAINEY, O. J. The appellant, French, Finch & Co., sued to recover on a bond executed by appellees, J. A. Hicks, as principal, and J. F. Sutton and M. G. Goss, as sureties, and payable to Kellogg, Johnson & Co., at St. Paul, Minn., and made to secure the faithful performance of a contract of employment by which said Hicks was to sell goods and merchandise of Kellogg, Johnson & Co. in the

state of Texas. The court sustained a general demurrer to plaintiff's petition, and, plaintiff failing to amend, the cause was dismissed, and plaintiff appeals.

Plaintiff's petition is as follows: "Your petitioner, French, Finch & Co., a corporation, complaining of J. A. Hicks, J. F. Sutton, and M. G. Goss, would respectfully show: (1) That French, Finch & Co. is a private corporation, duly incorporated under and by virtue of the laws of the state of Minnesota. That Dudley B. French is president and L. W. French is secretary and treasurer of said corporation. That said corporation has its home office and principal place of business in the city of Saint Paul, in said state. Said corporation was formerly known by the name of Kellogg, Johnson & Co., and heretofore, to wit, on the ——— day of ———, 190—, the corporate name of Kellogg, Johnson & Co., by an amendment to its charter, duly and legally changed its name to that of French, Finch & Co. French, Finch & Co. and Kellogg, Johnson & Co. are one and the same corporation, and French, Finch & Co. succeeded to all the rights, liabilities, and contracts, of whatsoever nature and kind, that were due or owing to or executed by Kellogg, Johnson & Co. That J. A. Hicks, J. F. Sutton, and M. G. Goss are all resident citizens of the county of Kaufman, state of Texas. (2) For cause of action, French, Finch & Co., your complainant, would respectfully show: That on and prior to the 14th day of August, 1902, it was engaged in the manufacture and sale of boots and shoes, etc., in the city of Saint Paul, state of Minnesota, and, being desirous of selling its manufactured products in the state of Texas, did on the 14th day of August, 1902, enter into a written contract with the defendant J. A. Hicks, by the terms of which contract defendant J. A. Hicks was to act as traveling salesman in the state of Texas for your complainant, and was to sell boots and shoes for your complainant from the date of the signing of said contract until the 1st day of August, 1903, or until said contract was canceled by the terms and conditions thereof. That said contract was duly signed by Kellogg, Johnson & Co. and defendant J. A. Hicks in duplicate, and delivered to them respectively, and under and by virtue of the terms of said contract said Hicks entered into the employ of complainant on or about the 14th day of August, 1902. That by the terms of said contract complainant was to furnish to said Hicks one set of samples, sample cases, stationery, etc., delivered at Terrell, Tex. all of which were furnished according to the terms of said contract by complainant. It was further agreed by the terms of said contract that complainant should furnish to said Hicks a sum of money not to exceed \$50 a week while actually on the road selling goods. That said sum so advanced was to be deducted from commissions earned by said Hicks that might be due him at the termination of said contract. That, as a

compensation for the services to be performed by the said Hicks, complainant contracted and agreed to pay to said Hicks 6 per centum commissions on all goods sold by said Hicks, provided the orders were accepted by your complainant, and the goods were shipped and accepted by the purchaser. That, as a condition precedent to the entering into of this contract by your complainant with the said defendant Hicks, your complainant required said Hicks to furnish a good and sufficient bond in the sum of \$1,000 with approved securities, conditioned for the faithful performance of the contract and return of all samples, sample cases, and other property, and the return of excess of all funds furnished to said Hicks during the existence of this contract over and above the amount due and so earned by said Hicks under the terms of this contract. Said contract was heretofore canceled by mutual consent on or about the 1st day of March, 1903. A copy of said contract is hereto attached, and marked 'Exhibit A,' and made a part hereof, to which reference is here made. (3) That in accordance with said contract said J. A. Hicks did on or about the 25th day of August, 1902, deliver your complainant a certain bond or obligation in the sum of \$1,000, with J. F. Sutton and M. G. Goss as sureties, which bond was given in compliance with the condition of the contract hereinbefore referred to, and by its terms said defendants, and each of them, promised to pay Kellogg, Johnson & Co. of the city of Saint Paul, state of Minnesota, the sum of \$1,000, conditioned that the said J. A. Hicks shall well and truly perform all the conditions of said contract, and return to said Kellogg, Johnson & Co. all samples and sample cases furnished to him, and should pay over to said Kellogg, Johnson & Co. all sums of money advanced to him under the terms of said contract in excess of the commissions earned thereunder, as shown by said contract, then this obligation shall be null and void; otherwise to remain in full force and effect. A copy of said bond is hereto attached, marked 'Exhibit B,' and made a part hereof, to which reference is hereby made. (4) That after the execution and delivery of said contract and execution and delivery of said bond, as hereinbefore described, the defendant Hicks entered into the employ of your complainant, and did travel for and sell for your complainant boots and shoes in the state of Texas to the various parties in various amounts, aggregating \$6,934.25, a list of which is hereto attached, and marked 'Exhibit C,' and made a part hereof. That said list contains the names and the amounts of goods sold to the various parties by said Hicks, which were accepted by your complainant, and all goods which were shipped and accepted by the purchasers. That all said sales made by said Hicks which were accepted by your complainant, and all goods that were shipped and accepted by the purchasers, aggregated the total sale, amounting

to \$6,934.25. That the commissions of 6 per cent. upon the terms of said contract earned by the defendant Hicks amounted in aggregate to \$416.05. That during the time that said Hicks worked for your complainant under the terms of said contract, there was advanced to him sums of money, in accordance with the terms of said contract, aggregating the sum of \$1,125. That your complainant has allowed said Hicks, as a credit on the amount due your complainant, his expenses to Saint Paul and return, which aggregate \$60.85. That the amount of moneys so advanced to said Hicks in accordance with the terms and conditions of said contract exceed the amount of moneys due him on account of commissions for sales made by him in accordance with the terms of said contract, and the amount allowed him for expenses to Saint Paul and return, by the sum of \$648.60. Wherefore your complainant says said J. A. Hicks and J. F. Sutton and M. G. Goss, by virtue of the terms of said bond, are indebted to it in the sum of \$648.60, with interest thereon at the rate of 6 per cent. per annum. That said sum is now due and remains unpaid. That defendants, and each of them, have been requested to pay the same, but they have failed and refused, and still fail and refuse, to pay the same, or any part thereof, although often requested so to do, to plaintiff's damage in the sum of \$800. Wherefore your complainant prays that defendants, and each of them, be cited in terms of the law, and that upon hearing hereof it have judgment for its debt, interest, and all costs in this behalf expended, and for general and special relief."

It appears from the judgment of the court that the general demurrer was sustained, on the ground that the petition shows plaintiff was a foreign corporation, and it did not show that it had filed its articles of incorporation with the Secretary of State and taken out a permit to do business in the state of Texas before the institution of this suit. It appears from the allegations of the petition that the business and the manner of doing same by plaintiff, and for which appellee Hicks was employed to perform, comes within interstate commerce, and did not require plaintiff to secure a permit from the state to engage therein; therefore the court erred in sustaining the general demurrer. Hicks was employed to travel and sell goods, and while the petition does not specifically allege that the goods so sold were to be shipped from Minnesota, yet it alleges that said goods were manufactured there, and the allegations we think clearly indicate that said goods were to be shipped from there on orders of sale received from said Hicks by plaintiff. The employment of agents in this state by foreign corporations to secure orders of sale, and such articles are shipped into this state from another state on such orders, is interstate commerce, and when the business is done in this manner no permit is required. *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718; *Barn-*

hart v. Morrison, 87 S. W. 376, 13 Tex. Ct. Rep. 168.

Appellee claims that there is no such privity shown between French, Finch & Co. and Kellogg, Johnson & Co. as entitles plaintiff to maintain this action. The petition alleges that they are one and the same corporation, that the name of the corporation Kellogg, Johnson & Co. was legally changed to that of plaintiffs, and that plaintiff "succeeded to all the rights, liabilities, and contracts, of whatsoever nature and kind, that were due or owing to or executed by Kellogg, Johnson & Co." This, we think, was sufficient to show that the right to maintain the action existed in plaintiff.

The judgment is reversed, and cause remanded.

WESTERN UNION TELEGRAPH CO. v. BELL.

(Court of Civil Appeals of Texas. March 29, 1906.)

1. APPEAL — ASSIGNMENT OF ERROR — SUFFICIENCY.

Under Courts of Civil Appeals Rules 80, 34 (67 S. W. xvi), requiring each point under an assignment to be stated as a proposition, and in a proposition relating to errors of law apparent on the record enough must be stated to make the error obviously apparent, an assignment of error that the court erred in overruling a demurrer to the petition, not followed by a proposition pointing out the defect, is insufficient.

2. SAME.

An assignment of error and an accompanying proposition attacking a judgment in an action against a telegraph company for delay in delivering a message, announcing the death of the brother of the wife of plaintiff, and requesting her to come at once, on the ground that the judgment for plaintiff was contrary to law, in that the petition did not allege that the wife could and would have reached her destination and been present at her brother's funeral had the message been promptly delivered, sufficiently presented the question of the sufficiency of the petition.

3. TELEGRAPHS—FAILURE TO DELIVER MESSAGE—ACTION FOR DAMAGES—EVIDENCE—SUFFICIENCY.

It is essential to a recovery for the failure of a telegraph company to promptly deliver a message announcing the death of a brother of the wife of plaintiff to prove that, if the message had been promptly delivered, the wife not only could but would have reached her destination in time to have attended her brother's funeral.

4. SAME—PLEADING—PETITION—SUFFICIENCY.

A petition in an action for delay in delivering a message announcing the death of the brother of the wife of plaintiff, and requesting her to come at once, which alleges that plaintiff's wife and her brother were much attached to each other; that in consequence of the delay plaintiff's wife was unable to leave her home until too late to be present at her brother's funeral; that she endeavored by telephone to arrange for its postponement, which could not be done; and that the company's negligence caused plaintiff's wife to suffer distress at not being able to be present when and before her brother was buried, which could have been done if the message had been duly received—is insufficient for failing to allege that the wife would have gone to the funeral if she

had been afforded the opportunity by prompt delivery of the message.

5. SAME—DELAY IN DELIVERING MESSAGE—NOTICE TO COMPANY OF NECESSITY OF PROMPT TRANSMISSION.

A telegram to a third person reading, "Tell Mollie Bell to come at once; her brother, Charley, is dead," informed the telegraph company of the importance of a prompt delivery, and rendered it liable for damages for delay preventing the sister from being present at the funeral of her brother.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 83, 85.]

Appeal from District Court, Galveston county; Frank M. Spencer, Judge.

Action by William Bell against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

Hume, Robinson & Hume and N. L. Lindsey, for appellant. James B. & Charles J. Stubbs, for appellee.

REESE, J. William Bell sued the Western Union Telegraph Company to recover damages for its failure to promptly transmit and deliver a telegraphic message to his wife, apprising her of the death of her brother, in consequence of which failure his wife was unable to be present at the burial of her brother, and to see him before he was buried. One of the messages was from H. W. Buttleman to Mrs. William Bell, Port Arthur, Tex., advising her of her brother's death, and the other was from the same party to Mike Maurer, Port Arthur, as follows: "Tell Mollie Bell to come at once; her brother, Charley, is dead." The messages were sent from Galveston, where Mrs. Bell's brother lived, and were delivered to the operator at Galveston for transmission to the respective addressees at Port Arthur about 3 or 4 o'clock p. m., Sunday, September 27, 1903, but were not delivered to the addressees until about 11 o'clock a. m. on the 28th September, and too late to enable Mrs. Bell to reach Galveston in time for the funeral of her brother, which took place at 4 o'clock p. m. on the 28th. It was alleged that the sender of the messages was informed by defendant's agent, when presenting them for transmission, that the telegraph office at Port Arthur would not be open until 4 o'clock p. m., as it was Sunday, to which the sender replied that it would be in time if the message reached the addressee by 6 o'clock p. m., or, if it was delivered at a later hour that night. Mrs. Bell could leave early the next morning, and arrive in time to attend her brother's funeral. Defendant answered by general demurrer and general denial, and specially excepted to that part of the petition claiming damages for the failure to promptly transmit and deliver the message to Mike Maurer, on the ground that such damages were not in contemplation of the parties. Upon the trial there was a verdict for plaintiff for \$600, and judgment accordingly, from which defendant appeals.

The court overruled the general demurrer to the petition, which is assigned as error. The assignment is presented as a proposition, and the statement following sets out the petition in full without addition or comment. The simple statement that "the court erred in overruling defendant's general demurrer to plaintiff's original petition" is not sufficient to call the court's attention to the particular vice in the petition relied upon by appellant. Such an assignment of error would be sufficient if followed by a proposition or propositions pointing out the defect, but not otherwise. Rule 30 (87 S. W. xvi). Indeed, such error would be fundamental, and could be urged in the brief without an assignment, but not without a proposition making the error of law "obviously apparent." Rule 34 (87 S. W. xvi). The assignment of error presented does not "sufficiently disclose the point" to authorize appellant to treat it as a proposition, but should have been followed by a proposition or propositions "disclosing the point," and rendering the error of law "obviously apparent." The assignment, therefore, cannot be considered.

The sixth assignment of error, however, presents the point in such a way as to require its consideration. In this assignment and accompanying proposition appellant attacks the judgment on the ground that it is contrary to law and without evidence to support it, in that there was no allegation that plaintiff's wife could and would have reached Galveston and been present at her brother's funeral had the message been promptly delivered. It was essential to a recovery by appellee that his wife, if the message had been promptly delivered, not only could, but would, have reached Galveston in time to attend her brother's funeral; her mere ability to have done so is not sufficient. Obviously, she would not have suffered any damage by being deprived of the ability to reach Galveston in time, unless, also, she would have actually done so if by a prompt delivery of the message the opportunity had been afforded her. This fact must not only be proven, but must be alleged, which was not done. We do not mean to hold that it was necessary to state *ipsisssimis verbis* that Mrs. Bell would have left Port Arthur on a train by which, with its connections, she would have reached Galveston in time for the burial, but there must be such allegations of fact as necessarily included this statement.

Appellee insists that the following allegations in the petition contain sufficient averment that Mrs. Bell would have gone to Galveston if she had been afforded the opportunity by a prompt delivery of the message: "Plaintiff's wife and her brother, Charles, were much attached to each other, their association during their childhood and afterwards having been close and constant, and it was especially desired by her family and herself that she should see her brother before he was laid away, and also attend upon his funeral."

Again: "That in consequence of the delay in delivering said telegrams, the charges for which were duly paid, plaintiff's wife was unable to leave Port Arthur until too late to be present at her brother's funeral; that she endeavored by telephone to arrange for its postponement, but that could not be done owing to the warm weather and the condition of the body; that defendant's said negligence caused plaintiff's wife to suffer much sorrow and distress at not being able to be present when and before her brother was buried, which she could have done if either of said messages had been received within a reasonable time after they were filed with defendant." While it might be reasonably inferred from these allegations that plaintiff's wife would have left Port Arthur in time to be present at the funeral, it is not a sufficient compliance with the rule of pleading which requires "that the facts constituting the right of a party to recover, and fixing the liability of his adversary, shall be averred directly and distinctly in his pleading, and not left to be supplied by inference." *Moody v. Benge*, 28 Tex. 545; *Tel. Co. v. Henry*, 87 Tex. 169, 27 S. W. 68—citing cases.

It is not necessary to do more than refer to the failure of the evidence also directly to show that Mrs. Bell would have left Port Arthur on the 6:30 a. m. train, by which, with its connections, she claims that she could have reached Galveston in time.

There is no merit in appellant's second assignment of error. The message to Mike Maurer, "Tell Mollie Bell to come at once; her brother, Charley, is dead," could not have been more explicit or effective in informing appellant of the importance of a prompt delivery of the message and of its purpose if it had been addressed to Mrs. Bell herself.

For the errors indicated, the judgment is reversed, and the cause remanded.

Reversed and remanded.

MESSER v. WALTON.

(Court of Civil Appeals of Texas. April 4, 1906.)

1. TROVER AND CONVERSION—CUTTING TIMBER—MEASURE OF DAMAGES.

Where defendant's employes by mistake crossed the line dividing defendant's land from that belonging to plaintiff, and cut timber on plaintiff's land believing it to belong to defendant, defendant was liable only for the value of the timber at the time it was cut; but if such employes were guilty of negligence in cutting on plaintiff's land, or if the trespass was intentional, then defendant was liable for the value of the timber in its converted condition.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trover and Conversion, §§ 245-271.]

2. TRIAL—INSTRUCTIONS—ASSUMPTION AS TO FACTS.

Where, in an action for conversion of timber cut from plaintiff's land, there was evidence merely that defendant had given H. permission to go on his (defendant's) ground and cut posts and wood, for which he was to account, and also that H. was informed as to the where-

abouts of the dividing line between defendant's land and that belonging to plaintiff, a request to charge that it was not necessary to make defendant liable for cutting of timber by H. on plaintiff's land that it should have been removed, but that if H. cut the timber by defendant's direction on plaintiff's land, and defendant was negligent in failing to inform H. of the boundary line, then defendant would be liable to the extent of the reasonable market value of the timber in its converted condition, was properly refused as assuming that H. was defendant's agent or servant, and that defendant was bound to inform him of the boundary line, notwithstanding his knowledge thereof.

3. SAME—APPLICABILITY OF EVIDENCE.

Where, in an action for cutting posts and cord wood from plaintiff's land by H. as defendant's agent or servant, there was no evidence that defendant directed H. to cut the timber on plaintiff's land, a request to charge that, if H. cut the posts and wood "by direction of defendant on plaintiff's land," etc., was properly refused.

Appeal from Bell County Court; W. R. Butler, Judge.

Action by W. A. Messer against D. R. Walton. From a judgment in favor of plaintiff for less than the relief demanded, he appeals. Affirmed.

McMahon & Curtis and W. D. Jennings, for appellant. Pendleton, Ferguson & Durrett, for appellee.

FISHER, C. J. This is a suit by the appellant against the appellee to recover damages arising from trespass upon the appellant's land. The specific grounds of damages are based upon the value of cedar posts and wood alleged to have been taken and converted by appellee.

The only question in the case is as to whether the trial court properly submitted the correct measure of damages, and whether or not the jury awarded the amount the appellant was entitled to recover. It is contended by appellant that he was entitled to recover the market value of the cedar timber converted into posts and wood. In opposition it is urged by appellee that, as the trespass was unintentional, and the timber was cut and removed under the mistaken belief by appellee that it was on his land, he would only be liable for the value of the timber at the time it was cut. The evidence in the record shows that the appellant and appellee were owners of adjoining tracts, upon which was situated cedar brakes, and there is also evidence to the effect that the employees of appellee, who were engaged in the work of cutting the timber, by mistake crossed the dividing line between the two tracts, and cut timber upon the appellant's land, under the belief that they were cutting on the land of appellee. There is possibly some evidence in opposition to this view, but, however this may be, the trial court submitted both issues to the jury. The court, in effect, instructed the jury that, if the parties were guilty of negligence in going upon the appellant's land, or if the trespass was intentional, then the appellant would be entitled to recover the value

of the timber in its converted condition. They were also instructed that, if the trespass was the result of inadvertence or mistake, then the measure of damages would be the mere value of the timber at the time it was cut. This last instruction finds support in the case of *Railway Co. v. Jones' Ex'rs* (Tex. Civ. App.) 77 S. W. 955, in which the cases of *M., K. & T. Ry. Co. v. Starr* (Tex. Civ. App.) 55 S. W. 393, and *Brown v. Pope* (Tex. Civ. App.) 65 S. W. 42, are distinguished. The last two cases were properly decided on the facts, and we do not regard that they are overruled by the first case cited, or that there is any conflict between the cases. As a further case bearing upon this subject we refer to *Hooper v. Smith* (Tex. Civ. App.) 53 S. W. 65.

What we have said disposes of the first and second assignments of error. The charge complained of in the third assignment of error was properly given, and what we have said also disposes of the fourth assignment of error.

The charge requested by the appellant which the court refused, and which is set out in the fifth assignment of error, is as follows: "You are further charged that it is not necessary to make defendant liable for a tort that the wood and timber should have been removed, but if you believe that there were 206 posts cut on plaintiff's land, and left thereon, under a contract or agreement between defendant and one C. W. Howe, and if the said Howe cut said 206 posts and 12 cords of wood by direction of defendant upon plaintiff's land, and cut said posts, that the defendant was negligent in failing to inform said Howe of the boundary line, then the defendant would be liable, notwithstanding the ignorance or mistake of said Howe in crossing the boundary line and cutting the timber, and you should find for plaintiff the reasonable market value of said posts." There is some evidence in the record tending to show that Howe was not the agent or the servant of the appellee at the time that he cut some of the posts and wood in controversy. It seems that he was given permission by the appellee to go upon the ground and cut posts and wood, for which he was to account to the appellee. The charge, to some extent, ignores this phase of the evidence; but the most serious objection to the charge is that it assumes that, if the appellee negligently failed to inform Howe of the boundary line, then he would be liable, notwithstanding the ignorance or mistake of Howe in crossing the boundary line. Howe testified that he cut some of the wood on Messer's land while he was working for Walton, and that he got some wood from Walton on the east side of the line. "Postun showed me, and said it was the dividing line between Walton and Messer. The line was marked on trees and rocks." Then he goes on and testifies as to the quantity of wood that he cut. If the defendant failed to inform Howe as to the

whereabouts of the dividing line, such failure would not be actionable negligence, provided Howe knew of the existence of the line from other sources. There is no evidence whatever in the record tending to contradict the testimony of Howe that he was informed as to the whereabouts of the dividing line. If he possessed such information, and knew of the location of the line, it would not be necessary for the appellee to give him further information upon that subject. The charge ignores this evidence. The requested charge uses the expression that, "if said Howe cut said 206 posts and 12 cords of wood by direction of defendant upon plaintiff's land," etc. That expression was calculated to convey to the jury the idea that the defendant directed Howe to cut the timber upon plaintiff's land. There is no evidence warranting that assumption. The defendant gave Howe permission to go upon his land and cut timber, but he did not direct Howe to cut timber upon plaintiff's land. Assuming this to be a fact, or either submitting it as a question to be passed upon, is not justified by the evidence in the record.

We find no error in the record, and the judgment is affirmed.

Affirmed.

AMERICAN EXPRESS CO. v. ADAMS et al.
(Court of Civil Appeals of Texas. March 31, 1906.)

1. COSTS—APPEAL FROM JUSTICE—RECOVERY OF MORE FAVORABLE JUDGMENT.

Under Sayles' Ann. Civ. St. 1897, arts. 1436, 1438, providing that a party appealing from a justice of the peace shall recover costs on the appeal in case he obtains a more favorable judgment than he suffered before the justice, unless, for good cause to be stated on the record, the court adjudged otherwise, where a defendant suffered a judgment for \$138.50 before a justice of the peace, and on appeal judgment was again rendered against it, but for only \$102.08, it was entitled to costs on the appeal, in the absence of a statement in the record showing why costs were not so taxed.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 853, 872.]

2. SAME.

Where a judgment appealed from was erroneous only in that certain costs were not awarded to appellant, and such error could have been corrected on a motion for a new trial filed in the trial court, but appellant neglected to present such question therein, it was not entitled to costs on appeal.

Appeal from Rains County Court; J. W. Pierson, Judge.

Action by E. B. Adams and others against the American Express Company. From a judgment for plaintiffs, defendant appeals. Reformed and affirmed.

This is an action instituted in the justice's court of precinct No. 1, Rains county, Tex., on the 12th day of October, 1904, by the plaintiffs against appellant for the sum of \$200 damages, alleged to have been sustained by plaintiffs by reason of delay in the ship-

ment of 814 crates of peaches shipped from Emory July 7, 1904, to Omaha, Neb., by the American Express. March 7, 1905, the case was tried in the justice's court, and resulted in judgment for plaintiffs in the sum of \$138.50 and costs. The defendant, American Express Company, appealed to the county court of Rains county, and on April 12, 1905, the case came on for trial, and plaintiffs filed their second amended account, alleging the number of crates of peaches shipped to have been 236, of the value of \$1 per crate, and alleging that by the carelessness and negligence of defendant the shipment was delayed, to their damage in the sum of \$194, for which they prayed judgment. April 13, 1905, the case proceeded to trial before a jury, which resulted in a verdict for plaintiffs for the sum of \$102.08. On the verdict of the jury, judgment was rendered for the plaintiffs for the sum of \$102.08, with interest at the rate of 6 per cent. per annum and all costs of suit. April 22, 1905, defendant filed its amended motion for new trial, which was overruled on same date, and from which judgment this appeal is prosecuted, and is now before this court for review.

McMahon & Rodes, for appellant. W. W. Berzette, for appellees.

BOOKHOUT, J. (after stating the facts). The only assignment of error that we deem meritorious is the one complaining that there was error in taxing the costs of the county court against appellant. The judgment in the justice's court was for \$138.50, and on appeal by appellant to the county court it was reduced to \$102.08. The costs of both courts are taxed against defendant, appellant here. This was error. The statute provides in such case that the party appealing shall recover the costs of the court above (Sayles' Ann. Civ. St. 1897, art. 1436), except where for good cause, to be stated on the record, the court adjudges the costs otherwise (Sayles' Ann. Civ. St. 1897, art. 1438). There is no statement in the record showing why the costs in the county court were taxed against appellant, or that shows why the provisions of article 1436 do not apply. The judgment will be reformed, and the costs in the county court taxed against the appellee. This error in the judgment was not specifically pointed out in appellant's motion for new trial, and the record fails to disclose that the court's attention was called to the same. The appellant, by proper motion, could have had the judgment corrected in the trial court, and this failure to do so has necessitated an appeal to this court. In such case it should be taxed with the costs in this court. *Montrose v. Fannin County Bank* (Tex. Civ. App.) 23 S. W. 709; *Railway Co. v. Henderson* (Tex. Sup.) 18 S. W. 432.

The judgment is reformed, and the costs of the county court are adjudged against appellee. As thus reformed, it is affirmed.

Reformed and affirmed.

TEXAS & N. O. R. CO. v. GARRETT.

(Court of Civil Appeals of Texas. March 10, 1906.)

JUSTICES OF THE PEACE—EXECUTION—FORMAL REQUISITES.

Rev. St. 1895, art. 1643, providing that the judgment of a justice shall, among other things, direct the issuance of such process as may be necessary to carry the judgment into execution, does not render a justices' judgment void merely because it does not in terms provide for the issuance of execution or other process.

Appeal from District Court, Jefferson County; G. P. Dougherty, Special Judge.

Suit by C. A. Garrett against the Texas & New Orleans Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and Chester, Crawford & Chester, for appellant. Fleming & Fleming, for appellee.

PLEASANTS, J. This suit was brought by appellant to enjoin the execution of the following judgment: "Garrett Commission Co. v. Texas & New Orleans R. R. Co. No. 2,297. In the Justice Court of Precinct No. 1, Jefferson County, Texas. On this, the 15th day of November, came the above cause regularly for trial, and, both parties having announced ready for trial and having waived a jury, the court heard the evidence and argument of counsel, and it is of the opinion that the law and the facts are for the plaintiff; so it is here ordered that the plaintiff, Garrett Commission Company, do have and recover of and from the defendant, Texas & New Orleans Railroad Company, the sum of \$19.99 and costs of suit. B. K. Pope, Justice of the Peace, Precinct No. 1, Jefferson County, Texas." The theory upon which the suit was brought and the proposition presented and urged in appellant's brief is that this judgment is unenforceable and void because it does not in terms provide for the issuance of execution or other process for its enforcement. This contention is based upon article 1643 of our Revised Statutes of 1895, relating to judgments rendered in a justice court. This article is as follows: "The judgment shall be recorded at length in the justice's docket and shall be signed by such justice. It shall clearly state the determination of the rights of the parties in the subject matter of controversy and the party who shall pay the costs, and shall direct the issuance of such process as may be necessary to carry the judgment into execution." It is urged by appellant that this provision of the statute is mandatory, and the failure of the justice to comply therewith rendered the judgment void.

We cannot accept this proposition as sound. Prior to the adoption of the Revised Statutes of 1879, there was no statute providing that the judgment of a justice court should direct the issuance of the process

necessary to its enforcement, and any memorandum made by the justice which sufficiently indicated what his judgment upon the issues in the case was had been uniformly held by our courts to be a valid judgment. *Clay v. Clay*, 7 Tex. 251; *Wahrenberg v. Horan*, 18 Tex. 59; *Howerton v. Luckie*, 18 Tex. 237; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626. In the enactment of the statute above quoted, the manifest purpose of the Legislature was to require justices of the peace to be more accurate in keeping their dockets and in the entry of judgments thereon, but we do not think it was the legislative intent that a failure to comply with these requirements should render the judgment void, and this effect should not be given to the use of the word "shall" in the statute. The case of *Railway Co. v. Thigpen* (Tex. Civ. App.) 57 S. W. 66, holds that the failure to comply with the provisions of the statute above quoted does not render a justice court judgment void. We think that, under well-established rules of statutory construction, the provision of the statute requiring the judgment to direct the issuance of process should be held to be merely directory, and therefore the trial court properly sustained a general demurrer to plaintiff's petition, and, plaintiff having declined to amend, the judgment dismissing the suit should be affirmed.

Affirmed.

STUART v. COLE et al.

(Court of Civil Appeals of Texas. March 31, 1906.)

1. DIVORCE—DECREE—CONCLUSIVENESS.

A decree of divorce, being a judgment in rem, has extraterritorial force, and is conclusive on the parties, though one of them was at the time it was granted a nonresident of the state.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 559-561.]

2. SAME—COLLATERAL ATTACK.

A decree of divorce may be collaterally attacked by showing that the court which rendered it was without jurisdiction.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 549.]

3. SAME—JURISDICTION OF COURT.

Where the steps required by the statute of a foreign state in order to confer upon the court thereof power to render a decree of divorce were taken, jurisdiction attached, and the decree was binding on defendant, though she was a nonresident, and no personal service was had on her, and she did not enter an appearance.

4. SAME—PROCESS—NATURE.

A warning order issued in a suit for divorce brought in the courts of Arkansas, warning defendant, a nonresident, to appear in the action, is not a writ or judicial process, within the statute of Arkansas providing that writs or judicial process shall run in the name of the state.

5. SAME—SERVICE OF PROCESS—PUBLICATION—PROOF OF PUBLICATION—SUFFICIENCY.

The statute of Arkansas provides that a warning order in a suit for divorce against a

nonresident shall be published weekly in a newspaper for at least four weeks. The affidavit of publication of a warning order averred that the order was published in a weekly newspaper for six consecutive weeks commencing April 18th and ending May 23d following. *Held*, that the affidavit showed that the order was published once each week on the dates of the publication of the paper, and was sufficient.

6. PROCESS—SERVICE BY PUBLICATION—PROOF.

The fact that a person making an affidavit of publication of process in a newspaper signs himself "publisher," instead of "editor, proprietor, or manager," does not make proof of publication defective, though the statute requires that the proof shall be made by the "editor, proprietor, or manager" of the newspaper; the word "publisher" being used in the sense of proprietor or manager.

7. DIVORCE—DECREE — RECITALS — CONCLUSIVENESS AS AGAINST COLLATERAL ATTACK.

Where the recitals in a decree of divorce granted by a court of Arkansas show the steps necessary to confer jurisdiction on such court over defendant, a nonresident, the recitals, under the express provisions of Sand. & H. Dig. Ark. § 4191, are conclusive in a collateral attack on the decree based on want of service on defendant.

Appeal from District Court, Hill County; Nelson Phillips, Judge.

Action by L. S. Cole and others against Sarah Stuart and others. From a judgment for plaintiffs, defendant Sarah Stuart appeals. *Affirmed*.

R. H. Sayers and Vaughan & Works, for appellant. Morrow & Smithdeal, for appellees.

BOOKHOUT, J. Appellees, as plaintiffs below, on the 20th day of January, 1904, filed their original petition in the district court of Hill county, Tex., against Sarah Stuart, appellant, and Thomas Moss and wife, in the form of an action of trespass to try title to recover the title and possession of 80 acres of land out of the Joseph Creer League, in Hill county, Tex., alleging eviction therefrom January 1, 1902. On the 29th day of August, 1904, appellant filed her second amended original answer, same consisting of general denial, special plea, alleging that appellant was the lawful and surviving wife and widow of H. A. Stuart, deceased, under whom plaintiffs claim title to the property involved in this suit as heirs; alleging she and the said H. A. Stuart were married in Hill county, Tex., August 3, 1887, and continued to live together as husband and wife in said Hill county until on or about January 30, 1888, on which date he separated himself from appellant, and continued to live apart from her without her consent until his death; that said property sued for was occupied by said H. A. Stuart, now deceased, and appellant as their homestead up to on or about January 30, 1888; that said property is now the homestead of defendant, and has been continuously since said abandonment, and that she never abandoned same as her homestead; that the decree of divorce obtained by the said H. A. Stuart in the circuit court of Boone county, Ark., on the 28th day of July, 1891, was

vold and of no effect, for the want of the jurisdiction of said court on account of failure to secure service of citation on appellant, as required by law; that said decree could not determine her status as a citizen of the state of Texas as to her property rights, or divest her property of right; that said H. A. Stuart died about the year 1902, intestate, and left no child or children or their descendants surviving him; that appellant is an heir of said H. A. Stuart; that he was her said lawful husband at the time of his death; and that as such heir she is entitled to one-half in fee simple of said land sued for, and is entitled to claim homestead interest in all of said land during her natural life, and so long as she may use said land as a homestead. The trial court instructed a verdict for plaintiffs, and, in accordance with such verdict, judgment was entered for plaintiffs. Defendant perfected an appeal.

It is contended that the court erred in instructing the jury to return a verdict for the plaintiffs, because the evidence of the proceedings in the suit for the divorce in said circuit court of Boone county established the fact that said court had not acquired jurisdiction to hear and determine said cause, in that no legal service, constructive or actual, had been had on the defendant in said divorce proceedings. Appellant was divorced from H. A. Stuart by decree of the circuit court of Boone county, Ark., in 1891. Was this decree void for the want of jurisdiction over the appellant, the defendant in the divorce suit? A decree of divorce is a proceeding in rem, and terminates the marriage relation. Being a judgment in rem, it has extraterritorial force, and is binding and conclusive on the parties to the cause although one of them was at the time it was granted a nonresident of the state in which the divorce was granted. Greenleaf on Ev. § 525; Spear on Married Women, § 362; 9 Am. & Eng. Enc. Law, p. 945 (2d Ed.); Hunt v. Hunt, 22 N. Y. 217; Black on Judgments, § 928. Such decree, however, may be collaterally attacked by showing that the court which rendered it was without jurisdiction. Morgan v. Morgan (Tex. Civ. App.) 21 S. W. 155; Chunn v. Gray, 51 Tex. 114. The decree recites: "On this day comes the plaintiff by his attorney, William Keener, and this cause came on to be heard on the complaint of plaintiff unanswered, the report of the attorney ad litem for said nonresident defendant, and the proof introduced, and the court finds that an affidavit has been filed by the plaintiff in this cause that said defendant was a nonresident of this state at the commencement of this suit; that a warning order had been made by the clerk in this case, and published in the manner and for the length of time provided by law; that N. B. Crump, an attorney of this bar, had been duly appointed for the defendant for more than sixty days before the beginning of this term; that the cause of this bill for divorce occurred in the state of Ar-

kansas, and within five years before the beginning of this suit, and that the plaintiff has been a bona fide resident of this state for more than one year prior to the bringing of this suit; that the plaintiff and defendant were legally married in said state, and that the defendant had willfully abandoned said plaintiff for more than one year prior to the filing of this complaint herein." A certified copy of the following proceedings had in said cause was read in evidence: (1) Affidavit of H. A. Stuart that Sarah Stuart is a non-resident of the state of Arkansas. (2) Order of the clerk of Boone county, Ark., appointing N. B. Crump, a practicing attorney, to represent the nonresident defendant. (3) Warning order issued by the clerk of said Boone county circuit court in said divorce case, as follows: "Warning Order. H. A. Stuart, plaintiff, vs. Sarah Stuart, defendant. Boone county circuit court. The defendant, Sarah Stuart, is warned to appear in this court within thirty days, and answer the complaint of plaintiff, H. A. Stuart." (4) Certificate of publication: "I hereby certify that the annexed advertisement was inserted in the Harrison Times, a weekly newspaper published at Harrison, Boone county, Ark., for six consecutive weeks, commencing on the 18th day of April, 1891, and ending on the 23d day of May, 1891. J. R. Newman, Publisher. Sworn to and subscribed before me this the 28th day of July, 1891, W.F. Mitchell, Clerk." (5) Report of attorney N. B. Crump: "Boone county circuit court. H. A. Stuart, plaintiff, vs. Sarah Stuart, defendant. Now on this day comes N. B. Crump, attorney for the nonresident defendant, and reports to the court after inquiry he has been unable to find defendant's whereabouts." It was shown that Mrs. Sarah Stuart had never lived in the state of Arkansas, and that no personal service was had upon her, nor did she have notice of the divorce suit. Were the steps required by the statute of Arkansas in order to confer upon the circuit court of Boone county power to render the decree in the proceedings taken? If so, jurisdiction attached, and the decree was binding upon the defendant in that case, the appellant here, notwithstanding she was at the time a resident of Texas, and no personal service was had upon her, and she did not enter an appearance in the case.

Plaintiff in the divorce suit when he filed his suit made an affidavit that Sarah Stuart, defendant, was a nonresident of the state of Arkansas. The statute of Arkansas provides: Where it appears by the affidavit of the plaintiff, filed in the clerk's office at or before the commencement of the action, that the defendant is a nonresident of the state, the clerk shall make upon the complaint a warning order, warning such defendant to appear in the action within 30 days from the time of making the order. Warning orders are required to be published weekly in a newspaper for at least four weeks. A defendant against whom a warning order has been made and published

is deemed to have been constructively summoned on the thirtieth day after the making of the order, and the action may proceed accordingly. The publication of the warning order is shown by the affidavit of the editor, proprietor, manager, or chief accountant, with a copy of said advertisement annexed, stating the number of times and the date of the papers in which the same are published. It is further provided that all writs and other judicial process shall run in the name of the state of Arkansas.

It is insisted that the warning order did not run in the name of "the state of Arkansas," and did not issue by virtue of an order of the judge of said circuit court, and the affidavit of publication of the warning order did not state the number of times it was published, nor the dates of the papers in which it was published, and said affidavit did not state that the party making said affidavit was the editor, manager, proprietor, or chief accountant of said newspaper, and for this reason the court did not have jurisdiction to render the divorce decree. It is clear that the clerk, under the statute of Arkansas, was authorized to make the warning order, and that it was not necessary that the same should be made by the court. There was no statute of Arkansas introduced in evidence requiring a warning order to run in the name of the state. It is argued that the warning order is "a writ or judicial process," and that the statute requires all writs and other judicial process to run in the name of the state. No decision of that state has been cited holding such order to be a writ or judicial process. In the absence of authority, we are of the opinion that such warning order is not a writ or judicial process, within the meaning of the statute of that state, but simply an order indorsed on the complaint, directing how service on the defendant shall be made. The affidavit attached to the publication was made by the publisher of the newspaper, and does not state the number of times and the dates of the papers in which it was published. The affidavit states that the order was published in a weekly newspaper for six consecutive weeks, commencing the 18th day of April, 1891, and ending the 23d day of May, 1891. The only construction to be placed on this language is that it was published six times in a weekly newspaper for six consecutive weeks between the dates mentioned. It being a weekly newspaper would necessarily imply that it was published once each week on the dates of the publication of such paper. The fact that the party making the affidavit signs himself "publisher," instead of "editor," "proprietor," or "manager," does not, we think, make the return defective. If the word "publisher," as used in the affidavit, was used in the sense of "proprietor" or "manager," then an affidavit made by a publisher of a newspaper meets the requirements of the statute. The definition

of that word is so nearly synonymous to that of the words "proprietor" and "manager" that when used in the sense of a publisher of a newspaper it means the same as manager or proprietor, and is sufficient. Again, the decree in the divorce proceedings recites all the material steps necessary to be taken under the Arkansas statute to cite a nonresident of that state by publication. The decree shows that the court, in effect, passed upon these facts, and found that service had been made in accordance with the statute. Under the statute and decisions of that state, such recitations in the judgment are evidence of the facts recited. Section 4191, Sand. & H. Dig. Ark.; *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217; *Boyd v. Roane*, 49 Ark. 409, 5 S. W. 704. The recitals in the judgment are evidence of the facts recited, and in a collateral attack upon the judgment, such as is here made, are conclusive as to the matters here claimed to show want of service. *Henry v. Allen*, 82 Tex. 39, 17 S. W. 515; *Clay v. Clay*, 13 Tex. 196; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 535; *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; *Milburn v. Smith* (Tex. Civ. App.) 33 S. W. 910.

We conclude that the circuit court of Boone county had the power to render the decree of divorce, and, it being shown that the land sued for was the separate property of H. A. Stuart, and not the homestead of H. A. Stuart and Sarah Stuart, at the time such decree was pronounced, the court did not err in instructing a verdict for plaintiffs below, appellees here.

The judgment is affirmed.

GIDDINGS et al. v. THOMPSON.

(Court of Civil Appeals of Texas. March 28, 1906. Rehearing denied April 25, 1906.)

1. BOUNDARIES—INCONSISTENT SURVEY—USE OF FIELD NOTES.

Where two calls of a survey are necessarily inconsistent, and there is nothing on the ground connecting itself with the original survey to explain the variance, the field notes of the surveyor may be looked to, to throw light on the question.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 172.]

2. SAME—LENGTH OF BOUNDARY—QUESTION FOR JURY.

Upon an issue as to the length of certain boundary lines, evidence held to require submission of the question to the jury.

3. SAME—INSTRUCTIONS.

In an action involving the location of a line forming the western boundary of plaintiff's and the eastern boundary of defendant's land, it appeared that the west line of plaintiff's tract was described as beginning at the south end of defendant's previously established eastern boundary, and running thence, along the line, a certain distance. The court instructed that the only issue in the case was the true location of the western boundary line of plaintiff's land, but further instructed that, if the southeast corner of defendant's land was located as claimed by plaintiff, the verdict should be

for plaintiff, while, if it was located as claimed by defendant, the finding should be for him. Held, that the instruction was not prejudicial to defendant on the ground that, as defendant's survey was the older and plaintiff's survey called for one corner of defendant's survey as its beginning point, the location of plaintiff's survey was immaterial.

4. TRIAL—INSTRUCTIONS—EXAGGERATING IMPORTANCE OF ISSUES.

In an action involving the location of a boundary line between land of plaintiff and that of defendant, it appeared that plaintiff's western boundary was described as beginning at the southeast corner of defendant's land, and thence running north, along defendant's east line, for a certain distance. The issue arose from a dispute as to the length of defendant's southern boundary; defendant claiming that it ran a certain distance from his southwest corner, and plaintiff claiming that it ran a certain lesser distance, so as to cause defendant's corner line to be further to the west, thus including more land in plaintiff's survey. Defendant's contention was based upon the theory that the southern boundary of his survey must necessarily be extended as claimed by him in order that the eastern boundary which was described as a due north line should meet the point at which the northern boundary was described as commencing. The court instructed that the only issue in the case was the true location of the western boundary of plaintiff's land and eastern boundary of the south half of defendant's land. Held, that this was not objectionable as withdrawing the north line of defendant's land from the consideration of the jury and exaggerating the importance of the south line.

5. SAME.

An instruction that, in arriving at the true line, the jury should determine, if possible, the lines originally run by the surveyors who made the surveys, was erroneous because leading the jury to give undue weight to the survey of plaintiff's tract which was made after that of defendant's and which took the disputed boundary line as one of plaintiff's boundaries.

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by Elizabeth E. Thompson against D. C. Giddings and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Searcy & Searcy and Hutcheson, Campbell & Hutcheson, for appellants. Byers & Byers, for appellee.

JAMES, C. J. The patent to the William Whitlock league, granted in 1824, contained field notes as follows:

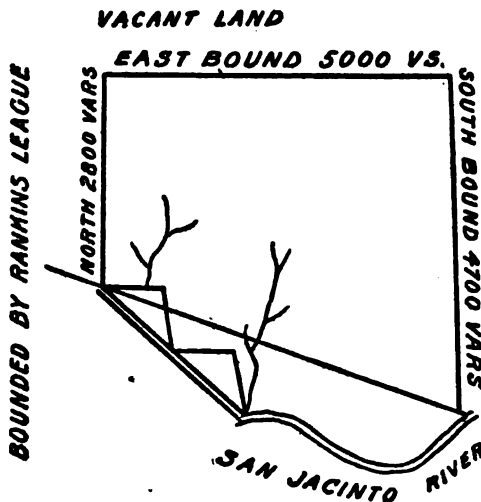
"From the lower corner of the league of Frederick Rankin the surveyor began on said bank of said river and drew 2,800 varas east along the lower boundary line of said Rankin league where a mound was placed; thence south, 5,000 vrs, where another mound was placed; thence west, 4,700 vrs, to said San Jacinto river, where another mound was placed 10 vrs from red oak S. E. marked W. W.; thence along the river meanders towards the beginning of the first line, containing inside of said lines the quantity of one league of land in super ficia bounded on the west by the San Jacinto river, and on the north by the Frederick Rankin league."

The English field notes duly certified from

the land office as a true and correct copy of the original field notes are as follows:

"William Whitlock. Title Issued Aug. 16/24. Vol. 2, p. 424, Harris Co. February 27th, 1825. Field notes of a league of land granted to Wm. Whitlock surveyed by Isaac Hughes under the direction of the commissioners, Baron de Bastrop and Empresario S. F. Austin: Beginning at the S. W. corner of F. H. Rankin's league on the east side of the San Jacinto river; thence down the river with its meanders, giving three miles front, set up the S. W. corner, from which S. 45° E., 10 vrs., red oak marked W W, N 7° W. red oak marked D; thence D. east, 4,700 varas, set up the S. E. corner in the prairie on a stake; thence D. north, 5,000 varas, set up the N. E. corner on the south boundary of F. H. Rankin's league; thence with his line to the beginning corner on the bank of the river. Surveyed by me.

"Isaac Hughes.



"General Land Office, Austin, Texas, January 7th, 1905.

"I, J. T. Robinson, chief clerk and acting Commissioner of the General Land Office of the state of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original field notes as appeared on page 139 of volume 1, No. —, which said volume is kept as an archive of this office.

"In testimony whereof, I hereunto set my hand, and affix the impress of the seal of said office the date last above written.

"J. T. Robinson,

"Chf. Clk. & Act'g Com'r. General Land Office."

Appellee, who was plaintiff, is the owner of the Hannah Nash labor, the field notes of which called for it to begin at Whitlock's S. E. corner; thence north with said Whitlock's line, 2,469½ varas, to a stake; thence east, 405 varas, to a stake on Absolom Reeves

west boundary line 197¾ varas from his N. W. corner; thence south along his west boundary line, 2,469½ varas, to his S. W. corner on Ametha Wilson's north boundary line; thence west with the line, 405 varas, to the beginning. Surveyed April, 1839. Appellee was admitted to be the owner of the Hannah Nash labor and appellants the owners of the south half of the Whitlock. The position on the ground of the south line of the Rankin, also the position on the ground of the south line of the Whitlock, were not in question, except in respect to their distance from the river. The original calls on the river for said lines are not found, and there are now no original marks or other evidences on the ground fixing their position, but the testimony to both of them shows their location to be well recognized. The real issue was the position of the east line of the Whitlock. The contention of the plaintiff was that the south line stopped 4,700 varas from the river and the east line of the Whitlock began there, and defendant contended that it extended out 5,050 varas, because it would have to run that far to give the north line the length of 2,800 varas. The Hannah Nash labor calling to begin at the southeast corner of the Whitlock apparently at 4,700 varas from the river, it is evident that the extension of the Whitlock south line to a distance of 5,050 varas would practically crowd it out. The Nash labor, as platted in the land office, extends north about half the distance of the Whitlock east line, and immediately adjoining it on the north is another labor the McGahey, which occupies the remaining distance to the northeast corner of the Whitlock. The field notes of these two labors seem to place one directly above the other, along the east line of the Whitlock. It appears further that improvements had been placed at the northeast corner of the Whitlock, upon the theory that that corner was 2,800 varas from the river, also that the owner of the McGahey labor treated his land as beginning at that distance from the river. On the other hand, we see from the original survey of the Hannah Nash in 1839 that the Surveyor Trott acted upon the theory that the southwest corner of the Whitlock was 4,700 varas from the river, and placed this labor accordingly. It is evident that, if the Hannah Nash is thus placed, it will not lie immediately below the McGahey labor as the map would indicate, but westward of it. It further appears from some of the testimony that if the south line of the Whitlock is run out 5,050 varas, which would conform to the length of the north line as called for (2,800 varas), there would be a shortage of about 350 acres in quantity, and if run 4,700 varas the shortage would be still greater.

The first, second, and third assignments of error assert in effect that the testimony was such as not to admit of any other line for the south line of the Whitlock than one fixed

by reference to its north line extending 2,800 varas from the river. This claim is made upon the assumption that the north line of the Whitlock was not only a recognized, but was a marked, line, and that the east line for a portion of its course was marked. If this were borne out by the record, there would be good reason for holding that such north line would control the construction of the survey; the other lines and corners not being identified by any marks or footsteps found of the original surveyor. But there is absolutely nothing on the ground in the way of marks with reference to the north line or any other which are or can be distinguished as placed there by the original surveyor. The truth is that there is nothing found on the ground in reference to the north line that would show footsteps of the surveyor along it or the distance he traversed in running it, if he ran it (the same is so of the south line), so that the court would have had no right under the evidence here to assume the north line was established for the distance of 2,800 varas from the river in such a manner as to make it the basis of the other lines, and to so instruct the jury.

When the calls of the Whitlock are applied to the ground, a difficulty is presented in this: That either the call for the length of the south line or that of the north line was a mistake. The north line cannot be 2,800 varas long and the south line 4,700 varas, and the east line a north and south line. Either the north line is 2,450 varas long, to correspond with a 4,700-vara line on the south, or the south line has to be 5,200 varas long to correspond with a 2,800-vara north line. There is nothing found on the ground connecting itself with the original survey to correct or explain the variance. It is well established that in such a case the field notes of the surveyor may be looked to to throw light on the question. *Johnson v. Archibald*, 78 Tex. 102, 14 S. W. 266, 22 Am. St. Rep. 27; *Ayers v. Harris*, 77 Tex. 115, 13 S. W. 768. In this case these notes were introduced. It appears from them that the original surveyor began at the southwest corner of the Rankin on the river, and ran south for the southwest corner of the survey he was making; thence he ran east, 4,700 varas, where he set a stake in the prairie for the southeast corner; thence north, 5,000 varas, where he set up the northeast corner, on the south line of the Rankin league; thence with this line to the beginning corner on the bank of the river (naming no distance). The plat which seems to have accompanied the notes, however, giving the distance as 2,800 varas for the north line. It appears that it was upon these field notes that the patent was based, and it would appear that the calls were reversed in the patent from the order in which the surveyor had made them on the ground. The field notes tend to show that the south line was actually run out by

Hughes, the original surveyor, a distance of 4,700 varas from the river, where he says he set up a corner on a stake, also that the east line, 5,000 varas, was actually run out because at its terminus he set up a corner. Up to this point we have evidence that he went over the ground and measured the lines, but it is at least open to question that he ran from the last call to the beginning corner, and it would be an admissible inference that he did not, for in his note that was the only line for which he failed in them to state the distance, and it was a call along a known line to the beginning corner. Besides this, if he had actually surveyed the south line 4,700 varas, as it appears he did, he would not have found the north line to be 2,800 varas long had he traversed it.

If the notations upon the lines of the plat found in the record in connection with the field notes were his, it is more reasonable to infer that he arrived at the distance 2,800 varas by calculation than by measurement. At any rate, that is the only line which is subject to the reasonable inference that it was not actually run by the surveyor. This being so, it would have been erroneous for the court by its charge to make a 2,800-vara north line the controlling factor in the construction of the survey. The extent of the south line of the survey was left to the jury, to be determined from all the evidence. That they did not give controlling effect to a 2,800-vara north line, but found the south line as originally run was 4,700 varas in length, is a conclusion that cannot be said to be unsupported by evidence.

The fourth assignment brings into question the admissibility of the English field notes of the grant, and this we have already sufficiently discussed.

The remainder of the assignments complain of the charge and of the refusal of charges. The charge given was as follows: "You are instructed that the only issue in this case, under the pleadings and agreement of counsel for plaintiff and defendants, for your determination is that of the true location of the western boundary line of the Hannah Nash labor of land, and that of the eastern boundary line of the south half of the Whitlock league for the distance called for by the said Hannah Nash labor, from the southeast corner of said Whitlock league. In arriving at the true line, you are to arrive, if possible, at the lines as originally run by the surveyors who made the surveys upon which the patents issued. In determining this question ordinarily, calls for natural objects, such as rivers, lakes, springs, etc., are controlling calls. Artificial objects, such as monuments, adjacent surveys, marked lines, and courses, etc., are second in importance to the above. Course is the third in importance, and distance the fourth. If, after considering these general rules, there is still uncertainty and confusion as to the true line, that rule should

be adopted which is most consistent with the intention apparent upon the face of the grants as ascertainable from all the surrounding circumstances. The beginning corner in a survey is of no higher dignity or importance than any other known corner of the survey. If there are well-known and undisputed original corners established upon the ground around the surveys, they would control the other calls of the surveys which are conflicting and contradictory, if there are any such calls. If, therefore, you believe from the evidence, if any, that the south line of the Whitlock league ends at 4,700 varas from the east bank of the San Jacinto river, then your verdict will be for the plaintiff, but, if you believe from the evidence, if any, that the south line of the Whitlock league extends for a distance of 5,050 varas from the east bank of the San Jacinto river, then, and in that event, you will find for the defendants. You are further instructed that the jury is the sole judge of the credibility of the witnesses and the weight of the evidence. You are further instructed that the burden of proof is upon the plaintiff to establish her case by a preponderance of the testimony." This charge is questioned by the ninth and tenth assignments (1) because plaintiff's survey was a junior one, and calls for the older survey as its beginning corner. Therefore the location of the junior survey is wholly immaterial, and it was prejudicial to defendant to instruct the jury "that they may consider the location of these lines as the only issue in the case." The matter complained of could not have been confusing to the jury in view of the entire charge. The latter portion of the charge where the issue to be decided was submitted removes all doubt on this subject. The charge is further criticised for limiting the jury's consideration to the east boundary line of the south half of the Whitlock, as having the effect of withdrawing from them consideration of the north line, and of exaggerating the importance of the south line. The part of the charge objected to was in the statement of the issue under the pleadings and agreement, and it was a correct statement thereof. The charge immediately proceeded: "In arriving at the true line, you are to arrive, if possible, at the lines as originally run by the surveyors who made the surveys upon which the patents issued"—and this is complained of as submitting as the controlling issue in the case the question both of the Hannah Nash west line and the east line of the south half of the Whitlock. If the charge had read: "In arriving at the true line, you are to arrive, if possible, at the lines as originally run by the surveyor who surveyed the Whitlock"—it would have stated the correct rule, because the determining inquiry was not as to where the surveyor of the Nash placed the line of the latter survey. The charge was calculated to induce the jury in determining the position of the east line of

the Whitlock to give undue or controlling weight to the fact that Trott surveyed the west line of the Nash at 4,700 varas from the river as the east line of the Whitlock. For this the judgment must be reversed.

That portion of the charge complained of by the sixth assignment was not in itself erroneous. Inasmuch as defendants based their defense upon the theory that the call for the north line for the distance of 2,800 varas was more reliable or better established as conforming to the work of the original surveyor than the call for the south line to be 4,700 varas, they were entitled to instructions submitting the case in its relation to that theory. The requested charge referred to by the fifth assignment should have confined itself to the lines as originally surveyed.

The requested charge referred to in the seventh assignment was not applicable to the evidence. The eighth would have been on the weight of the evidence, if the jury had found themselves unable to determine the boundary in question by means of the calls of the original grant, and under the necessity of considering extrinsic testimony.

Reversed and remanded.

KING v. MONITOR DRILL CO.

(Court of Civil Appeals of Texas. March 12, 1906. Rehearing Denied April 5, 1906.)

1. CORPORATIONS—ACTION—CAPACITY TO SUE—PERMIT TO DO BUSINESS IN STATE.

Under Rev. St. 1895, art. 745, requiring foreign corporations desiring to do business in the state to obtain a permit from the Secretary of State, and article 746, providing that no such corporation shall maintain any action in this state unless it has filed its articles of incorporation in the office of the Secretary of State for the purpose of procuring its permit, a foreign corporation not doing business in the state is not required to file its articles or to procure a permit in order to sue in the state.

2. JUDGMENT—CONFORMITY OF PLEADINGS AND PROOFS.

Where a petition alleged that a note was executed by a firm, and sought recovery thereon against the firm, and the only evidence introduced was the note purporting to be executed by the firm, and the action is dismissed as to one member of the firm, a judgment cannot be rendered against the other member.

3. PLEADING—AMENDMENT—TIME FOR AMENDMENT—AFTER JUDGMENT.

Where a petition alleged the execution of a note by a firm, its amendment after rendition of judgment, at the time of entry of the judgment, to allege execution of a note by one member of a firm, is insufficient to authorize judgment against that member individually.

Error from District Court, Jefferson County; A. T. Watts, Judge.

Action by the Monitor Drill Company against C. S. King and another. From a judgment against defendant King, he brings error. Reversed.

G. P. Dougherty, for plaintiff in error. Molette & Wilkerson, for defendant in error.

PLEASANTS, J. This suit was brought by defendant in error to recover upon a promissory note for the sum of \$1,899.65, which purports to have been executed by C. S. King & Co. The original petition alleged that the note was executed and delivered by C. S. King & Co., a partnership composed of C. S. King and R. E. Gordon. To this petition the defendant King filed an answer, consisting of general and special exceptions and general denial and special pleas, denying, under oath, the alleged partnership and the execution by it of the note. The defendant Gordon answered by general demurrer and general denial. The trial of the cause resulted in a judgment in favor of plaintiff against the defendant King for the amount of the note, with interest and attorney's fees. The judgment in full, as entered upon the minutes of the court, is as follows: "On this, the 9th day of June, 1904, came on to be heard the above-styled cause upon the day set for its trial, and came the plaintiff by its attorneys, Molette & Wilkerson, and the defendant R. E. Gordon by his attorneys, Greer & Minor, but the defendant C. S. King, though having filed an answer, came not. After hearing the argument of counsel, it is considered, adjudged, and decreed by the court that the general and special exceptions of the defendant C. S. King be, and the same are hereby, overruled. It is considered that the plaintiff be allowed to amend its original petition by interlining. It being made to appear by counsel for the plaintiff that there is on file an answer under oath, denying the existence of a partnership composed of C. S. King and R. E. Gordon, and the said R. E. Gordon being present in court by his attorneys, Greer & Minor, and denying that he is or was a member of the firm of C. S. King & Co., therefore, upon motion of the plaintiff it is considered, adjudged, and decreed that, as the said R. E. Gordon is also made to appear by the record as a nonresident of the state of Texas, against whom a personal judgment cannot be obtained, that the plaintiff be, and is hereby, allowed to discontinue its case against the said R. E. Gordon, and he is ordered to go hence without his costs. It further appearing to the court that the cause of action is founded upon a promissory note alleged to have been executed and delivered by the defendant C. S. King to the plaintiff on June 1, 1903, due and payable with 10 per cent. attorney's fees and 8 per cent. interest after maturity on January 1, 1904, the court after hearing the evidence is of the opinion that the plaintiff ought to recover of the defendant C. S. King his damages in the premises. It is therefore considered, adjudged, and decreed by the court that the plaintiff, Monitor Drill Company, do have and recover of the defendant C. S. King the sum of fifteen hundred and ninety-three and 90/100 dollars, with 8 per cent. interest from this date, together with its costs, for which let execution issue."

It was shown by the testimony of counsel for plaintiff on the hearing of the motion for a new trial, filed by the defendant King, that said defendant was not present in person, and was not represented by attorney on the trial of the case, and that at the time the judgment was rendered there had been no amendment of the original petition. On the day the judgment was entered, which was several days after its rendition, plaintiff's attorney amended the petition by interlining an allegation charging that the note was executed by the defendant King. It was further shown that there was no evidence offered on the trial showing the execution of the note by the alleged partnership, or either of the individual defendants.

The first assignment of error is as follows: "The court erred in rendering judgment for plaintiff in this cause, for the reason that it appears from plaintiff's petition that it is a foreign corporation, being incorporated and existing under the laws of the state of Minnesota, and it was not pleaded and proven that plaintiff had a permit authorizing it to do business in Texas at the time the contract was made upon which the suit was brought; and for the further reason that it was not alleged and proven that the note upon which this suit was brought arose out of an interstate transaction; and for the further reason that there is no allegation and proof that plaintiff was authorized to maintain its suit in the courts of the state of Texas." While the petition alleges that the plaintiff is a corporation organized under the laws of the state of Minnesota, and does not allege that it has a permit to do business in this state, nor that the transaction out of which the cause of action arose was one protected by interstate commerce clause of the federal Constitution, there is no allegation from which it can be inferred that plaintiff was doing business, or that the transaction out of which the cause of action arose took place, in this state. It is not even alleged where the note sued on was executed.

We think it clear that article 746 of the Revised Statutes of 1895 only applies to foreign corporations that are doing business in this state, and when, as in this case, there is nothing in the petition filed by a foreign corporation from which it can be inferred that it is engaged in business in this state, or that the transaction out of which the cause of action arose took place here, it is unnecessary for such petition to show that the plaintiff has a permit to do business in this state. Article 745 requires foreign corporations that are desirous of transacting or soliciting business or establishing a general or special office in this state to obtain a permit from the Secretary of State to do business in this state, and the inhibition contained in article 746 applies only to corporations that have disregarded the provisions of article 745; and unless a foreign corporation is transacting or soliciting business in this state, or has an

office here, it is not required under these articles to have a permit to do business to enable it to sue in our courts. *Miller v. Goodman*, 91 Tex. 41, 40 S. W. 718.

The remaining assignments assail the judgment on the ground, substantially, that there was neither pleading nor evidence to support it. We think these assignments should be sustained. At the time the judgment was rendered, there was no pleading in the case charging appellant with the execution of the note in his individual capacity. The original petition alleged that it was executed by the partnership composed of appellant and Gordon, and sought recovery thereon against the firm. A partnership can only be brought into court by suit against its members, and when plaintiff dismissed its suit against Gordon it thereby abandoned its cause of action against the partnership. While it is only necessary for one member of a firm to be served with citation to bring the firm into court, the suit must be against all of the members. *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409. When the suit against the partnership was dismissed, appellant was left to answer individually to plaintiff's demand, and if, under the pleadings as they then stood, plaintiff had introduced proof to establish appellant's liability on the cause of action set up by the petition, the latter would have no cause for complaint. The undisputed evidence shows that no proof was offered except the note, which purports to have been executed by the firm, and is alleged to have been so executed in the petition. We think it clear that this evidence was insufficient to support a judgment finding that the note was executed by appellant. He had not been charged with the execution of the note individually, and therefore it was necessary for the plaintiff to show either its execution by him, or other facts which would render him liable thereon, to entitle it to judgment against him.

The allegation made in the petition after the rendition of the judgment can be given no effect. Appellant had no opportunity to answer the allegation charging him with the execution of the note, and the amendment interlined in the petition after the judgment cannot be looked to for the purpose of supplying deficiencies in the evidence under the pleadings as they stood at the time the judgment was rendered.

We are of opinion that the judgment of the court below should be reversed, and the cause remanded, and it has been so ordered.

Reversed and remanded.

CAPLEN v. COX.*

(Court of Civil Appeals of Texas, March 12, 1906. Rehearing Denied April 26, 1906.)

1. PARTNERSHIP—RESCISSION OF CONTRACT FOR FRAUD.

The contract of partnership will be rescinded at the instance of one induced by false

representations of the other party to become his partner.

[Ed. Note.—For cases in point, see vol. 88, Cent. Dig. Partnership, § 11.]

2. SAME—ACCOUNTING.

On rescission of a contract of partnership because of one being induced by fraud to enter into it, he may recover, not only the value of what he put into the business, with interest, but the value of his services in attending to the business; he accounting for what he has drawn out of the business, with interest, from the time of the dissolution of the partnership to the judgment, on the amount he has drawn out in excess of what he was entitled to for his services, the time when he drew it out not appearing more definitely than that it was during the continuance of the business.

3. SAME—EVIDENCE OF FRAUD.

Evidence in a cross-suit for rescission of a contract of partnership held sufficient to sustain findings that defendant was induced to enter into it by false representations of plaintiff.

4. SAME—REPRESENTATIONS AS MATTER OF FACT.

False representations by plaintiff, inducing defendant to enter into a partnership agreement that the value of plaintiff's stock of goods was \$8,111.29, he claiming to have got the figures from his bookkeeper, are made not as a matter of opinion, but as a fact, so that defendant is entitled to rely thereon; he not having equal means of information.

5. SAME—RECITALS IN CONTRACT.

One induced by fraudulent representations, not only to enter into a partnership agreement, but to put his stock into the business at less than its value, is not bound by the value placed thereon in the agreement on rescission of the agreement.

6. APPEAL—PRESUMPTION—EVIDENCE.

Where one testifies to the value, or real value, of goods, as distinguished from the value placed on them in a partnership agreement which he seeks to have rescinded, it must be assumed that he meant the market value, in the absence of objections, till after trial, that the market value *eo nomine*, should have been proven.

7. SAME—FINDINGS—FAILURE TO REQUEST.

In the absence of a request to make certain findings, complaint may not be made of failure to do so.

Appeal from District Court, Grimes County; Gordon Boone, Judge.

Action by John A. Caplen against Robert H. Cox. Judgment for defendant. Plaintiff appeals. Reversed and remanded, subject to remittitur.

W. W. Meachum, S. S. Hanscom, and Clay S. Briggs, for appellant. John M. King and McDonald Meachum, for appellee.

REESE, J. This suit was brought by John A. Caplen against Robert H. Cox for settlement of a partnership between them, and to recover the balance alleged to be due him by Cox after settlement of the partnership business. Cox answered by general demurrer and general denial, and by special plea in the nature of a cross-bill alleged that he had been induced to enter into the partnership by the false and fraudulent representations of Caplen, and praying that the partnership be dissolved and that he have judgment for the amount of his investment and interest and the value of his services in conducting the

*Writ of error denied by Supreme Court.

business, less the amount drawn out by him. Upon trial before the court without a jury defendant, Cox, had judgment for the amount of his original investment, with interest from the date of the partnership agreement, and \$75 per month from that date until the cessation of the business thereunder for his services, less the amount actually received by Cox out of the business, in the aggregate \$2,512.64. From this judgment Caplen appeals.

It was alleged in the petition: That on October 16, 1901, appellant and appellee had entered into a written agreement of partnership to carry on a general merchandise business in Navasota, Grimes county, Tex., under the firm name of Robert H. Cox & Co., appellant to be a silent partner. That appellant put into the business \$8,111 and appellee \$1,180, making a total capital of \$9,291. Appellee was to have charge of the business, so far as selling was concerned. Appellant was to do the buying and was to handle all cash. Each party was to be allowed to draw \$75 per month, and no more, for personal expenses. The partnership was to continue for five years, but might be dissolved at any time by Caplen or by mutual agreement. That the business had run down, the sales were not sufficient to meet current expenses, and Caplen, not being satisfied, had dissolved the partnership, as he had a right to do under the agreement. Appellant prayed for an injunction, the appointment of a receiver, and that an auditor be appointed, and for judgment for what might be found to be due him upon a statement of the accounts between them. Appellee, after general demurrer and general denial, pleaded specially that on or about October 16, 1901, he was engaged in business in Galveston, owning a stock of goods of the value of \$3,678.80, with a liability thereon of \$1,228.21, leaving a net value of \$2,450.00, and that appellant was also engaged in business in Navasota, having a stock of goods at that point; that appellant proposed to appellee that they form a partnership whereby the stock of each should be put into said partnership as the assets of the firm to be known as "R. H. Cox & Co.;" that appellee should remove his stock of goods from Galveston to Navasota, the partnership business to be conducted at Navasota; that, in order to induce appellee to enter into said partnership, appellant falsely and fraudulently represented to appellee that the reasonable value of appellant's stock was \$8,111, and that appellant knew that such representations were false and fraudulent; that appellant's stock was of the reasonable value of \$3,443, and such false representations were made by appellant with a design of deceiving appellee, and to induce him to make said partnership; that appellee did not know of the falsity of said representations, and was deceived thereby, and he believed them to be true at the time made, and acted upon same,

and was induced thereby to enter into the partnership; that he did not know the reasonable value of said stock of appellant, and had never seen same, etc.; that in plaintiff's petition it is stipulated that appellee put into said partnership \$1,180, and that appellant put in \$8,111, but in truth neither put in any money, but put in their stock of goods, etc., as aforesaid; that in truth and in fact the reasonable value of appellee's stock of goods, etc., was \$3,678, with a liability of \$1,228, leaving a net value of \$2,450, which was its true value; that appellee was induced by appellant to put in said stock at said agreed value of \$1,180; that appellee closed his business in Galveston, and moved his stock of goods, etc., to Navasota, and took charge of said business, devoting his entire time and attention to same from October 16, 1901, until about April 1, 1903, until he discovered the alleged fraud, whereupon he repudiated said contract and demanded of appellant restitution; that his services during the time he was employed in said business was of the reasonable value of \$1,627.70, prays that said contract be held null and void; that he recover of appellant the full value of his said stock of goods, etc., to wit, the sum of \$2,450, with interest thereon, together with reasonable compensation for his services rendered to said partnership; that he be protected by the judgment of the court from any liability arising out of the business of the firm, and for general relief. An auditor was appointed, who in his report found that the amount of appellant's original investment was \$4,825.51 and appellee's original investment \$1,180.88. The auditor reports an indebtedness of appellee to appellant upon a statement of the accounts of either \$556.79 or \$1,757.02, depending upon whether the stock on hand is to be taken at its invoice value or the amount for which it had been sold by the sheriff during the pendency of the suit. Appellee filed objections to several items of the auditor's report, but afterwards withdrew all of them except those to that part of the report in which the original investment of appellee is placed at \$1,180.88.

If the view taken of the case by the court was correct, the only part of the auditor's report material to the issues were the findings of the amount of the respective investments of appellant and appellee and the amount withdrawn by appellee while carrying on the business. The trial court filed findings of fact as follows, which we find to be supported by the evidence, and which are here adopted: "(1) That on or about the 16th day of October, A. D. 1901, the defendant, R. H. Cox, was engaged in the mercantile business in the city of Galveston, Galveston county, Tex., and owned a stock of goods, wares, and merchandise and fixtures of the value of \$3,678.30, with a liability thereon of \$1,228.21, having a net value of \$2,450.00. (2) That on or about said date plaintiff was engaged in the

mercantile business in Navasota, in Grimes county, Tex., with E. B. Deason, under the firm name of E. B. Deason & Co., owning and operating under said business two stocks of goods, one in a building known as the 'Vaughan Building' and the other in a building known as the 'Smith Building'; both of said stocks of goods, wares, and merchandise and fixtures being of the aggregate value of \$4,825.51. (3) That on or about the 16th day of October, A. D. 1901, plaintiff, Caplen, proposed to defendant, Cox, that they form a copartnership and combine the stocks of E. B. Deason & Co. and the stock of R. H. Cox and conduct the business in Navasota, Grimes county, Tex., under the name of R. H. Cox & Co., such combined stock to become the assets of said firm and be operated as one business under one management, Caplen to buy out his partner, E. B. Deason, and the firm to be composed of Caplen and Cox. (4) That, in order to induce Cox to enter into such copartnership, Caplen represented to Cox that the stock of goods, wares, and merchandise, fixtures, etc., owned by him, known as the 'E. B. Deason & Co.'s. stocks' was of the value of \$7,000 or \$8,000, or of a value more than twice the value of the stock, etc., owned by Cox. (5) That Caplen and Cox were on terms of friendly relations and had been for many years prior to said date, and Cox reposed great confidence in Caplen and placed great faith in his statements and representations to him, and believed the same and accepted the same as true. (6) That Cox believed said representations and statements to be true, and so believing relied and acted upon same and was induced by Caplen upon such representations to discount the value of his own stock of goods, etc., owned by him at a discount of 25 per cent. and 10 per cent. and to put a value upon the same as the value of his contribution to the firm assets of \$1,180.38, all of which was done by said Cox. That said stock of goods owned by said Cox was a clean, fresh stock of goods. (7) That upon such representations and statements Cox, believing the same to be true and relying and acting upon same, was induced to and did enter into the contract with Caplen in evidence, date October 16, A. D. 1901. That said contract stipulates that Caplen put in in said business the sum of \$8,111.29 in cash, and that said Cox put in in said business the sum of \$1,180.38 in cash. That no part of said capital was in fact in cash. (8) That the entire capital of said firm in fact consisted of the combined stocks of E. B. Deason & Co., owned by Caplen, and the stock owned by Cox. That the value of the stock, etc., put in said firm by Caplen was of the value of \$4,825.51 and the value of the stock, etc., put in said firm by said Cox was \$3,678.80, with a liability thereon of \$1,228.21, which left a net value of \$2,450.09. (9) That the liability of \$1,228.21 owed by Cox was paid by Caplen and credited to him in the

combination of the assets of the firm of R. H. Cox & Co. (10) That under the terms of said contract Caplen had the dictation and control of all financial matters pertaining to said business, and the exclusive management and disposition of the proceeds of said stock and of the buying of all the goods for said business and payment of all bills for said business, and that Cox should have the management of the store and the business to the extent of selling the goods, etc., as provided in the contract. (11) That in pursuance with the terms of said contract Caplen bought all goods and had same shipped to Navasota and paid all bills against said firm. That in pursuance with terms of said contract Cox took charge of said business on or about the 16th day of October, A. D. 1901, and managed and conducted the same in accordance with said contract until on or about the 31st day of March, A. D. 1903, when he, the said Cox, first discovered that the stock of goods Caplen had put in in said business was not of the value represented to him by Caplen, and which he, the said Cox, had believed to be true. (12) That the discovery by Cox on or about said date of March 31, A. D. 1903, was the first time Cox discovered the shortage and ascertained the truth. That immediately upon such discovery Cox advised Caplen that the partnership affairs must be adjusted, and that he could not continue the business, and that a settlement and adjustment must be had and thereby immediately repudiated said contract. (13) That under the terms of the contract Caplen and Cox each had the right to draw from said business the sum of \$75 per month, and that Cox drew from said business in cash and sundries from the 16th day of October, A. D. 1901, to the date of the dissolution of the partnership, to wit, on or about the 31st day of March, A. D. 1903, the sum of \$1,627.70. (14) That Cox gave his entire time and attention to said business from said date of the contract to on or about said date of March 31, A. D. 1903, managing and conducting said business in accordance with said contract, and that such services were reasonably worth the sum of \$75 per month."

The court did not err in overruling appellant's general demurrer and special exception to appellee's special answer or cross-bill. In this pleading appellee set out fully the facts showing that he had been induced by the false and fraudulent representations of appellant to enter into the partnership agreement, and also that he had been led thereby to agree to an undervaluation of his stock of goods, putting the same in at \$1,180 instead of \$2,450, which was the real net value, and that he had given his entire time to the business, with the value of such services. The facts pleaded, if true, entitled appellee to have the partnership agreement canceled and held for naught, and to recover of appellant whatever he had put into the business, esti-

mating his stock at its proper valuation, and interest thereon, with reasonable compensation for the value of his services while attending to the business, less what he had withdrawn from the business for his personal use. "Where a person is inveigled by the false representations of others to become a partner with them, the court will rescind the contract of partnership at his instance, and will compel those who inveigled him into joining them to repay him whatever he may have paid them, with interest, and to indemnify him against all claims and demands to which he may have become subject by reason of his having entered into partnership with them; he, on the other hand, accounting to them for what he may have received since his entry into the concern." 2 Ewell's Lindley on Partnership, p. 927; 22 Am. & Eng. Ency. of Law, 209, and cases cited. In such case appellee would be entitled to recover, not only the value of his investment in the business, with interest, but the reasonable value of his services in attending to the business. *Richards v. Todd*, 127 Mass. 167.

The first, fourth, sixth, eighth, and eleventh conclusions of fact of the trial court are objected to by appellant. We assume that the objection intended to be urged is that these conclusions are not supported by the evidence. None of these assignments can be sustained. The evidence was sufficient to support all of the court's findings of fact. The partnership contract shows the representations of Caplen as to the value of his stock, and the auditor's report, to which there was no exception as to this item (in fact no exception was taken as to any item thereof by appellant), showed that Caplen's stock was of the value of \$4,825.50, instead of \$8,111.29, as represented by him. The evidence leads to the conclusion, however, that Caplen added to the value of his stock at Navasota \$1,228.21 which Cox owed and which Caplen paid. The evidence excludes any inference that this was a mere expression of opinion by Caplen, or that it was intended by either of them to be taken as such. This was the E. B. Deason stock formerly owned by Caplen and Deason, and the uncontradicted evidence showed that a very short time previous Caplen had bought Deason's half interest in the stock for \$1,150, and nothing had been added to the stock thereafter and before the date of the partnership agreement. It is not necessary to the relief granted to appellee that Caplen should have known that these representations to the value of his stock were not true. It is sufficient that he should have made the representations, not as a mere matter of opinion, but as a fact, not knowing them to be true. Caplen stated that he got the statement upon which the value of his stock was based from Nicholson, his bookkeeper. This, and the particularity with which the exact value of the stock is given, show that he claimed to know its ex-

act value. *Putman v. Bromwell*, 73 Tex. 468, 11 S. W. 491. If this was not its true value, it does not matter whether he knew the fact or not. It cannot be said that the parties had equal means of information, if, in fact, Cox had any means of information as to the value of Caplen's stock. *Mitchell v. Zimmerman*, 4 Tex. 79, 80, 51 Am. Dec. 717; *Pendarvis v. Gray*, 41 Tex. 329; *Morrisson, Herriman & Co. v. Adone & Lobit*, 76 Tex. 255, 13 S. W. 166; *Hawkins v. Wells* (Tex. Civ. App.) 43 S. W. 818; *Neely v. Rembert* (Ark.) 71 S. W. 262. In the circumstances disclosed by the evidence Cox had a right to rely upon Caplen's deliberate statement as to the value of his stock. Caplen, at least, should not be heard to say that Cox should not have trusted him, but should have himself examined the stock before making the contract. No proposition was made to him by Caplen that he should do so at the time the partnership agreement was made to him. *Labbe v. Corbett*, 69 Tex. 503, 6 S. W. 808, 2 Pom. Eq. & 891. The evidence supports the finding that the representation of Caplen as to the value of his stock induced Cox to enter into the partnership agreement, and also to submit to a great undervaluation of his own stock. The larger the amount of Caplen's stock, the more valuable the partnership would be to Cox, and it is not unreasonable that he would have submitted to harder terms in fixing the value of his own stock than he otherwise would, in view of the large value of Caplen's stock as represented by him. This is substantially the effect of Cox's testimony and is not contradicted, except by Caplen, who testified that Cox's stock of \$2,450 net value was not worth more than 40 cents on the dollar. Appellee was no more concluded by the value placed upon his stock in the agreement than he was by any other provision of the agreement, if he was fraudulently induced to make it, but might show the real value of his stock as a basis of recovery.

Appellant complains that the court erred in rendering judgment in favor of appellee for the cost price of his goods, instead of the market value. The court finds that the net value of appellee's stock was \$2,450. This was the real value of the stock as shown by the testimony of Cox. No objection was made by appellant to this manner of proving the value, or that the evidence should be restricted to the market value. Caplen himself testified that their value was not more than 40 cents on the dollar of their cost, not that that was their market value, but that that was their value. There is no question of any other kind of value of the goods except their worth in the market, and when Cox testified as to their value, or their real value, as distinguished from the value placed upon them in the partnership agreement, it must be assumed that he meant the market value, in the absence of any objection on the part of Caplen to the proof of value in this way, or any

insistence, until after the trial, that the market value, *eo nomine*, should be proven.

The objections to the conclusions of fact, as set out in the several assignments, cannot be sustained, as we find the conclusions to be supported by the evidence. In so far as these assignments go to the alleged error of the court in not finding such facts as are indicated in the several assignments, they cannot be considered in the absence of a request for such findings. In so far as such facts, which appellant contends the court should have found in lieu of the facts found, are contradictory of the facts found by the court, our conclusion that the conclusions of fact are correct involves necessarily the conclusion that there was no error in the failure or refusal of the court to find other facts inconsistent therewith or contradictory thereof. The court found that the reasonable value of the services of Cox in attending to the business from October 16, 1901, to the date of the dissolution, March 31, 1903, was \$75 per month, and rendered judgment in his favor for \$1,812.50. It was also found that Cox had drawn out of the business in cash and sundries for his own use \$1,627.70, being \$315.20 in excess of the amount he was entitled to for his services. It is impossible to tell from the record when this amount of \$1,627.70 was drawn out by Cox further than that it was done during the continuance of the business, but it does appear that at the date of the dissolution, March 31, 1903, Cox had drawn out \$315.20 more than he was entitled to as the value of his services. Upon this amount he should have been charged legal interest from March 31, 1903, to the date of the judgment, January 6, 1906. The amount of this interest is \$33.45. The failure to charge appellee with interest on the whole amount drawn out by Cox is assigned as error, and to the extent indicated the assignment must be sustained.

We find no other error in the record requiring a reversal, but for this error the judgment will be reversed, and the cause remanded, unless appellee shall within 20 days enter a remittitur of this amount, in which case the judgment will be affirmed, at the cost of appellee.

FIRST NAT. BANK OF MORGAN v. BROWN.

(Court of Civil Appeals of Texas. April 13, 1906.)

1. CORPORATIONS—GARNISHMENT—AFFIDAVIT—SUFFICIENCY—ALLEGATION OF INCORPORATION.

Under Rev. St. 1895, art. 219, describing the requisites of an affidavit for garnishment against a corporation, and providing that it must state that the garnishee is an incorporated company, that statement is sufficient, and it is not necessary to allege that the garnishee is "duly incorporated."

2. GARNISHMENT — AFFIDAVIT — ERRONEOUS RECITAL.

Rev. St. 1895, art. 1579, requires justices of the peace to keep a civil docket and enter therein the time of the issuance and return of executions. An affidavit for garnishment stated that the judgment on which the garnishment was based had been perpetuated by the issuance of executions at various named dates, which, if correct, showed that 10 years had elapsed between two of the executions. The justice's docket, however, showed that one of the dates mentioned in the affidavit was erroneous, and that no period of 10 years had elapsed without the issuance of execution. *Held* that, as the court could take notice of the docket entries, it was unnecessary for the affidavit to recite the dates of the issuance of execution, and that, having done so, the erroneous recital might be disregarded as a clerical error.

Appeal from Galveston County Court; Lewis Fisher, Judge.

Action by J. S. Brown against J. B. Ross and another, in which the First National Bank of Morgan was summoned as garnishee. From a judgment against the garnishee, it appeals. Affirmed.

Wheeler & Clough and McGowan & Wade, for appellant. Cureton & Cureton, for appellee.

PLEASANTS, J. This is an appeal from a judgment in a garnishment proceeding instituted by appellee against the appellant. The judgment of the court below is sought to be reversed on the ground that the affidavit for garnishment is insufficient, in that it fails to show that the appellant is a corporation duly organized and incorporated under the law, and because said affidavit shows upon its face that the judgment upon which the writ of garnishment was applied for was dormant at the time the application was made. The affidavit is as follows: "That affiant is J. S. Brown, one of the members of the firm of J. S. Brown & Co., a partnership, now dissolved, composed of J. S. Brown and J. M. Brown, both of Galveston, Galveston county, Texas; that said firm of J. S. Brown & Co. recovered judgment against Ross Bros., a firm composed of J. B. Ross and Dennis Ross in the justice court of precinct No. 2 of Galveston county, Texas, on the 3d day of October, A. D. 1887, for the sum of \$104.00 principal, and \$25.60 costs of suit, together with legal interest thereon from October 3d, 1887, to this date, said cause being numbered on the docket of said court No. 4924, and styled J. S. Brown Co., plaintiff, v. Ross Bros., defendants; that said judgment is owned and held by affiant J. S. Brown and has been duly perpetuated by the issuance of executions from time to time on the following dates, to wit, October 4, 1887, February 8, 1887, to Johnson county, Texas, May 1, 1888, to Johnson county, Texas, October 30, 1889, to Johnson county, Texas, October 24, 1889, to Galveston county, Texas, August 11, 1902, to Johnson county, Texas, and September 22, 1902, to Bosque county, Texas, respectively;

that said judgment is a subsisting, unpaid and unsatisfied judgment against the said J. B. Ross as a member of the firm of Ross Bros.; that the said J. B. Ross was served personally with citation on September 18, 1887; that all the foregoing facts are shown of record in the civil docket of said court and the papers on file in the office of the justice of the peace of precinct No. 1 of Galveston county, Texas, in the city of Galveston, to which reference is here made and the same is made a part of this application; that said judgment, costs of suit, and legal interest of 6 per cent. per annum from October 3, 1887, are wholly unpaid and unsatisfied in whole or in part; and that neither J. B. Ross or Dennis Ross or the firm of Ross Bros. have, within the knowledge of affiant, property in the possession of either of them or in possession of said firm of Ross Bros., within this state, subject to execution, sufficient to satisfy such judgment. And that affiant has reason to believe, and does believe, that the garnishee, the First National Bank of Morgan, located in the town of Morgan, Bosque county, Texas, is an incorporated company, and that the defendant J. B. Ross is the owner of shares of stock in said company and has an interest therein. J. S. Brown. Sworn to and subscribed before me this 22d day of June, A. D. 1904. R. H. Barry, Justice of the Peace, Precinct No. 1, Galveston County, Texas."

We think neither of the objections to the affidavit should be sustained. The cases cited by appellant in support of the proposition that the affidavit is insufficient, because it fails to state that appellant company was "duly incorporated," are *Underwood v. Bank* (Tex. Civ. App.) 62 S. W. 943; *Way v. Bank* (Tex. Civ. App.) 30 S. W. 497; *Insurance Co. v. Friedman*, 74 Tex. 56, 11 S. W. 1046; *Insurance Co. v. Davidge*, 51 Tex. 244; and *Greenwood v. Pierce*, 58 Tex. 133. The cases cited, except the case of *Way v. Bank*, supra, hold that a petition in a suit or an affidavit in garnishment against a national bank, a railway company, or other corporation, which fails to allege that the defendant company is incorporated, is subject to exception for lack of such allegation. It is, we think, clear that these cases do not sustain appellant's contention. The case of *Way v. Bank* holds that a special exception to a petition in a suit against a national bank, on the ground that the petition failed to allege that the bank was "duly" incorporated, should have been sustained. This conclusion, however, was based upon the construction given by the court to article 1186 of the Revised Statutes of 1895, and, if it is conceded to be sound, is not authority for the proposition that an affidavit for garnishment against an incorporated company must state that the company is "duly" incorporated. The affidavit in this case is in strict compliance with article 219 of the Revised Statutes of 1895, prescribing the requisites of an affidavit for garnishment,

when the purpose of the writ, as in this case, is to attach shares held by the judgment debtor in a corporation. This statute only requires the applicant to state in his affidavit that the "garnishee is an incorporated company," whereas article 1186, which controlled in the decision of the *Way* Case, supra, requires that a petition in a suit against a corporation shall allege that the defendant is "duly" incorporated. There may be no sound reason for a difference in the requisites of a petition and an application for a writ of garnishment against a corporation, but the Legislature has seen fit, in the exercise of its unquestionable authority, to make a distinction, and the appellee was only required to comply with the statute.

The second objection to the affidavit presents a more difficult question. While the application states positively that the judgment upon which the writ is applied for has been duly perpetuated by the issuance of writs of execution, from the dates given in the affidavit it appears that more than 10 years elapsed between the issuance of the fifth and sixth execution on said judgment. But the affidavit further states, "that all of the foregoing facts are shown of record in the civil docket of said court, and the papers on file in the office of the justice of the peace of precinct No. 1 of Galveston county, Texas, in the city of Galveston, to which reference is here made and the same are made a part of this application." The docket of the court referred to in the affidavit shows that the fifth execution was issued on October 24, 1899, instead of 1889, as stated in the application, and there was no lapse of ten years between the issuance of executions on said judgment. It seems to be well settled that a valid writ of garnishment cannot be issued upon a dormant judgment (*Friedman v. Early Gro. Co.* [Tex. Civ. App.] 54 S. W. 278) and it is also the law that the papers in the original suit cannot be looked to to supply necessary statements in an affidavit for writ of garnishment. *Scurlock v. Railway Co.*, 77 Tex. 481, 14 S. W. 148. The application and affidavit in this case contain all of the statutory requirements. The judgment upon which the writ is applied for is fully described and identified and is alleged to be subsisting and enforceable. It was unnecessary for the application to go further and state the dates upon which the writs of execution were issued, but, having done so, its sufficiency depends upon whether we can consider the entries, upon the docket of the court referred to in said affidavit, as a part thereof, and, if so considered, whether we may regard the statement that the fifth execution was issued on the 24th of October, 1889, as an immaterial clerical error.

We think both of the questions above suggested should be answered in the affirmative. Article 1579 of the Revised Statutes of 1895 requires every justice of the peace to keep

a civil docket in which his judgments are to be entered. This article specifically enumerates the entries which it is the duty of the justice to make upon said docket, in addition to the judgment, and among them is the time of the issuance and return of executions. A court will take judicial knowledge of the existence and terms of its own judgments and entries in its minutes, and we think this rule should apply to all the entries made by a justice of the peace upon his civil docket in compliance with the statute above cited. *Kelly v. Gibbs*, 84 Tex. 143, 19 S. W. 380, 563; *Jeffries v. Smith* (Tex. Civ. App.) 73 S. W. 48; *Simon v. Greer* (Tex. Civ. App.) 34 S. W. 343. It follows from this rule that it was unnecessary for the affidavit in this case to show the dates upon which writs of execution were issued upon the judgment, since the court to which the writ was returnable would take judicial knowledge of the entries upon the docket showing such dates. The statements in the affidavit of the date upon which the fifth execution was issued being contradicted by the statement that the judgment had been duly perpetuated by the issuance of executions from time to time, and the justice docket having been referred to for a verification of both statements, we think it proper to consider the entries upon said docket as a part of the affidavit, for the purpose of determining whether the affidavit in fact shows upon its face that the judgment was dormant. As before stated, it appears from this docket that the fifth execution was in fact issued on October 24, 1899, and the statement in the affidavit that the judgment had been duly perpetuated is true. It follows that the statement of the date in said affidavit as October 24, 1899, is manifestly a clerical error, which is corrected by other parts of the affidavit and the record therein referred to, and was therefore immaterial. *Broyles v. Jerrells* (Tex. Civ. App.) 37 S. W. 377; *Corrigan v. Nichols* (Tex. Civ. App.) 24 S. W. 952. We do not think this holding conflicts with the rule that the papers in the original suit cannot be looked to for the purpose of supplying necessary allegations in the affidavit for writ of garnishment, announced in *Scurlock v. Railway Co.*, supra.

We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

GALVESTON, H. & S. A. RY. CO. v. WASHINGTON.*

(Court of Civil Appeals of Texas, March 24, 1906. Rehearing Denied April 26, 1906.)

1. TRIAL—ARGUMENT OF COUNSEL—APPEAL TO PREJUDICE.

In an action against a railroad for injuries sustained in a crossing accident, an argument of plaintiff's counsel to the jury which was outside of the record, inflammatory and vituperative in character, and in which he denounced

defendant as an octopus, and defendant's witnesses as frauds and fakes, and characterized one of them as an ungodly liar, was prejudicial error.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 308.]

2. APPEAL—REVIEW—FAILURE TO EXCEPT—ARGUMENT OF COUNSEL.

Argument of counsel will be reviewed on appeal though no exception was taken thereto, where the trial court had established a rule that he would not sustain an objection to improper argument, and would not instruct the jury to disregard an argument.

Appeal from District Court, Wharton County; Wells Thompson, Judge.

Action by George Washington, as next friend of James Washington, against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood, W. S. Brooks, G. G. Kelley, and C. L. Carter, for appellant. Jacob C. Baldwin, O. T. Holt, J. V. Meek, W. L. Hall, and R. M. Brown, for appellee.

PLEASANTS, J. George Washington, as next friend of his minor son, James Washington, brought this suit to recover damages for personal injuries caused said minor by the alleged negligence of appellant.

James Washington was, on the 25th day of March, 1896, run over by a train on defendant's railway in the city of Houston, and his feet and legs were so injured as to require the amputation of both legs below the knee. The petition alleges that while crossing the public street in the city of Houston, the said James Washington stepped upon a rotten plank which the defendant had placed in said street in constructing a crossing over its railroad, and that his foot broke through and became fastened in the hole thus made in said plank, and, while so fastened and held upon the track, he was run over by a rapidly moving train which was being operated by defendant's employes. The negligence charged was the failure to keep the crossing in repair, the failure of defendant's employes operating said train to keep a proper lookout for persons on the track, and to observe the ordinances of the city regulating the rate of speed at which trains should be operated within the city, and requiring the bell of the engine to be rung while the train was in operation. The defendant answered by general exception, and general denial, and by special pleas, in which contributory negligence was charged against the said James Washington, because of his failure to look and listen before going upon the track, and in stepping upon the track, in front of the approaching train. It is further averred that said James Washington, at the time he was injured, was a trespasser upon defendant's track, and was attempting to catch hold of and get upon one of defendant's moving cars for the purpose

*Application for writ of error dismissed by Supreme Court for want of jurisdiction.

of riding thereon without the consent of the defendant.

Plaintiff's evidence as to the circumstances under which the accident occurred was as follows: James Washington was run over by one of defendant's trains at the intersection of Colorado and Winter streets in the city of Houston. The track of defendant's railway is along Winter street. Colorado street crosses Winter street at right angles. The boy, who was about 10 years old at the time of his injury and lived on the south side of Winter street, five blocks east of the place of the accident, and about 20 feet from the railway track. At the time the accident occurred he was going home from a church service which he had attended at a church situated two blocks south and one-half block east of the place of the accident. His testimony as to the circumstances attending his injury is as follows: "I was on the southwest side of the intersection of Winter and Colorado streets, intending to cross from the southwest side to the northeast side, diagonally. I was walking up, and when I got to the corner, I looked up a little ways, and I was bound to look in front of me. I never saw any train, and I did not hear any train. I walked like any one else would. I stepped on the track. I just walked on catty-cornered. I stepped on a plank. They got planks inside the track. I was walking along not thinking about anything, and stepped in a hole, and my foot got caught between the rail and a plank. I did not think it was caught hard. I commenced pulling it, and kept on pulling it. It was my right foot. I saw it was kind of hard. I looked behind me and saw a train coming. It was a block and a half from me. I kept on pulling my foot and the train kept coming. I never heard any bell or any whistle. After the train got close to me, and I saw it would not stop, I fell back away from the track. My right foot was caught. I couldn't get it out. The train kept on coming and then ran over me. They ran over both my feet, and they were mashed so bad the doctors had to cut them off. The left leg was split, and the foot was out after the train passed. The train did not stop; it kept on going. My right foot was mashed all around the foot, and my left foot was mashed, and my left leg split up to the calf. I had on shoes at the time. After the engine and everything had passed a fellow by the name of Alfred Nelson came out and grabbed me, and asked me what had happened, and I told him I had my feet mashed. He lifted me up, and another man by the name of Will Underwood ran out, and when he ran out, Nelson sent him after a quilt. I never spoke to Underwood, and he did not talk to me. They got a quilt, and put me on it and carried me to Mr. Ed Hubert's store, right on the corner of Colorado and Winter streets. That is the corner I was injured on. * * * The evening I was injured I had been to

church and came along Edwards street to Colorado street, and then up to Winter street." He further testified: That he did not know what kind of engine hit him. Did not know what kind of train. It was pulling box cars. Did not know whether it was a switch engine that hit him or not. That the train that ran over him was running faster than he ever saw them running past his house. That it was running about 25 or 35 miles an hour. Colorado street had plank walks running from the sidewalk up the track. The walks were laid this way (indicating the direction at right angles to the track). The planks inside the track were laid running the same way as the track. That the planks inside were parallel with the track. That at the time he got his foot fastened in there the planks were rotten. That he broke part of the plank off. That it was rotten and broke off. That he fell on the south side of the track. That the engine was the first thing that hit him when he was struck. That it was the engine which mashed off his feet. That he did not fall and get his feet under the last car of the train. That he was not jumping on or catching hold of the cars. That when he got to the track the engine had not got to him. "I did testify [in May, 1902] that No. 763 [switch engine] was engaged in it, and that the numbers ran up as high as 767. I did testify that engine 764 was engaged in it [switching] then. I did testify to that. That is true. It is correct. I do recollect that at that time they were using engines running from 760 to 767, and that they were using engines 763 and 764. I knew the numbers from seeing them pass my house. When an engine passed by there was always a big number on the side of the engine. I knew the numbers of the engines they used in switching."

Lucy Williams testified for plaintiff, in substance, as follows: That she and her mother, Sarah Nelson, were on Winter street about a block and a half from Jimmy Washington, and saw him going to the track on Colorado street; that she saw a train coming, but did not pay any attention. "As the train approached, he left the track to get out of the way, and we looked and the boy was stooping down. After the train passed him I saw him fall, but I did not know whether the train knocked him down or not, on account of the smoke that come down over him, and after the train all had passed there, we saw he was hurt." She further testified that she did not know whether or not the boy was trying to get on the train at the time he fell, and that the train by which he was injured was drawn by a switch engine.

Sarah Nelson testified for plaintiff that she saw James Washington coming up Colorado street towards Winter street, and run on the track; that a train was then coming from the west pretty fast, but she did not notice whether or not the boy got off the track.

Mrs. Walker testified for plaintiff that on the evening the boy was injured she was driving north on Houston avenue, which avenue crosses Winter street two blocks east of Colorado street; and, hearing a train approaching, she stopped when she reached Winter street to see from which direction the train was coming, and looked up Colorado street; that she saw the boy on the track, and the train was coming very fast; that she watched him and saw the train strike him, and he fell over; that her horse got nervous, and she turned around and did not wait to see any more; that after the train passed she crossed the track and met a crowd coming on that side; that the boy was on the south side of the track when he fell; that he was about two blocks west of where she was; that the train was coming from the west towards her very rapidly.

The following evidence was introduced in behalf of defendant: John Dixon, defendant's yard foreman, testified that the only trains drawn by switch engines which passed the place of the accident on the evening it occurred were drawn by engines Nos. 763 and 764. Engine No. 763, with a train of cars, passed about 5:45 p. m., and engine No. 764 about 5:50 p. m. The engineer, the fireman, the foreman, and three others, members of the crew operating the train drawn by engine No. 764, all testified that no one was on the track when their train passed the place at which James Washington was injured; none of these witnesses saw the boy at any time, and if he was injured by their train, they knew nothing of it. The engineer and fireman both testified that they were keeping a lookout ahead of their train, and there was nothing to prevent them from seeing the boy if he had been on the track. The foreman testified that the engine was backing and that he was on the end of the engine tank looking out for anyone who might be on the track, and that the boy could not have been on the track without his seeing him.

The engineer and two of the crew operating the train which was drawn by engine No. 763 all testified that they did not see James Washington on the evening he was injured, and that he was not run over by their engine to their knowledge. They further testified that they were keeping a proper lookout, and that the boy could not have been on the track as stated by him without their seeing him. Of the remaining two members of this crew, Berry, the foreman, is dead, and the present whereabouts of Miller, the fireman, are not known.

E. T. Hubert testified that at the time of the accident he lived on the corner of Winter and Colorado streets, and was familiar with the place of the accident, having kept a store and lived there for several years. He was in his store at the time of the accident, and did not see the occurrence, but saw the boy im-

mediately after he was injured, and saw the train that injured him. It was a switching train, and composed of 15 or 20 cars, and was going east.

Will Underwood testified that he lived on the north side of defendant's track, at the intersection of Winter and Colorado streets, just opposite the place of the accident; that he was leaving his home to go to work at the time of the accident, and saw the boy when he got hurt; that he was about 20 feet from the boy at the time, and saw the train run over him; that it was a switching train going east, and was composed of 25 or 30 cars; that the four hind wheels of the last car ran over the boy's legs. He further testified: "The little Washington boy was standing just off the plank crossing on the ground, and between the cars as they passed me, I could see him getting ready to catch on. Where I was standing was low ground, and the bed of the track was high, so I could see the boy as high up as his shoulders. I saw him take two or three steps running alongside of the last car of the train. I saw one of his hands go up and then fall, while the other hand seemed to catch, and the next minute his body was swinging underneath the car in front of the hind wheels, and they run over his two legs. I ran over to him, picked him up, and carried him over to Hubert's store. Alfred Nelson and Ed Hubert were at the store. When I reached him and picked him up, I said: 'Kid, what the hell do you mean by trying to do that,' and he said, 'I was only trying to get a ride home.' There was no one else present when he said that to me. * * * I am working now, and have been since 1892, for the Houston & Texas Central Railroad Company."

Dr. William Olive, the physician who was called to attend the boy, and who amputated his legs, testified as follows: "My recollection is that James Washington made a statement in my presence that he was walking along the track, and as the car passed him he made an effort to catch the car, and fell under it. That is my recollection. It has been several years ago. It is my recollection he made this statement before I amputated his legs, while I was questioning him as to how he got hurt. It must have been several years after the accident when I was first called as a witness. I had not given the facts with reference to this case any more thought than to any other case. It is my recollection that the boy stated that he tried to catch on to the car. I would not undertake to repeat the words he used in making this statement. It is barely possible, though hardly probable, that I have his statement confused with the statement of some one else, or the statement of some one else confused with his. It is hardly probable, however, that I have."

A. Vann, witness for defendant, testified that at the time of the accident he was claim agent for the defendant company; that he

went to the house of plaintiff, James Washington, on the 4th day of April, 1896, and that the plaintiff made the following statement before him, which he reduced to writing, and which was signed by the plaintiff, James Washington, which said statement is as follows: "On the day I was injured, I was coming from church, and walking up the railroad track, when I heard a train coming from Cheney Junction towards the Fifth Ward Depot. I stepped off the track, and stood beside the passing train. Just as the last box car was passing me, I stepped close to the train, and as I did so my foot struck against something in the street, and I fell, and my feet went under the box car, and cut both my feet off. I did not attempt to get on the train; only stood near the track, and intended stepping on the track behind the train and going on home. There was no one with me at the time I was hurt. Albert Nelson was the first one to reach me after I was run over. I did not see any of the trainmen just before I was hurt. They did not stop or notice me in any way. The accident happened on the street on which Hubert's store is located. A lawyer has been down to see me, and he told me not to tell any one how the accident happened. I am 10 years old. My father is named George B. Washington, and works for Inman & Co., at Inman Press. I live on the corner of Holly street and Winter street. My mother is dead. I have three brothers. The engine pulling the train was switch engine No. 763. I did not attempt to catch the truss rods, nor in any way attempt to get on the train. This the 4th day of April, 1896. [Signed] James Washington."

Ed S. Phelps, for defendant, testified to having taken the ex parte deposition of James Washington in a suit brought by him in Harris county to recover for the injuries, for which recovery is sought in this suit. The witness testified. That he swore James Washington, and then propounded to him the questions in the order in which they appeared in the interrogatories. That he explained the questions to the boy, and reduced his answers to writing. That this was done at the home of the plaintiff. That his answers were read over to him, and he was asked if he desired to make any change; the answers being reduced to writing just as he answered them. Said depositions were signed and sworn to by the plaintiff. That shortly after he got to the home of James Washington, his father came in, and remained there during the balance of the time that he was taking the depositions.

In these depositions James Washington makes the following statements: "It is not a fact that I was attempting to catch on a car in that train and lost my hold and fell. It is not true that I jumped on and off moving trains. I have gotten on and off and across cars standing still. Once I had gotten on a car, and it started to move, and I got off.

My father told me not to get on and off moving trains, and I did not disobey him. I was in good health at the time of my injury. My stumbling over the plank walk was the thing that caused me to fall under the moving car. It is a fact the engine and nearly the whole train got by me before any part of it ran over me. I was entirely clear of the track until I fell under the wheels next to the last car in the train, and it ran over me. After I thus fell under the train, it was impossible to have stopped the train in time to have avoided striking me. Up to the time I fell with my legs under the next to the last car, there was nothing in my action to indicate to any one of the train men or any one else that I was in a dangerous position." He also admitted that he had made the statement to the witness Vann before set out.

The Harris county suit was filed April 4, 1896, and was dismissed for want of prosecution in October, 1896, and about two years thereafter this suit was filed in Wharton county. The petition in the suit filed in Harris county does not charge that the crossing was defective in any particular, and contains no allegation that James Washington was caught and held on the track by his foot becoming fastened in a hole in the crossing. The only allegations stating the cause of action are that while crossing defendant's track in a public street of the city of Houston, James Washington was run over and injured by one of defendant's trains, and that said accident was due to the negligence of defendant's employes in operating the train at a high rate of speed, and failing to keep a proper lookout, and to give proper signals when approaching the street crossing. On the trial below James Washington admitted that he had signed a paper prepared for him by Mr. Vann, but stated that he did not know at the time he signed it what the paper contained, and denied that he made the statements contained in said paper. He testified to the same effect in regard to the depositions taken by Mr. Phelps. The trial by a jury in the court below resulted in a verdict in favor of plaintiff for the sum of \$12,000.

The fifth and sixth assignments predicate error upon the refusal of the trial court to grant a new trial on the ground that the court permitted counsel for the plaintiff in his closing speech to the jury to go outside of the record and abuse and vilify witness for the defendant, and to use improper and inflammatory language which was calculated to and did arouse a feeling of passion and prejudice in the minds of the jury against the defendant. The bills of exceptions set out the argument objected to at length, and we think the objections made to it are valid. The following excerpts taken from the bill of exceptions sufficiently discloses the character of the argument:

"Mr. Kelly says he don't abuse witnesses. I don't either. I say that when an attorney

says things about a witness that are not true then he is abusing him; but when a man tells the truth about a witness, it is not abuse. I am going to tell you what I believe is the truth about Will Underwood. I believe he is the most ungodly liar that ever gave testimony in a court, and I believe I can show it. Will Underwood's testimony put them in a dilemma, and I will show it to you. Talk about fraud! Talk about fake! I wonder where Mr. Kelly is? He told me he was going to stay here, because he expected to catch me in my argument, but he has run at the first shot! Talk about fakes and frauds. If there is any of it here it rests on the Galveston, Harrisburg & San Antonio, and principally upon two of their agents, A. Vann and Ed Phelps. At the time that company committed this crime—I will call it a crime, running over this boy and leaving him to die like a dog, not even stopping the train to see what they had done—at that time they were violating the law, and every man of that crew was liable to be arrested and put in jail for it, until he gave bond to appear in court. Underwood was standing 35 or 40 feet from the track, and what did he see? You, gentlemen, are practical business men. I don't think there is a man on this jury who hasn't seen a train or ridden on it. My friend, Ahliday, is the youngest man on that jury, and I know that he has often seen them flash by this point over this track here. They have another way. The only defense that they set up is that the boy was trying to jump on the train, and they try to support Will Underwood a little by the evidence of Ed Hubert. They try to break it down by the depositions that Phelps took, and the statement that Vann took, and by that they try to contradict the boy. And Mr. Vann, the chief detective of the railway at that time, he called himself a claim agent—starts out to do what? To get a fair and impartial statement from that boy? No, sir; but to go to that boy's house, and, if he could, to extort from him a statement that would relieve the railroad company from responsibility. Mr. Billy Brooks says they went to see if they were responsible, so they could settle it. Who ever heard of a railway company going out to see if they were responsible? I have known of them being willing to compromise in a cinch case against them, but I never heard of one trying to find out if it was responsible. They sent Mr. Vann out to see about this case, and, if Mr. Vann had reported right, this case would have been settled long ago. But Mr. Vann had an idea of his own. Gentlemen, I have known Mr. Kelly to figure in many cases in which he got half the recovery, and I have helped him try them. Kelly has several cases on this docket now in which he gets a part of the recovery. Kelly, are you trying to rob old man Lowe because you are interested in the recovery? I expect Carter has figured in a good many, and when they

find a man is a good man they reach out, that octopus, with its long arms, reach out one of its tentacles, and says, 'Come down to Baker, Botts, Baker & Lovett's office. We will give you a good salary. We are tired of having you gouge the railroad.' Talk about fakes. Mr. Vann is one of these tentacles. It was his business to reach out with one of those long arms, and hover over that 10 year old boy, his feet severed from him, 10 days after he was wounded, suffering the agonies of the damned, with visions of engine 763 and 764, and all the engines of the world crashing over his body, with his brain distorted by suffering, and by the medicines given him, and the shock of his wound. Here comes this great big vampire, with his great beak, and his wings flapping. I expect that boy thought it was the archangel from below coming after him. He hovers over the boy, and tells him: 'Here, Jimmy, I want you to sign this paper,' and Jimmy signed it. I believe it happened that way, I believe it was written out before he went there. He asked Jimmy how it happened, and Jimmy gave him a distorted statement, the best he could in his terrible mental agony, and this glorious claim agent made out a remarkable statement, and said, 'Jimmy, sign it,' and Jimmy signed it. I believe it was the vaporings of that imagination of a 10 year old boy, with his body racked with agony, the wanderings of a distorted brain, that Vann wrote out. And then you bring that into a decent court, before a reputable jury, and ask them to believe it."

"When they got that paper in the office of the railroad company, and it got to Baker, Botts, Baker & Lovett, their distinguished attorneys, they found it was not sworn to. They would have to take other steps. In the meantime suit was brought. What did they do? They sent another one of their agents out there, and ain't it a singular coincidence that when our priestly looking friend, Mr. Phelps, arrived on the scene that he selected the 19th of June to go, the day it is notorious all over Texas as the day the colored people celebrate their emancipation, the day they consider it a religious duty to observe. Phelps selected the 19th of June, and, by a singular coincidence, when he got there, nobody was present. His father came in afterwards. You jump at conclusions too quick. I ain't going to cover anything up. He got down there and nobody was there, and he invades the home of that man, George Washington—lawyer going down to take an ex parte deposition—and gentlemen, do you know what an ex parte deposition is? In a civil case, I want to take your deposition. I prepare interrogatories addressed to you, and file them with the clerk, and the other side can see them and add cross-interrogatories, when they are handed back to the clerk, who sends them to an officer, and that officer takes the depositions—the answers to my questions and those of the other side.

But an ex parte deposition is another thing. I will tell you what it is. It is a cruel, unjust law, by which one side can file interrogatories without anybody ever seeing them. That is the true ex parte deposition. They sent Phelps down there to take an ex parte deposition of that boy three or four months after the accident happened. What for? To bolster up that paper of Vann's. I believe they prepared that deposition with this statement before them. Every question in it is predicated on that statement. Phelps goes down there and walks in. What does he find? Nobody in the house. It is true, as Mr. Kelly says, his father came in. He was a negro. If he had been a white man he would have kicked Phelps out. He had no right there. But the boy's father was a negro."

There is nothing in the testimony nor in the argument of defendant's counsel as shown by the bill of exceptions or elsewhere in the record which justified the plaintiff's counsel in denouncing the defendant as an octopus and it and its witnesses, Vann and Phelps, as frauds and fakes, nor is there any justification for the charge that the witness Phelps was acting as the agent of the defendant when he took the boy's deposition. He was a sworn officer of the law, and, in securing the depositions, was acting in that capacity, and not as an agent of the defendant. George Washington was present when the depositions were taken, and heard what they contained, and though he brings this suit as next friend of his minor son, he did not testify in the case. The testimony showed that at the time the depositions were taken the boy was sitting up in bed, and there is no evidence that he was then suffering any pain whatever. The statement that the counsel believed the witness Will Underwood was an ungodly liar was also improper. It was permissible for him to argue to the jury that the evidence in the case showed that statements of defendant's witnesses were not true, but we do not think it was proper for him to apply to them the abusive language shown in the bill of exceptions. Much of this argument was outside of the record, and its general inflammatory and vituperative character is apparent. We do not think the impropriety of the argument taken as a whole, or that it was prejudicial in its character can be seriously questioned. *Dillingham v. Scales*, 78 Tex. 207, 14 S. W. 566; *Ry. Co. v. Musick*, 76 S. W. 219, 8 Tex. Ct. Rep. 264; *Ry. Co. v. Scott* (Tex. Civ. App.) 26 S. W. 999; *Elevator Co. v. Hobbs* (Tex. Civ. App.) 23 S. W. 924; *Ry. Co. v. Cooper*, 70 Tex. 69, 8 S. W. 68. Appellees contend that the assignments should be overruled because the bill of exceptions show that no exceptions were taken to the argument at the time it was made, and the court was not requested by counsel for appellant to instruct the jury to disregard it. Under this contention it is insisted that the holding of this court in case of *Ry. Co. v. Rehm*, 82 S. W. 523, 11 Tex. Ct.

Rep. 41, that there might be such gross violation of the rules governing the argument of a case before a jury as to require a reversal of the judgment, notwithstanding no exception was taken to the argument at the time it was made, and no request was made to instruct the jury to disregard it, is not supported by any authority. We have no doubt of the soundness of that opinion, and think it is supported by the authorities therein cited. We do not hold, however, that the argument in this case is of such a character as would call for the application of the rule announced in the *Rehm* Case. The reason, or one of the reasons, given by the appellant's attorneys in their bill of exceptions for not excepting to the argument at the time it was made, and not requesting a charge instructing the jury to disregard it, was because it was known to them that the trial court would not sustain an objection to the argument, and that he had repeatedly stated that he would not sustain objections to improper arguments made to juries in his court, but would place the responsibility on the attorney making such argument. In approving this bill of exceptions the trial judge makes the following statement: "I will state further, that I never reprimand any attorney for any remarks made out of the record, nor do I instruct the jury to disregard them." The rule which requires that improper argument shall be excepted to at the time it is made is primarily based upon the ground that unless the attention of the trial judge is called to the objectionable argument it may escape his notice, and no opportunity having been given him by the complaining party to correct the error before the verdict, such party will not be permitted to speculate on the chance of a verdict in his favor, and then take advantage of the error on a motion for a new trial. It is obvious that this reason does not apply when the trial court has established a rule that he will in no case sustain an objection to improper argument, and will never instruct a jury to disregard an argument however improper it may be. To require an attorney under these circumstances to interpose an objection to an unauthorized argument would not only require the doing of a vain and useless thing, but one that would increase the harmful effects of the error of which he sought to complain, because the jury could reasonably conclude from the action of the judge in overruling the objection that the objectionable argument was authorized. To require an exception to be made under such circumstances would be manifestly unjust and unfair, and the rule invoked by appellees should not be applied in this case.

It only remains for us to consider the probable effect of the violation in this case of the rules of argument as before shown. Whenever these rules are violated, a substantial right is infringed, and unless it be made to appear that the complaining party has waived his right to complain by failing to

except at the proper time, or by provoking the improper argument, or that such argument did not probably affect the result of the trial, a new trial should be granted. We have already held that the failure of appellant's counsel to except to the argument, under the circumstances shown by the bill of exceptions, does not prevent appellant from now urging such objection, and that the argument complained of was not provoked by anything said by appellant's counsel in their addresses to the jury, and we cannot say, in view of the conflict in the evidence upon the issue of appellant's liability, that it is not probable that the jury were influenced by said improper argument. These conclusions require a reversal of the judgment of the trial court. *Ry. Co. v. McCarty*, 89 S. W. 805, 13 Tex. Ct. Rep. 876.

Whenever a trial in a lower court is free from irregularity, and the record shows that every right of the litigants has been properly safeguarded, this court has uniformly refused to disturb the verdict of a jury upon conflicting evidence, unless the verdict is so against the great weight and preponderance of the evidence, as to justify the conclusion from that fact alone, that the jury were improperly influenced; but no such sanctity can be attached to the finding of a jury when the record shows that they were probably influenced by an argument not founded on or authorized by the evidence before them, and which was marked by vituperation and abuse well calculated to arouse the passion and prejudice of the jury, and which have no proper place in any argument. As we have before said in the case of *Tel. Co. v. Burgess* (Tex. Civ. App.) 60 S. W. 1023, it is no reflection upon the integrity or the intelligence of a jury to hold that they may have been influenced by improper argument of counsel even when they are told by the court to disregard such argument, because the human mind is often unconsciously controlled by influences which it has striven to combat and which it believes it has overcome. In recognition of this fact, the law throws around a jury every safeguard to keep their minds free from every impression, except such as is produced by the legal evidence admitted in the case, and a disregard of these safeguards in the trial of a case makes it the duty of an appellate court to set aside the verdict of the jury in all cases in which it is probable that such irregularity has been injurious to the party complaining of it. *Ry. Co. v. Irvine*, 64 Tex. 529; *Wills v. Lowry*, 66 Tex. 542, 2 S. W. 449; *Willis v. McNeill*, 57 Tex. 465; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

Because, in our opinion, a new trial should have been granted on the ground stated in the assignments above discussed, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded.

ROBERTS v. FELLMAN DRY GOODS CO.
(Court of Civil Appeals of Texas. April 14, 1906.)

1. BOUNDARIES—PARTY WALLS — CONSTRUCTION—AGREED LINE.

A recital in a party wall contract that the wall was built on the line between the lots, coupled with evidence showing knowledge of defendant's grantor of the actual location of the wall, and his acquiescence in the possession of the strip in controversy for 16 years by plaintiff's grantor, was sufficient to sustain a conclusion that the prior owners of the two lots agreed, at the time the wall was built, that the division line should be established as the center of the party wall, as indicated in the agreement.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 212-226.]

2. FRAUDS, STATUTE OF—PARTY WALL AGREEMENT.

Where, at the time a party wall was constructed, neither of the adjoining owners had knowledge of the true location of the line, their parol agreement fixing the boundary line between the two lots as the center of the wall, acquiesced in for 16 years, was not within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 212-226; vol. 23, Cent. Dig. Frauds, Statute of, § 112.]

Appeal from District Court, Galveston County; Geo. El. Mann, Special Judge.

Action by the Fellman Dry Goods Company against Charles Roberts. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Maco & Minor Stewart, for appellant. Mart H. Royston, for appellee.

PLEASANTS, J. This suit was brought by appellee to enjoin appellant from entering upon or in any way interfering with plaintiff's possession of a parcel of land situated in the city of Galveston and described in the petition as lot 10 and strip 20 inches in width and 120 feet in length off the west side of lot 9 in block 502 in said city. The petition alleges that plaintiff is the owner of said land by record title from the sovereignty of the soil, and by limitation of 10 years, and that defendant is threatening to enter upon said land and forcibly eject plaintiff and remove therefrom improvements placed thereon by plaintiff. The defendant answered denying that plaintiff was the owner of any portion of lot 9, and asserting that he was the owner thereof, and that the brick wall mentioned in plaintiff's petition as a party wall, and which it was intended should be erected one-half upon lot 9 and one-half upon lot 10 was by mistake placed wholly upon lot 9, and that defendant had no knowledge of such mistake until shortly before the filing of this suit. He prayed that the true division line between said lots be fixed and established, that the equities between the parties be adjusted, and that the temporary injunction which had been issued against him be dissolved. The trial in the court below was without a jury, and resulted in a judgment

fixing the division line between plaintiff and defendant by extending a straight line run through the center of said party wall north to the north boundary of said lots, and south to their south boundary, and in favor of plaintiff for the title and possession of the land claimed and held by it west of said line, and perpetually enjoining defendant from interfering with plaintiff's possession thereof.

The material facts disclosed by the record are as follows: Lots 9 and 10, in block 502, in the city of Galveston, adjoin each other; the west line of lot 9 being the east line of lot 10. This line is 120 feet in length and extends from Postoffice street on the south to an alley which runs through said block north of said lots. In 1889 J. H. Burnett, who owned lot 10, desiring to construct a brick building upon said lot, agreed with J. M. Burroughs, who owned lot 9, to construct a party wall, one-half of which was to rest on lot 9 and the other half on lot 10. After the construction of this wall Burnett executed and delivered to Burroughs the following instrument: "Galveston, Feby. 4, 1889.—This is to certify that I, J. H. Burnett, have constructed a sixteen-inch party brick wall, six foot base, three stories high, eighty feet long, on the line dividing lots numbers 9 and 10 in block numbered 502, in the city of Galveston, in the county of Galveston, half on each lot, at a total cost of ten hundred and twenty 78/100 dollars, and have this day received from J. M. Burroughs five hundred and ten 38/100 dollars for the east half of the wall, in full for his half of said party wall. J. H. Burnett." This instrument was filed for record by Burroughs November 6, 1889, and was thereafter duly recorded in the proper records of Galveston county. There is no evidence that there was, at the time this wall was constructed, any dispute as to the location of the line between said lots, but said line was at that time unmarked, and its exact location unknown; both lots being then vacant. Burnett and Burroughs both supposed, at the time the agreement was made and the wall constructed, that the statement in the instrument as to the location of said line was correct. This wall was 80 feet and 6½ inches in length, and the building of which it forms a part has been continuously occupied by plaintiff and those under whom it claims ever since its construction in 1889. At the time this building was constructed, Burnett also constructed a shed north of and adjoining said building, which extended back to the alley, and the east wall of which was on a line with the east wall of said brick building. This shed has also been continuously occupied by plaintiff and those under whom it claims ever since its construction. Appellee purchased lot 10 and the improvements thereon from the estate of J. H. Burnett in March, 1904, and appellant purchased lot 9 from the estate of J. M. Burroughs in 1900. No claim is shown to have been made by any one that the division line

between said lots was not located as fixed by the agreement between Burnett and Burroughs in 1889 until April, 1905, when a survey disclosed that the true location of said line would place it one foot west of the center of said brick wall at its southern end, and seven inches west of the north end of a line run through the center of said wall from the south to the north line of said lot. When this discovery was made, appellant asserted claim to the strip of land lying between the two lines, and threatened to remove the wooden building on the north end of lot 10 by pushing it back to the line claimed by him, but was restrained from doing so by the temporary injunction issued in this suit.

Under his first assignment appellant assails the judgment, upon the ground that the court below erred in construing the conveyance by Burnett to Burroughs of the east half of the party wall as an agreement between said parties fixing the location of the boundary line between their lots. It may be that the conveyance should not be construed as an agreement fixing said boundary line; but the recital in the instrument that the wall was built upon said line, coupled with the evidence showing the knowledge of Burroughs of the actual location of said wall, and his long acquiescence in the possession by Burnett and those claiming under him, up to the line designated in said conveyance, was amply sufficient to sustain the conclusion that the owners of the land, both of whom are now dead, agreed at the time the wall was constructed that the division line between them should be fixed and established as indicated in said conveyance. It is not material that the evidence fails to show that the boundary line between these lots was in dispute at the time the agreement fixing its location was made.

No fraud is alleged on the part of Burnett, and there is no evidence tending to show that the true location of the line was known by either party at the time the agreement was made; but, on the contrary, appellant alleges in his answer that the location of said line was unknown to him until shortly before the institution of this suit, and the only reasonable conclusion that can be drawn from the evidence is that it was unmarked, and its location unknown by either party at the time said agreement was made. Under these circumstances a parol agreement fixing the boundary line between the lots was not within the statute of frauds, and, having been acted upon and acquiesced in for 16 years, must be held binding between the parties and those claiming under them. *George v. Thomas*, 16 Tex. 89, 67 Am. Dec. 612; *Browning's Ex'x v. Atkinson*, 46 Tex. 606; *Coleman v. Smith*, 55 Tex. 259; *Cooper v. Austin*, 58 Tex. 494; *Harn v. Smith*, 79 Tex. 312, 15 S. W. 240, 23 Am. St. Rep. 340.

The evidence further shows that the parties recognized the line indicated by the con-

veyance of the one-half of the party wall as extending the entire length of the lots. Burnett took possession and built up to said line north of the party wall, and his right to such possession has been recognized and acquiesced in by Burroughs and those claiming under him for the length of time before stated. We think that, upon the undisputed evidence in the case, no other judgment than one in favor of appellee could have been properly rendered. This conclusion renders it unnecessary for us to discuss the questions of law presented in the remaining assignments. The contentions made under said assignments may be conceded to be sound as abstract propositions of law, but are inapplicable to the facts in this case, and all of the assignments are therefore overruled, and the judgment of the court below is affirmed. Affirmed.

CAMP et al. v. LEAGUE.

(Court of Civil Appeals of Texas. March 31, 1906.)

1. BOUNDARIES—EVIDENCE—SUFFICIENCY.

In an action of trespass to try title, evidence held sufficient to support a judgment sustaining the contention of the plaintiff as to the location of a boundary.

2. APPEAL—REVIEW—HARMLESS ERROR.

Any error in the admission of evidence as to the location of a boundary, which, so far as it was material, was not disputed, was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4163.]

3. TRESPASS TO TRY TITLE—EVIDENCE—ADMISSIBILITY.

In trespass to try title, a lease from plaintiff to one of the defendants was admissible in evidence to prove an allegation that defendants were tenants under the plaintiff.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass to Try Title, § 57.]

4. EVIDENCE—EXPERT TESTIMONY — ADMISSIBILITY.

In trespass to try title, an expert surveyor was properly permitted to testify whether the property described by field notes in the petition was embraced within the metes and bounds given in deeds examined by him.

[Ed. Note.—For cases in point see, vol. 20, Cent. Dig. Evidence, § 2328.]

5. TRESPASS TO TRY TITLE — EVIDENCE—ADMISSIBILITY.

In trespass to try title, a question whether the witness had ever surveyed on the ground the tract described in the petition and an affirmative answer thereto were admissible as a predicate for the witness' testimony in which he detailed minutely what he had done and found upon the ground.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 840.]

6. TRIAL—RECEPTION OF EVIDENCE—RESTRICTION TO SPECIAL PURPOSES.

In trespass to try title, evidence of a statement by one of the defendants, who was present in court, and afterwards testified to the same matters, as to the location of a boundary in dispute, was properly confined by the court to the issue of good faith.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 126.]

7. BOUNDARIES—EVIDENCE—ADMISSIBILITY.

In trespass to try title, where it was shown that a defendant was in possession of land on both sides of a disputed boundary, the records of the county commissioners' court, showing that a road was laid out where defendants claimed the boundary was located, was inadmissible.

8. TRIAL—RECEPTION OF EVIDENCE—REPETITION.

Refusal of the court to allow parties to introduce matters which were already in evidence was proper.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 131.]

9. BOUNDARIES—EVIDENCE—ADMISSIBILITY.

In trespass to try title, where a boundary was in dispute, evidence of a deed of adjoining land was admissible in connection with other testimony showing that the land deeded was fenced, for the purpose of showing the identity and significance of fence rows found near the boundary in question.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 153, 160, 161.]

10. EVIDENCE—DOCUMENTS—ADMISSIBILITY.

Field notes in the handwriting of a county surveyor contained in a book handed down to his successor in office were admissible in evidence in an action of trespass to try title.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1253; vol. 8, Cent. Dig. Boundaries, §§ 171-173.]

11. EVIDENCE—COMPETENCY OF EXPERTS—SUBVEYS.

In trespass to try title, testimony of a surveyor that meanderings of a stream shown by a former survey would fit only one particular part of the stream was admissible after he had testified to an actual survey by himself.

Appeal from District Court, Galveston County; Frank M. Spencer, Judge.

Action by J. C. League against Berry W. Camp, executor of the estate of C. S. House, and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Wm. T. Austin, John C. Walker, and Ewing & Ring, for appellants. Maco & Minor Stewart, for appellee.

GILL, C. J. J. C. League brought this suit against Berry W. Camp, executor of the estate of C. S. House, deceased, Mary M. House (widow), Catherine Camp, and her husband, Berry W. Camp, to recover about 147 acres of land described by metes and bounds, a part of the John Dickinson league in Galveston county. The form of the action was trespass to try title, and it was further averred that Camp had entered upon the land under a written lease from one George W. Butler, a tenant of plaintiff, who leased the land to Camp with the consent of plaintiff. Defendants answered by general denial, plea of not guilty, and impleaded Hutcheson, Campbell, and Meyer as warrantors. Limitation of three, five, and ten years and improvements in good faith were also pleaded; but, as the issue of limitation does not arise upon the evidence, and the value of improvements is offset by the value of the rents, they will not be hereafter referred to. The case, as disclosed by the pleadings and the evidence, is one of boundary; the defendants

by supplemental answer specially pleading their theory as to the correct location of the disputed line. A trial to the court without a jury resulted in a judgment for League, and the defendants have appealed.

The statement of facts covers nearly 500 pages of the record. The lack of method in its preparation and the presence of much immaterial and irrelevant matter has entailed a vast amount of labor upon the court which might easily have been avoided. From the evidence, we condense the following as the facts pertinent to a proper disposition of this appeal: The Dickinson league of land is situated on the waters of Clear creek in Galveston county. It was surveyed and located in 1824. Its field notes call to begin at the northeast corner of the Williams league; thence east, 4,100 varas to the northwest corner of the Williams labor; thence south, crossing Clear creek, 3,880 varas, to a stake for the southeast corner of the league; thence west, 8,200 varas, to a point immediately south of the southeast corner of the Williams league; thence due north, 1,050 varas, to the southeast corner of the Williams; thence with the Williams east line, 5,000 varas, to the beginning. Mrs. Hill and Mrs. Perry became owners of the league by inheritance, and in 1840 the league was subdivided between them and the one-fourth of the league, known as "Lot No. 1," or the "Upper one-fourth," was awarded to Mrs. Hill; the remaining three-fourths being awarded to Mrs. Perry. This one-fourth is described as follows: Beginning at the northeast corner of the Williams league; thence east, with the north line of the Dickinson, 1,025 varas, to a stake for corner; thence southwardly, to the south line of the league, so as to cut off one-fourth thereof. From this description it is of course true that the southwest and northwest corners of the one-fourth would correspond with like corners of the Dickinson league. Subsequent conveyances of this quarter give the length of its south line as 1,181 varas east from the southwest corner of the Dickinson league, and the defendant so pleaded it. Thereafter the remainder of the league, or lower three-fourths, was subdivided by a surveyor named Brown, who made a map showing the subdivisions in their relation to each other and to the entire league. There were six of these subdivisions numbered two to seven and Nos. 5, 6, and 7 lie south of Clear creek; that stream being their northern boundary. Lot No. 7 is the most westerly, and the part of the east line of lot No. 1, or the "upper quarter," lying south of Clear creek, is the west boundary of lot No. 7. Lot No. 7 was intended to contain 882 acres. Moses Austin Bryan, one of the heirs of Mrs. Perry, conveyed lot No. 7, which had been allotted to him, to Richard Coward by the following description: "882 acres known as tract No. 7 on map of subdivision made by Saml. P. Brown of the Dickinson league, and one of the tracts allotted to me in division of

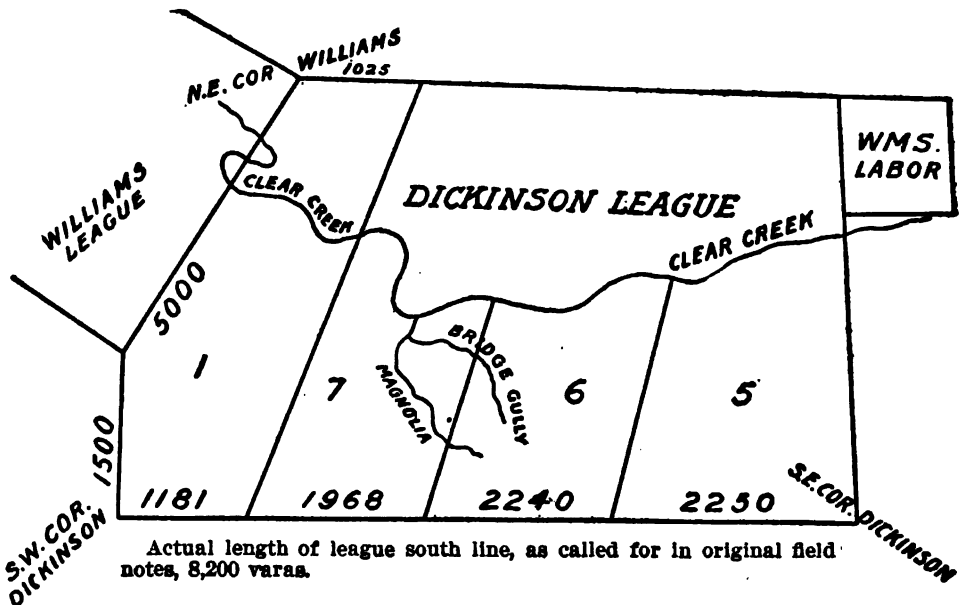
lands with my brothers and sisters. Beginning on the south bank of Clear creek at northwest of upper corner of tract No. 6, a stake, from which an elm brs. N. 27° W. 6 vrs., and a B. oak 12 in. dia. brs. S. 19° W. 1 vara; thence S. 27¼° W. with line of No. 6 to boundary of league 2,835 varas; thence west with league line, and at 1,968 varas set a stake, the corner of a tract of said league belonging to Hill, which is also the southwest corner of this tract; thence N. 36° E., 3,050 varas, to south bank of Clear creek, a stake, from which an elm 16 in. dia. brs. S. 26° W. 8 varas; thence with meanders of the creek to beginning—containing 882.20 acres." Richard Coward conveyed to Mary C. Pleasants a part of lot 7 by the following description: "All that tract of land estimated to contain 294 acres, it being a third part of a tract of land purchased by Richard Coward from M. Austin Bryan for which a title bond was given by Coward to Mary C. Pleasants of even date with the deed from Bryan to Coward, all of which will more fully appear by reference to said bond and deed which is made a part of this instrument. The aforesaid land is situated on Clear creek, * * * is a part of the Dickinson league, and is the upper one-third of tract No. 7 as per survey made by Samuel Brown. * * * Beginning at a corner set between No. 7 and No. 1 as per survey made by Samuel Brown; thence down Clear creek with its meanders to 3 red oaks standing near together as a corner, the base line being equal to 583 varas; thence S. 33° W. to stake set on back line of league; thence with the back line west to a stake set for the southwest corner of this survey and the southeast corner of No. 1; thence N. 36° E. with Wilbur's line (Wilbur had acquired the Hill upper quarter or No. 1) to beginning—all of which will more fully appear by reference to the record of the field notes and plat made by S. Brown and the plat and field notes made by J. O. Trueheart, district surveyor of Galveston county, all of which is made a part and parcel of this instrument." The date of this deed was August 1, 1855. Mary C. Pleasants conveyed to Martha Perkins by same description.

In a partition suit between George W. Butler and the heirs of Martha Perkins, this tract, which will hereinafter be designated as the Pleasants tract, was sold by the sheriff under the order of the court to one Lobit, and J. C. League bought from Lobit in 1898: the purchase price being \$3,000. League had previously bought from George W. Butler in May, 1897, who owned an interest therein as one of the heirs of Martha Perkins, and who had also purchased the entire tract from one Lewis, who held under a tax deed. Butler at that time owned a large tract in No. 1 lying immediately west of No. 7, and was using that and the Pleasants tract as a pasture; there being no division fence. When League acquired the title to the Pleasants

tract he immediately leased it to Butler by a written lease. Thereafter, on the 28th day of October, 1899, Butler sold to Camp et al. his entire holdings on No. 1, and thereafter leased to them the Pleasants tract with League's consent. League employed one Hoxie to survey the Pleasants tract and authorized Butler to fence it. This was done prior to Camp's purchase, and Butler placed the west fence where Camp now contends the west line of No. 7 should be. As the fences and claims of adjoining proprietors now stand, that would reduce the acreage of the Pleasants tract about one-half. League claims his west line should be — varas further west and has brought this suit upon that contention. The defendants pleaded specially that they were the owners of the part of No. 1 lying south of Clear creek, and that its southeast corner was 1,181 varas from the southwest corner of the Dickinson league, which they alleged was correctly marked by a stone. It is apparent from this statement that the location of the east and west lines of the league become important in ascertaining the boundaries of the subdivisions originally made between Mrs. Perry and Mrs. Hill, and subsequently made by Samuel P. Brown long prior to 1855 in a partition between the heirs of Mrs. Perry. The following rough sketch, while it does not pretend to accuracy will serve to illustrate the general situation:

able to follow counsel in their various contentions. It is enough if we shall disclose the general nature of the controversy, the character of the evidence relied on by appellee, and the character of that relied on by appellant to overthrow the judgment. The Pleasants tract has always been supposed to contain about 294 acres. Every sale of it has been made upon that theory. League bought and paid for it at \$10 per acre upon that theory. If appellants' contention is correct, the tract is either short about 149 acres, or else the encroachment is on the east and the missing acreage is now held by McFadden, who now owns and has inclosed the lands to the east of it. In order to a better understanding of the terms used in some of the descriptions and in this opinion it is well to state that the general course of Clear creek is from west to east, but, because its source is in the west, those tracts of land situated nearest its source are called the "upper" tracts. For that reason tract No. 1 is designated as the upper one-fourth of the league. The Dickinson league has an excess in acreage; the actual acreage being 5,804½ acres.

The appellee's contentions, and therefore the judgment, depend largely on the testimony of Luttrell, the present county surveyor. He testified that he began at the northeast corner of the Williams league, identical with the northwest corner of the Dickinson,



While many of the assignments are addressed to the admission and exclusion of evidence, the main assault upon the judgment is that the evidence does not justify it. This we will dispose of first. It is not our purpose to notice in detail all the evidence bearing in one way or another upon the issue, nor is it either practical or desir-

and proceeded by course and distance to locate the southeast corner of the Williams league; that in doing so he used the variation which he had verified by applying it to the known and marked north line; that, dropping due south from the Williams southeast corner to an intersection with the south line of the Dickinson, he measured from that

point east 1,182 varas and reached the point which plaintiff contends is the southwest corner of No. 7; that beginning at the southeast corner of the Dickinson, and measuring west the sum of the widths of the subdivisions Nos. 5, 6, and 7 made by Brown, he reached the same point; that this method gave to No. 1 its full proportion of the acreage and practically gave to No. 7 its acreage. Brown was county surveyor at the time he made the subdivisions. J. O. Trueheart succeeded him, and in 1858 made a survey for Coward, wherein Coward conveyed to Richard Williams a part of No. 7. This survey calls for the northeast and southeast corners of the Pleasants tract. They call to begin on south bank of Clear creek at the mouth of Magnolia creek. The location of the mouth of this creek is not disputed. It is yet extant, and so far as the evidence shows is unchanged. Following the meanders down Clear creek, as given by Trueheart, the distance called for, the northeast corner of No. 7 is reached, as given by Luttrell, and these old field notes state it is the corner as fixed by Brown. Measuring up the creek according to the Trueheart field notes, the northeast corner of the Pleasants tract is reached, as declared in those field notes. In the description in the deed to Pleasants, Trueheart's field notes are referred to, and, as he succeeded Brown, it is a fair inference that Trueheart was familiar with the boundaries. It is shown here that the meanderings given by him up and down from the mouth of Magnolia creek will not apply to any other part of Clear creek. This puts the northeast corner of the Pleasants tract where McFadden's west fence now is, and, measuring 583 varas west on a base line, the west boundary of No. 7 is reached, as contended for by plaintiff. The field notes of the Pleasants called for its northeast corner as marked by three red oaks standing close together. These red oaks were not found by any witness. About 100 varas south of the creek are two post oaks and the stump of another, all in the line of McFadden's west fence. We think the theory that they are the trees called for and were mistakenly called red oaks is untenable. Even if post oaks could be mistaken for red oaks, which is unlikely, they are not near enough to the creek to answer the call in the field notes. They are of value to plaintiff only in showing that the witness McFadden believed his west fence was on the Pleasants east line; that Hoxie also believed it as he made the survey for McFadden, and thus modifying the force of their testimony for defendants. It is also shown that there is an old row of cottonwood trees along the McFadden west fence, and that the fence has been there for 20 years as representing the west boundary of his holdings in No. 7, and he did not own under any conveyance west of the Pleasants east line. It may be said, in addition to these facts, that acreage, course, and distance also tend to sustain the theory ad-

vanced by Luttrell, as against that of Donelson, surveyor and witness for defendants, who placed the acreage of No. 7 at 770, although there was an excess in the league. It is thus obvious that the plaintiff has made a prima facie case; that is to say, unless these facts are utterly overthrown by an opposing theory or by evidence of agreed boundaries or estoppel, the judgment should stand.

Butler, from whom League bought, was the oldest settler in that community who testified. At the time of his sale to League he was claiming the land on both sides of the disputed boundary, and had it all under a common fence. He retained possession for League. He testified, among other things, that Mrs. Pleasants went into possession soon after her purchase and built a fence along the line now claimed by Camp; that it had ever since been supposed to be the boundary between No. 1, then owned by Wilburn, and the Pleasants tract on the east. It was shown by this and other witnesses that, at the date of League's purchase, there was an old fence row along that line; that about that time the county road was located through there on the theory that that was the boundary between the two tracts; that he and Lewis, during Lewis' possession and claim of the Pleasants tract, had so believed and so constructed their division fences. This was corroborated by the testimony of surveyors Hoxie and Donelson and other witnesses. The theory advanced by Donelson and Hoxie may be said to be largely referable to these evidences of neighborhood belief and evidences of old fences, etc. No witness claims to have found at either of the western corners of No. 7 any trees or other marks called for in any instrument whereby it had ever been described. But, at what he claims to be the northeast corner of No. 7 Donelson found an elm which he claims is the same called for in Bryan's deed to Coward in January, 1855. He stated that the elm was old and distinctly marked, and that running southwardly the course called for, but with a variation of 8 degrees, he struck an old cedar post which had been regarded as the southwest corner of No. 6. While the evidence as to the identity of the elm is strong, it is not conclusive. McFadden and Hoxie made the survey years prior to Donelson's discovery and did not find the tree. Though old settlers testify, and the various owners seem to have been diligent in having many surveys made, the tree seems not to have been discovered until found by Donelson. The tree with its old mark is there beyond dispute, but it had acquired no reputation as a corner tree as far as the record shows. The tree called for in the original subdivision was 12 inches in diameter over 50 years prior to this discovery by Donelson, and there is evidence to the effect that the timber of any considerable size was pretty thoroughly cut out about 1861. All of Donelson's testimony, based upon surveys

and measurements made by him with reference to league lines and corners, are based upon marks and monuments set by Hoxie, who made his surveys from posts set by private individuals possessed of no accurate knowledge as to where they should be placed. In this way Hoxie marked the southwest corner of the Dickinson, and no surveyor who testified in this case, except Luttrell, ever sought to locate it accurately from the Williams northeast corner. Luttrell's survey shows that the stone placed by Hoxie for the southeast corner of the Dickinson is too far south and east. The surveyors introduced by defendants made no survey from the Dickinson southeast corner; so it may be fairly said that the value of their testimony is simply to corroborate the general reputation and evidences of old lines and marks believed to mark the subdivision lines. McFadden's west fence was placed where it had been for 20 years as a result of a survey by Hoxie who testifies for defendant in this case. If Hoxie's location of the southwest corner of the league is correct, McFadden has encroached upon the Pleasants tract upon the east a distance practically equal to the acreage in controversy. While the three red oaks called for in the various deeds to the Pleasants tract are not found, their absence is accounted for by the lapse of time and the destruction of timber in 1861. The three post oaks, as before explained, are in McFadden's west fence, and have no more force as evidence than the existence of the fence itself.

It is well settled that general reputation and long acquiescence, while strongly tending to show the true location of a disputed line, will not control, if it is otherwise shown to have been actually located elsewhere, unless the acquiescence amounts either to an estoppel or an agreement as to boundary. *Bohny v. Petty*, 81 Tex. 524, 17 S. W. 80; *Schunlor v. Russell*, 83 Tex. 83, 18 S. W. 484; *Wiley v. Lindley* (Tex. Civ. App.) 56 S. W. 1002. One fact is manifest and that is that, if Camp had been plaintiff, he could not have recovered east of the east line of No. 1 fixed at a point 1,025 varas east from the northeast corner of the Williams; thence south to a point 1,181 varas east from the southwest corner of the Dickinson, unless he could have fixed a different boundary by acquiescence or estoppel, for the reason that the northeast and southeast corners of No. 1 were fixed originally by course and distance, the corners being unmarked. Brown's survey of No. 7 calls for the east line of No. 1, and there is no claim of a vacancy between them. On the whole evidence, we are of opinion the judgment of the trial court ought not to be disturbed on the facts, and this, though the evidence for defendants would have amply justified a judgment otherwise. As stated in the outset, we have not undertaken to review in detail the mass of evidence adduced by defendants, nor to notice and dispose of each point. We have set out only enough to elu-

cidate our views upon the facts. An able and careful trial judge has tried this case without the intervention of a jury, and we have found no justification for disturbing his finding.

Several assignments of error are addressed to the admission of evidence of litigation and junior surveys tending to fix the location of the southeast corner of the Dickinson league, especially the proceedings in the suit of Collett against McFadden, Butler, et al. To that suit G. W. Butler was a party. Both Camp and League claim under Butler. The latter was bound by that judgment which fixed the southeast corner of the Dickinson league, with reference to its location north and south. Its true location east and west was not disputed in this case, and its location north and south was not material. The admission of the junior surveys were immaterial, if error, in view of the fact that the cause was tried before the court, so the assignments are overruled without detailed notice.

The objection to the admission of the leases from League to Butler are untenable. One of the allegations was that defendants were tenants under plaintiff. The lease was admissible upon that issue. If plaintiff failed to establish the allegation, that would not have affected its admissibility. The tenancy of Butler was material as explaining his possession and certain acts of his done in behalf of League.

Plaintiff was permitted to ask Luttrell, over objection of defendants, if "the property described by field notes in the plaintiff's petition is embraced within the metes and bounds given in these deeds you have examined." This is the subject of the eighth assignment. The deeds referred to were the deed to plaintiff and the deeds of his predecessors in title to the Pleasants tract. The objection is without merit. It was but another way of asking an expert surveyor if the descriptions, while varying in terms, were identical. It is also true that, as the descriptions were before the trial judge, he could not have been misled. Appellant also complains of the admission of the affirmative answer to the question: "Have you ever surveyed on the ground the tract of land described in the petition?" The objections are that the question was leading and called for a conclusion. The question and answer were manifestly a mere predicate for the lengthy testimony of this witness which followed, in which he detailed minutely what he had done and found upon the ground. Neither objection is tenable.

The court confined to the issue of good faith the testimony of Camp as to what Butler told him as to the boundary when he placed him in possession, and this is the subject of the fourteenth assignment. Butler was in no position to bind League, and the declarations offered were mere hearsay. Butler was alive and testified in the case, and,

as far as it could properly bear upon the issue of boundary, his testimony covered the exact point.

Defendants sought to show that the county commissioners' court laid out a public road through the land about the time of League's purchase, and that it was laid out on the theory that the line between lots 1 and 7 was where Camp contends it is, and where the road was in fact placed. For this purpose the record of the proceedings of the commissioners' court was offered and was excluded on objection of plaintiff. This is complained of in connection with a complaint that McFadden was a member of the jury of view which laid out the road, and he was not permitted to state why that route was selected. The fact that the road was placed at that point, and why it was placed there, was abundantly proved in other parts of the record, and McFadden was afterwards permitted to state that he was a member of the jury of view, etc. Indeed, almost every thing that was excluded at one time or another, during the 17 days consumed in the trial, was at some other point in the trial gotten in without objection. But the records of the commissioners' court in the matter of this road were not admitted at all, and of this appellants complain. According to Butler's testimony the road was established at the date of his sale to League, and when he, Butler, was claiming and in possession of the land on both sides of the road. When the road was built a gate was made to close the point where it entered the pasture. That it was put at that point because of the general repute that the line was at that place is shown by other evidence, and the isolated act of the county in placing the road at that point was not admissible, since the act of the commissioners' court in fixing its location was controlled by the evidence which was admitted. That the proceedings were admissible to show the date of the construction of the road is not a sound proposition, because Butler being in possession of both tracts at the date of his sale to League, certainly will not be heard to say League is estopped to claim to the true west line of the Pleasants tract, and as to defendants the issues of estoppel is not presented.

The matters, the exclusion of which is complained of in the sixteenth and seventeenth assignments, were already in evidence, and the court simply refused to allow the parties to go over the same ground the second time. It is unfortunate that such rulings were not more frequent in the trial of this cause.

By the eighteenth assignment appellant complains of the admission of the deed whereby Richard Coward acquired from S. J. Perkins 28 acres out of lot No. 6. Perkins lived near the east line of No. 7, between Magnolia creek and Bridge Gully. Other testimony shows that he bought the 28 acres so as to have more land in front of his house, and

that he took possession of and fenced the 28 acres so purchased. This was many years ago, and only the marks of the fences are left. We think it admissible on the issue as to the identity and significance of the old fence rows found near the east boundary of No. 7.

By the twenty-first assignment appellant complains of the admission of the Trueheart field notes in evidence. These were contained in a book handed down by his successor in office. The book bore every mark of age and genuineness, purported to be the record of field notes kept by the respective incumbents of the office, and the Trueheart field notes were signed and purported to have been made by him in the survey of lot 7 for Coward and Williams. These field notes were in the handwriting of Trueheart. He is shown to have done much surveying in the county and in that neighborhood, and is placed in a position where he must have been familiar with the lines and boundaries of the Brown subdivisions as they then appeared upon the ground. The deed from Coward to Pleasants recites that Trueheart had made a plat and field notes of the premises. If shown to be genuine, they were unquestionably admissible as declarations of Trueheart and to establish general repute at that time. *Stroud v. Springfield*, 28 Tex. 649; *Pierce v. Schram* (Tex. Civ. App.) 53 S. W. 716.

The admission of the testimony of Luttrell to the effect that the meanderings would fit no other part of the stream was material and admissible after he had testified to an actual survey by himself enabling him to speak from knowledge, and the use of a sketch made by himself by which his testimony was made clear to the court is certainly not open to any valid objection.

The other assignments do not require special notice. They have been fully considered and found to be without merit. We are not inclined to further extend this already long opinion by discussing them in detail.

The judgment is affirmed.

W. B. WALKER & SONS v. HERNANDEZ.
(Court of Civil Appeals of Texas. April 11, 1906.)

1. DISMISSAL AND NONSUIT—RIGHT TO TAKE NONSUIT—AFFIRMATIVE RELIEF.

Under *Sayles' Ann. Civ. St.* 1897, art. 1301, declaring that at any time before the jury have retired the plaintiff may take a nonsuit, but shall not thereby prejudice the rights of the adverse party to be heard on his claim for affirmative relief, the right of the plaintiff to take a nonsuit is not affected by the fact that after the motion for the nonsuit is made defendant seeks to amend his pleadings so as to claim affirmative relief.

2. PLEADING—AMENDMENT — DISCRETION OF COURT.

The allowance of an amendment after the parties have announced themselves ready for trial is within the discretion of the court, and

its action thereon will not be reversed unless such discretion is abused.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3830; vol. 39, Cent. Dig. Pleading, §§ 601, 657.]

Error from District Court, Travis County; Geo. C. Calhoun, Judge.

Action by Ysabel Hernandez against W. B. Walker & Sons. There was judgment for defendants entered upon plaintiff's motion for a nonsuit, and defendants bring error. Affirmed.

Allen & Hart, for plaintiffs in error. Will G. Barber, and Dickens & Cupp, for defendant in error.

EIDSON, J. It appears from the recitals of the judgment of the court below, as embraced in the record in this cause, that after the parties had announced ready for trial and the demurrers and exceptions of the plaintiffs in error to the defendant in error's petition had been presented, argued by counsel, and overruled by the court, and the selection of a jury begun, the defendant in error asked the court to permit him to take a nonsuit, and before any order was granted allowing such nonsuit the plaintiffs in error prayed the court to allow them to amend their pleadings in the case, so as to grant them affirmative relief in establishing the release set up by them as against the defendant in error, which request was denied by the court, to which ruling of the court plaintiffs in error excepted, and objected to the court's allowing defendant in error to take a nonsuit, but the court allowed and granted the motion and prayer of defendant in error to take a nonsuit and dismiss the cause. The judgment of the court below then proceeds as follows: "It is therefore considered, ordered, adjudged, and decreed that this case be, and the same is hereby, dismissed, that the plaintiff take nothing by this suit, and the defendants go hence without day and recover their costs, for which execution may issue, to all of which judgment the defendants in open court excepted."

The plaintiffs in error herein were defendants in the court below, and the defendant in error was the plaintiff in the court below. The action of the court in refusing to permit the plaintiffs in error to amend their pleadings so as to pray for affirmative relief in establishing the release set up by them, and in permitting the defendant in error to take a nonsuit over their objection and protest, is assigned as error by the plaintiffs in error, and this assignment raises the principal question for our consideration upon this appeal. Article 1301, Sayles' Ann. Civ. St. 1897, provides as follows: "At any time before the jury have retired the plaintiff may take a nonsuit, but he shall not thereby prejudice the right of an adverse party to be heard on his claim for affirmative relief; when the case is tried by the judge such nonsuit may be taken at any time before the decision is

announced." In the case of *Hoodless v. Winter*, 80 Tex. 641, 16 S. W. 427, our Supreme Court said: "The right of the plaintiff to take a nonsuit upon his own cause of action was considered of sufficient importance by the Legislature to be given express recognition. Owing to unexpected contingencies that may occur during a trial, it is a privilege which it may become necessary for the most careful and diligent litigant to exercise, and it is important that the substance and not the shadow alone of the right shall be preserved. * * * It is only when the defendant by a counterclaim seeks some 'affirmative relief' that the right of the plaintiff to discontinue the entire cause is forbidden."

At the time the plaintiff asked the court to permit him to take the nonsuit there was no claim for affirmative relief by the defendants in the case; and therefore no right existed to be heard upon same or could be prejudiced by the taking of the nonsuit. Under these circumstances the statute gave the plaintiff the right to discontinue the entire cause. But does the fact that after the prayer for the nonsuit, but before it was granted, the defendants asked permission to amend their pleadings so as to set up a claim for affirmative relief, so change the situation as to deprive the plaintiff of his statutory right to take a nonsuit, so as to discontinue the entire case? In our opinion it does not. The case must be considered as consisting alone of the pleadings in existence at the time the plaintiff asks to take the nonsuit, and his right to the same is determined by the fact that at the time he asks to take the nonsuit there is no pleading of the defendant asking affirmative relief. But, if it be conceded that the law permitting the amendment of pleadings has some bearing upon the subject, the allowance of an amendment after announcement of ready for trial is within the discretion of the court, and its refusal would not be reversible error unless abuse of such discretion was shown. There is nothing in the record of this case that indicates any abuse of judicial discretion on the part of the court below by refusing to allow the defendant to file the amendment requested.

There being no error in the action of the court above discussed, it becomes unnecessary to consider the other assignments of error.

The judgment is affirmed.

**GERMAN INS. CO. OF FREEPORT, ILL.,
v. GIBBS, WILSON & CO. et al.***

(Court of Civil Appeals of Texas. March 31, 1906. Rehearing Denied April 28, 1906.)

1. DEPOSITIONS—OFFICERS AUTHORIZED TO TAKE DEPOSITIONS—DESIGNATION.

Under Rev. St. 1895, art. 2284, relating to depositions, and providing that on the appear-

*Writ of error denied by Supreme Court.

ance of the witness "the officer to whom the commission is directed" shall proceed, etc., a deposition taken by a notary public of N. parish, La., on a commission addressed to a notary public of O. parish, was properly suppressed.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Depositions, § 83.]

2. INSURANCE—ACTION ON POLICY—PARTIES.

Where the person to whom a loss is payable is stipulated on the face of a fire policy, he may sue alone; neither the insured nor his legal representatives being necessary parties.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1568.]

3. SAME.

A creditor, holding a fire policy as collateral security for an indebtedness in excess of the face of the policy, may sue alone and recover the loss; neither the insured nor his legal representatives being necessary parties.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1568.]

4. SAME—RESCISSON—EFFECT.

Plaintiff, a creditor of insured, sued on a fire policy payable to plaintiff, attaching the policy to the petition as an exhibit. Subsequently defendant paid into the hands of the clerk of the court the amount of the premium which had been paid for the policy, and pleaded the tender, and sought to avoid the policy. Thereafter insured claimed the money deposited and received it from the clerk without the knowledge or consent of plaintiff. *Held*, that such transaction did not deprive plaintiff of his interest in the policy and right to prosecute the action.

5. SAME—EVIDENCE—COMPETENCY.

In an action on a fire policy after an adjustment, the adjustment was evidence of the value of the goods destroyed, and prima facie proof of the amount due under the policy.

6. SAME.

In an action on a fire policy, plaintiff claimed that insured took out the policy under an agreement to keep his stock insured, with clauses in the policy making the loss payable to plaintiff to secure insured's debt to him, and that after the loss insured recognized plaintiff's right to the proceeds and directed him to collect the policy. *Held*, that it was proper to admit evidence that shortly after the fire insured and plaintiff discussed the loss, and that insured recognized it as payable to plaintiff, and directed him to collect the amount, as such evidence tended to prove an oral assignment after loss.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1676.]

7. SAME—ORAL ASSIGNMENT.

A fire policy may be assigned orally after the loss.

8. EVIDENCE—ADMISSIONS — STATEMENTS IN DEPOSITIONS—PRELIMINARY EVIDENCE.

Where depositions were suppressed because not taken before an authorized officer, the answers of a witness in the deposition were not admissible in evidence as against the witness, without proof that he made the statements, that they were correctly written down, and that he signed them.

9. SAME—ASSIGNMENT BY INSURED—CONSENT OF PAYEE.

Where a fire policy by its terms was payable to a third person, insured could not after the loss assign his claim, without the payee's consent, so as to defeat the rights of the payee under the terms of the policy.

10. SAME—ADJUSTMENT—EFFECT.

An adjustment of a loss under a fire policy may be set aside, on a showing that it was fraudulent, or made through a mistake of fact.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1416, 1418.]

11. SAME — WAIVER — PARTICIPATION IN ADJUSTMENT.

A nonwaiver clause in a fire policy, the purpose of which is to enable the company's agent to negotiate in regard to the loss without any waiver by the company of its right to contest its liability, does not apply after an adjustment of the loss has been made.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1406.]

12. SAME.

After an adjustment of the loss under a fire policy, the fact that insurer had no knowledge of facts which, if known, might have been effectual to defeat the claim under the policy, is of no avail, if the insurer might have known them upon inquiry, and was not fraudulently prevented from learning them by the insured.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1416.]

13. SAME—AUTHORITY OF AGENTS.

Instructions from an insurance company to its agent, not to write policies on property of insolvent or financially crippled debtors, do not avoid a policy written on such a risk, unless it appear that insured had knowledge of such inhibition.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 120.]

14. SAME—AGENCY FOR INSURED—EVIDENCE.

An employé of a firm, who was also the local agent of an insurance company, on the application of the owner of a stock of goods, issued a policy thereon. The agent had no interest in the business of insured, and was not his creditor, and subsequently a clause was inserted in the policy making it payable to the firm. *Held*, that the agent, in issuing the policy, acted not as agent of insured or of the payee, but as that of the company.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 127.]

15. SAME—REFUDIATION OF POLICY.

Where the insurer in a fire policy ascertained that its agent at the time of writing the policy was also the agent of the insured, if it desired to avoid the policy, it was its duty to manifest such intention promptly.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1038.]

16. SAME.

Where for two years before the insurer in a fire policy repudiated the same, on the ground that its agent had acted as agent for insured in issuing the policy, it had knowledge of all the facts on which it relied for repudiation, the repudiation was not sufficiently prompt.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1037, 1038.]

Error from District Court, Limestone County; L. B. Cobb, Judge.

Action by Gibbs, Wilson & Company and others against the German Insurance Company of Freeport, Ill. From a judgment in favor of plaintiffs, defendant brings error. Affirmed.

This suit was originally instituted by the Rotan Grocery Company against the German Insurance Company and Gibbs, Wilson & Co., a firm alleged to be composed of J. B. Gibbs, Laura C. Gibbs, and Lucy C. Wilson, owners of the Merchants' & Farmers' Bank of Kosse, Tex., to recover a judgment on a policy of insurance for \$2,000, issued to one F. W. Hewitt. Subsequently the Rotan Grocery Company disclaimed any interest in the policy, and the suit was continued in the name

of Gibbs, Wilson & Co., as plaintiffs, and the insurance company, as defendant. The plaintiffs alleged an adjustment of the loss at \$1,655.25 under the policy, and sought to recover the amount of such adjustment. The defendant pleaded in abatement, general denial, and various other defenses, the nature of which will appear in the opinion. A trial resulted in a verdict and judgment for plaintiffs, and defendant perfected a writ of error to this court.

Carden, Senter & Carden, for plaintiff in error. Z. I. Harlan and W. T. Jackson, for defendants in error.

BOOKHOUT, J. (after stating the facts). It is contended that the court erred in refusing to set aside the judgment rendered at a preceding term of the court suppressing the deposition of F. W. Hewitt and reinstate said deposition. The depositions of Hewitt, the insured, were taken on the 18th of January, 1904, by a notary public of Natchitoches parish, La., on a commission addressed "to any clerk of a court of record having a seal or any notary public of Caddo parish, La., or any commissioner of deeds duly appointed under the laws of Texas, within and for said state of Louisiana." The depositions were suppressed on the ground that they could not be lawfully taken by a notary public in and for Natchitoches parish on a commission thus addressed. The statute provides that "upon the appearance of the witness the officer to whom the commission is directed shall proceed to take his answers." Rev. St. 1895, art. 2284. The commission in this case having been directed to any notary public of Caddo parish, the taking of the depositions by a notary public of Natchitoches parish was not a taking by the officer to whom the commission was directed and was unauthorized. *Bracken v. Neill*, 15 Tex. 109; 6 Enc. Pl. & Prac. 502. The court did not err in refusing to reinstate the depositions.

The court did not err in sustaining the plaintiffs' exceptions to the defendant's plea in abatement. The plea alleged, in substance, that Hewitt, the insured, had died since the institution of the suit intestate; that there was no administrator upon his estate; that his only heirs were his father and mother, Benjamin Hewitt and wife, residents of Limestone county, Tex.; that they were interested in the proceeds of any judgment that might be recovered upon the policy. The policy of insurance provided that the loss, if any, was payable to Gibbs, Wilson & Co. This clause was written in the policy at the time it was issued. The plea in abatement sought to abate the suit because the heirs of the assured were not made parties. The policy having stipulated on its face the person to whom the loss is payable, such person may sue alone and recover the entire loss, and neither the assured nor his legal representatives are necessary parties to the

suit. *Allison v. Phoenix Ins. Co.*, 87 Tex. 596, 30 S. W. 547; *Insurance Co. v. Williams*, 79 Tex. 637, 638, 15 S. W. 478; *Joyce on Insurance*, vol. 3, par. 2305, note 5; *Donaldson v. Sun Mut. Ins. Co. (Tenn.)* 82 S. W. 251. Again, at the time the policy was issued, and at the time of the fire, Hewitt was indebted to Gibbs, Wilson & Co., defendants in error, in a sum largely in excess of the face of the policy, and is still so indebted to them. If defendants in error held the policy as collateral security for an indebtedness, largely in excess of the face of the policy, they alone could sue and recover for the loss. *Bank v. Security Co.*, 18 Tex. Civ. App. 106, 106, 44 S. W. 15; *Insurance Co. v. Leaverton (Tex. Civ. App.)* 33 S. W. 579; 13 A. & E. Enc. Law (2d Ed.) 201, note 6; *Greene v. Insurance Co.*, 84 N. Y. 572.

The defendant pleaded that plaintiff, under the terms of the policy, is merely a trustee for Hewitt; that soon after the suit was instituted, on or about June 30, 1902, the defendant tendered into court and paid the clerk the sum of \$87, being the amount of the premium paid for the policy, for the benefit of whoever might be shown to be entitled thereto; that soon after said tender was made Hewitt demanded and received from the clerk of the court the amount of said tender, and took the same in full satisfaction of any and all claims arising under the terms of the policy against defendant, and thereby canceled and annulled it. To this plea plaintiffs excepted, and the court sustained the exception, and this action is assigned as error. The loss under this policy was payable, unconditionally, to Gibbs, Wilson & Co. The policy was attached to plaintiffs' petition as an exhibit. After the fire which destroyed the property insured, Hewitt still recognized the loss as being payable to plaintiffs, and directed them to collect and apply it on his debt to them. Plaintiffs' petition, filed June 30, 1902, set up all these facts in this suit. On July 11, 1902, defendant tendered and paid into the hands of the clerk of the court in which this suit was pending \$87, the amount of the premium paid for said policy, for the benefit of whoever it might be shown and decided on the trial to be entitled thereto, and pleaded such tender and asked to avoid the policy for reasons set up in said pleading then filed. Soon thereafter Hewitt called on the clerk and claimed said \$87 and asked the clerk for it, and he paid it to him. There is no pretense, either in the plea in abatement, or the evidence, that this was done with either the knowledge or consent of Gibbs, Wilson & Co. It is held in this state that a clause in a policy of insurance making the loss under it payable to a person therein named, gives such person an interest in the policy, and he cannot be deprived of that interest without his consent. *Security Co. v. Bank*, 93 Tex. 582, 57 S. W. 22; *Bank v. Security Co.*, 18 Tex. Civ. App. 106, 44 S. W. 15. See, also, *Roller Mill Co. v. Insurance*

Co., (Mo. App.) 79 S. W. 720; Joyce on Ins. vol. 3, par. 2321. The act of plaintiff in error in depositing the premium in court, and the act of Hewitt in withdrawing the same from court having been done without the consent of defendants in error, and they not being parties thereto, did not deprive defendants in error of their interest in the policy and the right to prosecute this suit.

Upon the trial plaintiff offered in evidence an instrument entitled "Proof of Loss," which was purported to have been prepared by F. W. Hewitt, setting out the extent of his loss, amount of insurance, etc. Thereupon defendant asked the court to instruct the jury that this evidence could only be considered upon the issue as to whether or not Hewitt furnished the proof of loss required by the policy, and that the jury should not consider such evidence for any other purpose, and especially that the jury should not consider it as evidence of the value of the property destroyed, and that they should not consider said instrument as the act of the defendant or its agent. The request was denied, and the evidence was admitted without qualification. The fire which destroyed the insured property occurred November 30, 1901. On December 10, 1901, one Wm. L. Easley, an adjuster for defendant insurance company, visited Kosse, the place of the fire, for the purpose of adjusting the loss under its policy. He called first at the plaintiffs' bank and asked its employees to show him the policy issued by defendant to Hewitt, then asked to see the policy register kept by its local agent at Kosse, and was shown and examined both the policy and the register. He then inquired for Hewitt, the assured, and Hewitt was sent for by one of plaintiffs' employees. After this, and on the same day, as Easley was taking the train to leave Kosse, he met Gibbs, defendant's local agent, who had come in on the train Easley was going out on, and told him that he had that day adjusted the Hewitt loss under the policy. Plaintiffs, in their petition, set up the issuance by defendant of its policy, the loss under it, alleged an adjustment of the loss, and that the papers pertaining to and showing the adjustment were in the hands of defendant, notifying it to produce them on the trial, and asking judgment for the amount due as fixed by the adjustment. Defendant's counsel, in conformity with such notice, turned over on the trial to plaintiffs' attorneys the paper styled "Proof of Loss," with the indorsements thereon. This paper was shown to have been obtained by defendant's counsel from the defendant's state agents. On the back of said paper, and in the handwriting of Wm. L. Easley and written with the same ink with which he signed his name, were indorsements identifying this policy, giving the name of the assured, amount of the policy, date of the fire, date proofs were received, giving "Amount of loss claimed, \$1,655.25" and "Amount al-

lowed, \$1,655.25"—all of said indorsements signed by Wm. L. Easley, adjuster. At the bottom of said indorsements was written the following: "60 days." The policy provides that the "ascertainment or estimate" of loss or damage to the property insured "shall be made by the insured and this company, * * * and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy, shall be payable sixty days after due notice, ascertainment, estimate, satisfactory proof of the loss have been received by this company." Proofs of loss and adjustment were made on December 10, 1901. M. A. Shumard, the general state agent of defendant, testified that the loss was adjusted, and the amount of the liability of the insurance company agreed upon in the adjustment to be \$1,655.25, and that under the adjustment and the 60-day clause in the policy the date of the payment of the loss would be February 10, 1902. On February 10, 1902, the said state agent sent the company's draft to its local agent at Kosse for said sum of \$1,655.25 in settlement of this loss. This draft was made payable to Rotan Grocery Company and F. W. Hewitt, and was returned because the bank (Gibbs, Wilson & Co.) owned the proceeds of the policy. The court instructed the jury that there was an adjustment of the loss under the policy and to find for plaintiffs the amount of the loss as adjusted, \$1,655.25, with 6 per cent, per annum interest from February 10, 1902, unless they found for defendant under other instructions. In another paragraph they were instructed that, if they found certain facts therein stated to exist, the adjustment was not binding on defendant, "and in such case there would be no evidence of the value of the goods lost that belonged to Hewitt, and you will in such event find for defendant." The proofs of loss constituted part of the adjustment. The adjustment was evidence of the value of the goods destroyed and prima facie proof of the amount due, and a charge such as asked would have been misleading and was properly refused. *Fire Association v. Blum*, 63 Tex. 285; *Joyce on Ins.* vol. 4, par. 3771.

The sixth and seventh assignments of error complain of the action of the court in admitting, over defendant's objection, testimony that, after the fire Hewitt, the insured, and Gibbs, manager for defendant in error, discussed the loss under the policy, and that Hewitt recognized it as payable to Gibbs, Wilson & Co., and desired them to collect it and apply the proceeds to his indebtedness to them. It is contended that the declarations of an insured made after a loss cannot be used by a claimant of the policy as original evidence to show title or interest in a third party in a controversy between him and the insurance company. After alleging that Hewitt took out this policy under an agreement to keep his stock insured, with clauses

in his policy making the loss, if any, payable to plaintiffs to secure them in his debt to them, plaintiffs alleged that, after the loss under this policy, Hewitt recognized the right of plaintiffs to the proceeds of the loss, and directed plaintiffs' agent to collect the same and apply it as a credit on his indebtedness to plaintiffs. As proving the latter allegations, plaintiffs proved by J. R. Gibbs, the manager of their bank at Kosse, that shortly after the fire Hewitt and he discussed the loss, and in that discussion Hewitt recognized the loss under this policy was payable to Gibbs, Wilson & Co. and directed them to collect it and apply the amount collected on his indebtedness to them. The policy was then with plaintiffs, as collateral security for that indebtedness. A fire insurance policy, after loss, may be orally assigned. 13 Am. & Eng. Enc. Law (2d Ed.) p. 201, note 6; *Greene v. Insurance Co.*, 84 N. Y. 572. The evidence complained of was admissible as tending to prove such an assignment of the policy sued on.

On the trial the defendant offered the depositions of F. W. Hewitt, purporting to have been taken before Ponder S. Carter, a notary public of Natchitoches parish, La., as admission by him against his interest. These depositions had been suppressed by the court. It was shown that Hewitt was dead. The declarations and admissions were to the effect that about 600 bundles of ties and 300 rolls of bagging, composing part of his stock at the time the policy of insurance was written, belonged to the Rotan Grocery Company, and that he told Mr. Gibbs to write him a policy on the bagging and ties in the name of the Rotan Grocery Company. The depositions of Hewitt having been suppressed, the same were not admissible as depositions. *Joy v. Liverpool, London & Globe Ins. Co.* (Tex. Civ. App.) 74 S. W. 822. The statements of Hewitt were contained in a deposition purporting to have been taken January 16, 1904. This was long after the fire, and after Hewitt had told Gibbs, Wilson & Co. to collect the loss and apply it to his debt to them. In a suit involving the title to personal property, it is held that the declarations of a prior vendor, made after a sale, are not admissible against him to defeat a recovery by him. *Bergen v. Marble Co.*, 72 Tex. 53, 11 S. W. 1027; *Boltz v. Engelke* (Tex. Civ. App.) 63 S. W. 899, 900. There is authority to the effect that acts, declarations, and statements similar to those made by Hewitt are sufficient to constitute an oral assignment of the policy. *Greene v. Insurance Co.*, supra. If this holding is sound, then under the authorities last cited the evidence was not admissible. But, however this may be, the answers in the deposition offered were not in the handwriting of Hewitt. There is no evidence that Hewitt made such statements to the writer, and that the writer correctly took down his statements, and that it was then signed by

Hewitt. We are of the opinion that before the statements and admissions contained in the paper could be introduced against Hewitt, or his assignees, that it should be shown that Hewitt made the statements therein contained, that they were correctly written down at the time, and that Hewitt signed the same. These facts, if they are facts, could have been shown by the person who wrote down the statements. The certificate of the notary was not evidence of these facts. 6 Enc. Pl. & Prac. 541. We conclude that there was no error in excluding the evidence.

Again, the suit was to recover upon the adjustment of the loss under the insurance policy, and by the court's charge a recovery was not authorized or permitted, except on the adjustment. There is nothing in the excluded statements of Hewitt impeaching the perfect fairness of the adjustment, or that shows, or even tends to show, either fraud or mistake in the adjustment. The action to recover after adjustment is based upon a new and independent contract, and not upon the policy, and the insurer can defeat such action, only, by showing fraud or mistake in the adjustment. Even if it be shown that there had been forfeitures of which the insurer had no knowledge when the adjustment was made, it will not be excused, if it appears that the information was available and might have been obtained by the use of reasonable diligence. *Ostrander on Fire Ins.* (2d Ed.) par. 213; *Joyce on Ins.* vol. 4, par. 3743; *May on Ins.* vol. 2, par. 442; *Smith v. Insurance Co.*, 62 N. Y. 85; *Stache v. Insurance Co.*, 49 Wis. 89, 5 N. W. 36, 35 Am. Rep. 772.

For the reason last set forth in our holding that there was no error in excluding the admissions made in the purported deposition of Hewitt, we hold that the court did not err in excluding the affidavit of Hewitt, made before M. M. Patton, a notary public of McLennan county, on March 4, 1902, that Gibbs was instructed by him to write a policy covering the ties and bagging, that the same belonged to the Rotan Grocery Company, and the policy was to be taken out to protect their interest in case of fire. Nor did the court err in excluding the statements of Hewitt made to the witness Shear to the same effect, made after the loss and after Hewitt had parted with his interest in the policy.

There was no error in excluding the transfer of the policy to the Rotan Grocery Company by Hewitt on January 26, 1902. He could not, after the loss had occurred, by an assignment of his claim against the company, defeat the rights of Gibbs, Wilson & Co., the payees under the "loss payable" clause in the policy. *Security Co. v. Bank*, 93 Tex. 582, 57 S. W. 22; *Bank v. Security Co.*, supra; *Joyce on Ins.* vol. 3, par. 2321.

The following paragraph of the charge is assigned as error: "You are instructed that on October 15, 1901, F. W. Hewitt was insured by defendant in a sum not exceeding

\$2,000 for the term of one year upon certain property in Kosse, which plaintiff says was destroyed by fire on or about November 80, 1901; that by the policy the loss, if any, was payable to Gibbs, Wilson & Co.; and that there was an adjustment of the loss made by Hewitt and an agent of defendant on December 10th, fixing the same at \$1,655.25, and you will find for plaintiff the said sum with interest at the rate of 6 per cent. per annum from February 10, 1902, unless you shall find for defendant under some one or other of the issues hereinafter submitted." It is contended that this charge is upon the weight of evidence, in that it instructed a verdict for \$1,655.25, unless the jury found for defendant under one of its special pleas, although the question of ownership of the property, and the amount of the loss, were issues in the case upon which the burden of proof was on plaintiff. One of the issues referred to in the paragraph of the charge complained of was the question of ownership of the property destroyed, which issue the court submitted, and the jury found this issue in favor of plaintiffs. There was evidence tending to show, and which justified the jury in finding, that the bagging and ties in Hewitt's store at the time the policy was issued, and which were covered by the policy, belonged to Hewitt. The adjustment fixed the amount of the loss, and the same was *prima facie* evidence of the amount. *Fire Ass'n v. Blum*, 63 Tex. 285. The face of the policy showed that the loss was payable to Gibbs, Wilson & Co. and the court did not err in assuming this fact as established. The evidence showed an adjustment of the loss by plaintiffs' adjuster, Wm. L. Easley. The nonwaiver clause in the policy will not be extended beyond its plain terms, and would not apply after an adjustment of the loss had been made. *Insurance Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459; *Smith v. Glen Falls Ins. Co.*, 62 N. Y. 85; *Insurance Co. v. Archdeacon*, 82 Ill. 286, 25 Am. Rep. 313. It could be shown as a ground for setting aside the adjustment that it was fraudulent or made through mistake of fact.

It is contended that the court erred in the following charge: "If Easley, defendant's adjuster, knew at the time of adjustment that Hewitt had failed to keep such books as were required by the policy, then the defendant cannot defeat this suit on the ground of failure to keep such books." This charge is applicable to the iron-safe clause, pleaded by defendant. In order for a breach of this clause to be available as a defense to the adjustment, the proof should show that the adjustment was made in ignorance of the breach. The proof fails to show that the adjuster called upon Hewitt to produce his books and records, and that he failed to produce them for his inspection during the adjustment. That the company had no knowledge of facts which might, if known, have been effectual to defeat the claim, is of no

avail, if the insurer might have known them upon inquiry at the time of the adjustment, and was not fraudulently prevented from coming to their knowledge by the insured. *Fire Ass'n v. Blum*, supra; *Ostrander on Fire Ins.* par. 213; *Joyce on Ins.* par. 8743; *May on Ins.* vol. 2, par. 442; *Smith v. Glen Falls Ins. Co.*, 62 N. Y. 85.

Complaint is made of the action of the court in refusing the following special charge requested by defendant: "You are instructed that the undisputed evidence shows that J. B. Gibbs, the agent of the defendant company, who issued the policy sued upon, acted in that transaction as the agent of plaintiff, and for its benefit and protection, and also as the agent of Hewitt, the insured, and that said Gibbs did not report at the time to defendant that said policy was made payable to plaintiff, and that plaintiff did not discover said fact until after the fire and after the submission of proofs of loss by the insured to defendant's adjuster; that a controversy arose between plaintiff and the Rotan Grocery Company as to the right to the proceeds of the policy, and thereupon defendant denied any liability under the policy. You are therefore instructed that, under the undisputed testimony, defendant promptly denied liability upon the policy, upon discovery of the fact that said J. B. Gibbs had acted as its agent, and also as the agent of plaintiff and of Hewitt in procuring the policy of insurance, and you will therefore find for the defendant." It is contended that, under the undisputed evidence, the policy was voidable at the election of the insurance company, because it was issued by Gibbs as manager of plaintiffs' bank, for the benefit and protection of the bank upon the property of an insolvent or financially crippled debtor, and Gibbs, while pretending to act in the transaction as agent of defendant, concealed these facts from it, although it was his duty under the rules of defendant to report it. The rules of defendant applicable to its agents contained the following instructions: "The property of all people of questionable standing, either personal or in business, is strictly prohibited." "See that all questions on Daily Report applicable to the risk reported are answered in full; otherwise Daily Report will be returned for completion or risk declined. Questions are not asked 'as a matter of form,' but to gain information absolutely necessary to a correct understanding of the liability assumed." "On issuing policy send Daily Report of it to this office by first mail. Read the instructions on Daily Report and you will see exactly what is wanted." The evidence fails to disclose that Hewitt had any knowledge of these instructions. Gibbs had authority to issue, and did issue, the policy. It is not sought to be avoided for want of authority on the part of the agent to issue the policy, but upon the ground that the agent omitted to comply with his instructions

from the company to transmit to it copies of the written portions of the policy, in that he did not show in his daily report that the policy contained a stipulation making the loss, if any, payable to plaintiff. We think it clear that instructions from the plaintiff in error to its agent not to write insurance on property of "insolvent or financially crippled debtors" will not avoid a policy written on such prohibited risk, unless it be shown that the insured had knowledge of such inhibition. May on Ins. (4th Ed.) vol. 1, par. 126; Joyce on Ins. vol. 1, par. 428; Joyce on Ins. vol. 1, par. 659; 16 A. & E. Ency. Law (2d Ed.) 917, and note 2; Insurance Co. v. Owens, (Ky.) 21 S. W. 1037.

J. B. Gibbs, at the time of writing the policy, was not the agent of Hewitt, the insured. Hewitt applied to him for the insurance and desired \$3,000, but Gibbs, the local agent, after inspecting the risk, declined to write it for more than \$2,000, because he did not think the stock would bear more. At that time Gibbs had no interest in the partnership of Gibbs, Wilson & Co., to whom the loss under the policy was payable. He was at that time an employé of that partnership. Hewitt did not owe him anything, and he had no interest in Hewitt's business. The loss payable clause in the policy was inserted under an agreement made about April 28, 1900, between Hewitt, acting for himself, and J. B. Gibbs, acting for Gibbs, Wilson & Co. The insertion of this clause in the policy did not make Gibbs, Wilson & Co. a party to the contract, but the contract remained a contract between the insurance company and Hewitt. Insurance Co. v. Ruddell (Tex. Civ. App.) 82 S. W. 826. Gibbs, Wilson & Co. not being parties to the contract, and J. B. Gibbs at the time the policy was written not being the agent of Hewitt, or having any interest in his business, could, in issuing the policy, only have acted for the insurance company, and, this being so, his act was valid. Fiske v. Assurance Co. (Mo. App.) 75 S. W. 382; Assurance Co. v. Cooper, 6 Colo. App. 25, 40 Pac. 147.

Again, the charge requested tells the jury that, under the undisputed testimony, defendant promptly denied liability upon the policy, upon the discovery of the fact that J. B. Gibbs acted as its agent, and also as agent of plaintiff and of Hewitt in the procuring of the policy of insurance. This fact was not established by the evidence. It would seem that the defendant had notice of all the facts it now claims avoided the policy when its adjuster saw the policy at the time he adjusted the loss on December 10, 1901; when Gibbs wrote them on January 4, 1902, that the policy had been assigned to the bank; when he wrote them again on February 12, 1902, returning draft, that the bank held the policy under a clause in it making the loss payable to Gibbs, Wilson & Co.; when Gibbs's depositions were taken on April 4, 1902, in which he testified fully to all these facts;

when Shumard's depositions were taken on May 11, 1902, in which he swears to all the facts they now set up; when Rotan's petition was filed, March 18, 1902, and plaintiffs' cross-bill setting up the facts fully, attaching a copy of the policy, was filed on June 30, 1902. Yet, notwithstanding all these facts, defendant retained the premium paid it and never repudiated the dual agency of Gibbs, if any, until December 24, 1903, although it had filed two answers before. To have told a jury that such was a prompt repudiation of the acts of its agent would have been error. It was the duty of the company to manifest its intention to avoid the policy promptly, upon ascertaining its agent was at the time he wrote the policy also the agent of the insured. Insurance Company v. Shrader, 11 Tex. Civ. App. 259, 260, 31 S. W. 1100, 32 S. W. 344; Insurance Co. v. Smithville (Tex. Civ. App.) 49 S. W. 412; Morrison v. Insurance Co., 69 Tex. 363, 6 S. W. 605, 5 Am. St. Rep. 63.

The assignments of error not discussed have been carefully considered by us, and we are of the opinion no reversible error is pointed out therein.

The judgment is affirmed.

HOUSTON & T. C. R. CO. v. TURNER.*

(Court of Civil Appeals of Texas. April 7, 1906. Rehearing Denied April 28, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROADS—ASSUMED RISK.

Where, in an action for the death of a section foreman by being struck by cars moved onto a switch track, there was no evidence that prior to the accident defendant's employes had habitually sent the cars on such side track at a speed greater than six miles an hour, deceased did not assume the risk of the operation of such cars at a higher speed than that specified.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 561, 596.]

2. SAME — DEPARTMENTS OF WORK — NEGLIGENCE OF EMPLOYÉ OF OTHER DEPARTMENT.

Where deceased at the time of his injury was not connected with the work of switching cars in defendant's yard, he did not assume the risk of injury from the negligent method by which members of the switching crews employed by defendant did the switching.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 567-573.]

3. SAME—CARE REQUIRED.

An employé in the switchyards of a railroad company not being a trespasser in passing over a track 20 to 30 feet from his place of work, other employes of the railroad engaged in switching cars on the track were bound to use ordinary care to protect him from injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 153.]

4. SAME—ISSUES—SPEED OF CAR.

In an action for death of a section foreman by being struck by a car negligently operated on a switch track, evidence that, when the car was struck by other cars being backed onto the switch track, it flew up off the track and came down with the trucks on the ties, and was driven 15 or 20 feet on the ties, though the brakes

*Writ of error denied by Supreme Court.

were set, and that such effect could not have been produced except by terrific force, was sufficient to raise the question of excessive speed of the cars.

5. TRIAL — INSTRUCTION — APPLICABILITY TO EVIDENCE.

In an action for death of a section foreman, an instruction that if the deceased to avoid danger stepped from the railroad track to a place where he would have been safe, but that he stepped on loose dirt, causing his foot to slip, there could be no recovery, was properly refused, where there was no evidence that the deceased was in a place of safety when his foot slipped on the loose dirt.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Action by Mollie Turner against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

See 91 S. W. 562.

Baker, Botts, Parker & Garwood, Sam. R. Frost, and Skinner & Supple, for appellant. J. E. Lancaster, J. A. Beall, and Templeton & Harding, for appellee.

TALBOT, J. This suit was instituted by appellee, Mollie Turner, to recover damages sustained by her on account of the death of her husband, William Turner, who, she alleges, was killed by the negligence of appellant's servants. Appellant pleaded the general issue, contributory negligence, and assumed risk on the part of the deceased. A jury trial resulted in a verdict and judgment for appellee in the sum of \$5,000, from which appellant has appealed.

The evidence is sufficient to warrant the following conclusions of fact: William Turner was struck and killed by the cars of the Houston & Texas Central Railroad Company on November 20, 1901. He was a section foreman of appellant and in charge of a gang of men at work in its switchyards in the city of Waxahachie. There were three parallel tracks in the yard, a short distance apart, running east and west. The north track was known as the "passing" track, the middle as the "main" track, and the south track as the "elevator" or mill track. The section men under the control of the deceased, William Turner, were engaged at the time of the accident in repairing or putting in what is called a "cut-off" track, between the main track and the passing track, on the north side of the main track. The yard crew were engaged in switching and transferring cars from one track to another. While this switching of cars was being done, the deceased, Turner, went upon the elevator track, some 20 or 30 feet from where his men were at work, at or near the east end of a flat car which was standing on that track. While in this position, the switch crew "shoved," or "kicked," back from the west onto the mill or elevator track some box cars which by the impetus given them by the engine rolled back eastward, struck the flat car, causing it to move suddenly forward against Turner,

knocking him down and running over him, inflicting injuries upon him, from the effects of which he died in a few hours. The deceased had been the section foreman of that section of appellant's road, including the yards of the city of Waxahachie, for two years or more. There are a number of side tracks and switches in Waxahachie, and about one-third of the section crew's time is consumed in working in the yards of said city. The deceased, Turner, knew, or, in the exercise of ordinary care for his own safety in discharging the duties incumbent upon him, must have acquired knowledge, of the usual and customary manner of switching cars in Waxahachie and the usual force and speed with which they were moved, and that it was usual to place and store cars on the elevator track, where Turner was injured, by having them kicked down this track by an engine and allowed to roll down detached from the engine and stop by the force of gravitation unattended by any one to control them. The cars, which were switched in and which struck the flat car, causing it to run over Turner, were moved with a speed and force greater than the usual and customary speed and force with which switching was usually done in that yard. At the time the deceased was struck and injured he was standing on or in the act of crossing over the elevator track at the east end of the flat car that ran over him, and the section crew were at work on another and different track, about 20 or 30 feet away. There is no positive evidence showing the purpose for which Turner had gone to the place where the accident occurred, but from circumstances shown the inference is strong that he went there to attend a call of nature. The cars switched onto the mill or elevator track were kicked down that track by the switch engine in charge of the switching crew, detached from the engine and unattended by any person to control them, and struck the standing car, which ran over and killed the deceased, Turner, with such force that the end of said car next to Turner bounced up off the track, and, although coming down with the trucks on the cross-ties, was driven 15 or 20 feet. By an ordinance of the city of Waxahachie it is made a penal offense, punishable by fine, for any train, locomotive, engine, or car to be run within the corporate limits of said city at a greater rate of speed than six miles an hour, and there was evidence from which the jury were authorized to conclude that the car causing Turner's death was propelled at a greater rate of speed than six miles per hour.

Appellant's several assignments of error complain solely of the court's charge and the refusal to give certain special instructions requested by it. The second assignment challenged the correctness of the court's definition of contributory negligence. The definition conforms in substance to those which have been approved by the courts of this

state, is sufficient, and this assignment will be overruled.

The court in the eighth paragraph of its charge instructed the jury that, "when a person enters the employment of another, he assumes the risks ordinarily incident to such employment. He does not assume risks arising from the master's negligence. Neither does he assume risks arising from the negligence of other employes working in another department of service, unless he knows of these risks. In no event does he assume risks arising from negligent acts of other employes working in a different department of service which are unusual and extraordinary." In applying the law to the facts of the case, and after grouping certain facts and telling the jury that if they found such facts to exist, and that they constituted negligence on the part of appellant, to find for appellee, the court further charged the jury in that immediate connection as follows: "On the other hand, if you fail to find that such switching, if it was done, constituted negligence, as negligence has been defined herein, then you will find for the defendant on this issue, or, if such switching, if done, was not done with unusual and extraordinary force, but was done in the usual and ordinary way, manner, and force, and William Turner knew that such was the usual and ordinary way and manner in which switching was done (if it was), then you will find for the defendant on this issue." Complaint is made of these charges on the ground that the issue of assumed risk on the part of the deceased, Turner, was restricted and confined to such risks and danger of which he had actual knowledge.

Appellant requested the court to charge the jury as follows: "(1) In addition to the main charge just given you, you are instructed that if you believe from the evidence Wm. Turner knew, or had reason to believe, that the cars would probably be switched in from the main track upon the track known as the 'elevator' track, and that the usual and customary manner of placing cars on this track was by shoving or kicking them over the switch with a speed at which the cars were then moved, and permitting them to run loose down the track disconnected from the engine, and to stop by force of gravitation without the application of brakes, and without any person on such loose car, or cars, and that he voluntarily went upon the track behind, or in front of, the flat car for the purpose of his own personal convenience, and not on any business in line or pursuit of his employment as section foreman, and that he knew the danger to himself by reason of his position when injured, and that he voluntarily assumed that position at a time when his presence at the point of danger was not required by his employers, then, under such circumstances, if you find they exist, the said Turner assumed the risk of injury and plaintiff would not be entitled to recover. (2) In

addition to the main charge already given and read to you, you are instructed that if, under the circumstances existing at the time and place of the injury to Wm. Turner, the employes of the defendant operating the switch engine did not see Turner and did not expect or anticipate his presence there at the place where he was struck, and the bell of the engine was being rung at the time, then the defendant's servants owed the said Turner no further duty of keeping a lookout to discover and protect him from danger, and under such circumstances, if they exist, he received the injury, the defendant would not be liable in this suit." In the twelfth paragraph of the court's charge the jury was instructed as follows: "You are further charged that on November 19, 1901, there existed an ordinance of the city of Waxahachie prohibiting the running of trains or cars, within the city limits, at a speed of over six miles an hour, and in this connection you are instructed that if you believe from the evidence that the car or cars kicked in onto the mill siding (if they were so kicked) were caused to run at a speed of over six miles an hour, and were so running at the time the flat car was struck (if it was), and that such speed (if it existed) caused the flat car to run on, against, or over William Turner, producing and causing his death, then plaintiff would be entitled to recover, unless you find that William Turner was guilty of contributory negligence as hereinafter charged." The action of the court in refusing the special charges quoted is also assigned as error.

At a former day of the present term the judgment of the court below was reversed and the cause remanded. Appellee filed a motion for rehearing and the controlling questions involved in the case were certified to the Supreme Court for decision. That court, in answering the questions certified relating to the foregoing charges given and refused on the subject of assumed risk, declares that issue was not raised by the evidence because (1) there was no evidence that tended to prove that prior to the accident the railroad employes had habitually sent the cars on the side track at a speed greater than six miles per hour; (2) the deceased was not connected with the work of switching the cars in the yard; therefore he did not assume the risk of injury from the negligent method by which the other employes of the railroad company did the switching. In discussing the question, the Supreme Court says: "The proposition contended for by the railroad company is that, if its employes were habitually negligent in the manner of handling the cars and Turner knew that fact, he assumed the risk of injury from such negligence. As a general rule the employe does not assume the risk of dangers growing out of the employer's negligence, or the negligence of those for whom the master is responsible, however habitual it may be. To this rule there are exceptions,

but the facts do not bring this case within any one of them." For further discussion of the propositions and authorities cited in support of the conclusion reached, see *Houston & T. C. R. Co. v. Turner*, 91 S. W. 562, 15 Tex. Ct. Rep. 55. With respect to the requested charge refused and quoted above, to the effect that, if at the time and place of the injury to Wm. Turner the employes of defendant operating the switch engine did not see Turner and did not expect or anticipate his presence there, then defendant's servants owed the said Turner no duty to keep a lookout to discover and protect him from danger, the Supreme Court says: "Turner was not a trespasser because he moved away from the place where he was at work to urinate. It is not shown that any convenient place was provided. It was the duty of the employes who were handling and switching the cars on the side track to use ordinary care to protect any person who might be lawfully upon the yards. Turner was an employe and lawfully at the place [where the accident occurred] in returning to his work. There were no facts connected with the case which relieved the railroad employes of the duty to use ordinary care in handling the cars for the protection of such persons as might be in Turner's situation. They owed no special duty to Turner himself, but he was entitled to the protection due to any person who might be lawfully at that place."

In deciding that the trial court did not err in the twelfth paragraph of its charge, wherein the jury were instructed that "if the car, or cars, kicked in onto the mill siding were caused to run at a speed of over six miles an hour, and were so running at the time the flat car was struck, and that such speed caused the flat car to run over the deceased, Turner, producing his death, plaintiff would be entitled to recover, unless Turner was guilty of contributory negligence," the Supreme Court remarks: "The evidence introduced raised the issue that the car which caused the injury was being propelled at a speed greater than six miles per hour. Spring, the only witness who saw Turner when he was struck, testified that, when the car that was sent in on the side track struck the standing car, the end of the latter car flew up off the track and came down with the trucks on the cross-ties, and by the force of the blow was driven 15 or 20 feet on the ties, although the brakes were set on the flat car. Two witnesses that had had long experience in these matters swore that such effect could not be produced except by a very great force; one of the witnesses saying it would require a 'terrific force.' Other witnesses testified that no other car in that yard had ever been thrown from the track in such manner before. This evidence was amply sufficient to raise the question of excessive speed of the car."

Error is assigned to the court's refusal to give the following charge requested by ap-

pellant: "If from the evidence you believe that Wm. Turner saw the cars which were at the time being shoved or kicked in upon the elevator track approaching toward the flat car which was standing on the track, and that to avoid the danger of the impact of the moving cars with the flat car he stepped from the track to a place where he would have been safe, but that he stepped upon loose dirt, which caused his foot to slip, thereby causing him to fall, and that his slipping and falling was the cause of his being caught under the wheels of the car and injured, then no recovery can be had against the defendant, and your verdict should be in defendant's favor." The Supreme Court, in accord with the ruling of this court, held that the trial court did not err in refusing this charge. The holding of the Supreme Court is based upon the fact that "there was no evidence that Turner was in a place of safety when his foot slipped upon the loose dirt." His own declaration, which is the only evidence on the subject, was that he "was then upon the railroad track and endeavoring to get off the track."

Assignments of error not herein discussed and not involved in the questions certified to the Supreme Court have been carefully considered, and in our opinion disclose no reversible error. William Turner lost his life through the negligence of appellant's servants, and he was not guilty of such contributory negligence as precludes a recovery by appellee, his wife, who has sustained damages by reason of his death in the amount awarded her by the jury. It follows from the decision of the Supreme Court upon the certified questions that the trial court did not err in that portion of its general charge, nor in refusing to give the special charges involved in said questions, and appellee's motion for rehearing is granted and the judgment of the court below is affirmed.

Affirmed.

HOUSTON & T. C. R. CO. v. EVANS.

(Court of Civil Appeals of Texas. April 14, 1906.)

RAILROADS — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

One passing over a bridge at a private railroad crossing when he knew the bridge was defective and dangerous, was guilty of contributory negligence, barring recovery for injuries resulting from the defects.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1038.]

Appeal from Limestone County Court; James Kimball, Judge.

Action by A. W. Evans against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and rendered.

Baker, Botts, and Parker & Garwood, for appellant. Williams & Bradley, for appellee.

TALBOT, J. This suit was brought in the county court of Limestone county, by A. W. Evans, against the Houston & Texas Central Railroad Company, for the recovery of damages alleged to have been suffered and sustained by him by reason of loss and injury to his horse and wagon and injury to his person, growing out of an accident which occurred on October 21, 1904. Plaintiff alleged, in substance, that on the date of the accident, the defendant owned a railroad and right of way extending 50 feet on each side of its track, and said right of way was fenced; that plaintiff owned a farm about two miles north of Groesbeck and on the east side of and adjoining the right of way; that there was no road or other way by which he could get from his premises to the public road on the west side of the railroad, except by crossing said right of way over the crossing where the injury occurred, ingoing to his post office, church, school, etc.; that defendant placed the crossing in question, with the gates in its right of way fence, and placed the bridge where the injury occurred over a ditch on the east side of its track; that on the day of the accident, while crossing said bridge with his team, a portion of the bridge gave way, and plaintiff and his team and wagon were injured, etc. Defendant answered by a general demurrer and special demurrers; plead, among other things not necessary to state, a general denial, and plead specially that plaintiff knew the dangerous condition of the bridge before the injury occurred and was guilty of contributory negligence in crossing said bridge under the circumstances. Appellant's right of way had been fenced and at appellee's request it put in gates and constructed the bridge appellee was attempting to pass over at the time the injuries alleged were sustained, to be used by him as a private crossing over appellant's road. Upon a trial before the court and jury, a verdict and judgment in the aggregate sum of \$65 were rendered for appellee, from which appellant has appealed.

When the introduction of the evidence was closed, appellant requested the court to charge the jury as follows: "At the request of the defendant, you are charged that in this case the plaintiff has failed to show any right to recover any sum of the defendant; hence you will return a verdict for the defendant." Appellee testified: "The bridge was made of old railroad ties. There were two ties placed down across the drain or ditch and they were floored with cross ties—the top of the floor was about 25 inches from the deepest part of the ditch—I had been crossing this bridge about three years. Two cross-ties of the floor

of the bridge were broken in two; three of the cross-ties of the floor of the bridge were rotten. Before the injury I knew that two of the ties were rotten. I told those parties [the section men] that the bridge was in bad shape, and asked them to fix it. I knew the ties, two of them, were rotten three or four months before the accident. I told the section bosses, both of them, that the bridge was unsafe. Yes, I knew it was unsafe to cross the bridge with a wagon at and before the accident. The accident was caused by a horse falling through the bridge."

The requested charge should have been given. One who uses a private railroad crossing with full knowledge that it is defective and dangerous, does so at his own risk, and, if he is injured when so using the crossing, he cannot recover. In discussing the question of negligence on the part of a passenger in attempting to board a moving train, in the case of *Railway v. Ellison*, 87 S. W. 213, this court said: "The criterion, as we understand it, for determining whether the act of a passenger in attempting to board or alight from a moving train shall be deemed negligent *per se* is, was the act, under the circumstances, dangerous, and was the danger known to the passenger, or so obvious that it can be said that no person of ordinary care and prudence would have committed it. The essential fact to be ascertained in determining the question is the knowledge of the danger incident to the act. If the danger was known to the party, and he voluntarily incurs the risk, he should be held guilty of contributory negligence as a matter of law, and a right of recovery denied." The cases are not distinguishable on principle, and an application of the rule stated in the present case is perhaps more strongly demanded by the facts than it was in the *Ellison Case*, *supra*. That appellee knew the bridge in question was unsafe and dangerous when he attempted to use it and was hurt is placed beyond all controversy. He stated without any qualification whatever, that he knew three or four months before the accident that two of the cross-ties of the floor of the bridge were rotten; that before the accident he knew two of said ties were broken in two, and that he knew it was unsafe, that is, dangerous, to cross the bridge with a wagon before and at the time of the accident. That appellee was guilty of contributory negligence proximately causing his injuries and damages, is conclusively established by his own undisputed evidence, and he cannot therefore recover.

The judgment of the court below is therefore reversed, and judgment is here rendered for appellant.

**ST. LOUIS SOUTHWESTERN RY. CO. of
TEXAS v. HALL.**

(Court of Civil Appeals of Texas. April 14, 1908.)

**1. CONTINUANCE—ADMISSIONS TO PREVENT—
EFFECT AS EVIDENCE.**

In an action for personal injuries caused by the frightening of a team by a railway locomotive, where the plaintiff, to prevent a continuance, admitted the truth of testimony that the engine at no time moved faster than three or four miles an hour, testimony on behalf of the plaintiff that the engine was going fast was inadmissible.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, § 115.]

2. TRIAL—REMARKS OF COUNSEL.

In an action for personal injuries caused by the frightening of a team by a locomotive, where plaintiff, to prevent a continuance, admitted that the engine at no time moved faster than three or four miles an hour, it was improper to permit his counsel in argument to the jury to state that the engine was running rapidly toward plaintiff's wagon.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, § 115; vol. 46, Cent. Dig. Trial, § 285.]

**3. DAMAGES — COMPENSATORY DAMAGES —
PROXIMATE CAUSE—INSTRUCTIONS.**

In an action for personal injuries, where there was evidence tending to show that the plaintiff was previously suffering from Bright's disease, an instruction that if before or since the injury the plaintiff was afflicted with Bright's disease, or is now suffering therefrom, he is not entitled to recover for the pain or disability so caused, was improperly refused.

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

Action by J. K. Hall against the St. Louis Southwestern Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

See 85 S. W. 786.

B. B. Perkins and Templeton, Crosby & Dinmore, for appellant. Evans & Elder and Robt. F. Spearman, for appellee.

TALBOT, J. Appellee, Hall, brought this suit to recover damages for personal injuries alleged to have been received by him through the negligent operation and movement of one of appellant's engines, by its servants in charge thereof, while appellee was driving his wagon and team over a public street crossing in Wolfe City, Tex. Appellee alleged that, when he approached within about 15 feet of said crossing, he observed an engine standing at the switch, 25 or 30 yards from, and headed towards, the crossing; that he stopped his team in plain view of appellant's servants operating said engine and awaited its movements for a few minutes; that the engine did not move, and he undertook to drive over the crossing; that, when his team got fairly upon the crossing, the servants of appellant, seeing appellee's position, negligently commenced to propel said engine at a rapid and dangerous rate of speed towards appellee and over said crossing, passing within a few inches of appellee's wagon, making

a loud and hissing noise; that by reason of the sudden and rapid movements of the engine and said noise appellee's horses became frightened, ran away, carrying his wagon onto an embankment, throwing him from the wagon to the ground with great force, and permanently injuring him in various parts of the body. Appellant pleaded the general issue and contributory negligence on the part of appellee. A trial by jury resulted in a verdict and judgment for appellee in the sum of \$5,000, from which this appeal is prosecuted.

The court did not err in admitting the testimony complained of in appellant's first, second, sixth, seventh, and eighth assignments of error. The testimony was relevant, and neither of the questions eliciting it was, in our opinion, leading, nor did either of them call for an opinion or conclusion of the witness. Nor do we think the court erred in admitting, over the objections of appellant, the testimony of Dr. Spaulding, of which complaint is made in appellant's fifth assignment of error. We are of the opinion that the hypothetical question submitted to this witness as an expert was sufficiently supported by, and in conformity with, the facts proved to render his answer thereto admissible. When this case was called for trial in the district court, appellant made an application for a continuance, for the want of the testimony of C. R. Payne, and stated in said application that it expected to prove by said witness that he (witness) was on the locomotive engine which plaintiff alleges frightened his horses at the time of plaintiff's injuries; that he saw plaintiff's wagon just as the wagon was turned over, and that it was then 60 or 70 feet from the railroad crossing, and the engine was about 20 feet from said crossing; that said engine moved from the west toward the said crossing before the wagon turned over, and at no time before it passed said crossing was said engine moving faster than three or four miles an hour; that witness did not see plaintiff or his wagon until the wagon was turned over. Upon the presentation of said application for a continuance to the court plaintiff's counsel, in open court, stated to the court that "plaintiff admitted that the witness C. R. Payne, if present, would testify as set out in the said application for a continuance, and admitted that such testimony of C. R. Payne is true." This admission being made appellant's application for a continuance was by the court overruled and the trial of the case begun.

In the introduction of his testimony appellee called Georgia Rowe as a witness in his behalf, who, after stating that she saw appellee's wagon stop near the crossing, and that as he started up his team the engine started towards the wagon, was permitted to testify in that connection, as shown by bill of exception, "that it looked like the engine was going fast and that the engine was running

up near the wagon, and that she did not know whether the engine struck the wagon or not, but that it was right close to the wagon." Appellant objected to the admission of this testimony on the ground that it contradicted and was inconsistent with facts admitted by appellee to be true, at the beginning of the trial, to avoid appellant's application for a continuance. The court refused to sustain the objections, but permitted the testimony to go to the jury for their consideration, and its action is assigned as error. We think it clear that the admission of this testimony was prejudicial error. Had the appellee only admitted that the witness Payne, if present, would testify as set out in the application for a continuance, there would have been no error in the ruling complained of; but such an admission would not have sufficed for the accomplishment of the end in view. In order to defeat appellant's application for a continuance, it was necessary for appellee to admit that the facts which appellant alleged it expected to prove by the absent witness were true. This he did, and should not have been permitted thereafter to dispute them. Having admitted said facts to be true, whatever issue was established by them could no longer be treated as a controverted one, in relation to which testimony inconsistent with or contradictory of the admitted facts was admissible.

But it is contended in effect that the statements of the witness complained of were made before any objection was urged thereto, and no motion was made to exclude them. Therefore appellant cannot complain and have the matter reviewed in this court. This contention is not tenable. The statements of the witness objected to were not made in response to questions indicating that the answers thereto would be incompetent, but upon a request of the witness by appellee's counsel to detail what she saw and heard. As soon as the objectionable matter was stated, appellant's counsel objected to it, and in view of the manner and form of interrogating the witness the objection was sufficient to require the exclusion of the testimony without a formal motion being made for that purpose.

But again error is assigned to the court's action in permitting appellee's counsel in the closing argument to the jury, over the objection of appellant, and without interruption, and without directing the jury to disregard it, to make use of the following language, viz.: "Mrs. Rowe testified that, when she saw the engine, it was running rapidly toward plaintiff's wagon, puffing and making an unusually loud noise, and the locomotive nearly struck plaintiff's wagon, barely passing the hind end of the wagon; that Hall himself also testified to the same facts, and it is true; that Hall ought to be glad that his team ran away, because, if it had not, the engine would have run into his wagon and he would not have been here to-day, and

that the engineer and fireman would have been covered in cotton, and would have been here to-day swearing that they never saw anything; that the truth is it is better for Hall that the team ran away—it saved his life, and he ought to be glad of it." In this action of the court there was error, of which appellant has just cause to complain. Clearly we think this argument was in conflict with the admission made by appellee to avoid appellant's application for a continuance, and was in view of such admission an unauthorized contention for the existence of a state of facts in support of appellee's right of recovery, which could not properly be considered by the jury, and should have been by the court checked and the jury instructed to disregard it. The remarks of counsel intensified the error in admitting the testimony of the witness Georgia Rowe complained of, and were highly calculated to improperly influence the jury, to the detriment of appellant, upon the issue of negligence in the operation of its engine at the time and place appellee was hurt.

Appellant requested the court to instruct the jury as follows: "If you believe from the evidence that the plaintiff, J. K. Hall, was prior to August 29, 1902, or has been since said date, suffering from or been afflicted with Bright's disease, and if you further believe from the evidence that plaintiff has since August 29, 1902, suffered, or is now suffering, or will hereafter suffer, any pain or disability, and if you further believe from the evidence that such pain or disability, if any, is or has been or will be proximately caused by Bright's disease, then for such pain or disability so caused the plaintiff is not entitled to recover in this suit, and you will so find. Proximate cause, as that term is used in this charge, means such cause as acting in a natural and ordinary sequence, unbroken by any new cause, produces the result." This charge was refused, and the refusal is assigned as error. We are of the opinion the charge embodied a correct proposition of law applicable to the facts and should have been given. Dr. Cantrell testified, in substance, that he had treated appellee for two or three years prior to the accident in which he claims to have been injured for kidney trouble; that he had made a number of chemical examinations of appellee's urine, a microscopical examination; that appellee had inflammation of the kidneys; that such disease was permanent unless cured at an early stage; that in the progress of kidney disease the sufferer usually lives several years; that it was not a rapid acute Bright's disease or Bright's disease that affects the lining membrane of the kidneys, it impairs the general health and strength of the patient, they have aches and rheumatic pains, etc.; that the last time he examined appellee was about 10 days before the trial; that he made a microscopical examination of his urine six or eight weeks before the trial,

and it revealed the fact that the trouble still existed, and that as to the kidneys there was practically no great amount of difference. This witness further testified that he saw appellee on the day of the accident in question and examined him physically to ascertain the nature of his trouble and how badly he was hurt; that he saw him on the same day of the accident; that he found a sprain in his ankle and a slight bruise in the front and back of his shoulder; that as to the shoulder he found only a surface bruise, there were no other parts injured, and no bones fractured; that he had treated appellee at intervals since August, 1902, to the time of the trial; that what he treated him for a few weeks after the injury had no reference to the fall or accident; that he referred the physical condition that has existed since a week or two after the accident to an inflammation of the kidneys; that if appellee has suffered any with his right arm in lifting it up, has suffered any pain or inconvenience about the shoulder, from his knowledge of his condition and history, he referred such pain, etc., to rheumatic trouble; that he could not attribute it to the injury. Dr. Hooper testified that he treated appellee in 1901; that he treated him several times; that he found him suffering with kidney trouble; that he analyzed his urine; that his diagnosis was that he had Bright's disease, and that his diagnosis had not been modified or changed since that time; that he treated appellee for chronic Bright's disease. He further testified that "rheumatic pain from anything of that kind could be located anywhere in the body; that if a man 40 or 42 years of age should be examined by him and found to have Bright's disease in the stage in which he found appellee to have it when he examined him, and if the patient should afterwards complain of pain about the shoulders, hips, or complain that in moving his arms and raising them above a certain point it gave him pain—that Bright's disease could be the temporary cause of most of those troubles or might be the direct cause." This evidence clearly raised the issue whether appellee's alleged suffering and disability had been, and would probably continue to be, the result of Bright's disease, or the result of injuries claimed to have been received by him through the alleged negligence of appellant's servants. The charge of the court in general terms instructed the jury that appellee was not entitled to recover for any injury, except that which may have been the result of the negligence of appellant; "but this was not sufficiently specific to deprive the defendant of the right to have the particular question raised by the evidence called to the attention of the jury when made in a legal way." *Railway v. Hall*, 85 S. W. 786, 12 Tex. Ct. Rep. 377. In other words, appellant, having requested it by a correct special charge, was entitled to have the minds of the jury di-

rected to the very fact, or facts, involved in the issue, and invoke their judgment upon the evidence relative thereto. This is a familiar rule, well established by the authorities in this state. *Railway Co. v. McGlamory*, 89 Tex. 635, 35 S. W. 1058; *Railway v. Shieder*, 88 Tex. 152, 30 S. W. 902, 28 L. R. A. 588; *Railway Co. v. Rogers*, 91 Tex. 52, 40 S. W. 956. The refusal to give the special charge in question deprived appellant of the right accorded it under the rule referred to, and constitutes reversible error.

It is believed that assignments not discussed disclose no reversible error. The special charges asked and refused were either inapplicable or covered by the main charge and special charges given.

For the errors indicated, the judgment is reversed, and cause remanded.

BERRY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

GAMING — POOL TABLES — BETTING TABLE FEES.

Defendant, who conducted a poolroom, was not guilty of exhibiting a gaming table and bank because some frequented the room and bet the table fees, unless he knew of the custom and permitted the same.

Appeal from District Court, Hamphill County; B. M. Baker, Judge.

T. M. Berry was convicted of exhibiting a gaming table and bank, and he appeals. Reversed.

Willis & Willis and Reeder & Cooper, for appellant. R. E. Taylor and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of exhibiting a gaming table and bank; his punishment being fixed at a fine of \$25 and 10 days' confinement in the county jail.

There is but one question that requires consideration, and that is whether the court should have given appellant's special requested instructions. We will state enough of the facts in order to present this question. Several witnesses testified to playing pool at appellant's place of business on a pool table owned by appellant. Some of them testified that they wagered the table fees; that is, that the loser paid the table fees. Sometimes the table fees were paid to appellant himself, and sometimes to a negro attendant named Clark. None of the witnesses, as we view the record, state that appellant knew that the fees were wagered, or that the loser paid said table fees. All that he appeared to be interested in was in getting the fees due on each game, which was 15 cents for a two-handed game, and more for a three-handed game. Several of the witnesses state that they did not know whether it was a general custom among the boys for the loser to pay for the game or not. Witnesses state that sometimes the loser

would pay and sometimes the winner would pay, just as they arranged the terms of the game. None of them state that appellant knew of this custom; and the effect of the testimony, as it appears to us, was to make the case against appellant by proving the custom among the boys and to affect him with notice by circumstances. On this state of case the court instructed the jury as follows: "You are instructed that you cannot find defendant guilty unless you find from the evidence beyond a reasonable doubt that he kept and exhibited for the purpose of gaming a gaming table and bank; and in this connection you are instructed that a pool table is one which may be kept and exhibited for the purpose of gaming. And you are instructed that, if persons play pool on a pool table under an agreement that the loser of the game shall pay the table fees in money, or the money fees for the use of the table, it would come within the legal meaning of the word 'bet.'" Appellant asked the following instruction, which was refused: "You must believe from the evidence beyond a reasonable doubt that bets were made upon the pool table owned, held, and kept by defendant; that defendant was informed or knew of such bets being made and permitted same to be made, before you can convict the defendant; and, unless you so believe, you will find the defendant not guilty." Under the proof it occurs to us that the requested instruction should have been given. The court had previously told the jury, in effect, that if they believed the table fees were bet—that is, that the loser was to pay for the same—appellant would be guilty; and this without regard to his knowledge. The proof at least makes an issue as to his knowledge on this subject. We hold that appellant's rights should have been safeguarded on this branch of the case, and that the jury should have been told that defendant could not be convicted unless he was informed or knew of such bets being made. In *Mayo v. State*, 82 S. W. 515, 11 Tex. Ct. Rep. 130, we do not understand that any question was made as to notice; certainly none that the court failed to charge upon knowledge on the part of appellant. But here the question is directly made that the testimony demanded a charge on notice or knowledge on his part.

In our opinion the testimony demanded such a charge. For the refusal to give the same, the judgment is reversed, and the cause remanded.

MOORE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

GAMING—EXHIBITING GAMING TABLE—EVIDENCE—SUFFICIENCY.

On a trial for exhibiting a gaming table, evidence held insufficient to sustain conviction.

Appeal from Jones County Court; Jno. B. Thomas, Judge.

Will Moore was convicted of establishing a gaming table, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction was for exhibiting a gaming table and bank, for the purpose of gaming.

Dickerson testified that he played a game of pool in the pool hall at Stamford; the understanding between the parties being that the loser should pay the fees. At the end of the game, they paid the fees to defendant, who was in the hall at the time they finished their game. This witness did not know how long appellant had been there or whether he was there when they began playing or during the time they were playing. He further states there is a restaurant in the front part of the building, and a pool hall was in the rear end of the building, a partition separating them; that he had frequently seen appellant both in the pool hall and in the restaurant. Witness further stated, that he had played there frequently, and it was understood between himself and the parties with whom he played, that the loser should pay the table fees. Appellant testified that at the time mentioned by the previous witness he had leased the pool hall to Turner, and had nothing to do with it, except sometimes he would be in the pool hall when the parties would finish their game, and pay the fees, and at times they would hand the said fees to him, and he would hand them to the man whom Turner had in charge of the hall. On the occasions testified by the previous witness, Turner's man or clerk was in the hall; that he (appellant) had just stepped back there from the restaurant, and Dickerson handed him (appellant) the fees, and he turned and handed them to Turner's clerk, who was in charge of the hall. He states that he knew nothing about any agreement between Dickerson and the party with whom he played as to the losing man paying the fees; that he did not even see them play the game, but happened to be in there when they paid the fees; that he was running a restaurant in the front part of the building, and owned the building, including the restaurant, pool tables, and pool hall. Owens testified that the pool hall and tables had been leased by appellant to Turner during the month in which the playing occurred, and heard the trade between them; and saw Turner pay appellant \$32.50, as rent during that month; and that on the day the game was played, he knew as a fact that Turner was in charge of the pool hall. He also testified as to appellant running a restaurant in the front part of the building. Witness Dyer testified that it was an understanding between the players when they played

at this pool table that the losers would pay the fees, and that he had seen appellant in there frequently, and had sometimes seen fees paid him; but he did not know whether he was present when the game was played or not, or whether he heard or knew anything of the understanding between the players to pay the table fees. Under this testimony it is evident that appellant was not in charge of the pool table or the pool hall; and if he was guilty at all, it was by reason of the fact that he handed the table fees to Turner's clerk; said fees having been previously handed him by one of the players. He was in no way connected with the game, or exhibiting the gaming table and bank. We do not believe this testimony is sufficient to convict him for exhibiting a gaming table and bank.

The judgment is reversed, and the cause remanded.

MOORE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 21, 1906.)

GAMING—EXHIBITING GAMING TABLE—EVIDENCE—SUFFICIENCY.

On a trial for exhibiting a gaming table, evidence held to warrant conviction.

Appeal from Jones County Court; Jno. B. Thomas, Judge.

Will Moore was convicted of exhibiting a gaming table, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of exhibiting a gaming table and his punishment fixed at a fine of \$25, and 10 days' confinement in jail.

The facts are as follows: Jack Dyer testified for the state that he knew defendant. Frequently saw him in the restaurant and pool hall in Stamford. Was in said pool hall on the 15th of last June, and played a game of pool with other boys, and the man who lost the game would pay the fees. "I lost a game, and paid the fees myself. They were paid to defendant. The fees were five cents a cue, and it was understood when we played that the man who lost the game would pay the fees. Lee Campbell was one of the parties that played on this occasion. The poolroom was in the back end of the building, and the restaurant in the front. There was a partition door between the rooms. Frequently saw defendant in the front end of the building running the restaurant. Don't know whether defendant was in the poolroom, when we began playing or not; but saw him there when we got through. I then paid him the fees. Paid all the fees to defendant and to no one else. I played there frequently, and it was always understood that the loser pay the fees. I don't know whether defendant knew this or not."

Lee Campbell testified, substantially the same as Jack Dyer. Defendant's testimony was, as follows: "During last June I had the pool hall leased out to Turner, and he was running it; and I was running a restaurant in the front end of the same building. There was a partition between them. I do not remember the transaction testified by witnesses for the state. But on the 15th of last June, the man Turner had running the pool hall had to be out, and as a matter of accommodation to him and Turner, on that day I received the fees for several games of pool from the parties that would play, and turned them over to Turner's man when he came in, and I went from my restaurant back into the pool hall several times during that day. I probably received the fees mentioned by the witnesses for the state; but if I did, I knew nothing about who lost the game, or who won it, or of any understanding that the losing party should pay the fees. I was looking after the pool hall that day for Turner, and was the only man in charge of it. I owned the building, including the restaurant, pool hall, and tables; I was in no way interested in the running of this pool hall, or the keeping of the tables therein on this date, and had nothing to do with the same more than as above stated." Defendant proved by witness Owens, the lease of the property, as testified by defendant, to Turner; and that during the month in question defendant run a restaurant in the front of said building; that he frequently saw defendant in the pool hall, and sometimes when the man in charge would step out, parties would pay defendant.

The above stated facts were submitted to the court, without a jury, and appellant was found guilty, as charged in the indictment. We think the evidence warrants the conclusion of the court. While it is true, as appellant insists, that no one testified positively that he knew that games of chance were being played upon the billiard table, yet it is circumstantially established that he did know. He does not deny in his statement that prosecuting witness' testimony is not true; nor does he deny that it was usual to play games of chance upon the table. So we take it that, while the evidence is not positive, it is circumstantially strong enough to establish the fact that he exhibited the game. Mayo v. State, 82 S. W. 515, 11 Tex. Ct. Rep. 130.

The judgment is affirmed.

Ex parte MASSEY.

(Court of Criminal Appeals of Texas. Nov. 15, 1905. Rehearing Denied March 14, 1906.)

1. INTOXICATING LIQUORS—STORAGE—REGULATION—CONSTITUTIONAL LAW.

Gen. Laws 29th Leg. p. 91, c. 64, regulating the occupation of keeping and storing intoxicating liquors in local option districts, is not invalid, as not within Const. art. 18, § 20, authorizing the Legislature to prohibit within

prescribed districts the sale of intoxicating liquors.

2. STATUTES—LOCAL ACTS.

Gen. Laws 29th Leg. p. 91, c. 64, regulating the storage of intoxicating liquors in local option districts, is not a violation of Const. art. 3, §§ 56, 57, as a local act.

8. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.

Gen. Laws 29th Leg. p. 91, c. 64, regulating storage of liquors in local option districts, is not unconstitutional as denying citizens the equal protection of the laws.

Application by H. D. Massey for writ of habeas corpus to obtain his release from custody on a charge of violating the local option law. Relator remanded.

Newton & Ward, for relator. Howard Martin, Asst. Atty. Gen., for respondent.

HENDERSON, J. This is an original application for the writ of habeas corpus, which was granted by Hon. W. L. Davidson, during vacation, and made returnable to the full court at this term. The agreed statement of facts shows that local option was in force in the county of Hays on the 21st day of August, 1905; that applicant, Massey, was then and there engaged in the business or occupation of keeping and storing spirituous, vinous, and intoxicating liquors for others; and that he permitted persons, among others, Jack Liley, to drink a bottle of beer within his said place of business. In other words, the state claims that relator had violated the act of the Twenty-Ninth Legislature (Gen. Laws 29th Leg. p. 91, c. 64) regulating the occupation of keeping or storing spirituous, vinous, or intoxicating liquors for others within any county, justice's precinct, subdivision of a county, city, or town, in which the sale of spirituous, vinous, or intoxicating liquors had been prohibited under the laws of this state, by permitting such intoxicating liquors to be drunk within his said place of business. A violation of this statute is made a misdemeanor, punishable by a fine and imprisonment. Applicant was arrested on complaint charging a violation of said law, and, as stated before, sued out a writ or habeas corpus, claiming that said law was unconstitutional and void.

One ground of his contention is that said act is void, because section 20 of article 16 controls legislative power in regard to legislation applicable to intoxicating liquor in local option territory, and that the Legislature is without power or authority to pass any other legislation, applicable to local option territory, than that authorized by section 20 of article 16 of the Constitution. To support his contention on this behalf he refers us to *Holley v. State*, 14 Tex. App. 505; *Stallworth v. State*, 16 Tex. App. 346; *Stephens v. State* (Tex. Cr. App.) 85 S. W. 797; *Ex parte Brown*, 38 Tex. Cr. R. 306, 42 S. W. 554, 70 Am. St. Rep. 743. Both the *Holley* and *Stallworth* Cases relate to the power of the Legislature inhibiting the giving away of liquor in local option territory, and

it was held that the constitutional provision in question limited the power of the Legislature to the prohibition of the sale of liquor. The case of *Stephens* is authority for the proposition that the state law prohibiting a gift to minors is in force in the local option territory, and would seem to contravene the relator's position. In *Ex parte Brown*, the question was as to the validity of an act of the Legislature which prohibited the keeping of a cold storage for the purpose of keeping and storing intoxicating liquors for others in local option territory. It was there held that it was not within the police power of the state to prohibit the keeping of such a cold storage. The opinion in said case appears to have been based upon two grounds: First, that the Constitution (article 16, § 20), which authorized legislation prohibiting the sale of intoxicating liquor in the local option territory, measured the power of the Legislature to deal with the liquor question in any other manner; and, second, that intoxicating liquors were regarded both in the state and nation as property, and the attempt to prevent the holding or use of such property, for no illegal or improper purpose, was an invasion of the fundamental rights of the citizen. In the discussion of the question, it seems to have been assumed that the act in question, inhibiting the keeping of a cold storage, was an attempt on the part of the Legislature to deal with the liquor question in a manner not authorized by the Constitution. If such be the case, there can be no question that, under the Constitution as construed by our authorities, which we think are correct, any attempt on the part of the Legislature to deal directly or indirectly with intoxicating liquors, save as prescribed by the Constitution, would be without authority of law and void. The provision of the Constitution authorizes the people to inhibit the sale of intoxicating liquors in local option territory. Then would the keeping of a cold storage in such territory be an infringement of said provision? A closer scrutiny of the question renders this proposition at least doubtful, as it is not a direct assault on the local option law, but appears to be outside of the law. Whether or not this be correct, the holding of the court in *Ex parte Brown* is unquestionably sound on the proposition that the attempt of the Legislature to prohibit the keeping of a cold storage in local option territory was a direct invasion of the inalienable rights of the citizen. The question there was, not the regulation in the keeping of a cold storage, but the absolute prohibition. Here, however, the question is one purely of regulation. Regulation is not prohibition. On the contrary, it apprehends the existence of the thing to be regulated. Unquestionably a person may keep a cold storage in local option territory without any infringement or impairment of the local option law. But it cannot be assumed that, because he can pursue such business, the Legislature is without authority

under its police power to regulate the keeping of a cold storage. We do not understand that the police power of the state is abrogated or suspended in local option territory, or that state laws which are applicable to such territory are inoperative. It has been held by this court that the state law regulating gifts of liquor to minors is operative in local option territory. *Stephens v. State* (Tex. Cr. App.) 85 S. W. 797. We have also held it was competent to tax the legal sales of intoxicating liquor for medicinal purposes under state laws and that this was not antagonistic to article 18, § 20, of the Constitution. *Snearley v. State*, 40 Tex. Cr. R. 507, 52 S. W. 547, 53 S. W. 696. It has never been suggested that the sale of liquor in local option territory for medicinal purposes, which is regulated by law, is unconstitutional on that account. As has been often held, intoxicating liquor is peculiarly a subject of police regulation. See *Ex parte Rippey*, 44 Tex. Cr. R. 72, 68 S. W. 687; *Amer. & Eng. Ency. of Law*, vol. 22, p. 928. So we have laws inhibiting the drinking of liquor at the place where sold, except in saloons proper, and laws inhibiting the sale of liquor at or near churches, schoolhouses, and theaters, and at houses of ill fame. These have always been upheld. While the giving away of liquor in local option territory cannot be prohibited, yet, we take it, this can be unquestionably regulated by law, and if one should set up a saloon for the purpose of giving away intoxicating liquors, the Legislature, under its police power, could prohibit same from being drunk on the premises. Here, the Legislature provided that, where liquors are kept in storage by a person for others, they should not be drunk within the place of business. Doubtless the exercise of this legislative authority was in the interest of public morals to prevent crowds gathering and drinking intoxicating liquor at such places, and thus being incited to riotous and boisterous conduct, to the evil example of the community. We hold that this is an exercise of legislative power which is not inhibited by any provision of our Constitution. The act does not prohibit the keeping, but simply undertakes to regulate the keeping, of such cold storages.

Applicant also contends that this act is unconstitutional because it is in conflict with sections 56 and 57, art. 3, of the Constitution, in that it is a local or special law. Relator in defining what is a local or special law quotes with approval from the opinion of the Supreme Court in *Clark v. Finley*, 98 Tex. 171, 54 S. W. 343, as follows: "Without entering at large upon a discussion of what is here meant by local or special law, it is sufficient to say that the statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is a special law, and comes within the constitutional inhibition." We entirely concur

with this definition, and it is in line with a number of other definitions of what constitutes a local or special law found in the authorities. Our local option law certainly by its terms applies to all persons as a class under the same environments and conditions. It relates to every portion of the state which may adopt local option; and every portion of the state can adopt local option if it sees fit. In our view a local or special law would not have been applicable, and section 57 provides distinctly that no special law can be passed where a general law can be made applicable. Almost this identical question was before our Supreme Court in *Beyman v. Black*, 47 Tex. 588, with reference to a construction of our stock law, and involved the question whether the same was a general or special law; it being applicable to only particular counties of the state, others being exempted. *Orr v. Rhine*, 45 Tex. 345, was referred to, and the authority of the Legislature to pass the general law, applicable only to certain counties, was upheld. The court say: "Certainly the constitutional authority to enact laws strictly local implies the same authority to make local exceptions to a general law. The act in question is general in its terms and in its operation, save in certain specified counties, and can with no propriety be termed a local or special law. Indeed, it has not been argued that it violates any of the provisions of the constitutional amendments of January, 1874, forbidding local or special laws in certain enumerated cases," etc. And *Clark v. Finley*, supra (and which was ably briefed on behalf of the state by counsel for relator in this case), distinctly holds that it is competent for the Legislature to classify officers with reference to compensation, based upon the population of their respective counties, and that the same cannot be pronounced unreasonable by the courts. In the opinion, the court upheld the fee bill, which was applicable to certain counties of a stated population, others not being amenable to the act regulating the fees of officers. The exact question here presented was before the Supreme Court of Missouri, in *State v. Pond*, 6 S. W. 469. It was there held, under provisions of law similar to those of our own state relative to counties or towns which had adopted local option, that it was not a local or special law; that its operation was uniform upon all persons within such territory. See *Cox v. State*, 8 Tex. App. 254, 34 Am. Rep. 746, and *Groesch v. State*, 42 Ind. 547. It does not occur to us that the position assumed by relator that this was a local or special law is sound.

Relator further contends that the act in question is void under the federal Constitution, because it arbitrarily classifies the citizens of the state, and denies to a portion of said citizens the equal protection of the laws. As has been heretofore stated, the act is one directed to the local option territory and is not, in our opinion, an arbitrary clas-

sification, but is based on reason; that is, it is applicable to a class of citizens of the state situated under like circumstances, and not applicable to citizens of the state situated under different circumstances. So far as the nonlocal option territory is concerned, if there are any cold storages at all, they are very few. The open saloon renders this absolutely unnecessary. Besides, if what we have heretofore held with reference to the right of the state to pass a general law applicable alone to local option territory is sound, then the classification is not unreasonable and there is no denial of the equal protection of the laws to citizens embraced in the local option territory. The saloon which exists outside the local option territory is regulated by laws peculiar to it; and the cold storage, which exists in local option territory, is operated under laws and regulations peculiar to it. We fail to see how there is any denial of the equal protection of the laws to any class of citizens of the state under the operation of this act. As stated before, the liquor traffic is peculiarly within the police regulation of the state, and the Legislature can regulate the manner in which the intoxicants can be drunk. As illustrative of this, we have laws prohibiting liquor being drunk in wholesale liquor houses—that is, liquor houses that sell in quantities of a quart or more—and no one has ever contended that this was a denial of the equal protection of the law, although in saloons that sell either by wholesale or retail liquor can be drunk in such places.

Relator is remanded to custody, with the costs taxed against him.

BROOKS, J. I concur in the conclusion reached.

DAVIDSON, P. J. I believe *Ex parte Brown*, 38 Tex. Cr. R. 295, 42 S. W. 554, 70 Am. St. Rep. 743, enunciates the correct doctrine, and should be cited as authority against the decision in this case. The question in *Brown's Case* is the same as in this case, and this case is wrong. An examination of the two cases, I think, demonstrates the same principle involved.

Ex parte MASSEY.

(Court of Criminal Appeals of Texas. Dec. 6, 1905. On Rehearing, March 14, 1906.)

1. INTOXICATING LIQUORS—UNLAWFUL SALE—PLACE OF SALE.

The solicitation of an order in local option territory by the agent of a liquor dealer on an understanding that the order was to be forwarded to the principal's place of business, where he might have a right to reject the order, and that if he filled it the liquor should be delivered to a carrier and then become the property of the purchaser, did not amount to a sale in local option territory, though the order was accepted and the liquor delivered.

2. SAME—CONSTITUTIONAL LAW.

A statute making it a misdemeanor "to solicit an order for the sale" of intoxicating liquor in local option districts is invalid, under Const. art. 16, § 20, authorizing the Legislature to prohibit the "sale" of liquor within prescribed limits.

3. COMMERCE—INTERSTATE COMMERCE—INTOXICATING LIQUORS.

A statute making it a misdemeanor "to solicit an order for the sale" of intoxicating liquor within local option districts is a violation of the interstate commerce clause of the federal Constitution.

Brooks, J., dissenting.

Application by **H. E. Massey** for a writ of habeas corpus to obtain his release from custody on the charge of soliciting an order for the sale of intoxicating liquor in local option territory. Relator discharged.

Newton & Ward, for relator. **M. B. Templeton** and **Howard Martin**, Asst. Atty. Gen., for respondent.

DAVIDSON, P. J. The last Legislature passed the following statute (Laws 1905, p. 379, c. 159): "That if any person in any county, subdivision of a county, justice's precinct, city or town, in this state, in which the sale of intoxicating liquors has been prohibited by law, shall solicit or receive an order therein for the sale or delivery of any intoxicating liquor in such county, subdivision of a county, justice's precinct, city or town, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than fifty dollars nor more than three hundred dollars, and by confinement in the county jail for any period not less than thirty days nor more than ninety days." Applicant was charged by complaint and information, in two counts, with the violation of this statute. He was arrested, and sued out the writ of habeas corpus before this court.

The first count in the information charged that **J. S. Carroll** was conducting in the town of **Maxwell**, **Caldwell** county, an establishment for the sale of liquor; that local option was in force in **Hays** county on the 21st of August, 1905, and applicant was the agent of **Carroll**, and as such agent he solicited and received from **Eli Hill**, in **Hays** county, an order for the sale and delivery of one quart of whisky; that it was agreed between **Hill** and applicant that the order was to be forwarded from **Hays** county to **Carroll**, at his place of business at **Maxwell**; that **Carroll** reserved the right to reject or fill the order; that if he filled the order the whisky was to be delivered to the **American Express Company**, a common carrier at **Maxwell**, in **Caldwell** county, to be transported by the express company to **Hays** county, and there delivered to the purchaser, **Eli Hill**; that when the liquor was delivered to the common carrier at **Maxwell** it was then and there to become the property of **Hill**, and

the express company was to transport the same as the agent of said Hill. The second count charges that on the 21st of August, 1905, applicant, in said county of Hays, did solicit and receive in said Hays county, from Eli Hill, an order for the sale and delivery in said Hays county of one quart of whisky, the same being an intoxicant.

Under all the authorities in Texas the first count does not charge a violation of the law, even if the whisky had been delivered and reached its destination in Hays county. The allegations set out in the first count would constitute a sale at the point of shipment, had there been a contract and the goods shipped, and not at the point of destination. *Bruce v. State*, 36 Tex. Cr. R. 53, 39 S. W. 683; *Weldorn v. State*, 36 Tex. Cr. R. 34, 35 S. W. 176; *Keller v. State* (Tex. Cr. App.) 87 S. W. 669; *James v. State* (Tex. Cr. App.) 78 S. W. 951; *Sedgwick v. State* (Tex. Cr. App.) 85 S. W. 813; *Parker v. State* (Tex. Cr. App.) 85 S. W. 1155; *Joseph v. State* (Tex. Cr. App.) 86 S. W. 326; *Luster v. State* (Tex. Cr. App.) 86 S. W. 326. *Sims' Case* (Tex. Cr. App.) 87 S. W. 689, is directly in point in regard to the right of the principal to ratify or reject such orders. So, under the order set out in the first count, if the sale had been consummated it would not have been in Hays county, but at Maxwell, Caldwell county, and that it is necessary to have a sale in the prohibited territory to constitute a violation of the local option law. We deem it unnecessary to further discuss the first count of the indictment. The second count charges that the order was solicited not only in Hays county, but the delivery was to occur in Hays county. We suppose this was intended to charge a state of case that would require the shipper to deliver the property in Hays county, and the property to remain his until it reached the consignee in the local option territory; in other words, that by the terms of the act in question the Legislature intended only to prohibit the soliciting and taking of orders in the local option territory, when the contract was to be consummated by the sale and delivery of the goods in the local option territory. But the further question is still involved in a general way that the Legislature intended to prohibit the soliciting of orders in local option territory, where the ultimate object of the consummation of that contract was the sending of the goods into the local option territory, without reference to where the sale might be consummated, in or out of the local option territory.

It is not the law, if the party solicits or takes the order in a local option district to deliver intoxicants in such district, that it constitutes a sale. If this is the final termination of the matter, there would be no sale. There might not even be a contract for a sale. If the solicitation ended the transaction, there would be no contract. Why? Because the parties solicited either failed or de-

clined to accept the terms offered by the party soliciting the order. If there was an acceptance and an order given, still there would be nothing but a contract to deliver or sell at some future period. This is not sufficient. Why? Because there must be a sale, and such sale must be within the prohibited territory in order to come within the provisions of article 16, § 20, of the Constitution. This section alone furnishes the authority for local option legislation, and limits the authority of legislation to the prohibition of sale "within the prescribed limits" where the law is operative. It is a well-known rule, sanctioned by all legal authority, that, where the Constitution provides how a thing may or shall be done, such specification is a prohibition against its being done in any other manner. This is but the application of the familiar rule that the expression of one thing is the exclusion of any other, and therefore is decisive of legislative authority. This doctrine was fully discussed in *Holley's Case*, 14 Tex. App. 516, and quite a number of subsequent cases. The recent case of *White v. State* (Tex. Cr. App.) 85 S. W. 10, is strongly in point. See, also, *Stallworth's Case*, 10 Tex. App. 346, *Ex parte Brown*, 38 Tex. Cr. R. 295, 42 S. W. 554, 70 Am. St. Rep. 743, *Stephens v. State* (Tex. Cr. App.) 85 S. W. 797, and numerous authorities already cited, *supra*. In *White's Case*, *supra*, there was an agreement to sell and deliver the intoxicating liquor in the local option district, and the money was paid to the solicitor by the party from whom the order was sought. Before delivery of the goods, the solicitor of the order canceled the contract and returned the money to the would-be purchaser. Under this state of case, it was held not to be a violation of the law, because there was no consummation of the contract; that is, no sale had been made. The solicitation had only merged into a contract for the delivery of the goods. But the sale did not occur; that is, the goods were not delivered. The writer did not participate in the decision in that case, and the report of the case shows his absence. It may be safely asserted that a solicitation of an order is not even a contract; that, if accepted and merged into a contract, then it is not a sale, but simply an agreement to sell. It is nothing more than an executory contract, and by its very terms excludes the fact that a sale has been consummated. On the very face of the agreement the stipulations are for a sale at some future time. The act in question not only seeks to punish that which is not a sale, but provides a penalty for the doing of an act which the law itself recognizes not to be a sale, and which, by the terms of the agreement, cannot be a sale. The punishment denounced is for soliciting an order for the sale or for a delivery. This solicitation may be rejected, or, if accepted, it is not necessary that it be executed in order to call for a punishment under the terms of the act in question. It

excludes the idea that the intoxicant is delivered. The offense is complete by the terms of the law without a delivery, or even without a contract for delivery. A sale is not necessary. The party would be punished whether the sale was in fact consummated or not. This is so clearly in violation of the terms of the constitutional provision cited *supra* that we deem it almost unnecessary to discuss it.

Again, the law is violative of the federal Constitution and the Wilson act of Congress regulating interstate commerce. The act in question makes no exception in favor of interstate commerce shipments or contracts. It punishes alike, whether the solicitation is for state or interstate shipments. That it is violative of the federal laws cannot be questioned in the face of 100 years of decisions by the courts, federal and state. This, it occurs to us, would render the act void. See *Western Union Tel. Co. v. State*, 62 Tex. 630; *Kimbrough v. Barnett*, 93 Tex. 313, 35 S. W. 120; *T. & P. Ry. v. Mahaffey*, 84 S. W. 646, 11 Tex. Ct. Rep. 858; *State v. Hamey* (Mo.) 65 S. W. at page 949; *State v. Indiana & O. Oil, Gas & Mining Co.*, 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; *Louisville & N. R. Co. v. Railroad Commission of Tenn.* (C. C.) 19 Fed. 679. To hold otherwise would impute to the legislative and executive departments a purpose to discriminate against the citizens of this state in favor of those of other states, and an intent to punish our citizens for an act which would be entirely innocent if done by the citizens of other states. To hold that the Legislature intended such discrimination would not only be a reflection on that branch of the government as to their intelligence, and a criticism upon their sense of fairness and justice, but would give the law such a construction as would lead to absurd and unjust results. Courts will not do this unless forced by the plain, certain, and unambiguous language employed by the Legislature showing that such was their purpose. The terms of this act do not require it be given such a construction. Certainly our Legislature never intended to pass a law, the operation of which would authorize citizens of other states to come ad libitum into local option territory, solicit orders, and turn the entire shipment of liquor into such territory over to liquor dealers outside the state, to the exclusion of our own people, and punish severely our citizens for an act which is entirely innocent if committed by the liquor dealers of other states. A construction of a law must be avoided which leads to injustice and absurdities. Under the interstate commerce clause of our federal Constitution, our Legislature is powerless to prevent shipments of goods into this state from another state, under a contract between a citizen of this state and the citizen of the state from which the goods may be shipped. Exception was not made

in the act under consideration in favor of parties resident outside the state; but the terms of the law are framed to cover all parties who undertake to take orders in the prohibited territory, whether state or interstate. As directly pertinent to this question, see *Western Union Tel. Co. v. State*, *supra*. Being inoperative and unconstitutional as to interstate commerce, the terms of the law are so worded and constructed that this feature of it cannot be excluded without rendering the whole act void. Therefore the whole act must fall as being unconstitutional. We therefore hold that the act is violative of article 6, § 20, of our state Constitution; and, second, that it is violative of the federal Constitution and act of Congress regulating interstate commerce. So, in any event, and from any standpoint, this law is beyond legislative authority and cannot stand.

The applicant is therefore ordered discharged from custody.

HENDERSON, J., will file reasons for concurring. BROOKS, J., dissents.

On Rehearing.

HENDERSON, J. The applicant was ordered discharged at the Tyler term, and is now before us on motion for rehearing filed by the state. In connection with the motion, respondent has filed an able brief in which the propositions announced by the court in the original opinion are strenuously attacked, and it is urged that, in consonance with correct legal principle and the authorities bearing on the question, a rehearing should be granted and applicant remanded.

As we understand the act of the Twenty-Ninth Legislature (Laws 1906, p. 379, c. 159), it prohibits the solicitation of orders for the sale of intoxicating liquor in any territory where local option is in force, for the sale or delivery of said liquor in such territory; and this without regard to any sale in the territory. The original opinion held that said act was invalid, on two grounds: First, that the Constitution authorized the prohibition of sales only in a local option territory, and thus negated any other authority on the part of the Legislature to make other police regulation; and, second, that the act of the Legislature as formulated apprehended the solicitation of sales, lawful in themselves, and which the Legislature had no power to inhibit, and therefore the act was void. Respondent denies that article 16, § 20, of the Constitution is restrictive to sales alone, or that it denies to the Legislature the exercise of other police power in furtherance of and tending to aid the power given to the people in said article of the Constitution, and cites us to *Bowman's Case*, 38 Tex. Cr. R. 14, 40 S. W. 796, 41 S. W. 635, *Randle's Case*, 42 Tex. 590, and *Smisson v. State*, 71 Tex. 223, 9 S. W. 112.

Bowman's Case, in effect, holds that sales

for sacramental and medicinal purposes were eliminated from the provisions of the Constitution prohibiting the sales of intoxicating liquor; that such sales were not within the evil contemplated, being within themselves useful—the first being sales for sacramental purposes and protected by another clause of the Constitution, and the latter was excepted as being necessary to the welfare of the people; that it was not necessary for the Legislature to except the same, the exception inhering in the Constitution itself; that the act of the Legislature was simply a legislative construction of the Constitution. Their construction was certainly not the exercise of more power than was given by the Constitution. Therefore it was not a case of *ultra vires*, as stated in *Bowman's Case*, *supra*. The act of the Legislature is in accord with the rule laid down in 1 Blackstone Com. (Cooley's 4th Ed.) p. 60, and the illustration therein given. Rule 4, relating to interpretation of laws, is as follows: "As to the effects and consequences, the rule is that, where words bear either none or a very absurd signification if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon who opened the vein of a person that fell down in the street in a fit." So that, in construing article 16, § 20, we simply eliminated the matter as not within the evil contemplated. In the statute now before us, the solicitation of sales by drummers from other states is as much within the evil contemplated as sales by our own citizens. We cannot, therefore, hold that the Legislature intended to eliminate these under the rule above indicated. Nor is the *Brown Case*, 38 Tex. Cr. R. 295, 42 S. W. 554, 70 Am. St. Rep. 743, when rightly understood, authority in support of any contention made by respondent. See the opinion of this court in *Ex parte Massey* (decided at the Tyler term) 92 S. W. 1088. In the latter case it was shown that the cold storage act was no part of the local option law and had no bearing as to the sale of liquor, the prohibition of which alone was authorized by the Constitution. In that case, in speaking of the keeping of a cold storage as being violative of the local option law, the writer said: "A closer scrutiny of the question renders this proposition at least doubtful, as it is not a direct assault on the local option law, but appears to be outside of the law"—which we think is clearly the case, and marks the distinction between said *Brown Case* and the case at bar, which has a direct bearing as to the sale of liquor in local option territory, which is the matter of prohibition under our Constitution.

Respondent was not fortunate in the citation of the *Randle Case*, inasmuch as the question as to the offering for sale of a lot-

tery ticket was not involved in that case. *Randle* was indicted for establishing a lottery, under the name of the "Galveston Gift Enterprise Association," and the question was simply whether such institution was a lottery. So far as we have been able to discover, the court nowhere, even as dicta, holds constitutional the act of the Legislature which made it criminal to offer a lottery ticket for sale. But we can see, if that question had been before the court, they should have so held. That case came under the Constitution of 1869, which was brought forward from the Constitution of 1845, under which said prosecution was had. The article reads as follows: "No lottery shall be authorized by this state, and the buying and selling of lottery tickets within this state is prohibited." That was simply a limitation on the Legislature with reference to authorizing the establishment of lotteries within this state. The clause imparted no power to the Legislature; nor did it take away from the Legislature any legislative power on the subject. In accordance with the general rule, as announced in respondent's brief, in the absence of restriction the Legislature had plenary power over the subject. The same observations may be made with reference to *Smisson v. State*, 71 Tex. 222, 9 S. W. 112, cited by respondent. The court there held that the power given in the Constitution to the Legislature to authorize the sale of school lands did not by implication deny the power of the Legislature to authorize the leasing of the same. We heartily concur with the observation there made by Judge Stayton "that a power, clearly legislative in its character, not expressly denied to the Legislature, ought not to be held to be denied by implication, unless its exercise would obstruct the exercise of a power expressly granted." Both of said cases were under a clause of the Constitution directly bearing on the authority and duty of the Legislature. In the last-mentioned case, the Legislature unquestionably could have authorized the sale of school lands, in the absence of some constitutional inhibition. It was merely held in that case that the power expressed in the Constitution to make sale of such lands, which the Legislature had before, did not deprive the Legislature of the power to make other disposition of such school lands not inconsistent with the granted power. That is not the question here.

In the case before us the people had no inherent power to legislate on the subject of local option prior to the adoption of article 16, § 20. As early as the case of *State v. Swisher*, 17 Tex. 441, it was held that the Legislature could not delegate to voters or the people the power to pass laws, in the absence of some constitutional provision authorizing this. Judge Lipscomb, who rendered the decision, says: "But, besides the fact that the Constitution does not provide for such reference to the voters to give

validity to the acts of the Legislature, we regard it as repugnant to the principles of the representative form of government by our Constitution. Under our Constitution the principle of lawmaking is that the laws are made by the people; not directly, but by and through their chosen representatives. By the act under consideration this principle is subverted, and the law is proposed to be made at last by the popular vote of the people, leading inevitably to what was intended to be avoided—confusion and great popular excitement in the enactment of laws." This principle was reaffirmed in *San Antonio v. Jones*, 28 Tex. 10. It was not until the adoption of article 16, § 20, in the Constitution of 1876, that power was given in the organic law authorizing the delegation of power to the qualified voters to enact local option in the territory therein mentioned. That clause was amended in the Constitution of 1891, and both it and the original clause authorized the Legislature to enact a law whereby the qualified voters in said territory may determine by a majority vote from time to time whether the sale of intoxicating liquor shall be prohibited within the prescribed limits. No one will deny that this enactment was a delegation of authority to the voters of the territory named to make a law adopting local option in such territory. The people or the voters of the locality did not have this before. The Legislature retained in full its power over the subject; but, when the people spoke under this clause of the Constitution, the Legislature was deprived of its authority over the subject, and full authority—that is, the authority expressed over the subject in said enactment—was delegated to the people, or the voters of the locality, who represent as to this matter the people of the territory. That power, so delegated, expresses the method which the voters can pursue with regard to intoxicating liquors; that is, the voters of the locality are authorized to pass a law prohibiting the sale of intoxicating liquors within the local option territory. As we understand it, the whole subject-matter is exhausted. Nothing is left to regulate. The putting into operation of section 20 abolishes the liquor traffic altogether, leaving nothing to the exercise of police power. Whatever power can be exercised must be with reference to sales, and them only. If the Legislature had undertaken to authorize the people to vote on the question as to whether the people would penalize an offer to sell intoxicating liquors, it would not have been in execution of the delegated power. It would have been *ultra vires*. No more was the Legislature authorized to couple such a provision with the prohibition of sale. Much less could the Legislature interfere and of themselves interpolate a provision making penal the offer to sell intoxicating liquors. The people were authorized to vote only upon one question.

That was the prohibition of sales of in-

toxicating liquors. The power granted was exclusive, and the Legislature could make penal only that which the voters of the locality were authorized to adopt. The provision of our Constitution on the subject of local option was intended to prescribe a method of dealing with the question, and to exclude any other rule or method, at least so far as local option territory is concerned. The application of this doctrine was recognized in *Holley's Case*, 14 Tex. App. 506, referred to in the original opinion. In that case, the question of gift was involved, and it was there held that the Legislature could not authorize, or, if authorized by the Legislature, the voters of the locality could not pass, a law prohibiting the gift of intoxicating liquors. It was there contended that the inhibition of a gift was in aid of the main proposition, to wit, the prevention of sales of intoxicating liquor. The court there quotes with approval what Judge Cooley says on this subject, to wit: "It is established as a general rule that, when the Constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the enjoyment of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative, one. And it is further modified by another rule—that, where the means for the exercise of a granted power are given, no other or different means can be implied as being more effective or convenient. * * *

Another rule of construction is that, 'when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases.' Cooley's Const. Lim. (4th Ed.) p. 78." The court further says: "This rule is decisive of the controversy. The Constitution defines the circumstances under which the people may prohibit the sale of intoxicating liquors under legislative enactment, and the legislature have attempted to extend the prohibition to a gift, and have imposed a penalty for giving away intoxicating liquors. This they had no authority to do. On the contrary, the Constitution having specified the bounds within which they were to act, it was a direct assumption and usurpation of unwarranted power to go beyond those bounds." *Steele v. State*, 19 Tex. App. 425; *Dawson v. State*, 25 Tex. App. 670, 8 S. W. 820. This principle has been since followed as the established doctrine in this state. Even in the act prohibiting blind tigers, it was held that there had to be a sale before the law with reference to blind tigers became operative. *Segars v. State* (Tex. Cr. App.) 51 S. W. 211. And so it has been held that the prescription of a physician, without the accompanying sale, is inoperative. *Williams v. State*, 81 S. W. 1209, 10 Tex. Ct. Rep. 979.

On the second proposition we hold that the act as formulated renders it invalid; that is, the act in its terms is comprehensive, and makes penal all solicitations of sales for intoxicating liquors in local option territory. There is no exception as to the sale by solicitors from other states, under the laws of Congress regulating interstate commerce, and there is no exception as to soliciting sales for medicinal purposes. All of these sales are lawful sales in local option territory. *Sedgwick v. State* (Tex. Cr. App.) 85 S. W. 818; *Snearley v. State*, 40 Tex. Cr. R. 507, 52 S. W. 547, 53 S. W. 696. In this connection we observe, as a matter of surprise, that counsel for respondent contend that the soliciting of the sale of liquor by persons representing some house situated in another state does not come within the laws governing interstate commerce; that is, the contention is that soliciting the sale of goods is not interstate commerce. The authorities are all one way on this question. See *Amer. & Eng. Ency. of Law*, vol. 17, p. 64, notes 9 and 10; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. Ed. 392. And in *Robbins v. Shelby Taxing District*, 120 U. S. 497, 7 Sup. Ct. 592 (30 L. Ed. 694), the court say: "The negotiations of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." Now we apprehend it will be conceded, as stated above, that sales or solicitations or offering for sale of intoxicating liquor in local option territory is legitimate as interstate commerce and for medicinal purposes under the rules prescribed by our Legislature. It will also be admitted that there are no terms in the act excepting these sales from its provisions; that is, the act is all-embracing, and according to its letter makes such sales penal. Now there is a line of decisions which authorize us to reject certain portions of an act, which are unconstitutional, and retain as valid the constitutional portions where the act is severable. But here we have no exceptions or clauses relating to these legal sales, in the shape of provisos or otherwise. So that, in order to validate the act, we are asked to interpolate the exceptions, and then reject them, and hold valid the penalizing of soliciting sales of intoxicating liquor, over which the Legislature had power to punish. This cannot be done.

We quote from *Sutherland on Stat. Const.* § 173, as follows: "In *United States v. Reese* 92 U. S. 214, 23 L. Ed. 563, it was held that the power of Congress to legislate at all upon the subject of voting at state elections rests upon the fifteenth amendment to the federal Constitution, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified voter at such election is because of his race, color, or previous condition of servitude. A congressional enactment, not confined in its operation to unlawful discrimination on ac-

count of race, color, or previous condition of servitude, transcends the constitutional limit, and is unauthorized. *Waite, C. J.*, said: 'We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will, when ascertained, if within the constitutional grant of power. * * * To limit this statute in the manner now asked would be to make a new law, not to enforce an old one. That is no part of our duty.' This view has been repeatedly approved in subsequent cases." *U. S. v. Harris*, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550; *Va. Coupon Cases*, 114 U. S. 305, 5 Sup. Ct. 933, 962, 29 L. Ed. 185; *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. 656, 763, 32 L. Ed. 766; *James v. Bowman*, 190 U. S. 136, 23 Sup. Ct. 678, 47 L. Ed. 979. In this case the principle is laid down that penal legislation broader than the mandate cannot be sustained; the court having no power to amend or reform it. The court here says: "It is urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial." The court, in following the line of decisions mentioned, says: "We deem it unnecessary to add anything to the views expressed in these opinions. We are fully sensible of the general great wrong which results from bribery at elections, and do not question the power of Congress to punish such offenses, when committed in respect to the election of federal officers. At the same time it is all-important that the criminal statute should de-

fine clearly the offense which it purports to punish, and that, when so defined, it should be within the limits of the power of the legislative body enacting it. Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested, or in which some mandate of the national Constitution is involved, and the courts are not at liberty to make a criminal statute broad and comprehensive in its terms (and in these terms beyond the power of Congress), and change it to fit some particular transaction which Congress might have legislated for if it had seen fit." We believe these citations are peculiarly applicable to the question we are discussing, especially under our statute with reference to offenses, which requires that all offenses be defined. It is not for the court to legislate into a statute provisos or exceptions, which may be surmised the Legislature intended to put there and did not, for the purpose of then judicially legislating such provisos out of the statute.

We see no reason to overturn the decisions of this court, since the Holley Case, which hold that article 16, § 20, affords the method by which local option can be adopted in localities. That method is the prohibition of the sale of intoxicating liquors in such territory, and can only be put into force by a vote of the majority of the voters in such locality; and the Legislature is not authorized to submit to them any other issue than that marked out by the Constitution. That is exclusive and exhaustive. There is nothing reserved to the Legislature; its only function being to regulate how the vote shall be taken on this question and to pass laws for the punishment of the sale of intoxicating liquor in violation of the law which the people have made. But, if it should be conceded that the Legislature had the power in the first instance to punish the solicitation of a sale of intoxicating liquor in local option territory without submitting it to a vote of the people in such locality, then, as we have shown, it did not pass a law legal in form and capable of enforcement.

The motion for rehearing is accordingly overruled.

Ex parte HACKNEY.

(Court of Criminal Appeals of Texas. Dec. 6, 1905.)

Application by W. G. Hackney for writ of habeas corpus to secure his release from custody under a conviction for soliciting an order for the sale of whisky in local option territory. Appellant discharged.

F. J. Duff and A. L. Davis, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted under a charge for soliciting an order

for whisky in Jasper county. The constitutionality of the act is assailed on practically the same grounds as those in *Ex parte Massey* (just decided) 92 S. W. 1086. For the reasons indicated in the *Massey Case*, the judgment is reversed, and the applicant ordered discharged from custody.

BRUCE v. STATE.

(Court of Criminal Appeals of Texas. Dec. 6, 1905.)

INTOXICATING LIQUORS—SOLICITING ORDER FOR LIQUOR—EVIDENCE—SUFFICIENCY.

On a prosecution for soliciting, in local option territory, an order for the sale of intoxicating liquor, evidence that defendant casually met witness, and that they found that defendant's employer, who was in the liquor business, was a mutual friend, and that defendant stated he had no card with him, and handed witness a circular or order blank, stating that witness should keep it, as he might need it for future reference, was insufficient to warrant a conviction.

Brooks, J., dissenting in part.

Appeal from Camp County Court; J. D. Bass, Judge.

William E. Bruce was convicted of soliciting an order for the sale of intoxicating liquors, and he appeals. Reversed.

Sam D. Snodgrass, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with soliciting an order of A. J. Ray for the Bruce Liquor Company of Dallas, Tex., for the sale of intoxicating liquors. The order was alleged to have been taken in Camp county, to be filled in Dallas. The law is attacked on the same ground and for the same reason as in the *Massey Case* (just decided) 92 S. W. 1086. For the reasons indicated in that opinion, the judgment will be reversed, and prosecution dismissed.

There is another matter raised which might be mentioned; that is, the sufficiency of the evidence, even if the law was in force. Bruce and Ray were strangers and met at the hotel. Ray says that, when he stepped on the front gallery, defendant Bruce was sitting there. He had never seen him before. "He remarked to me, 'You look hot.' I replied, 'Yes, I have been unloading horses, and have been perspiring freely.' He asked me where I was from, and I told him." It seems that witness was from Nolan county, and had just reached town with his horses. "We talked for a while. Witness remarked that he frequently shipped horses to Tennessee, through Memphis. Defendant remarked that he had an uncle living in Memphis; that his name was Bruce. Witness says, 'Thomas S. Bruce & Co.?' Defendant said, 'Yes.' Witness then informed defendant that he knew his uncle well and had done business with him, and had his name and address in his pocket. Defendant then gave me a circular or order blank, and remarked, 'I have no card, but this is the

business I am engaged in.' I read the circular or order blank and handed it back to him. He remarked, 'Keep it, you may need it for future reference.' I then put it in my pocket, walked into my room, got one of my letter heads, with a picture of a horse on it, with my name and address— My business is a horse dealer. I handed the letter head to him, and said to him, 'I have no cards, but this is my name and business.' At the time defendant handed me the order blank, nor at any other time, did he say anything about my buying whisky. He never did ask me to buy or order any whisky from him. In fact, he never mentioned whisky to me at any time. When I handed him my letter head, I did not mean to solicit him to buy a horse from me. I said nothing of the kind to him. I simply remarked I had no card." These are the facts. We do not understand how these facts could be tortured into soliciting an order for the shipment of whisky, even if the law was valid.

The judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J., dissents on the law, but believes the facts are insufficient.

CARTER v. STATE.

(Court of Criminal Appeals of Texas. March 14, 1906.)

Appeal from Grayson County Court; G. P. Webb, Judge.

Jim Carter appeals from a conviction. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was prosecuted and convicted for soliciting orders for the sale and delivery of intoxicating liquors in local option territory, under the act of the Twenty-Ninth Legislature (Laws 1905, p. 379, c. 159). The majority of this court in *Ex parte Massey* (decided at the recent Tyler term) 92 S. W. 1086, held that this act of the Legislature was unconstitutional. This being true, the judgment is reversed, and the prosecution ordered dismissed.

WARE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 28, 1906.)

1. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS.

On a prosecution for murder, a continuance should have been granted in order to procure the testimony of defendant's wife, where it appeared that it would be proved by her that deceased had told her that he intended to kill defendant's calf and also defendant, and that she had told defendant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1823.]

2. WITNESSES—IMPEACHING OWN WITNESS.

Where a witness, who had testified before the grand jury as to incriminating statements made by accused, informed counsel for the state before the trial that he had been mistaken and that he could not so testify on the trial, it was error to permit the state to show, after the witness had denied the making of the incriminating statements, what he had testified to before the grand jury and the facts concerning his determination that he was then mistaken.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1214.]

3. CRIMINAL LAW—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Inasmuch as such evidence could not be introduced to impeach the witness, the limitation by the court of its purpose to that effect did not cure the error.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 8141.]

4. SAME—EVIDENCE—PREVIOUS PROSECUTION.

On a prosecution for murder, it was error to require defendant to testify on cross-examination that he was tried about 20 years before on a charge of murder; the occurrence being too remote.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 822.]

5. HOMICIDE—MANSLAUGHTER—INSTRUCTIONS.

On a prosecution for murder, though the court charged that an assault and battery producing pain and bloodshed was adequate cause for manslaughter, in applying the law to the facts the court should have instructed that if deceased made an unlawful assault on plaintiff and struck him, causing pain and bloodshed, it was adequate cause, and in view of such cause, or such cause in connection with all the facts, defendant's mind was excited and he was rendered incapable of cool reflection, and in such condition shot deceased, he would be guilty of no higher crime than manslaughter.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 606.]

6. SAME—ARGUMENT OF COUNSEL.

Where, on a prosecution for murder, counsel for the state called defendant an assassin in his argument, the court should have restrained him, and informed the jury not to regard it.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1679.]

Appeal from District Court, Kaufman County; J. E. Dillard, Judge.

Joe Ware was convicted of murder in the second degree, and he appeals. Reversed.

N. B. Morris and Young & Adams, for appellant. J. S. Woods, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment fixed at confinement in the penitentiary for a term of 15 years.

The statement of facts shows that there was ill feeling between the parties antedating the homicide. About two weeks before the homicide, deceased shot the dog of appellant, and this intensified the feeling. A day or two before the killing, there was some trouble about a calf of appellant getting into the inclosure of deceased. Deceased made complaint to the wife of appellant in regard thereto, and in that connection made threats against appellant. It was also proven by the

state that appellant used threats against deceased. On the day of the homicide about noon, deceased and appellant met at the post office in the little town of Tolosa; deceased being in the post office when appellant came. Several other parties were also present. The parties spoke to each other. Deceased was getting his mail, and appellant asked the postmaster while looking in the W's to see if he had anything. As soon as they were through with the mail matter, deceased asked appellant about his calf getting into his inclosure, and an altercation ensued between them in regard thereto. As the parties waxed warm, deceased reminded appellant that they were in the post office. Appellant thereupon told deceased he could come out of the post office, and started. Deceased followed him to the door, and the altercation continued. There was a buggy standing near the post office, and the parties got near to it as they were quarreling. Appellant, among other things, told deceased, that it was a damn cowardly trick to kill his dog; and deceased told him his dog was sucking eggs. Appellant said it was a damn lie. At this juncture some of the witnesses say that appellant struck deceased first with a newspaper, which he had in his hand; but a majority of the witnesses state that deceased struck the first blow, hitting appellant over the head. Deceased being a larger and stronger man than appellant, in the fight which ensued he soon obtained the advantage, and, according to the testimony, was beating appellant over the head and had him stooped over. Appellant drew his pistol, and shot deceased in the bowels, inflicting a mortal wound, from which he died in about 30 hours. This is a sufficient statement of the facts to discuss the assignments.

Appellant made a motion for continuance on account of the absence of his wife. It appears that diligence was used to procure her testimony, but she was sick at the time. This is appellant's second application for continuance. It occurs to us that the testimony of this witness was of a material character; it being proposed to prove by her that in connection with the deceased speaking to her about the calf's depredations on his property, that he said, he intended to kill the calf, and also kill the defendant. That she told her husband of this. This was a day or two before the homicide. The continuance should have been granted.

During the trial, after the state had rested its case in chief, and after defendant had testified as a witness in his own behalf, the state called as a witness, E. L. Dixon, and asked him if immediately after the shooting, and while en route from Tolosa to Kaufman, defendant made any statement to him in regard to the killing, and he answered that he did not. Whereupon the assistant county attorney asked said witness if he had not testified before the grand jury to the effect, that defendant stated he would have shot deceased

again, and would have killed him if his (defendant's) pistol had not snapped. And he answered that he did make such statement, but he was mistaken, and in thinking over the matter, immediately after leaving the grand jury he discovered his mistake, and sought a neighbor and desired to correct the same; and was informed that he could do so at the trial. That before the trial he also informed counsel for the state that he was mistaken as to said matter. All of this procedure was objected to on the ground that the questions propounded were leading, and no necessity was shown for having the witness' memory refreshed by the proceeding before the grand jury; and that said statement of the defendant before the grand jury could not bind defendant, and could only be used by appellant for the purpose of impeaching the witness, and he being a state's witness he could not be impeached by the state by showing that he had made a statement before the one he had made in court, unless he had testified to something injurious to the state's interest. All of which objections were overruled by the court, and the witness compelled to testify as aforesaid. In connection with the witness' testimony, the statements made before the grand jury were permitted to go before the jury. In our opinion, the objections of the appellant should have been sustained. It is competent, where the witness may have deceived the party calling him, if he testifies to some fact injurious to that side, to impeach such witness; but here it seems that the witness became cognizant of his mistake in his testimony before the grand jury almost immediately. He is shown to have notified other parties of his mistake, and wished to correct it; and the attorneys representing the state were also notified of his mistake, and that he would not testify as he had testified before the grand jury. Consequently in the attitude this witness occupied before the court he could not be impeached, by showing directly or indirectly that he had made a statement before the grand jury different from his testimony. He gave no testimony injurious to the state, but simply failed to testify to a fact for the state. We believe the testimony was calculated to injure appellant. It was a recitation of matters that showed both carelessness on the part of appellant as well as malice; and if witness had testified to it, it would have been important. The fact that it was shown to the jury that he made such statement before the grand jury was liable to impress the jury with the idea that perhaps the fact was true, and witness was equivocating. *Jenkins v. State*, 75 S. W. 312, 8 Tex. Ct. Rep. 182; *Bailey v. State*, 37 Tex. Cr. R. 579, 40 S. W. 281; *Gill v. State*, 36 Tex. Cr. R. 589, 38 S. W. 190; *Drake v. State*, 29 Tex. App. 276, 15 S. W. 725; *Thomas v. State*, 14 Tex. App. 70; *White v. State*, 10 Tex. App. 381. The fact that this testimony could not be introduced before the jury to impeach the

witness, the limitation of the court of its purpose to that effect, would not cure the error.

While appellant was on the stand, over objections of his counsel, and on cross-examination by the state, he was required to testify that about 20 years before this trial, he was tried in the state of Mississippi, before an examining court on a charge of murder. This was improper, and not authorized by law; being too remote in point of time. *Wesley v. State*, 85 S. W. 802, 12 Tex. Ct. Rep. 462; *Bowers v. State*, 71 S. W. 284, 6 Tex. Ct. Rep. 428; *Carroll v. State*, 32 Tex. Cr. R. 431, 24 S. W. 100, 40 Am. St. Rep. 786; *Greenleaf on Ev.* § 459; *Wharton's Cr. Ev.* §§ 474, 476.

We have examined the court's charge on provoking the difficulty, and while we believe on another trial the court should be a little more explicit in applying the law to the facts, and tell the jury that they must believe that appellant not only used words and conduct calculated to provoke a difficulty, but that he must have intended to so provoke it, yet considering the entire charge of the court, we do not believe there was error which would require a reversal. Consequently the court was not called upon to give the requested charges numbers 1 and 2.

The charge of the court on manslaughter is criticised, because it is in the abstract, and the law is not applied to the facts. It occurs to us that this criticism is proper. As we take it, appellant's contention so far as manslaughter is concerned, was that an assault on him causing pain or bloodshed, was adequate cause; and in connection therewith, the jury could look to all the facts and circumstances in evidence tending to illustrate and intensify said cause. The jury are told in the definitions, that an assault and battery producing pain or bloodshed, is adequate cause; but in applying the law to the facts, the court should have instructed the jury, if they believed deceased made an unlawful assault on appellant and struck him, causing pain or bloodshed, that in law was adequate cause, and if, in view of such cause, or such cause in connection with all the antecedent facts and circumstances, the jury believed appellant's mind was excited, and he was rendered incapable of cool reflection, and in such condition shot deceased, he would be guilty of no higher grade of offense than manslaughter.

We do not deem it necessary to discuss the assignments with reference to the argument of counsel for the state, further than to say that the county attorney should not have used the epithet of "assassin" against defendant in his argument, and the court should have promptly restrained him, and informed the jury not to regard said remark. *Kugadt v. State*, 38 Tex. Cr. R. 681, 44 S. W. 989; *Morris v. State*, 39 Tex. Cr. 371, 46 S. W. 253; *Byrd v. State*, 39 Tex. Cr. 609, 47 S. W. 721.

For the errors discussed, the judgment is reversed, and the cause remanded.

ST. CLAIR v. STATE.

(Court of Criminal Appeals of Texas. March 14, 1906.)

1. HOMICIDE—EVIDENCE—CHARACTER OF DECEASED.

Witness for defendant having testified that deceased was a quarrelsome man, and it being elicited on cross-examination that witness and deceased had quarreled, it was error to permit all the details of such quarrel to be given.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 398.]

2. WITNESS—IMPEACHMENT—COMPETENCY OF EVIDENCE.

Where a witness testified that he had performed a certain amount of work while the fight resulting in the homicide was in progress, and it was sought to impeach him by evidence of contradictory statements, it was error to permit the impeaching witnesses to go into matters beyond the scope of the predicate laid and detail conversations relating to the entire difficulty.

3. CRIMINAL LAW—TRIAL—ORDER OF PROOF.

No error was shown by the exclusion of evidence to show the character of the deceased, where the offer was made before the details of the killing were admitted and before it had appeared that deceased had made threats against defendant.

4. HOMICIDE—INSTRUCTIONS—ABANDONMENT OF DIFFICULTY BY DECEASED.

An instruction that if deceased abandoned the difficulty and the accused, so understanding it, then fired and killed deceased, he could not plead justification, was insufficient, without further stating the law applicable to the degree of the crime.

5. SAME—SELF-DEFENSE—THREATS.

An instruction that if defendant had been informed of threats of violence by the deceased, and at the meeting deceased had manifested an intention to execute his threats, "and was warned that deceased was a dangerous man," the right of self-defense existed, was erroneous for the injection of the condition quoted.

6. CRIMINAL LAW—APPEAL—TRANSCRIPT OF EVIDENCE.

The narrative form of perpetuating evidence for appeals is the better practice, ordinarily, and is not a violation of the act giving the right to send up the stenographer's report.

Appeal from District Court, Collin County; J. M. Pearson, Judge.

J. W. St. Clair was convicted of murder in the second degree, and appeals. Reversed.

Abernathy & Mangum and Abernathy & Abernathy, for appellant. R. C. Merritt, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder in the second degree, with seven years' confinement in the penitentiary allotted as the punishment.

Langham testified to the general reputation of the deceased as being a quarrelsome man, and that of defendant as being a reasonably peaceful citizen. The state, on cross-examination, then asked witness, if he had ever heard of deceased having a quarrel with any one. Witness answered that deceased and he had had such quarrel. Over objection of appellant, the details of the trouble between the witness and deceased was gone into before the jury; and that

quarrel also involved the son-in-law of Langham, Milford. Milford was also placed on the stand by the state and permitted to go at great length into the details, reasons, and whys and wherefores of the quarrel between Langham and himself on one side, with the deceased on the other. Objections were urged to the introduction of this testimony, which ought to have been sustained.

Felix Howard was a witness for the state. On cross-examination he testified that he was burning stalks and had burned three piles of stalks during the fight. He was then asked how many piles of stalks he put up during the fight; and he answered that he never put up any. The predicate was then laid to impeach him by 'Squire Beckham, to the effect, that he had stated to Beckham, that he had piled up a half-dozen armfuls while the shooting was going on. He denied this, and stated that he did not pile any stalks while the difficulty was in progress; and the defendant thereupon called Beckham, who testified that he heard Felix Howard state that he kept on piling stalks while the shooting was going on, and he thought he piled a half-dozen armfuls during its progress, and that he called the boys attention to it, and he repeated the statement; that the statement was made on Sunday, after the shooting in the back of the bank building at Blue Ridge. It was also stated, while this examination was in progress, that Abernathy, of counsel for the defense, had requested Beckham, justice of the peace, to be present so that no advantage would be taken by the boy, Felix Howard, when he made his statement to Abernathy. The state, upon cross-examination of Beckham, went into all of the details of the conversation with Howard, in regard to the difficulty between deceased and defendant, which covers several pages of the transcript, and about matters independent of and foreign to the impeaching evidence, and covering the entire difficulty between appellant and deceased. It is not necessary here to detail this; it is too voluminous. Suffice it to say that it covered largely the statement of the boy, Felix Howard, to Beckham and Abernathy in regard to the entire difficulty, resulting in the death of Cundiff. This testimony, as well as that in the previous bill of exception, should not have gone to the jury. We deem it unnecessary to go into a discussion of the matters, as the authorities are numerous, to the effect, that the impeaching testimony must conform to the predicate laid, and not go out into other matters. *Red v. State*, 39 Tex. Cr. R. 424, 46 S. W. 408; *Messer v. State* (Tex. Cr. App.) 63 S. W. 644.

Bills of exception were reserved to the refusal of the court to permit appellant to prove the reputation of the deceased. The qualification of the court to these bills, states, that this testimony was offered before the details of the killing were admitted

in evidence, and before it was shown that threats had been made by deceased against appellant. As qualified by the court, we believe the exception was not well taken. The bills do not show that after proving the threat, the same testimony was again offered. The record, however, contains testimony fully showing the threats of deceased against appellant, and this testimony forms the basis of some of the charges given by the court.

There are some exceptions reserved to the conduct of the prosecution during the trial. As the case will be reversed on other grounds, we premit a discussion of these bills. There seems to have been considerable wrangling and discussion along the line of sidebar remarks and animadversions and criticism among the attorneys. Such matters and conduct ought to be promptly restrained by the trial court. We fully appreciate the fact that attorneys in their earnestness in advocating their cause become heated, and often go beyond the case; but the court should promptly exercise authority. Such conduct is not conducive in the highest sense to the enforcement of the law, or in strict consonance with what should encompass the trial.

Several sections of the court's charge are criticised in regard to manslaughter and self-defense, and the failure to submit special charges in regard to those theories of the evidence. Without repeating the evidence and going into detail, we think some of the criticisms are just and correct. There were adverse theories presented by the evidence; the issues of murder in the second degree, manslaughter, and self-defense, and self-defense from the standpoint of actual and apparent danger, as well as the standpoint of communicated threats. The issue of abandonment of the difficulty by deceased was also in the case, and charged upon by the court. This portion of the charge informed the jury that, if deceased abandoned the difficulty, and appellant so understood it, and he then fired upon and killed deceased, he could not plead justification. This is the substance of the charge on the abandonment of the difficulty. This is not sufficient. If appellant was acting on the defensive, and, while engaged in the difficulty, deceased abandoned the difficulty, and appellant so understood it, and he then shot and killed deceased he would not be justified. But he might not be guilty of a higher offense than manslaughter. The court did not instruct the jury what would be the law applicable to appellant's case under this condition of things. In our opinion, if the jury should find that defendant was acting on the defensive, and the deceased abandoned the difficulty, and as he was leaving, if the jury should find he was, appellant then shot him, knowing or realizing that deceased had abandoned the difficulty, his offense would not be higher than manslaughter. As the

charge is given it left the jury to ascertain for themselves of what offense appellant would be guilty if he shot after deceased abandoned the difficulty. They gave appellant murder in the second degree. If the law had been charged it might not have been higher than manslaughter.

There is another question in regard to this abandonment, also, that should have been charged more favorably to appellant. The defensive theory was that there was no abandonment, and there being evidence of the fact that appellant was approaching a tree, and that this was only for the purpose of getting a better vantage ground from which to carry on the battle. If the jury should believe this state of fact, then there would be no abandonment of the difficulty, and appellant's right of self-defense would be in no manner abridged. Of course, in a difficulty like the one detailed in this evidence, matters and occurrences move in rapid succession; and if there was an abandonment at all, or if appellant was approaching the tree for the purpose of getting a vantage ground, it must have been done in an almost incredibly short space of time. The rapidity of the movements of the parties, and the shortness of a difficulty of this character, where self-defense, manslaughter and abandonment of the difficulty all congregate within a moment or two of time, would call on the court to be specifically certain with reference to the law when those issues are set forth in the charge.

We would call attention, also, to another phase of the charge on self-defense. The twenty-fourth subdivision of the charge, which pertains to self-defense, is as follows: "On the other hand, if you find and believe from the evidence, that prior to the killing, J. A. Cundiff had made threats to kill or inflict serious personal violence upon the defendant, J. W. St. Clair, and you further believe from the evidence that J. W. St. Clair, before the killing, was informed of said threats, and was warned that Cundiff was a dangerous man; and you further believe from the evidence that on the occasion of the killing that J. A. Cundiff used words or did acts, or used words and did acts which indicated a purpose and intention on the part of Cundiff to carry said threats into execution," etc. This charge is criticised because it coupled the right of self-defense with the fact that appellant was warned Cundiff was a dangerous man. In other words, that the law of self-defense was curtailed by the fact that deceased was a dangerous man. It is too restrictive, or rather it is a burden upon self-defense which the law does not justify. The statute authorizes the slayer to act in self-defense where threats have been communicated to the slayer; and the party slain at the time of the difficulty did some act manifesting his intention to execute the threat. It is not necessary that he be a dangerous man. It is true that the statute authorizes the introduction of evidence that deceased was a

violent and dangerous man, but it does not make the right of self-defense depend upon that fact. It depends upon the fact that the deceased did some act manifesting his intention to execute the threat. The evidence in regard to the dangerous character of the deceased is introducible as evidence, in the case to be weighed by the jury. The slayer would have as much right to act in self-defense if his life was in danger, either actually or apparently, whether deceased was or not a dangerous man, and the right of self-defense is not curtailed by reason of the fact that deceased was not known as a dangerous man.

There are over 40 questions presented for revision, including those discussed. Many of them we deem unnecessary to be reviewed. Among other things stated in the motion for new trial is the misconduct of the jury, as well as the further fact that on several occasions separation occurred. The evidence in regard to this is voluminous, covering nearly 100 pages. But, in view of the disposition made of the case, these matters are not discussed. Nor is the further question in regard to the formation of the jury and the manner of selecting and summoning the special venire, as it will not occur upon another trial.

This record contains nearly 800 pages of rather closely typewritten matter, and it occurs to us that the salient features necessary for the disposition of it on this appeal might have been easily placed within 200 pages; at least in a much smaller compass than was done. It places upon this court a very great burden, and an unnecessary one, to go through such tremendous records to review a few questions, when they could have been easily presented by being properly and judiciously stated. We make the suggestion that, in preparing records for appeal to this court, they be made up entirely with the view of presenting concisely and succinctly, yet fully, the questions to be decided, omitting all unnecessary details. It is true that, under the recent act of the Legislature, the right is given to send up the stenographic report, and perhaps in some instances this may be necessary, but such cases are or ought to be rare occurrences. The "narrative" form of perpetuating the evidence for appeals is the better practice, and is not in violation of the recent act of the Legislature, when attorneys and the court below see proper to do so. Of course we would not undertake to criticise their action in this respect; but, where this practice can be avoided, we suggest that it be done. The crowded condition of our docket renders it now almost impossible for this court to dispose of the rapidly increasing appeals. These suggestions are made in order that trial courts and attorneys may be of assistance in the rapid disposition of appeals, and without suggesting or intimating that any right, real or imaginary they may have, shall be curtailed.

For the errors discussed, the judgment is reversed, and the cause remanded.

LEWIS v. SHELBY COUNTY.

(Supreme Court of Tennessee. May 12, 1906.)

1. ANIMALS—DISEASES—DESTRUCTION.

Acts 1901, p. 283, c. 156, authorizing the state live stock inspector to slaughter any diseased animal when the public safety demands its destruction, renders his action in destroying an animal unquestionable in any subsequent proceeding.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Animals, § 82.]

2. CERTIORARI—INFERIOR TRIBUNALS.

Acts 1901, p. 283, c. 156, authorizing the state live stock inspector to slaughter any diseased animal in the interest of public safety, provides for the appointment of commissioners to determine the animal's value and makes the same county charge. *Held*, that the judgment of the commissioners may be reviewed by certiorari to the circuit court.

3. ANIMALS—DISEASE—DESTRUCTION.

On presentation of a certificate by the commissioners to the county court it had no jurisdiction to fix for itself the value of the animal.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Proceedings by Gillie Lewis against Shelby county to recover the value of an animal destroyed by the state live stock inspector under Acts 1901, p. 283, c. 156. From a judgment in favor of claimant, the county appeals. *Affirmed*.

Lee Thornton, for appellant. J. S. McKinley, for appellee.

NIEL, J. Chapter 156, p. 283, of the Acts of 1901 is entitled "An act to prevent the spread of communicable diseases among domestic animals in the state of Tennessee," etc.

Section 10 of this act provides:

"That whenever, in the opinion of the state live stock inspector, the public safety demands the destruction of any animal, or animals, under the provision of this act, he shall, before ordering the killing or the slaughtering of the same, appoint three competent and disinterested freeholders, who shall be affirmed or sworn before proceeding to act, and they shall make a just and true valuation of said animal or animals to be so killed or slaughtered, and in valuing shall consider the health and condition of the animal when killed, and they shall make and deliver a written certificate, setting forth all the essential facts in the case to the lawful owner, who shall present the same for payment to the chairman of the county court of the county in which such animal or animals are so killed or slaughtered, and the same shall constitute a county charge, to be paid as other claims against the county are."

Gillie Lewis was the owner of a mule which the inspector examined. Believing it to be infected with glanders, the inspector appointed three persons, in accordance with the section above quoted, to place a valuation upon the mule, before he caused it to be slaughtered. These commissioners valued

the mule at \$60, and made their certificate accordingly. This certificate was presented to the quarterly county court on one of the regular days of the April term 1905.

Instead of accepting the certificate as final evidence of a county charge, the county court instituted an inquiry within its own body, to ascertain the true value of the mule. After hearing the evidence it fixed the value at \$25, and declined to pay any further sum.

Thereupon the county and Gillie Lewis made up an agreed case, embodying the foregoing facts and brought the matter before the chancery court of Shelby county for adjudication by proper legal proceedings.

The chancellor decreed that the valuation fixed by the commissioners under the act was conclusive, and could not be inquired into nor questioned. A judgment was thereupon rendered in favor of Gillie Lewis against the county for \$60. From this judgment the county has appealed and assigned errors.

The only assignment we need consider raises the question as to whether the valuation fixed by the commissioners was final.

We are of opinion that the inspector had, under the police power, the right to destroy the mule, and this could not be questioned in any subsequent proceeding. The proceedings, however, before the commissioners, instituted for the purpose of fixing the value of the mule were judicial in their nature. The commissioners constituted one of the numerous inferior tribunals, created by the Legislature from time to time, without the grant of a right of appeal or writ of error to the parties concerned. The judgments of such tribunals may, however, still be reviewed. The property practice in such a case is an application to the circuit court for a writ of certiorari. Either party dissatisfied may apply for this writ and have the question re-examined upon the merits in the circuit court. The scope of this writ, as applicable to inferior tribunals of the class referred to herein, will be found fully discussed in the case of *Staples v. Brown*, 113 Tenn. 639, 85 S. W. 254.

Neither party having obtained a review of the judgment of the commissioners, in the only manner open to them, it must be treated as final.

The action of the county court in attempting to fix for itself the value of the mule was beyond its jurisdiction.

The judgment of the chancery court will, therefore, on the grounds stated in this opinion, be affirmed.

THOMPSON v. FIDELITY MUT. LIFE INS. CO.

(Supreme Court of Tennessee. May 19, 1906.)

1. INSURANCE—PREMIUMS—DELINQUENCY—COURSE OF BUSINESS.

There were thirty-six premiums due on the policy sued on between the date of its issuance and insured's death. Of these seven

were accepted after they were due, and, of the seven, two were accepted only after insured had executed a certificate of good health. Of the remaining five, two were forwarded by mail on the day they became due, and three were paid and accepted after due, unconditionally, of which one was paid one day after it was due; one two days, and one sent by mail to the home office of defendant one day after it was due, and received five days after due. The revival contracts recited that the policy had become forfeited for nonpayment of premiums, and contained an express agreement that insured should pay his future premiums promptly. *Held*, that such facts were insufficient to establish an habitual course of dealing justifying insured in believing that the insurer would not insist on a forfeiture of the policy for failure to pay premiums at maturity.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1057, 1716.]

2. SAME—INDULGENCE IN PAYMENT.

Mere indulgences in the payment of premiums do not constitute a waiver of the condition authorizing forfeiture for nonpayment of premiums when due.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1057, 1716.]

3. SAME — PAYMENT OF PREMIUMS AFTER DEATH.

A course of dealing between insurer and insured, whereby the former has accepted payment of premiums after maturity, does not bind it to accept premiums for the purpose of avoiding forfeiture, where they are not tendered until after insured's death.

4. SAME—PREMIUMS PAYABLE IN INSTALLMENTS—CONDITION SUBSEQUENT.

Where the annual premium on a policy is payable in installments, a failure to pay any installment works a forfeiture, though the condition be construed as a condition subsequent.

5. SAME—INCONTESTABILITY.

Where a policy provided that it should be incontestable after three years if the payments required should have been made when due, such clause should be construed to mean that the policy was incontestable for causes other than nonpayment of premiums.

6. SAME—POLICY—CONSTRUCTION.

An insurance policy provided that if the premiums which were payable quarterly were paid when due, the insurer would pay to the insured's representative the face value of the policy "less the balance of the dues for the current year of the death of the insured," and any indebtedness of insured to the association, followed by a provision for forfeiture on failure of insured to pay when due any moneys required to be paid under the policy. *Held*, that such provisions gave the insurer the right to deduct from the face of the policy installments not due at the time of insured's death but which became due during the current year, in case insured regularly met his payments at maturity, and did not confer on insured a right to insurance for the whole current year on the payment of installments of the policy.

7. SAME—FAILURE TO PAY CLAIM—PENALTIES.

Where plaintiff was not entitled to recover under a policy, she could not recover the penalty prescribed by Acts 1901, p. 248, c. 141, for the insurance company's withholding the amount alleged to be due thereon.

Appeal from Chancery Court, Shelby County; F. H. Heiskell, Chancellor.

Action by M. E. P. Thompson, as administratrix, against the Fidelity Mutual Life Insurance Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Turley & Turley, for appellant. R. Lee Bartels, for appellee.

WILKES, J. This is a suit to collect a life insurance policy. The bill upon its face shows that the insured died in default of payment of the last premium. The complainant seeks to recover upon two theories, one that there was a course of dealing between the insured and the company by which the insured was allowed to pay his premiums after they became due, and in consequence of this course of dealing complainant was led to believe that he might make such payments within 30 days after they became due.

The last payment which was allowed to go by default was due December 30, 1904. The insured was then absent from his home at Memphis, and in his last sickness; but of this the company had no notice.

The company mailed notice in due time and in the usual way of the maturity of this premium, but it was never received by Thompson or his wife, or any one else for him, so far as the record shows.

The policy provides as follows:

"The Fidelity Mutual Life Association.
* * * In consideration of the application for this policy, which is made a part hereof,
* * * and the payment to said association of seven and ⁸²/₁₀₀ dollars (\$7.83) upon the thirtieth days of the months of March, June, September, and December in every year, for a period of twenty years from March 30th, 1896, and thereafter in the event of the continuance of this contract, the payment of renewal premiums on the date aforesaid, * * * does hereby receive William Y. Thompson, of Memphis, Tennessee, as a member of said association, and issues this policy of insurance and hereby promises to pay the sum of twenty-five hundred dollars to the administrators, executors, or assigns of said member within ninety days after proof of death," etc. * * * "less the balance of the dues for the current year of the death of the insured, and any indebtedness of the member to said association, subject, however, to all the requirements hereafter stated, and the conditions herein indorsed, which are hereby referred to and made a material part of this contract.

"(2) Provided, any moneys required to be paid under this policy, during the continuance of this contract, must be actually paid when due to said association; * * * otherwise, this policy shall be ipso facto null and void, and all moneys paid thereon shall be forfeited to the said association."

The policy was issued on the 30th of March, 1896, and delivered to the insured on April 3, 1896, at which time he paid the initial premium. The insured died on the 14th of January, 1905, in default in the payment of the premium due December 30, 1904. On a day between January 20 and 23, 1905, a tender of the premium due December 30,

1904, was made to the Nashville office of the defendant. At that time the company was not aware that Thompson had died, and that fact was not communicated to it at the time of tender. The agent in charge at the Nashville office, advised the party making the tender that it could not be accepted because it was overdue, unless accompanied by a certificate of good health.

At the time the policy was issued, the insurer had an office in Memphis, but during the summer of 1900, this office was abolished, and the insured was instructed to pay his premiums by mail to the Nashville office. The subsequent premiums were paid to the Nashville office.

There were thirty-six premiums due upon the policy between the date of its issuance and the death of the insured. Of these, seven were accepted after they were due. Of these seven, two were accepted only when the insured had executed a certificate of good health. Of the five remaining premiums, two were forwarded by mail to the Nashville office on the day they became due, thus leaving only three premiums that were paid and accepted after due, unconditionally. Of these three premiums one was paid one day overdue, one two days overdue, and one sent by mail to the home office one day after due, and received five days after due.

The evidence shows that the certificates of health executed by Thompson and the revival contracts recited that the policy had become forfeited for nonpayment of premiums at maturity, and there was an express agreement on the part of the insured that he was to pay his future premiums promptly. The correspondence that passed between the cashier of the Nashville office and the insured in reference to the premium due December 30, 1900, shows that it was necessary, in order to protect Thompson's insurance, that the cashier should pay his premiums on the due date, out of her own funds. The subsequent correspondence between the cashier of the same office and Thompson, in reference to the premium due June 30, 1901, made known to Thompson that his policy had been forfeited because his premium was not paid promptly, and that before he could be reinstated it was necessary for him to execute a health certificate.

We cannot, in view of the evidence in regard to the payment of premiums which we find in the record, conclude that there was an habitual course of dealing between the parties which would justify the insured in believing that the company would not insist upon a forfeiture of the policy if he failed to pay his premiums when they fell due, so as to bring the case within the operation of the rule laid down in *Insurance Co. v. Hyde*, 101 Tenn. 396, 48 S. W. 968; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841.

The doctrine is there laid down, that any agreement declaration, or course of dealing on the part of an insurance company which

leads the insured honestly to believe that by conformity thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon a forfeiture, though it may be claimed under the express letter of the contract.

As was said by the court in case of *Equitable Assur. Soc. v. McElroy*, 83 Fed. 631, 28 C. C. A. 365:

"The course of dealing between the insured and the insurer must be such as to justify the insured in believing that the company will not insist upon a forfeiture of the contract for his failure to pay his future premiums when due; that the insured does believe this and that he acts on this belief. Otherwise, there is no estoppel on the part of the insurer to insist upon prompt payment and forfeiture for failure to pay *ad diem*."

The rule is laid down by Mr. Bacon, Mr. Joyce and other text-writers that the "course of dealing" between the insured and the insurer as to accepting overdue premiums must amount to a custom or habit in order to estop the insurer from insisting on forfeiture for the failure to pay a subsequent premium *ad diem*; and that not only must it be shown that the premiums were habitually received after they were due, but that the insurer intended to waive the prompt payment of future premiums, or that the assured, as a reasonable man, was led to believe by its action that the insurer had waived the condition of forfeiture. Bacon, vol. 2, § 431; Joyce, vol. 2, § 1368; Vance, p. 353; *Crossman v. Association*, 143 Mass. 435, 9 N. E. 753.

That mere indulgences in the payment of premiums do not constitute a waiver of the condition of forfeiture for failure to pay premiums when due. *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Easley v. Association*, 91 Va. 169, 21 S. E. 235.

In the case of *Thompson v. Insurance Co.*, supra, the claim made was similar to the contention made in this case. Justice Bradley said:

"If the permission to pay a premium or premiums after maturity was a matter of indulgence on the part of the company, it cannot be justly construed as a permanent waiver of the clause of forfeiture, or implying an agreement to continue the same indulgence for time to come. As long as the insured continued in good health, it is not surprising and should not be drawn to the company's prejudice, that it was willing to accept the premium after maturity, and waive the forfeiture which might have been insisted upon. This was for the mutual benefit of themselves and the insured at the time, and in each instance in which it happened, it had respect only to that particular instance without involving any waiver in reference to future payments. The insured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on

one occasion or a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse."

Under the above authorities, before complainant can recover in this case, she must show:

(1) That the course of dealing between the insurer and the insured, in reference to the acceptance of overdue premiums, amounted to a custom or a habit.

(2) That by reason of this course of dealing, the insured was justified in believing that the company would not insist upon a forfeiture for his failure to pay his subsequent premiums ad diem.

(3) That the insured did actually believe that he could postpone the payment of his future premiums after maturity without the risk of a forfeiture.

(4) That the insured acted upon this belief in this instance, and that by reason thereof, did not pay the premium due December 30, 1904, at its maturity.

But this rule does not in any event apply, unless the payment is made and accepted during the life of the insured, so that we consider this course of dealing as really unimportant.

A permission to pay a premium after due date during the life and good health of the insured is not equivalent to a permission to pay after his death. It is well settled that a course of dealing between the parties, under which the insurer accepted overdue premiums when the insured was in good health, will not give his representative or himself the right to pay or tender his premiums after maturity, and he is in a bad state of health, or had died. *Bacon*, vol. 22, § 431; *Crossman v. Association*, 143 Mass. 436, 9 N. E. 753-755; *Insurance Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Association v. Miller*, 85 Ky. 88, 2 S. W. 900.

The reason of this is, there has been an increase in the risk or hazard. An insurer might be willing to accept an overdue premium and reinstate an insured when his condition of health is the same as when the policy was originally issued, but it cannot be argued from this that he should be required to reinsure or reinstate the same person when he was or is in extremis. The course of dealing, if any, was to accept the overdue premiums, from a live man, not a dead one.

At the time the tender was made in this case Thompson was dead.

As bearing somewhat upon this feature of the case, it had been held that illness of the insured is no excuse for his not paying his premium when due. The law and his contract require him to make provision for meeting his premiums when due, and if he fails to do this, he cannot be heard to complain by

saying that he was physically unable to attend to his business. *Thompson v. Insurance Co.*, 104 U. S. 257, 258, 26 L. Ed. 765; *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662; *Carpenter v. Association*, 68 Iowa, 453, 27 N. W. 456, 56 Am. Rep. 855.

In the case of *Want v. Blunt*, 12 East Rep. 183, the contract provided that upon payment of premiums on a certain day, or within fifteen days thereafter, that upon the death of the insured the company would pay to his widow the amount named in the policy. The insured died in default of the payment of his premium, but it was tendered the company within fifteen days after his death. The court held that the payment was not made in time; that the condition in the policy permitting the insured to pay within fifteen days after the due date of the premium meant, should pay "within fifteen days after due date, during the life of the insured."

Said the court: "This contract of insurance must be construed according to the meaning of the parties expressed in the deed. * * * The risk insured against is W.'s death. The duration of the insurance is so long as he continues to make his payments, but the insurance is not to be void if paid within fifteen days after due. The question to be determined is whether at the death of the insured the policy had expired. The insurance is for a quarter of a year, and so on, from quarter to quarter, contingent upon the payment of premiums in advance. The death of the insured happened after one of the quarters had ended and when a new one had begun, but no payment of premium had been made as a consideration for the insurance for the new quarter. As the protection offered was only up to the beginning of a new quarter, its continuance thereof being dependent upon the payment of another quarter's premium, there was no insurance upon his life at the time of his death, hence the death happened during a period not covered by the policy. The payment of a premium for another quarter was equivalent to making a new assurance, though under a former policy. The frame of this policy shows that the premium must be paid during the life of the assured."

This case was followed by *Pritchard v. Association*, 3 C. B. 622. Said Justice Willes:

"The provision for revival upon the good health of the insured assumes that the subject upon which the insurance is to attach is a living person, otherwise, the stipulation would be absurd. The very foundation of a life policy is that it is a contract for the payment of a certain sum upon the future death of a person then in being, in consideration of the present payment of the premium. The renewals or revivals of the contract, like the original, are clearly only for future assurance on a living person."

In the policy in the present case, it is provided that the insurance shall not be bind-

ing unless delivered during the lifetime of the insured; the provision in the certificate of health and revival contract that the insured should be in good health also contemplated his being alive at the time.

In *Carlson v. Supreme Council*, 115 Cal. 466, 474, 47 Pac. 375, 35 L. R. A. 643, the by-laws of the benefit association provided that if the insured died in default of assessments or dues, his beneficiaries would have no rights under the contract. There was a further provision in the by-laws that if unpaid dues and assessments were paid within 60 days, the assured would be reinstated. After default, but before the expiration of the 60 days thereafter, the insured died, and his beneficiaries tendered the amount of his unpaid assessments and dues. The tender was refused and suit brought upon the beneficiary's certificate. The court held that before the policy was revived, and while the assured was in default, there was no insurance, and that the insured took the risk of losing his insurance if he died without having paid his premiums; that the meaning of the contract giving the assured 60 days after the date of his assessment to pay was that he must pay within that time and during his life. Said the court:

"The contract of insurance becomes complete at the death of the insured. The liability or nonliability becomes fixed by that event. The right to recover depends upon the conditions existing at the moment of the insured's death."

To the same effect is *Miller v. Union Cent. Ins. Co.*, 110 Ill. 104.

"Payment after death creates no contract. There is no consideration for the insurance." *Bliss on Insurance*, § 316.

"There can be no valid insurance of the life of a dead man." *Bliss on Insurance*, § 355.

Complainant claims that the condition of the policy requiring payment of premium ad diem, or on failure the policy to become forfeited, was a condition subsequent, and no forfeiture could be claimed without some affirmative act on the part of the insurer. It is immaterial whether the condition of precedent or subsequent failure to pay when due in itself worked a forfeiture. The parties have so agreed, and the courts will enforce the agreement. *Ressler v. Insurance Co.*, 110 Tenn. 411, 75 S. W. 735; *Iowa Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204.

So, where the annual premium is payable in installments, a failure to pay any installment works a forfeiture. *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662.

Time is of the essence of the contract, and even though the condition be construed as a condition subsequent, failure to pay when due forfeits the contract. *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.

The policy provides that after three years, if the payments required shall have been

made when due, the policy shall be incontestable. This only means that it shall be incontestable for causes other than the nonpayment of premiums, but does not in any wise relieve the insured from the payment of his premiums, but on the contrary expressly stipulates that they shall be kept up and paid when due, during the 20 years' life of the policy.

An amended bill was filed under which it was, in substance, contended that under the terms of the policy when properly construed, no forfeiture would accompany nonpayment of any premium at maturity.

The contract of insurance provides that if the premiums payable on the 30th of March, June, September, and December of every year, are paid when due, the insurer will pay to the representative of the insured the face value of the policy "less the balance of the dues for the current year of the death of the insured, and any indebtedness of the member to said association, subject, however, to all the requirements hereinafter stated," etc.

This provision is followed by a provision for forfeiture upon the failure of the insured to pay, when due, any moneys required to be paid under the policy.

The contention is based upon a construction of the terms of the policy; and it is insisted that under them the company had absolute right to collect all of the payments due on the policy within any current year from its anniversary, notwithstanding the assured might die during the year and before some of the installments fell due, and having this right it was bound to give to the insured a corresponding right to insurance for the whole of the current year.

This amended bill was demurred to and the demurrer sustained; and this is assigned as error.

We think this contention cannot be maintained, as made by complaint in her amended bill.

The contract rightfully construed is that upon the death of the insured, while the policy is in an existing contract, i. e., when the premiums are regularly paid when due, the insurer shall have the right to deduct any accruing payment for the current year not then due. In other words the right to deduct from the face of the policy the installments not due attaches only where the insured regularly meets his payments at maturity, and dies before all of the payments for the current year become due.

In case of a default of any moneys due under the contract, it ipso facto becomes null and void.

But it is said that the contract of insurance is a contract for annual insurance, and that the right of the insured and insurer must be determined from the status of the parties at an anniversary of the policy.

Concede that it is an annual insurance, still, is an annual insurance with the payments to

be made quarterly? It is expressly provided that a failure to make any payment when due will work a forfeiture; hence the annual insurance is subject to the voluntary default of the insured.

The privilege of paying the annual premium in quarterly installments was evidently for the convenience of the insured. Ordinarily, these premiums are payable as a whole in advance for the term of one year. The failure to pay the whole of the premium in such a case works a forfeiture in the event that it is so provided. In this instance the result is the same, upon the failure of the insured to meet his quarterly payments when due. At the end of any quarter there is no obligation imposed upon the insured to pay the next succeeding quarter; his failure to pay works a forfeiture of his contract, but the company cannot compel him to pay the remaining installments. In the event of the death of the insured, before the end of the first quarter, or any succeeding quarter, if he has paid his premiums when due, his representatives are entitled to collect his insurance. In the absence of any provision permitting the company to deduct from the face value the remaining installments for the year, the insured would receive the face value of the policy, having paid one-fourth, two-fourths, etc., as the case may be, of the annual premium. In order to avoid this, the company said to the insured, "You pay your premium in installments; if you meet those installments regularly when due and die before all of the installments have become due, we will pay the face value of the policy," "less any unpaid portion of the yearly payments." In other words, the company reserves the right to deduct the dues for the current year accruing but not due. Thus, in the event of a loss, while the contract is in force, to preserve to itself the right to collect the unpaid portion of the annual premium. In the case of a default in the payment of any installment when due, the policy is no longer an existing contract, and the insurer has no right to collect the remaining installments.

As was said by the court in the case of *McConnell v. Assur. Soc.*, 92 Fed. 769, 34 C. C. A. 663, where the court was called upon to construe a provision similar to the one in question: "It is an annual policy on which the premium is payable by quarterly installments, leaving the insured at liberty to drop it at any quarter, and imposing no liability on the part of the company, unless the quarterly payment is made, when due. If, however, the insured died at the end of the first quarter of the current year, the insurance company receives only one-quarter of the annual premium instead of the whole. It has insured the deceased for a year, subject to his voluntary default. He has died and the policy is earned. He should pay the whole year's premium therefor, but has only paid one-quarter's premium. To meet this injustice, the proviso was introduced that if the

insured should happen to die before the whole of said quarterly payments should have become due then the company will be entitled to deduct the premiums for all subsequent quarters of that current year from the amount of the policy. That proviso is not meant to apply to the case of a defaulted payment, but only to a case where the payments are regularly made as they become due, and where all the installments have not become due on the death of the insured. In this case, there was a failure to pay a quarterly installment on the day fixed. As a consequence the policy became forfeited."

The above case was based upon the authority of *Insurance Co. v. Sheridan*, 8 H. L. Cas. 745. In that case, the policy contained a provision that the annual premium for the whole term was £33 payable by quarterly installments. If the insured should die, having paid his premiums when due, the policy would be payable for the sum insured. "But if the insured died before the whole of the quarterly payments shall have become payable for the year, the directors may deduct from the sum insured the whole of the premium for that year."

The insured died after the third installment became due, but before it was paid.

The House of Lords, through Lord Campbell, held the contract to be an insurance from quarter to quarter, but that the payment of the quarterly installments was a condition precedent to the right to continue the policy as an existing contract. Lord Cramworth, while agreeing with Lord Campbell as to the result reached, was of the opinion that the insurance was an annual insurance with the payments due quarterly, and the failure to pay any installment when due worked a forfeiture of the contract. Said Cramworth: "The proviso (referring to the clause giving the insurer the right to deduct unpaid portions of premiums) is not meant to apply to the cause of a default in payment when due, but to a case where the regular payments had been made as they became due, but where all had not become due."

The case of *Howard v. Continental Ins. Co.*, 48 Cal. 229, is also in point. There the policy provided for the payment of an annual premium in advance, or if the insured saw fit twice yearly or thrice yearly in advance. Further, that if the insured should die, to pay the face value after deducting any balance of the year's premium. There was a provision for forfeiture for failure to pay when due any moneys required to be paid under the policy. The insured elected to pay his premium thrice yearly, paying one-third upon the delivery of the policy. He died after the second installment became due and remained unpaid. In a suit upon the policy, in which the claim was made that the provision giving the insurer the right "to deduct the balance of the dues for the current year" extended to the insured credit for the payment of his other installments until the last installment fell

due, the court held: "First, the payment of the installment did not extend to the insured credit for the other installments until the end of the year, but that they should have been paid when due." Further, "less the balance for dues for the current year" did not have the effect of extending such credit, but that the meaning of those words was that the company could deduct any installment not due at the death of the insured, not only that the company was compelled to pay the face of the policy and deduct therefrom an overdue installment. The court said: "We agree that it was intended in case of the death of the insured before one or more installments became due that the company should deduct from the amount insured the balance of the current year's premium. But we do not think as a consequence of this right, reserved by the insurer, the insured was relieved of the necessity of paying any installment when it was agreed it should be paid. The company was authorized to deduct any installment not due at death; but was not compelled to pay the sum insured, with the right to deduct an installment overdue when death occurred."

Thus construing the several clauses, effect is given to all stipulations of the contract; but to sustain the view of respondent, it would be necessary to ignore the portion of the policy which fixes the thrice yearly payments, and making the policy read that the payments be made one-third at the beginning of the year. Primarily, the whole of the annual premium was payable in advance. The consideration for the policy was the payment of the whole premium; if not paid, the policy to lapse. But the option was given the insured to pay thrice yearly in advance. In the first case, there was no obligation to pay the sum insured unless the thrice yearly payments were made when due.

As said by the court in *Werner v. Insurance Co.*, 11 Daly (N. Y.) 176, complainant loses sight of the manner in which the payments are to be made, that is, upon the days named in the policy. Certainly the quarterly payments were due on the days named, the provision for forfeiture provide that any moneys, required to be paid under the policy, must be actually paid, when due, otherwise the policy becomes void. Confessedly, there was a payment due on the policy December 30, 1904, but no payment made. The insured died 15 days in default, and no tender until after his death. Under the plain terms of the policy it had ceased to be an existing contract.

The fallacy in the contention of counsel for complainant lies in his claim that the insured was entitled to one year's insurance from March, 1904 (anniversary of policy), absolutely. Whereas, the contract is that he is entitled to such insurance only upon the condition that he pays his premiums when due.

Mr. Joyce says: "If the stipulation is that the annual premium shall be paid quarterly in advance upon specified days, or the policy shall be forfeited, the party will be held

strictly to the performance of such a condition, and the contract becomes terminated by a nonpayment as stipulated. And this is so even though other portions of the contract refer to 'annual insurance' or 'yearly premium.' And though the policy provides that if all of the quarterly payments have not been made when the insured dies, the company may deduct the whole unpaid balance of that year's premium from the amount of the policy." Volume 2, § 1108.

This is a hard case, but by no means an unusual one; where a party has failed to comply with the requirements of his policy, and death coming unexpectedly, he has lost all benefits under it by its plain provisions.

Complainant insisted upon a jury trial in the court below, but did not make demand for same according to the rule of the court. Moreover, there does not appear to be any disputed question of fact material to the decision of the case involved in it.

It is said that complainant is entitled to recover the penalty prescribed by Acts 1901, p. 248, c. 141.

Inasmuch as complainant, in our view of the case, is not entitled to recover the insurance, it follows, as a matter of course, she cannot recover any penalty for withholding it.

The decree of the court below is affirmed, with costs.

BRADFORD & CARSON v. MONTGOMERY FURNITURE CO.

(Supreme Court of Tennessee. May 19, 1906.)

1. GOOD WILL—SALE—RIGHTS OF PARTIES.

Where a partnership business, including its good will, was sold under an unconditional agreement that the sellers should not re-engage in that business in the same city for a limited time, the fact that the buyers put the business, with other capital, into a corporation before the expiration of the period did not release the sellers from their obligation.

2. ASSIGNMENTS—RIGHT ASSIGNABLE.

Where a partnership business, including its good will, is sold under an unconditional agreement that the sellers shall not re-engage in that business in the same city for a limited time, the good will and the contract for its protection are property rights, and assignable.

3. CONTRACTS — VALIDITY — RESTRAINT OF TRADE.

A contract for the sale of a business, including the good will, with an agreement on the part of the sellers not to re-engage in that business in the same city for three years, is not in restraint of trade, but valid and enforceable.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 555.]

4. GOOD WILL—SALE—RIGHTS OF PARTIES.

Where a partnership business, including its good will, was sold, and a note taken in a separate sum for the good will at its separate valuation under an unconditional agreement of the sellers not to re-engage in that business in the same city for three years, a breach of the agreement at the end of a year did not defeat the seller's right to maintain an action on the note, subject to the right of the defendants to recoup such damages as they might be able to prove themselves entitled to recover.

5. DAMAGES—BREACH OF CONTRACT—STIPULATION NOT TO RE-ENGAGE IN BUSINESS—NOMINAL DAMAGES.

Where a contract for the sale of a business, including the good will, with an agreement on the part of the sellers not to re-engage in that business in the same city for three years, is breached by the sellers re-engaging in business within the time limited, the measure of recovery is the actual damages which the buyers are able to show naturally and proximately resulted therefrom, and on failure to furnish data from which the jury can properly estimate the actual damages, they will be limited to nominal damages.

Appeal from Chancery Court, Davidson County; John Allison, Chancellor.

Action by Bradford & Carson against the Montgomery Furniture Company. From a decree in favor of defendant, complainant appeals. Reversed and remanded.

Stokes & Stokes, for appellant. Chambers & Nust and M. B. & Boyd Howell, for appellee.

SHIELDS, J. Complainants J. H. Bradford and J. T. Carson, partners under the firm name and style of Bradford & Carson, bring this bill against R. J., B. W., and W. W. Montgomery, partners under the firm name and style of Montgomery Furniture Company, to recover upon a note made to complainants by the defendants on February 2, 1902, for \$3,000.

The defense made by answer and cross-bill is that the complainants have breached a contract and agreement made with the defendants in part consideration of the note sued on, and have thus destroyed the consideration of the note and injured and damaged defendants in the sum of \$10,000 for which they ask a decree.

The material facts found by the Court of Chancery Appeals are these:

Complainants, who for some years have been engaged in the wholesale and retail furniture business in the city of Nashville, on February 2, 1902, sold their entire business consisting of furniture, fixtures, and the good will of the firm to defendants, agreeing at the same time to remain out of the furniture business in Nashville for three years, from and after that time. The contract price of the merchandise and fixtures was \$28,587.01, and was paid at the time of the sale. The value of the good will of Bradford & Carson, and their contract not to again resume business in Nashville within three years was agreed to be \$3,000, and for this the note sued upon was made. Complainants delivered their stock, fixtures, and business to the defendants, ceased the furniture business, and complainant Bradford entered and remained in the employ of the defendants, assisting them in conducting their business, for some four months.

That on July 1, 1902, the Montgomery Furniture Company sold their entire business to the Montgomery Furniture & Manufacturing Company, a corporation which the defendants were instrumental in creating and organizing

for the purpose of manufacturing furniture and dealing in it at wholesale and retail, in the city of Nashville. The defendants were the owners of \$30,000 of the capital stock of the corporation, which was \$72,000, were its chief officers, and had the management of its business. The corporation continued the furniture business in all respects as it had been conducted by the defendants, until January 1, 1904, when it resold this part of its business to the defendants who have carried it on from that time in all things as they did prior to their sale to the corporation.

That on January 1, 1903, the complainant, J. H. Bradford, in connection with his brother and son as partners, again engaged in the wholesale furniture business in Nashville, under the firm name of the Bradford Wholesale Furniture Company, in opposition to defendants, competing with them while stockholders of the Montgomery Furniture & Manufacturing Company, and later as partners under their old firm name and style of Montgomery Furniture Company.

Upon these facts the Court of Chancery Appeals held and adjudged that the complainants had breached their contracts not to engage in the furniture business in Nashville for three years, from and after their sale to the defendants, and that this breach constituted a good defense to any recovery upon the note sued on, and dismissed their bill with cost. That court made no finding upon the subject of damages which the defendants claim they sustained by complainants' breach of their contract.

Complainants have appealed from this decree, and assigned errors. We will dispose of the several errors assigned as a whole.

The first contention of the complainants is that when the defendants sold their partnership business to the Montgomery Furniture & Manufacturing Company, they ceased to be in the furniture business, and complainants were free to again engage in it, and, in doing so, they were not in opposition to the defendants, and committed no breach of their contract. This contention is predicated upon the assumption that complainants contracted with the defendants as individuals only, and that when the defendants sold their business to the Montgomery Furniture & Manufacturing Company they as individuals ceased to do business, and that that conducted by the Montgomery Furniture & Manufacturing Company, was a separate and distinct business carried on by another person, a stranger to their contract and in no way entitled to its benefits. They further say that the contract which they had made with the defendants was not assignable, and did not pass to the corporation with the sale of the business of the defendants, but was lost and destroyed by such sale. In support of this contention they cite and rely upon the case of Bagby & Rivers Co. v. Rivers, 87 Md. 400, 40 Atl. 171, 40 L. R. A. 632, 67 Am. St. Rep. 357. That case does go far to

wards supporting their position. It is there held that Bagby, who had purchased the good will of the firm of Bagby & Rivers, together with the right to continue the business in the old firm name, from the retiring partner Rivers, with a contract upon the part of Rivers not to again engage in the same business, in the same place, within a limited time, lost the benefit of the contract and released Rivers from his agreement when he assigned said contract to a corporation formed to continue the same business. We are, however, not satisfied with the reasoning of the court in that case, believing it to be too technical, and destructive of the spirit of the contract and the purpose and intention of the parties, and are unwilling to follow it. All contracts should be construed and interpreted, when it is possible to do so, in accordance with the intention of the parties, so as to effect the ends contemplated and contracted for by them. We think the complainants contracted with the defendants not to engage in the furniture business for three years, in competition with them, regardless of whether they conducted their business, as individuals, partners, or stockholders in a corporation. The thing contracted for was protection against competition from the complainants, in order that the defendants might have the full benefit of the good will of the old business they had purchased. It was immaterial to the complainants in what name the defendants conducted their business; that was a matter in which they were not interested. Their contract was simply not to engage in a business which would by competition be injurious to, or compete with the capital, energy, and ability which the defendants were investing in and devoting to the furniture business in Nashville. Complainants would probably have made the same contract for the same consideration, if defendants at the time had told them they intended to incorporate their business. The entire business of the defendants, including all they had purchased from the complainants, was made over to the corporation, and they became the owners of nearly one-half of the capital stock, and were its chief officers. They had the same money invested in the business of the corporation, and gave that business the same attention as they had previously their partnership business. The business of the corporation, to the extent they were interested in it, was their business and was as much protected by the contract of the complainants as it was while it was conducted in their own name. Certainly after January 1, 1904, when they withdrew from the corporation, their business was the same in all respects as it was when the contract was made with the complainants. We think, to hold that the defendants lost the benefit of their contract by virtue of the vestiture of the title of their business in an artificial person in order, as they thought, to carry it on more advantageously, would be to allow

the complainants, while recovering full consideration, to defeat the object of their contract and do the defendants great injustice. Complainants contracted not to engage in the furniture business for the time mentioned in opposition to the defendants. The agreement was absolute and without qualification. The change made by the defendants in the manner of conducting their business, in no way affected complainants. It did not in any way increase or lessen the obligation and burdens of their contract, and we cannot see upon what principle, consistent with reason and justice, that it should release them from its performance.

The good will which defendants had purchased from complainants, and the contract they had made with them for its protection, were property rights, valuable and assignable, and were not affected by the changes made by the defendants in the manner in which they conducted their business. The contract remained in full force and effect until it expired by its own limitations.

These conclusions, we think, are well supported by reason and the weight of authority. In the case of *Kramer v. Old et al.*, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650, the defendants sold their milling business at Elizabeth City, N. C., to the complainant and agreed not to again engage in the same business at that place; afterwards, with others, they organized a corporation in which they became stockholders to compete with the purchaser of their former business at Elizabeth City, and the complainant filed a bill to enjoin them from carrying on said business. The defendants insisted that as stockholders they were not violating the contract which they had made as individuals; that the corporation was a separate and distinct person and was not bound by any contract made by its stockholders. The court, in granting the relief prayed, said:

"As a Court of Chancery Appeals we must declare that, where injunctive relief is asked, it is the duty of the court to restrain the contracting parties from violating the spirit, as well as the letter, of the agreement. Under a fair and just interpretation of its terms the stipulation meant that the three defendants were not to engage in business so as to bring their skill, names, and influence to the aid of any competitor carrying on the same trade within the prohibited limits. It was therefore a violation of the contract on the part of the three mentioned, or either of them, to take stock in, help to organize, or manage a corporation formed to compete with the plaintiff in his business.

"While the courts will not restrain a party bound by such a contract from selling or leasing his premises to others to engage in the business which he has agreed to abstain from carrying on, or from selling to them the machinery or supplies needed in embarking in it, a different rule must prevail when it appears that the prohibited par-

ty attempts, not to sell outright to others, but to furnish the machinery or capital, or a portion of either, in lieu of stock in a corporation organized with a view to competition with the person protected by his contract against such injury. The three contracting defendants have presumably received the full value of the business sold and which is protected by their own agreement against their own competition, and equity will not allow them with the price in their pockets to evade their contract under the thin guise of becoming the chief stockholders in a company organized to do what they cannot lawfully do as individuals."

In the case of *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 747, the defendants had contracted with the plaintiffs not to operate a steamboat upon certain waters, and had breached their contract. Plaintiff sued for damages, and the defense was that the association of which the plaintiffs were members, when the contract was made, had been dissolved, the defendants were released from the obligation of their contract. The court, in affirming a judgment for plaintiffs, said: "Because a part of the covenantees sold out their interest in the steamboats running on the Hudson river, between the making of the agreement and its breach by the defendants, the remaining covenantees who retained their interest in such boats ought not to be deprived of their remedy on the agreement to recover the damages sustained by them by means of such breach. * * * The action can be sustained, if any one of the plaintiffs has a beneficial interest in the suit. The covenant inured to the benefit of the covenantees who retained their interest in the steamboats running on the river. The other covenantees who had sold out and therefore could not be injured by the breach of the agreement, are merely nominal parties to the suit. The dissolution of the Hudson River Steamboat Association is no defense to the suit. The agreement was not made with the plaintiffs as members of the association, or as copartners, but as individuals, and was intended to protect their interest, whatever that might be, in the steamboats running between New York and Albany. The obligation of the agreement is not at an end, because the steamboat association has been dissolved, or because the partnership of which the plaintiffs were members at the time of the making of the agreement has expired by efflux of time."

And in *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 381, *Dennis, Mumford & Hooper*, partners engaged in the agricultural implement business in the city of Richmond, Ind., purchased the stock of *Beard & Sinex*, then in the same business, and who contracted with *Dennis, Mumford & Hooper* not to again resume that business in Richmond. Afterwards *Dennis* bought out his partners and continued the business. *Beard & Sinex* took in an additional partner and resumed the agri-

cultural implement business. *Dennis* filed his bill to enjoin them from doing so. It was held that he succeeded to all the rights of his partners under the contract they had made, and that the defendants by taking in an additional partner could not escape their contract, and the agreement they had made was enforced according to its spirit and the intention of the parties.

In the case of *Pemberton v. Vaughn*, 10 Adolphus & Ellis, 59 Eng. Com. Law, 87, the facts were as follows: The defendant was in possession of a house in which he made and sold ginger beer. For a consideration he gave possession of the premises and sold the good will of his business to the plaintiff, agreeing not to again enter the same business within one mile of said premises. There was a breach of this agreement and action brought for the damages sustained. Upon matters urged in defense the court said: "It does not follow that the plaintiff will not require the protection of the agreement because he may not himself continue in the business; he may sell the business and sell it on better terms on account of the protection secured by the agreement."

In the case of *Hitchcock v. Koker*, 6 Adolphus & Ellis, 98, 33 Eng. Com. Law, 438, which involved a similar question, the court in sustaining the action held: "If therefore it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the master carries on the trade there, we cannot think it unreasonable that the restraint should be carried further, and it should be allowed to continue if the master sells the trade or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master can by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that these restrictions should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor."

The case of *Francisco v. Smith*, 143 N. Y. 488, 38 N. E. 980, is also in point. The facts were these: *Francisco* purchased the business of a baker in the town Little Falls, N. Y., the seller contracting not to engage in a similar business in that town for five years. *Francisco* mortgaged the fixtures and other personal property used in the business and made a default. The mortgage was foreclosed, the property purchased by the mortgagee, and the business suspended and closed for several months. *Mrs. Francisco* then repurchased the fixtures and other personal property and reopened the business in her own name, and purchased from her husband the contract which *Smith* had made with him. *Smith* opened a competing business, and she

brought a bill to enjoin him from continuing it, and it was held: "It is unquestioned that the agreement entered into by the defendant not to engage in the bakery and confectionery business in Little Falls, during the period of five years, was legal and valid, and that courts of equity will enforce such agreements for the protection of the business to which they relate. Such an agreement is a valuable right in connection with the business it was designed to protect, and going with the business it may be assigned, and the assignee may enforce it just as the assignor could have enforced it if he had retained the business. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464. "The agreement can have no independent existence or vitality aside from the business. If Mr. Francisco had not disposed of the business, and had not himself carried it on, there would have been nothing for the agreement to operate upon—no grounds for equitable relief against a breach thereof, or for recovery in an action at law of anything except possibly nominal damages. He would not have lost the benefit of the agreement by omitting, for any definite time during the five years, to carry on the business. It may be assumed, and, indeed, it is conceded, that he retained the business until he made the assignment to the plaintiff, May 25, 1891. At that date there was nothing which prevented him from resuming and carrying on the business, and then having the full benefit of the defendant's agreement. But before that date the plaintiff had purchased the property, tools, and fixtures connected with the business, and was in possession of the place where the business had been carried on by the defendant and subsequently by her husband. At that date he assigned to her the business and the good will thereof, and all his rights under the defendant's agreement. Mr. Francisco having the conceded right to sell all the property and the business together, and to assign the agreement at the same time, what is there in reason or principle that precludes him from first disposing of the property and place of business, and afterward selling and assigning to the same person the business and the good will thereof, together with the agreement made for the protection of the business? We can perceive nothing. The assignment of the agreement goes with, and is connected with, the business as much in the one case as in the other."

In the case of *Upriver Ice Co. v. Denler*, 114 Mich. 297, 72 N. W. 157, 68 Am. St. Rep. 480, the defendant sold 140 shares of the capital stock of the complainant, a corporation, to Bennett and contracted with him not to again engage in the ice business in Port Huron or near there, either as principal, agent, or employé. Bennett assigned this contract to Hayes, and he to the complainant. Denler purchased the Crystal Ice Company and resumed the ice business in

Port Huron. The complainant brought a bill to restrain him from continuing the business in violation of the contract which it held as assignee of Bennett. The defense was that the contract was personal in its nature, and enforceable only by the person in whose interest it was made. The court granted complainant full relief saying: "But it is said that the complainant could take no interest in the contract as assignee. We have proceeded upon the assumption that the contract was made in the interest of the company, and was supported by some consideration. But even if this were not the fact, yet the written contract made with Bennett came to the company by assignment; and, we think, the complainant acquired all the rights of Bennett by the assignment. That very question was considered in *Jacoby v. Whitmore*, 49 Law T. (N. S.) 335. The original contract was made between Whitmore and one Martin Cheek. Thereafter Cheek assigned to plaintiff all his beneficial interest and goods will in the business, and it was held that plaintiff took by this assignment all the rights and interest which Cheek held under the contract. In the present case the complainant company was directly interested in protecting itself from the competition of Denler. The company was composed of the two, O'Neil and Hayes. Hayes had taken an assignment of the Denler contract and turned such rights over to the company by assignment, and we are of the opinion that the company had the right to enforce the contract."

It is therefore clear, we think, that the contract of the complainants not to engage in the furniture business in Nashville for three years from and after February 1, 1902, was not annulled or forfeited by any of the facts relied upon, and that they breached it when Bradford with others entered that business before the expiration of the time contracted for, both while the defendants were stockholders in the Montgomery Furniture & Manufacturing Company, and afterwards when they resumed business as partners.

The Court of Chancery Appeals, as stated, was of the opinion that this breach was a complete defense to the recovery sought upon the note of defendants, and dismissed complainants' bill. Complainants insist that granting the breach of their contract, as herein held, the effect is not necessarily to defeat their action, but that the relief which the defendants were entitled to was either to enjoin them from again entering into business in violation of their contract, or an action to recover such damages as naturally and proximately followed such breach which might be recouped in this case, or recovered in a separate action at the election of the defendants. The determination of these questions depend upon whether the contract made between the parties was an entirety or not. If it was an entire contract supported

by one consideration, or the agreement upon the part of the complainants to cease the furniture business in Nashville for three years was a condition precedent, there can be no doubt but what the decree of the Court of Chancery Appeals is correct, and that the complainants' bill should be dismissed. In the case of *Coleman v. Hudson*, 34 Tenn. 465, Judge McKinney speaking for the court says: "The distinction between an entire and severable contract is clearly stated in the books. In the former the consideration is entire on both sides. It does not, either by its terms or the implied intention of the parties, contemplate or admit of apportionment upon a partial failure on either side; and the complete fulfillment of the contract by either is required as a condition precedent to the fulfillment of any part of the contract by the other. A severable contract is a contract, the consideration of which by its terms is susceptible of division and apportionment. There is, in such contract, no entirety of consideration on either side constituting a condition of the agreement; and neither party can claim more than an equivalent for the actual consideration on his part. Story on Con. § 21, 22.

"An entire contract in its legal interpretation is an unconditional agreement for the whole of the several articles, or number or quantity of goods contracted for; and precludes by its terms, and equally by the plain intention of the parties, all idea of divisibility. A severable contract on the other hand in its terms implies an apportionment."

"There is another class of cases noticed in some of the books of a mixed nature partaking of the character both of entire and severable contracts, and which may be considered as entire or severable according to the circumstances of the particular cases."

In Page on Contracts, § 1453, it is said: "The question whether a covenant is independent or dependent, turns entirely upon the intention of the parties as shown in the entire contract, and the tests hereinafter suggested, while of great help, cannot be conclusive in every case. The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed upon the language employed by the parties to express their agreement. If parties think proper, they may agree that the right of one to maintain an action against another shall be conditional or dependent upon the plaintiff's performance of covenants entered into on his part. On the other hand, they may agree that the performance by one should be a condition precedent to performance by the other. The question in each case is, which intent is disclosed by the language employed in the contract. It is said where the acts stipulated to be done, are to be done at different times, the stipulations are to be construed as independent of each other. This, as a general rule, is correct, but it is subject

to the intention of the parties as signified in the language of the contract. The great rule is to ascertain the intent of the parties from the language used."

Applying the principles here announced, we think that the contract in question was not entire, but severable, and that this clearly appears from its terms and the circumstances surrounding its execution.

The consideration of the note of the defendants was twofold—the good will of the firm of Bradford & Carson and their contract not to engage in the furniture business in Nashville for three years from the time of their sale to the defendants. These are separate and distinct considerations.

The good will of a firm is a species of property, often very valuable, and it may be sold and transferred. It is defined by Judge Story as follows: "This good will may be properly enough described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it received from constant and habitual customers, on account of its local position or common celebrity or reputation for skill, or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partiality or prejudices." Story on Pat. § 99.

A contract or agreement upon the part of the vendor of the good will not to resume the same business in the same locality, while adding greatly to it when sold, is no part of the good will and is not implied from a sale of it. It is the subject of a separate and distinct contract and in the absence of an express agreement of that kind the vendor is at liberty to resume his former business at his pleasure. This seems to be well settled. *Jackson v. Byrnes*, 108 Tenn. 700, 54 S. W. 984; *Howard v. Taylor*, 90 Ala. 243, 8 South. 36; Page on Con. § 374.

There can be no question but that the defendants acquired the good will of Bradford & Carson, and that it was delivered to them at the time of their purchase. There was certainly no failure of this part of the consideration of the note. The entire business of Bradford & Carson was turned over to the defendants, and Bradford the active partner, worked for them on a salary for several months. Performance of this part of the contract, it is clear, was not dependent upon any of the other parts of it as it was done immediately while the execution of all the other parts was deferred. The contract of complainants not to again engage in the furniture business while the performance of it was begun immediately, could not be completed until the expiration of the three years from its date. This contract upon the part of the defendants to pay \$3,000 as a consideration for the good will which had been delivered to them, and the agreement on the

part of complainants to cease business for three years, was to be performed in one year from its date. One year from the reception of part of the consideration, and two years before complainants could complete the other part of the consideration. It is clear, therefore, that it could not have been the intention of the parties that the performance of this contract by either party was conditioned upon its performance by the other. The terms of the contract render such an intention absolutely impossible of execution. We think, therefore, it is clear that the contract between the parties is severable, and that the breach by the complainants of that part of the agreement binding them not to resume business for three years cannot defeat their action upon the note of the defendants. It would be unjust to so hold, since the defendants have received by far the larger part of the consideration of their note—the good will of the firm of Bradford & Carson, and the performance of their contract to cease business for nearly one-third of the time agreed upon, which was certainly the most advantageous part of it to the defendants in enabling them to secure and hold the business of that firm.

We are of the opinion that the defendants are entitled to maintain their cross-bill to recover from the complainants such damages as they sustained from the breach of complainants' contract not to re-enter the furniture business in Nashville within three years, which are the natural and proximate results of such breach, to be set off against the decree upon their note, in part or whole, and if the same be in excess of such decree, to have a judgment therefor in this case.

Contracts of this character, when they, like the one under consideration, are reasonable and go no further than affording a fair protection to the good will purchased, do not interfere with the general interests of the public, and are not in restraint of trade, but valid and enforceable. *Jackson v. Byrnes*, 103 Tenn. 699, 54 S. W. 984; *Muse v. Swayne*, 70 Tenn. 251, 31 Am. Rep. 607; *Anchor Electric Co. v. Hanks*, 171 Mass. 101, 50 N. E. 509, 41 L. R. A. 189, 68 Am. St. Rep. 403; *Mell v. Moony*, 30 Ga. 413; *Lufburrow v. Henderson*, 30 Ga. 482; *Herbert v. Ford*, 29 Me. 546; *Warfield v. Booth*, 33 Md. 63; *Sedgwick on Damages*, § 1062; *Page on Contracts*, § 375.

The chief difficulty found in actions for breaches of contracts of this character, is in ascertaining the damages which the plaintiff can recover, as they are generally uncertain, remote, and speculative. For this reason the most efficient remedy is an injunction inhibiting the defendant from again entering into the business he has contracted not to resume. The jurisdiction of courts of equity to grant this relief is well established. *Jackson v. Byrnes*, 103 Tenn. 699, 54 S. W. 984.

The right of the plaintiff to maintain an ac-

tion at law upon a contract not to compete in business is equally well established, and the plaintiff has his election as to which remedy he will pursue, but when he elects to sue for damages, he must be prepared to prove such damages as the law recognizes, or otherwise he can only recover nominal damages. The true measure of damages for a breach of contract of this sort is the injury the plaintiff has sustained. If he has sustained no damages which are the natural and proximate results of the breach, he has sustained no injury, and can only recover nominal damages. The measure of damages in a case of this character is well and fully stated in the case of *Howard v. Taylor*, 90 Ala. 242, 8 South. 36 cited with approval by this court in *Jackson v. Byrnes*, supra.

The facts of that case were as follows:

Howard sold to Taylor his bar and fixtures in the town of Decatur, with an unexpired lease upon the premises where he did business, and the good will of the concern for the aggregate price of \$1,400, and promised and agreed that he would not carry on the same business at any other place in that town, but would remove his stock of goods and business to another county. This contract was breached by his resuming business in Decatur, and the action was to recover damages accruing to the plaintiff from such breach. The trial judge charged that the measure of damages was the difference between the value of the property sold, and the aggregate price paid to the defendant. In reversing the judgment in favor of the plaintiff, *Clopton, J.*, speaking for the court, said:

"The question arises, does the charge upon the facts stated, and in view of the character of the stipulation and its connection with the good will, assert the correct measure of recovery? In other words, is the compensation for the injury sustained by the breach of such promise arbitrarily measured by the excess of the gross amount paid over the value of the other property, without regard to the extent of the actual injury suffered? In an action founded on the breach of a contract, the general rule is that the plaintiff can only recover the natural and proximate damages caused by the breach complained of. Under this rule, the right of the plaintiff is to recover compensation for the injury he has sustained by the violation of the promise not to engage in the same business. The difficulty of proving the damages from the breach of such promise, arising from its nature, may be conceded. The uncertainty and difficulty of proving the resulting damages does not except the case from the operation of the general rule, and, in the absence of proof, positive or circumstantial, of injury, the plaintiff is entitled to recover only nominal damages. *Terry v. Eslava*, 1 Port. (Ala.) 273, 26 Am. Dec. 626. The loss of profits, if there are data from which the amount may be ascertained with reasonable certainty; the diminution in value of the property sold, and the

cost of the licenses for the unexpired term, all may be regarded as elements of the damages, which go to make up the measure of recovery. *Burkhardt v. Burkhardt*, 42 Ohio St. 474, 51 Am. Rep. 842; *Mitchell v. Read*, 84 N. Y. 556; *Mellesch v. Keen*, 28 Beav. 453; *Rawson v. Pratt*, 91 Ind. 9.

"In such action, the plaintiff must not only show a right of recovery, but also the facts or elements which compose the measure of recovery, unless the criterion by which the damage may be ascertained is provided by the contract, or by the law operating on the contract. Without proof of actual injury, and its extent—from the mere fact that the defendant engaged in the same business in Decatur—the instruction assumes that plaintiff suffered damages to the extent of the difference between the gross price paid and the value of the property other than the good will. Though a promise not to engage in the same business imparts value to the good will, for the reason that it affords a protection to the business of the purchaser, not obtainable by the good will simpliciter, there is no distinction in the character and extent of the damage produced by a breach of such promise. In either case, engaging in rival business, and inducing the old customers of the seller and the public to deal with him, is the main source and cause of injury. The value and enjoyment of the good will are depreciated and interrupted by reason of the proximate damage to the business of the purchaser caused thereby. The plaintiff received the the fixtures, and exercised the right to lease and occupy the house, and in so doing received the good will, so far as it pertains to, and is the incident of, the place of business—the advantage of patronage on account of its local position. Under these circumstances, a violation of the promise not to engage in the same business does not necessarily work the total destruction of the good will, nor deprive plaintiff wholly of its enjoyment and benefits. The rule as to the measure of damages, when there is the breach of a contract for the sale of specific chattels by a failure to deliver a part of them, is inapplicable. When the plaintiff elected his action on the contract for the recovery of the damages consequent on its breach, he took upon himself the burden of proving the extent of the injury. Merely showing a breach establishes the right of plaintiff to damages, but, in the absence of proof of the extent of the injury, he is entitled to recover only nominal damages.

"The charge given at the instance of the plaintiff is equally, if not more, objectionable. On the same hypothesis, substantially, as the charge just considered, and without any proof of actual damage, it authorized the jury to render a verdict, using its own language, 'for whatever amount you may think

the plaintiff is damaged, not exceeding the amount claimed in plaintiff's complaint, and after deducting \$450 admitted by plaintiff to have been received by him.' The damages claimed in the complaint were \$2,000, and the amount of the deduction was the proved value of the fixtures. Under the rule settled by our decisions, in an action *ex contractu* of this character, neither remote, consequential nor exemplary damages are recoverable. The plaintiff is entitled to just compensation for the actual injuries, which are the natural and proximate consequences of the wrong complained of; and such compensation must not be left to a capricious or speculative decision, but awarded on established principles."

This case was again before the Supreme Court of Alabama (110 Ala. 470, 18 South. 311) upon the appeal of the plaintiff, Taylor, and that court in passing upon the same question said:

"His [Taylor's] only real ground of complaint consists in Howard engaging in a competitive business in violation of his contract; for this breach he was entitled to recover such actual damages as he could show naturally and proximately resulted therefrom. Failing to furnish data from which the jury could properly estimate the actual damages, he could recover only a nominal sum.

"The difficulty of making proof from which the damages may be accurately computed, and the injustice of allowing the defendant to retain the full amount he received while violating his agreement with apparent impunity, furnish a sufficient reason why the plaintiff might have sought injunctive relief in a court of equity and obtained the specific performance of the contract; but these circumstances do not justify us in relieving the plaintiff of the burden of the action he elected to bring, nor in declaring for his benefit a measure of damages not based upon sound principles of law."

Taylor v. Howard, 110 Ala. 470, 18 South. 311.

The principles announced by the Supreme Court of Alabama in these cases apply to the rights of the parties in this case, and will be followed by the chancellor in ascertaining the damages resulting to the cross-complainants from the breach of contract of Bradford & Carson not to again enter the furniture business in Nashville within the time they contracted not to do so.

This case will be remanded to the chancery court, where the damages sued for by cross-complainants in their cross-bill, as shown by the averments thereof, will be ascertained and set off, in whole or in part, as the proof may warrant, against the decree in favor of complainants, and, if such damages exceed the amount of said decree, cross-complainants will recover the same from the defendants to the cross-bill.

RUTHERFORD et al. v. RUTHERFORD et al.

(Supreme Court of Tennessee. May 12, 1906.)

1. WILLS—CONSTRUCTION—ESTATE CREATED—CONTINGENT REMAINDER.

Testator's will contained the provisions: "I give, devise, and bequeath all the residue of my property, real and personal and mixed, to my two nieces 'to their sole and separate use free from the debts, contracts, control or marital rights of' any husband of either, 'to have the use and benefit of said property, half to each, for and during their natural lives and then to their respective heirs to have their own half' and that 'what I mean to say is that if either of these nieces shall die without children, the share of one so dying shall go to the survivor or the children surviving.'" *Held*, to create a contingent remainder the ultimate owners of which could not be determined until the death of both life tenants.

2. PARTITION—PERSONS ENTITLED—CONTINGENT REMAINDERMEN.

There can be no partition or sale for partition among contingent remaindermen.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 42-50.]

3. SAME—LIFE TENANTS.

The fact that there can be no partition or sale for partition among contingent remaindermen does not prevent the life tenants from having a partition or a sale for partition.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 42-50.]

4. SAME—STATUTES—CONSTRUCTION.

The sections of the Code on the subject of partition in kind and of sale for partition are in part material, and must be construed together.

5. SAME—SALE FOR PARTITION.

Shannon's Code, § 5042, provides that any person entitled to a partition shall be entitled to have the premises sold, if they are so situated that partition cannot be made, or if they are such that it would be for the advantage of the parties that they should be sold. Section 5010 gives the right of partition to the holders of life estates along with other persons. Section 5020 provides that in case any one or more of such parties or quantity of interest of any of the parties be unknown to the petitioner, or be uncertain or contingent or the ownership of the inheritance shall be a contingent remainder, so that such parties cannot be named, the facts shall be set forth in the petition. Section 5040 provides that partition is conclusive "on all parties named in the proceedings who have at the time any interest in the premises divided, as owner in fee or as tenants for years or as entitled to the reversion, remainder, or inheritance of such premises after the termination of any particular estate therein; or who, by any contingency in any will, conveyance, or otherwise, may be or may become entitled to any beneficial interest in the premises, or who shall have any interest in any individual share of the premises, as tenants for years, for life by the curtesy, or in dower." Section 5070 provides that where any of the persons are absent from the state or are not known or named in the proceedings, the court will direct the shares of such parties to be invested in permanent securities until claimed by them or their legal representatives. *Held*, that where land was so situated near two lines of railway that it would be advantageous to the parties that it should be sold in parcels for factory purposes and, if partitioned could not be used to advantage, and when partition proceedings were instituted, there was an active demand for such property, for factory purposes, a sale for partition was proper, notwithstanding the existence of a contingent estate.

6. SAME—DISTRIBUTION OF PROCEEDS.

Where there is a sale of lands on partition, life estates may be valued and the value paid over to the life tenants under the direct provision of Shannon's Code, § 5056.

7. SAME—ALLOWANCE FROM PROCEEDS.

Where land was sold in partition proceedings for \$9,000, and in order to obtain surrender of possession by tenants the life tenants were compelled to make an allowance of \$180 on the total rents and to pay \$500 in cash, and it appeared that the sale was a very advantageous one and could not have been made if the tenants had refused to surrender their lease, the life tenants were entitled to an allowance for their outlay out of the aggregate fund.

8. SAME.

A commission due to real estate agents cannot be allowed out of a fund arising from a sale of real estate in partition proceedings.

Appeal from Chancery Court, Shelby County; F. H. Heskell, Chancellor.

Bill by Lula D. Rutherford and another against Elizabeth L. Rutherford and others for sale of land and distribution of proceeds in lieu of partition. From a decree denying certain relief, complainants prosecute two special appeals. Modified, reversed, and remanded.

Edgington & Edgington, for appellants.
Geo. H. Gillham, for appellees.

NEIL, J. In the year 1897 one Frederick Volmer made and published his last will and testament, which contained the following provisions:

"I give, devise, and bequeath all the residue of my property, real and personal and mixed, to my nieces, Lula D. Rutherford, wife of J. R. Rutherford and Josephine Hampe, to their sole and separate use free from the debts, contracts, control, or marital rights of the said J. R. Rutherford, or of any said husband either of said nieces shall have hereafter; said nieces to have the use and benefit of said property, half to each, for and during their natural lives and then to their respective heirs to have their own half.

"What I mean to say is that if either of these nieces shall die without children, the share of the one so dying shall go to the survivor or the surviving children."

The two nieces mentioned in the will are the complainants in the present bill. Mrs. Rutherford has several children, all minors. Josephine Hampe, after date of the will, intermarried with Frank O'Conner. She has no children.

Mr. Volmer left several tracts and lots of land which passed under the will; none of these, however, need be specially referred to herein except the tract of 63 acres lying near the city of Memphis.

Prior to the present proceeding a bill was filed by J. W. Winkler, as guardian of the children of Mrs. Rutherford, against the said children and Mrs. Rutherford and Mrs. O'Conner, for certain purposes which need not be specially mentioned here. The result of that litigation, so far as concerns

the present controversy, was that the children or the estate represented by them, acquired free of the life estate five acres undivided, or as it is otherwise expressed in the decree of that case, $\frac{2}{3}$ of the 63 acres. That proceeding is not before us; we have only its results.

The original bill in the present case was filed by the two life tenants against the children of Mrs. Rutherford and their guardian, G. W. Winkler, to have the 63 acres sold for partition or division of proceeds.

The chancellor, after hearing evidence, accepted and confirmed an offer of \$1,200 per acre for $7\frac{1}{2}$ acres of the 63 acres, but in his decree of confirmation reserved the question as to whether the sale should be treated as one under the law of partition or as a sale purely for reinvestment.

Subsequently an amended bill was filed by complainants in a double aspect treating the proceeding both as one instituted to effect a partition by means of sale and as seeking to make a sale for reinvestment. Under this bill the chancellor confirmed the sale to A. B. Nicky & Sons, the persons who had made the offer above mentioned, as a sale made for reinvestment. He held that the estate was such that the statutes concerning partition and sale for partition did not apply.

Complainants made application to have their life estate valued and paid out to them. This was declined by the chancellor.

From this decree the first special appeal was prayed by complainants; subsequently another special appeal was prayed, and is now before us, but at present we shall consider only the one which we have specifically mentioned.

The question suggested turns on the point as to whether the interests were such that they could be made the subject of a sale for partition.

Of course there could be no partition or sale for partition among the remaindermen, because their rights are purely contingent. The children of Mrs. Rutherford have no vested interest in the property. It is impossible to say at this date who will be the ultimate owners of the remainder. This cannot be determined until the death of both Mrs. Rutherford and Mrs. O'Conner. If Mrs. O'Conner should die without children leaving her sister Mrs. Rutherford surviving her, we think under a true construction of the will Mrs. O'Conner's half interest would go to Mrs. Rutherford. If Mrs. Rutherford should die without children her interest would go to Mrs. O'Conner. If either should die leaving children, the interest of that one would go to her children. If one should die without children after the death of the other, who had died leaving children, the share of the one so dying without children would go to the surviving children of the other. Of course it would be impossible to partition or make sale for

partition among interests so uncertain as to the person who shall ultimately take. *Land Company v. Hill et al.*, 87 Tenn. 589, 610, 611, 11 S. W. 797.

But this does not prevent the life tenants from having a partition or a sale for partition. Our statutes upon the subject contemplate the existence of contingent estates which cannot be made the subject of partition or of sale for division, and provide for the enforcement of the rights of others, notwithstanding the existence of such contingent estates. The sections of the Code upon the subject of partition in kind and of sale for partition are in pari materia, and must be construed together.

In section 5042 of Shannon's Code, it is provided that any person entitled to a partition of premises under the preceding sections shall be equally entitled to have the premises sold for division, if they are so situated that partition cannot be made, or if they are of such a description that it would be manifestly for the advantage of the parties that they should be sold instead of partitioned.

In section 5010 the right of partition is given along with other persons, to the holders of life estates.

In section 5020, it is provided in respect of the petition as follows:

"In case any one or more of such parties or the share or quantity of interest of any of the parties be unknown to the petitioner, or be uncertain or contingent, or the ownership of the inheritance shall depend upon an executory devise, or the remainder shall be a contingent remainder, so that such parties cannot be named, the facts shall be set forth in such petition."

In section 5040, it is enacted that the partition is conclusive "on all parties named in the proceedings who have at the time any interest in the premises divided, as owners in fee or as tenants for years or as entitled to the reversion, remainder, or inheritance of such premises after the termination of any particular estate therein; or who, by any contingency in any will, conveyance, or otherwise, may be or may become entitled to any beneficial interest in the premises; or who shall have any interest in any individual share of the premises, as tenants for years, for life, by the curtesy, or in dower."

In section 5070, referring to the subject mentioned in section 5020, it is said under the article headed: "Disposition of proceeds of sale," that: "Where any of the persons are absent from the state, are without legal representatives in this state, or are not known or named in the proceedings, the court will direct the shares of such parties to be invested in permanent securities at interest, for the benefit of such parties, until claimed by them or their legal representatives."

It is held in *Freeman v. Freeman*, 9 Heisk. 301, that the existence of such contingent interests will not prevent a sale for division

of proceeds. It was held in that case that the persons in being in whom the contingent remainder would become a vested estate, if the life estate should fall in during the pendency of the proceedings, would represent the ultimate contingent remaindermen under the theory of virtual representation. See, also, *Parker v. Peters*, 2 Tenn. Cas. 636; *Ridley v. Halliday*, 106 Tenn. 607, 81 S. W. 1025, 53 L. R. A. 477, 82 Am. St. Rep. 902.

No injury could be sustained by the contingent remaindermen, by a sale for division, because there could be no sale, unless it should be made to appear that it would be for the benefit not only of the life tenants, but of the whole estate. *Reeves v. Reeves*, 11 Helsk. 674; *Wilson v. Bogle*, 95 Tenn. 290, 293, 294, 32 S. W. 386, 49 Am. St. Rep. 929.

It is also to be observed that a sale for partition may be made not only where the land is of such a description that it cannot be partitioned in kind, but also where the land is so situated that it would be manifestly for the advantage of the parties that it should be sold instead of partitioned. In view of this principle it was held in *Wilson v. Bogle*, supra, that a tract of 1,000 acres should be sold for division of proceeds rather than partitioned among four persons, because it was suitable only for mining, and the water and the timber were so located upon the land with respect to each other that it would be best that one person should own the whole tract. So in the present case, it was shown in the court below that the land was so situated in respect of its location near two lines of railway as that it would be most advantageous to the parties that it should be sold in small parcels for factory purposes. It was shown, in substance, that if it should be partitioned it could not be used to advantage. It was also shown that there was, when the proceedings were instituted, an active demand for this class of property for factory purposes, and that this demand will probably continue for a time, and should be taken advantage of.

From what has been said it is apparent that a sale for partition can be very properly made under such a state of facts as shown in this record, notwithstanding the existence of a contingent estate. The sale under such circumstances would be really for the purpose of enabling the life tenants to obtain partition and enjoyment of their estate and for the reinvestment of such portion of the proceeds as should belong to the contingent estate.

It is provided in section 5056 of Shannon's Code, that the life estate may be valued and paid over to the life tenant. We are of opinion, therefore, that the sale for division of proceeds was proper in the present case, and that the cause should be remanded to the chancery court of Shelby county to the end that the share of the two life tenants may be valued and paid out to them, and that the residue of the fund, that belonging to the

contingent estate, should be kept in court and invested in permanent securities for the benefit of such person or persons as may ultimately become entitled to that estate in possession when the contingency on which it turns shall be ascertained by the happening of the event. We are of opinion that future sales in this case should be treated in the same way.

The other special appeal referred to is based upon the following facts: The $7\frac{1}{2}$ acres was rented as a part of $33\frac{1}{2}$ acres. In order to induce the three persons who had the land rented, John Robillo, Casone Francisco, and Brusi Guiseppa, to surrender their lease on the land, the life tenants were compelled to make an allowance of \$180 on the total rents and to pay \$500 in cash. They ask reimbursement for this sum out of the aggregate fund. The sale of the $7\frac{1}{2}$ acres at \$1,200 per acre was worked up by two real estate agents in Memphis, I. F. Peters and H. C. Williamson Land Investment Company. Each of these persons claim \$225, or an aggregate of \$450, being 5 per cent. on the purchase price, as compensation for their services, as such real estate agents.

The complainants and the guardian ad litem consent that these two amounts should be allowed. The chancellor, however, disallowed them.

The sale was a very advantageous one. It could not have been made if the tenants had refused to surrender their lease. An effort was made to procure a surrender of the lease from them for a less sum, but this could not be effected. The alternative was then presented of paying the sum demanded or of allowing the sale to fall through. We think there could be no doubt of the wisdom of the parties in consenting to make the payment. We think it equally clear that this should be allowed out of the aggregate fund.

We are of opinion, however, that the claim of the two real estate agents should not be allowed out of the fund. That expense must be taken care of by those who employed the agents referred to.

The result is that the chancellor's decree will be modified and reversed so as to conform to the above opinion, and the cause will be remanded for further proceedings.

The cost of the appeal will be paid out of the aggregate fund.

CHICAGO, ST. L. & N. O. R. CO. v. MOGRIDGE.

(Supreme Court of Tennessee. April 25, 1906.)
 EMINENT DOMAIN — MEASURE OF COMPENSATION—TIME.

Under Const. art. 1, § 21, providing that no man's property shall be taken without just compensation, and Shannon's Code, § 1865, providing that no person shall enter on land to occupy the right of way until damages assessed by a jury and the costs have been actually paid, or, if an appeal has been taken, until bond has been given to abide by the final judgment,

where a railroad company took possession of a right of way during the progress of the trial of condemnation proceedings, but before judgment fixing the amount of damages, the amount should be fixed with reference to the date when possession was actually taken.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 333.]

Appeal from Circuit Court, Shelby County; A. B. Pittman, Judge.

Condemnation proceedings by the Chicago, St. Louis & New Orleans Railroad Company against Mrs. Laura Mogridge. From the judgment, plaintiff appeals. Affirmed.

Cooper & Fitzhugh (C. N. Burch and Albert W. Biggs, of counsel), for appellant. William G. Cavett, for appellee.

WILKES, J. The only question presented in this case is, in proceedings for condemnation of property for railroad purposes, at what date should the value of the property and damages sustained be fixed—whether at the institution of the suit, or at the time of the filing of the report of the jury of inquiry or view, or the time of the trial in the circuit court, or when actual possession is taken.

The railroad company contends that the date should be that of the institution of the suit, which in this case was June 28, 1902; and the landowner insists that it should be as of the date actual possession was taken, which in this case was July 14, 1905.

The petition for condemnation was filed June 28, 1902.

An order of condemnation was made, and a jury of view was appointed July 11, 1902.

The jury of view made a report July 18, 1902, fixing damages at \$5,070.

From this report there was an appeal to the circuit court July 19, 1902.

On May 1, 1905, the road gave bond for possession, and the circuit court ordered the writ to issue, and it did issue, and petitioner was put in possession July 14, 1905.

The appeal was heard November 3, 1905, and the trial judge charged the jury to fix the value of the property as of date, July 14, 1905, and to give interest from the next day, July 15, 1905.

The jury assessed the damages at \$6,100, and the railroad company has appealed.

The testimony tends to show that the value of the property had increased between the institution of the suit in June, 1902, and July, 1905.

The present suit is one in which the condemnation is first sought by suit, and the possession is taken later, during the progress of the trial, but before judgment fixing amount of damages.

There is a difference among the authorities as to the proper rule, arising largely out of the difference in constitutional and legal provisions, and the different modes of procedure in the different states; and it is

said that the question has not been definitely passed upon by this court.

But we think that under our constitutional provision that no man's property shall be taken without just compensation being made therefor (Const. art. 1, § 21), and our statutory provision (Shannon's Code, § 1865) which is as follows: "No person or company shall, however, enter upon such land for the purpose of actually occupying the right of way until the damages assessed by the jury on inquiry and the costs have been actually paid, or, if an appeal has been taken, until the bond has been given to abide by the final judgment"—the theory of the law is that the title to the property passes only when possession is taken under the condemnation proceedings.

See, also, sections 1859 and 1862.

In *White v. Railroad*, 54 Tenn. 541, it is said:

"We have already seen, however, that in this state the indemnity need not precede the seizure, provided the statute secures it beyond all contingency. And the best security guarantied under defendant's charter is that the title in fee remains in the owner until the indemnity is paid.

"Also, we hold the proposition to be incontrovertible that, when the property of the citizen is to be taken and appropriated under the right of eminent domain, the statute authorizing it must be strictly followed; and the condition of indemnification, either made or beyond all peradventure assured, becomes a condition precedent to the divestiture of the owner's right."

See, also, *Tenn. Cent. R. R. Co. v. Campbell*, 109 Tenn. 651, 75 S. W. 1012.

In *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123, it is said:

"Nevertheless, we have no hesitation in holding, upon general principles, that interest should have been allowed from the time of the appropriation of the property. From that time the original owner was deprived of the use and possession of the land taken. The liability of the city accrued at that date, though the amount therefor is not determined finally until long thereafter. Damages are properly assessed with reference to the value of the land taken, and the depreciation of the residue at the time of condemnation. The legal rights of both parties, so far as the damages are concerned, are fixed at that time. Subsequent enhancement or diminution of the value, though ever so great, cannot be considered by the jury on estimating damages. Witnesses are examined as to the amount of damages at the time of the appropriation, and not at the time of the trial. That method was properly adopted in this case. The city especially asked her witnesses the value of the property in August, 1887.

"The land was taken about August 10, 1887. Hence, judgment will be entered for

the amount of the verdict, with interest from that date."

This is virtually holding that the date at which possession is taken is the date when the damages should be fixed when the property is taken in advance of the trial.

In cases where the trial is had, and damages fixed before possession is taken, it would seem that the date of the trial or judgment should determine; but that case is not before us.

We are of opinion that there was no error in the judgment of the court below; and it is affirmed, with costs.

KINNEY v. YAZOO & M. V. R. CO. (two cases).

(Supreme Court of Tennessee. April 24, 1906.)

1. CARRIERS—DELIVERY OF PASSENGER.

There is a cause of action against a carrier where it refuses to deliver a passenger at the usual station platform, but puts her off 300 yards from it, in the mud and rain, she being old, crippled, and going on crutches.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1067-1072.]

2. TRIAL—QUESTION FOR JURY.

Where there is a conflict in the testimony on a material determinative question, the court may not pass on the credibility of the witnesses, but must submit the case to the jury.

Appeal from Circuit Court, Shelby County; H. W. Laughlin, Judge.

Two actions—one by Mrs. M. E. Kinney, the other by J. E. Kinney—against the Yazoo & Mississippi Valley Railroad Company. Judgment for defendant. Plaintiffs appeal. Reversed and remanded.

Marion G. Evans, for appellants. Francis Fentress (J. M. Dickinson and C. N. Burch, of counsel), for appellee.

WILKES, J. These are actions for damages begun before a justice of the peace. On the trial in the circuit court, after all the evidence was in, on motion of defendant's counsel, the trial judge peremptorily instructed the jury to find for the defendant road, and verdicts and judgments were rendered accordingly, and plaintiffs have appealed in each case; the cases being tried together in the court below and in this court.

The error assigned is that the trial judge erred in giving the jury peremptory instructions to find for the defendant, and declined to submit the evidence to the jury.

This assignment is good in form, and properly raises the question whether there was any material evidence upon which plaintiffs would have been entitled to verdicts and judgments.

There is no power in the trial judge to direct a verdict in any case in which there is a dispute as to any material, determinative evidence, or any doubt as to the conclusion to be drawn from the whole evidence upon the issues to be tried.

If there is any dispute as to any material,

determinative fact, the case must be submitted to the jury. If there is no dispute as to such fact, the question is one of law for the court. *Tyus v. R. R.*, 114 Tenn. 594, 86 S. W. 1074; *Brown v. Traction Co.*, Knoxville (Sept. Term, 1905) 89 S. W. 319.

Counsel agree that the defendant road undertook for the usual fare to carry Mrs. Kinney, as a passenger, from Pritchard to Comorant, Miss.; that she was an old lady, and cripple, and going on crutches.

There is no question made but that the road was obligated to deliver her at the usual station platform at the place of destination.

The defendant road insists that it did deliver her at the station at the usual place, about 60 feet from the depot; that the conductor and porter helped her from the train, and went with her to the depot, carrying her baggage, and left her comfortably in the depot house, and her baggage on the platform. The conductor and porter both swear to this state of facts.

Mrs. Kinney swears that she was put off the train 300 yards from the depot, over her protest and demand that she be carried to the depot or station house; that she was put off by the porter and either the conductor or flagman; and told that she would not be carried up to the station; that the place where she was put off was full of mud and standing water and logs thrown about; that it had been raining, and everything about there was muddy; that she had to walk on her crutches up to the station, without help, and having a little child about five years old with her; that she was unable to carry her telescope, and had to send back for it; that she missed connection she expected to make, and was compelled to stay all night; and that she contracted cold, and was made sick.

She is corroborated by J. L. Savage, a passenger on the same train, in the main features of her testimony, that the train which she was on stopped 300 yards from the station, and did not run up to it, as it usually did; and that he got off, and walked up to the station; but that Mrs. Kinney could not walk that far in her condition; and that she got off 300 yards from the station, after waiting for the train to be pulled up, and requesting that it be done, and after she was told that it would not be.

Now, if this evidence of Mrs. Kinney is to be believed, she had a right of action. There was a sharp conflict between her and the conductor and porter upon the material question as to whether she was carried up to the station or not, and also a conflict on this point between the statement of J. L. Savage and the porter as to where she left the train.

The trial judge did not have the right to pass upon the credibility of the witnesses; but, there being a conflict of evidence on a material, determinative question, the case should have been submitted to the jury, and peremptory instructions were not proper or permissible.

The judgment is reversed, and the cause remanded for a new trial, and the defendant road will pay the costs of appeal in both cases.

O'NEAL v. RICHARDSON et al.

(Supreme Court of Arkansas. March 3, 1906.)

1. SALES—TRANSFER OF TITLE.

Under an agreement between plaintiff and defendants, by which plaintiff was to buy cotton and turn it over to defendants to gin, after which defendants would buy the cotton from plaintiff, defendants, prior to the ginning and baling of the cotton, acquired no title which they could transfer, even to an innocent purchaser for value.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 524.]

2. SAME—BONA FIDE PURCHASERS.

Where plaintiff agreed to buy cotton for defendants, to be ginned, reserving a lien thereon and on the fund derived from the sale thereof for his advancements the title to the cotton was in defendants, and a sale thereof to a bona fide purchaser for value passed title freed from plaintiff's lien.

3. TRIAL—DELIBERATIONS OF JURY—COERCION OF VERDICT.

Where a jury, being unable to agree, returned into court for further instructions, it was improper for the court to state to them that it was necessary for all or some of them to make concessions with a view to rendering a verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 747.]

4. APPEAL—HARMLESS ERROR—COERCING VERDICT.

Where, after the jury had returned for further instructions, the court erroneously stated that it was necessary for some or all of them to make concessions, and the jury were still unable to agree, and did not agree until the court had given further instructions, the error was harmless.

5. TRIAL—INSTRUCTIONS—REDUCTION TO WRITING.

Under Const. art. 7, § 23, requiring the court to reduce its instructions to writing on the request of either party, it was not error for the court to give the jury an additional instruction orally in the absence of a request or demand that it be reduced to writing.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 518.]

Appeal from Circuit Court, Lawrence County; Frederick D. Fulkerson, Judge.

Action by L. E. O'Neal against V. G. Richardson and another, in which the Lesser Goldman Cotton Company and the Planters' Compress Company intervene. From a judgment in favor of interveners, plaintiff appeals. Affirmed.

S. D. Campbell, for appellant. H. L. Ponder and Jos. M. & Jno. W. Stayton, for appellees.

BATTLE, J. L. E. O'Neal brought this action against V. G. Richardson and J. M. Jackson, partners doing business as Richardson & Jackson, to recover the possession of certain 23 bales of cotton. Richardson & Jackson answered and denied that the cotton belonged to O'Neal, and alleged that the cotton was their property and that they had sold

the same to Lesser Goldman Cotton Company and the Planters' Compress Company. These companies, purchasers, intervened and claimed to be the owners, and entitled to the possession of the cotton.

Richardson & Jackson were operating a round bale cotton gin, and in order to operate the same it was necessary to buy seed cotton to furnish the gin. They were without sufficient means to continue the operation of the gin and applied to O'Neal for assistance; and finally entered into an agreement with him, under and in pursuance of which, O'Neal claims, that all the cotton ginned by Richardson & Jackson was purchased by, and belonged to him; and that when it was ready for shipment he sold it to them and that under this agreement and arrangement, the cotton in controversy was purchased by him, but never was sold to them, and still belongs to him.

Richardson & Jackson say that they had \$350, and that, under the agreement with O'Neal, he signed a note for \$350, as surety, and they borrowed on it \$350, and this and the other \$350, making \$700 were placed in his hands for the purpose of paying for the cotton to be purchased by them; that he acted as their cashier, and in pursuance of said agreement, and for his protection against any losses on account of being their surety, paid with their money for the cotton purchased for the gin, and received the proceeds of the sale of the cotton sold, by them, and with such proceeds paid for other seed cotton; and in this manner the gin was kept in operation. He was to receive compensation for his services. They further say that the cotton in controversy was purchased by them, and sold to interveners, and that O'Neal "had nothing to do with it."

Each party adduced evidence in the trial in the action which tended to support his or their contention. Evidence was also adduced which tended to prove that the interveners were purchasers of the cotton in controversy for a valuable consideration without notice of any lien thereon.

Over the objections of the plaintiff the court instructed the jury as follows:

"(3) If you find from a preponderance of the evidence herein in order to secure the means to run their gin, the defendants, Richardson & Jackson, induced the plaintiff to go upon their notes to the bank for money and to make advances to them from time to time, they agreed the plaintiff should hold all funds received by defendants, and all cotton shipped or sold by them was delivered to plaintiff by the delivery of the bills of lading therefor, and the plaintiff was to be repaid his advances and for the money borrowed on his name, and he was to receive a compensation therefor, such an arrangement would not confer the title of the cotton upon the plaintiff.

"(4) If you find from a preponderance of the evidence herein, the defendant requested

O'Neal to become their surety to the bank and the defendants further gave him certain sums of money and it was further agreed he should hold the money and disburse the same for seed cotton, for them, and hold the bills of lading therefor and collect the proceeds of sale and repay his advances and was later on to receive compensation for services rendered, such an arrangement would not be sufficient to give such a title to the plaintiff as would entitle him to recover in this suit and you should find for the interveners.

"(5) If you find from the evidence that the plaintiff was not the absolute owner of the cotton in controversy, but was to hold the same or proceeds thereof until he was made safe or repaid for advances made by him, such would not be sufficient but the cotton must have been actually delivered to him, and if you find the cotton in controversy was bought and ginned in the ordinary course of business and the same was never delivered to O'Neal, he cannot sustain his action against the interveners, and you will find for the interveners.

"(6) If you further find from the evidence that O'Neal became surety for Richardson & Jackson to the Bank of Newport for \$350 and that he was to have a lien upon the cotton that was ginned by Richardson & Jackson, in case the said note became due and O'Neal had to pay it, this would not prevent a recovery of the cotton in controversy by the interveners and the Lesser Cotton Company unless you further find that said Lesser Cotton Company bought said cotton with notice of said lien."

After the case was submitted to the jury, and they had been out some time, and had returned into court, being unable to agree, the court stated to them:

"Of course, it is necessary for all of you, or some of you, to make concessions; I hope you will go out now with a view to getting a verdict.

"To this statement of the court, the plaintiff at the time objected and excepted."

They retired to their room, and after they had been out some time, they again returned into court, being unable to agree, and the court instructed them orally as follows:

"Gentlemen, these instructions mean about this: If there was an agreement between Richardson & Jackson on one side and O'Neal on the other that O'Neal should buy cotton from the wagon, and own it for himself, and then to turn it over to them to gin, and then they would buy it from him, then the title was not to pass to Richardson & Jackson until after it was ginned and baled, then O'Neal would be the owner and Richardson & Jackson would have no right under any circumstances, in such an event, to sell the cotton either to innocent holders or any one else. On the other hand it means about this: That if O'Neal was buying this cotton for Richardson & Jackson, and that he just had

a lien on the cotton and on the fund for what he had advanced and his security to the bank, if he was a security, then that would be Richardson & Jackson's cotton and they have violated their agreement; the title would pass to Lesser Cotton Company and be a better title than O'Neal's lien, unless they had notice of that kind of an arrangement. That is all there is in it. The question is whether or not O'Neal absolutely owned it, or whether he had a lien or such a lien as the Lesser Cotton Company had no notice of. I also instruct you that the fact that there had been no settlement as to the wages of O'Neal or a settlement, on the other hand, as to what he was to pay for ginning, that would not determine the issue in this case. It is only a question to be looked at. The mere fact that they had not settled the pay for ginning, if he was the owner, or the fact that they have not settled as to what he was worth as security—that doesn't necessarily settle it. In fact there has been no settlement."

To the oral instructions, the plaintiff objected and excepted. Thereupon the jury retired, and after being out some time returned a verdict in favor of the interveners. Plaintiff appealed.

In examining instructions for the purpose of ascertaining whether they be correct they should be considered in connection with other instructions upon the same subject. The instructions numbered 3, 4, 5, and 6, to which appellant objected, were explained by the oral instruction. As explained they contain no reversible error. See *Hauselt v. Harrison*, 105 U. S. 401, 405, 28 L. Ed. 1075.

The statement of the court to the jury as to the necessity of making concessions was improper, but it does not seem that it was prejudicial. After it was made they retired and remained out some time and then returned into court and reported that they were unable to agree, and did not agree until the oral instruction was given. Under the statement and instructions then given to them the jury were unable to agree. The statement yielded no results.

Appellant insists that the court erred in orally instructing the jury. He objected to it as he did to written instructions, but there was no request or demand that it be reduced to writing. It is only at the request of either party that a court is required to reduce instructions to writing. Const. art. 7, § 23.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

COTTONWOOD LUMBER CO. v. HARDIN. (Supreme Court of Arkansas. Feb. 24, 1908.)

1. ADVERSE POSSESSION—PAYMENT OF TAXES—COMMENCEMENT OF LIMITATION PERIOD.

Under Act March 18, 1899 (Acts 1899, p. 117, No. 66), providing that unimproved and uninclosed lands shall be deemed to be in the

possession of the person who pays taxes thereon, if he have color of title thereto, and shall have paid taxes for at least seven years in succession, not less than three of such payments being made subsequent to the passage of the act, the adverse possession begins with the payment of the taxes while the person holds color of title, and not at the expiration of the seven years.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 516, 528.]

2. SAME—CONSTITUTIONAL LAW.

Act March 18, 1899 (Acts 1899, p. 117, No. 66), providing that unimproved and uninclosed lands shall be deemed to be in the possession of the person who pays the taxes thereon, if he have color of title, and shall have paid taxes for at least seven years in succession, not less than three of the payments being made subsequent to the passage of the act, is constitutional and valid.

Appeal from Circuit Court, Lee County; Hance N. Hutton, Judge.

Action by W. F. Hardin against the Cottonwood Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

This is an action of ejectment by W. F. Hardin against the Cottonwood Lumber Company to recover land in Lee county. The plaintiff inherited the land from one W. F. Hardin, who held it by mesne conveyances from the government. The defendant company and their grantors had claimed the land under color of title from 1870 to the time of the action, and they had paid taxes continuously from 1870 to 1902, inclusive. The defendant alleged that he and his grantors had held the land adversely under color of title for more than seven years and pleaded the seven-year statute of limitations. The defendant asked and the court refused to give the following instruction: "Under the act of March 18, 1899, entitled 'An act for the protection of those who pay taxes on land,' the payment of taxes on land by one who has color of title for seven years in succession up to the commencement of the action, at least three of such payments having been made since the passage of said act, operates as a complete investiture of title by limitation, and, under the undisputed facts in this case, the verdict must be for the defendant." Acts 1899, p. 117, No. 66. The court then, of its own motion, over the objections of defendant, orally declared the law to be as follows: "Under act of March 18, 1899, where a person under color of title to unoccupied and unimproved lands has paid taxes thereon for seven years in succession, at least three of which payments being after the passage of said act, his possession is deemed to commence only from the date of the last and not the first payment, and that the plea of the seven-year statute of limitations cannot be successfully made before the expiration of seven years from the date of the seventh payment." The court thereupon found in favor of the plaintiff and gave judgment accordingly.

P. D. McCulloch and Austin & Danaher, for appellant. H. F. Roleson, for appellee.

RIDDICK, J. (after stating the facts). This is an appeal by the defendant, Cottonwood Lumber Company, from a judgment rendered against it in favor of W. F. Hardin for the recovery of a tract of land in Lee county. The defense of the lumber company against the action brought by Hardin to recover this land was based on the act of 1899, in reference to tax payments on wild and unoccupied land, but the case was decided by the circuit judge before the recent decision of this court in *Towson v. Denson*, 86 S. W. 661, in which the meaning and effect of that statute were declared and explained. By reference to the statement of the facts in this case it will be seen that the learned circuit judge held the same opinion in reference to the meaning of the act as was held by the judges who dissented in *Towson v. Denson*. I concurred in the dissenting opinion delivered by Chief Justice Hill in that case, and, but for the decision of the court in that case, I should concur in the ruling of the circuit court in this case. But the judgment of this court in *Towson v. Denson* was rendered after argument and a careful consideration of the question presented. The question decided in that case was not one of principle, but related only to the proper interpretation of an act of the Legislature. As the meaning of the act was not clear, and as the decision was made after a full consideration of the arguments of learned counsel, I feel bound thereby, for the decision became a rule of property which should not now be overturned unless the statute, as interpreted by the court, is unconstitutional.

The only question then in this case is whether the statute of 1899, in reference to the effect of payment of taxes on wild and unoccupied land, is unconstitutional and void. After consideration of the question, we do not think that this contention can be sustained. Taking the act to mean what the court said it meant in *Towson v. Denson*, still we think the cases cited by counsel for appellant show that it is a valid law. The act declared that unimproved and uninclosed lands shall be deemed and held to be in the possession of the person who pays taxes thereon, and it contained the provision that "no person shall be entitled to invoke the benefit of the act unless he and those under whom he claims shall have paid such taxes for at least seven years in succession, and not less than three of such payments must be made subsequent to the passage of this act." Kirby's Dig. § 5057. Were it not for the clause that requires that at least three of the tax payments must have been made after the passage of the act, it would, under the construction given it by the court in *Towson v. Denson*, have been clearly unconstitutional so far as it was retrospective in character, for, if valid, it would then have divested the title of land from many of those who had neglected to pay taxes thereon and vested it in the persons who had paid these taxes

continuously for seven years or over under color of title. But when we consider the provision of the act which requires that at least three of the tax payments must have been made subsequent to the passage of the act, we cannot say that the act arbitrarily attempts to divest the title of land from owners who had not paid taxes thereon and vested it in those who had paid taxes thereon continuously for seven years, for the provision referred to gave owners of land who had not paid taxes at least two years in which to pay taxes and obviate the effect of the statute. This provision of the act brings it within the scope and reason of those decisions that hold that limitation laws and laws regulating the registration of deeds are not unconstitutional when a reasonable time is given within which the effect of such a statute, as it applies to rights of action already existing or to existing conveyances, may be avoided and rendered harmless in respect to vested rights. *Munn v. Illinois*, 94 U. S. 134, 24 L. Ed. 77; *Turner v. New York*, 168 U. S. 90, 18 Sup. Ct. 38, 42 L. Ed. 892; *Saranac Land & Timber Co. v. Roberts*, 177 U. S. 318, 20 Sup. Ct. 642, 44 L. Ed. 786.

As in our opinion the act of March 18, 1899, was a valid law, it follows from the decision of the court in *Towson v. Denson*, under the undisputed facts in the case, which show a continuous payment of taxes by defendant and those under whom he holds for over 30 years under color of title and claim of ownership to the land adverse to the claim of plaintiff, that the judgment should be for the defendant.

Reversed and remanded, with an order that judgment be rendered accordingly.

McCULLOCH, J., did not participate.

MACRAE et al. v. JOHNSON et al.

(Supreme Court of Arkansas. Feb. 24, 1906.)

Appeal from Lee Chancery Court; E. D. Robertson, Chancellor.

Action by W. V. Johnson and others against G. W. Macrae and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

N. W. Norton, for appellants. H. F. Role-son, for appellees.

RIDDICK, J. The facts in this case are similar to those in case of *Cottonwood Lumber Co. v. W. F. Hardin*, 92 S. W. 1118, and for the reasons stated in the opinion in that case the judgment is reversed, and cause remanded, with an order to enter judgment for defendants.

McCULLOCH, J., did not participate.

LITTLE ROCK & H. S. W. R. CO. v. McQUEENEY.

(Supreme Court of Arkansas. Feb. 17, 1906.)

1. RAILROADS—OPERATION—STATUTES—APPLICATION.

Acts 1891, p. 213, requiring all persons running trains on any railroad within the state to keep a constant lookout for persons and property on the track, etc., applies to the operation of cars and engines in a railroad yard.

2. SAME—UNLOADING CARS—KNOWLEDGE OF EMPLOYEES.

Between 4 and 5 o'clock in the afternoon of the day plaintiff was injured he caused the car he was unloading to be opened by defendant's night watchman and another employé. Plaintiff continued to unload until 25 minutes after 6, when he was injured by defendant running a freight car against his wagon without warning. The night watchman knew he was unloading the car when he was injured, and permitted him to do so; it being such night watchman's duty to close and seal cars when he found them open at a time when they should be closed, and to see that no one was molesting cars in the yard. *Held*, that such facts justified an instruction that if defendant's employé having charge of looking after the unloading of cars knew that plaintiff was unloading a car and was in defendant's yards for that purpose after business hours, and plaintiff did not know that he was violating a rule of the company in so doing, defendant owed him the duty not to injure him by the negligent acts of its employé.

3. TRIAL—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Where the court charged that if plaintiff's own negligence contributed to the injury he could not recover, another instruction that if plaintiff showed by a preponderance of the evidence that he was injured by reason of defendant's negligence, the burden was on defendant to show contributory negligence by a preponderance of the evidence, was not objectionable as withdrawing plaintiff's evidence of contributory negligence from the jury.

4. DAMAGES—PERSONAL INJURIES—AMOUNT RECOVERED.

In an action for injuries to a licensee in a railroad yard, who was unloading a freight car, evidence held to sustain a verdict awarding plaintiff \$4,000 damages.

Appeal from Circuit Court, Garland County; A. M. Duffie, Judge.

Action by James McQueeney, revived after his death in the name of Catherine McQueeney, his administratrix, against the Little Rock & Hot Springs Western Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Johnson, for appellant, Wood & Henderson, for appellee.

BATTLE, J. James McQueeney, in his lifetime, brought this action against the Little Rock & Hot Springs Western Railroad Company to recover damages suffered from personal injuries occasioned by the negligence of the defendant, alleging in his complaint that, on 3d day of September, 1902, at Hot Springs, in this state, while the plaintiff was engaged in unloading a freight car on defendant's railroad, the servants, agents and employes of the defendant wrongfully, negligently, maliciously, and willfully ran a

freight car against the wagon upon which he was standing with such force as to throw him to the ground and inflict upon him great personal injuries. Defendant answered, denying the material allegations in the complaint, and alleging that any injuries received by the plaintiff were due to his own contributory negligence.

The plaintiff recovered a verdict and judgment against the defendant for \$4,000, and it appealed.

The evidence in the case tended to prove the following facts:

The Waters-Pierce Oil Company owned a car load of freight which appellant placed on its team or wagon track to be unloaded. On the 3d day of September, 1902, in the forenoon, the agent of the oil company obtained the bill of lading for the goods in the car and in company with McQueeney, the teamster for said company, went to the car and opened it, and McQueeney commenced unloading by taking the freight therefrom and hauling it to the warehouse of the oil company. He continued the unloading and, at some time between 4 and 5 o'clock in the afternoon had hauled about 9 or 10 loads and there were yet in the car not quite two loads. Upon returning to the car between the hours named for another load, he found the car closed. Wright, alias Rice, an employé of appellant, had just closed it and was still in the yard. McQueeney informed him that he had not unloaded the car, and that he had made a mistake in closing it. McQueeney then, between 4 and 5 o'clock in the afternoon, with the assistance of A. J. Austin, the night watchman for appellant, in the presence of Earl Sanders, the agent of appellant in charge that day, and of Wright, opened the car, and proceeded to unload it. Upon leaving the car with another load he spoke to Austin, and told him there was still a part of a load in the car, and that he would return for it, and requested him not to close the car, which he agreed to. McQueeney carried the load he then had on his wagon to the warehouse of the oil company and at five minutes before 6 o'clock started back to the car for the remaining goods. He had a good team, and made a quick trip, and returned to the car about 6 o'clock, and after putting his wagon in position, began to unload. He made nine trips back and forth between his wagon and the car, and was standing on the back end of his wagon in the act of rolling a barrel of oil from the door of the car to his wagon, on his tenth trip, when a car upon the same track was moved up by employés of appellant without, according to the testimony of one witness, ringing the bell to the engine or giving any other warning. The moving of the car caused another car to strike McQueeney's wagon, turn it over, and throw him violently to the ground. He was 60 years old at the time of this accident, but was a strong, healthy man, and had "for the 14 years previous to

that time been in the continuous employment of the Waters-Pierce Oil Company, in hauling freight from the railroad and to customers. His work required of him heavy lifting, which he had done without difficulty." His injuries received from the fall were serious. "He was unable to work, being paralyzed in one leg and injured in his back and one arm and on one side of his head. For a time his paralysis affected his speech. He suffered great pain from the time of the accident up to the time of the trial, which was over a year, and was still suffering at the time of the trial. For a considerable time his suffering was severe. He was still partially paralyzed at the time of the trial, and was then so helpless that he could not dress himself without assistance. He had not been able to work from the time of the accident up to the trial and was still not able to do work. * * * At the time of the accident he had steady employment at the salary of \$50 per month and perquisites in the way of oil and fuel furnished him by the Waters-Pierce Oil Company worth \$10 per month, making his earnings equal to \$60 per month. His expectancy of life was 14.09 years."

When McQueeney returned to the car that he had been unloading, the last time before the accident, it was open and in the same position and condition it was when he left it at the time he told Austin he would return for the remnant of the freight. Austin had complied with his promise. This was in the apparent scope of his authority, which was to close and seal cars when he found them open, and to go through the yards, and see that no one was molesting them, to guard them and see that they were not broken into.

It was a rule of the defendant that no freight should be delivered or cars unloaded after 6 o'clock in the afternoon; but there is no evidence that McQueeney had notice of this rule.

The team track on which the car unloaded by McQueeney stood was straight and the fireman on the engine which caused the accident could easily have seen McQueeney's wagon, if he had looked in that direction, the direction in which the engine moved.

The court gave the following instructions to the jury, at the instance of plaintiff, over the objections of the defendant:

No. 1: "It is the duty of all persons running trains in this state upon any railroad to keep a constant lookout for persons and property upon the track of any and all railroads, and if any persons or property shall be killed or injured by the neglect of any employés of any railroad to keep such lookout the company owning and operating any such railroad shall be liable and responsible to the persons injured for all damages resulting from neglect to keep such lookout and the burden shall devolve upon such railroad to establish the fact that his duty has been performed. But you are further instructed

that the failure to keep a constant lookout would not render the railroad liable if the plaintiff himself was a trespasser in going upon said track or was guilty of any act of negligence contributing to the injury of which he complains."

No. 4: "If you find that the employes of defendant who had charge of looking after the unloading of cars on its tracks knew that plaintiff was engaged in unloading a car and that he was upon defendant's yards for that purpose after business hours, and you further believe from the evidence that the plaintiff did not know that he was violating any rule or custom of the company, then you will find that defendant owed him the duty not to injure him by any negligent act of its employes in moving cars on said yard."

No. 6: "You are instructed that if from the evidence that the plaintiff had spoken to the watchman of the defendant, that he was going to return for the last of his freight in a car, and that said watchman knew that plaintiff was hauling freight from said car and that said watchman had the right and it was his duty to close said car and that plaintiff did return and found said car at the same place and in the same condition as when he left the same, and you further find that the plaintiff believed as an ordinary prudent man that he had a right to unload his freight at the time, then he would not be a trespasser and if he was injured by negligence of any employe in charge of said train you will find for the plaintiff."

No. 9: "The burden is on the plaintiff to show, by a preponderance of the evidence, that the defendant was guilty of negligence, and that he was injured by such negligence, to entitle him to recover in this action; and if you find from the evidence, that the defendant was negligent, and that the plaintiff was injured thereby, then, in order to defeat his recovery on the ground that he was guilty of contributory negligence, the burden is on the defendant to show such contributory negligence by a preponderance of the evidence."

And the court modified the second and third instructions asked by the defendant so as to read as follows:

No. 2: "If you believe from the evidence that the plaintiff went late in the evening, after business hours, to the yards of the defendant, and after he had been told by the person whose duty it was to seal or open the cars, that he could not get into the car that day, then he would be a trespasser, and the railroad company owed him no duty until his presence there was discovered by the persons in charge of the train; and if you believe from the evidence that they had not seen him, and did not know of his presence near the car, until after the injury, your verdict must be for the defendant."

No. 3: "One who voluntarily goes into

the yards of a railroad company after it is getting dark, crossing one or two tracks to get there, and after he knows the car has been sealed up to prevent any more unloading that day, is a trespasser, and would be guilty of contributory negligence, and cannot recover for injuries received while there."

And gave the following at the instance of the defendant:

No. 5: "One who is injured by the mere negligence of another cannot recover, either at law or in equity, any compensation for the injury, if he, by his own ordinary negligence contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault the injury would not have happened to him; therefore, if you find from the evidence in this case that the plaintiff's own negligence or fault either caused or contributed to the injury he cannot recover."

No. 7: "If you believe from the evidence that the servants in charge of the train which caused the injury did what men of ordinary prudence and caution would have done, under the circumstances, then defendant was not guilty of negligence, and is not liable; but even if you should believe that defendant is guilty of negligence, still, if plaintiff by his own negligence or fault, contributed to the injury, or if his negligence or fault co-operated with the acts of the defendant and caused the injury, your verdict must be for the defendant."

The defendant objected to the instruction numbered 1, given at the request of the plaintiff, because it makes applicable to this case the act of the General Assembly (Act 1891, p. 213) entitled, "An act to better protect persons and property upon railroads in this state," approved April 8, 1891. It argues that this act does not require a lookout to be kept by persons running cars and engines in a railroad yard. To sustain this contention it will be necessary to hold that the tracks in the yards do not constitute a part of the railroad. But this is not true. Every track necessary to its operation is a part of the railroad. The act was obviously intended for the protection of persons and property upon railroad tracks, and all tracks and cars moved thereon come within its provisions. Persons and property upon any railroad track need and are entitled to its protection. The act makes no exceptions, and applies to all cases which come within the mischief intended to be remedied and within its object.

The act was applicable to the case before us. In the yard in which the accident complained of happened were team or wagon tracks upon which freight cars were placed to be unloaded. The car which the plaintiff was unloading at the time he was hurt was upon one of these tracks. He was unquestionably in need of protection, and was

entitled to compensation for the injury he received, unless he contributed to it by his own negligence.

The objection urged by the defendant against the instruction numbered 4, given at the request of plaintiff, is, that there was no evidence to show "that any of defendant's employes who had charge of looking after the unloading of cars on its tracks, knew that plaintiff was engaged in unloading a car, and that he was in defendant's yards for that purpose after business hours." Were there such employes who had such knowledge? Between 4 and 5 o'clock in the afternoon of the day on which the accident occurred plaintiff, in the presence of Sanders, who was then and there in charge, and Wright, who had closed the car, with the assistance of Austin, the night watchman, opened the car and proceeded to unload it. He continued to unload until, according to some of the evidence, about 25 minutes after 6 o'clock in the afternoon, and this was at sunset. No employe could reasonably suppose that he would quit unloading when he hauled away the last load when so little was left in the car at that time to be taken away. Austin, the night watchman, knew he was unloading at the time he was injured, and permitted him to do so. But it is said that he had no authority to look after the unloading of cars. The evidence showed that it was a part of his duty to close and seal cars when he found them open at a time when they should be closed, and at such times to go through the yards, and see that no one was molesting them, to guard them and see that they were not broken into. This clearly implied the authority to look after the unloading of cars when he was on duty. He knew that the plaintiff was unloading the car, and through him the defendant had notice, and it was his duty to the plaintiff and defendant to warn him of his danger or give notice of his presence upon the track to those in charge of the train in the yard; and to give the notice in time to avoid injury. There was no evidence that plaintiff knew or ought to have known of any rule of the defendant prohibiting him from unloading the car after 6 o'clock p. m.

What we have said in reference to instruction numbered 4 applies to instruction numbered 6.

Defendant objects to the instruction numbered 9, because it withdraws from the consideration of the jury the evidence of contributory negligence adduced by the plaintiff. But this defect was covered by other instructions. This instruction does not tell the jury what they should do in the event they found from the evidence adduced by the plaintiff that he was guilty of contributory negligence, but the court in other instructions told them that if they found from

the evidence that the plaintiff's own negligence or fault either "caused or contributed to the injury he could not recover." "From the evidence" necessarily means all the evidence in the case, which includes the evidence adduced by the plaintiff.

We think that the evidence is sufficient to sustain the verdict in this court.

Judgment affirmed.

ADAMS v. STATE

(Supreme Court of Arkansas. Feb. 17, 1906.)

CRIMINAL LAW—INCEST—EVIDENCE—OTHER ACTS—STATUTE OF LIMITATIONS.

In a prosecution for incest, evidence of other acts of incest with prosecutrix, the indictment for which is barred by the statute of limitations, is admissible for the purpose of showing the probability of the commission of the offense charged, and sustains the evidence of such offense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 833, 834.]

Appeal from Circuit Court, Ouachita County; Charles W. Smith, Judge.

E. P. Adams was convicted of incest, and appeals. Affirmed.

H. P. Smead, for appellant. Robt. L. Rogers, Atty. Gen., for the State.

BATTLE, J. At the October, 1904, term of the Ouachita circuit court the grand jury returned into court an indictment against F. P. Adams, charging him with incest, committed by having illicit intercourse with his niece, she being an unmarried woman and he a married man; and at the October, 1905, term of that court he was tried upon a plea of not guilty, found guilty as charged in the indictment, and his punishment was assessed at three years imprisonment in the penitentiary. He appealed to this court.

In the trial of appellant for the offense charged against him evidence was adduced by the state, over the objections of the appellant, to prove illicit relations between him and the niece mentioned in the indictment, which occurred more than three years before the finding of the indictment. The evidence tended to prove that these illicit relations, constituting incest, commenced six or seven years before the finding of the indictment, and continued to the time when the act for which he was indicted was committed. This evidence, although it discloses other acts of incest with the same niece, the indictment for which is barred by the statute of limitations, is admissible for the purpose of showing the probability of the commission of the offense charged, and sustains the evidence of such offense. *Commonwealth v. Bell*, 166 Pa. 405, 81 Atl. 123.

The evidence was sufficient to sustain the verdict.

Judgment affirmed.

BONNER v. BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DIST.

(Supreme Court of Arkansas. Jan. 27, 1906.
Rehearing Denied Feb. 10, 1906.)

1. TAXATION — SALES OF LAND — CONFORMITY TO ASSESSMENT.

Under Kirby's Dig. §§ 6976, 7024, 7083, 7085, providing that real property belonging to the same owner shall be assessed by the largest subdivision of which the same is capable of assessment, that, when the land is owned by one person, the description of lands both on the taxbooks and delinquent lists shall be in tracts of not less than 160 acres, and that lands shall be described on the delinquent list as they are described on the taxbooks, the assessment of lands cannot be changed by the collector after the taxbooks have been delivered to the proper officer, and, where a tract of land is assessed as a whole, it must be sold as a whole, and a sale of one-half of the tract is void.

2. SAME—SUBJECTS OF TAXATION—LANDS ACQUIRED BY LEVEE DISTRICT.

Lands purchased by a levee district at a sale for unpaid levee taxes continue subject to taxation after their acquisition by the district.

3. COSTS — PARTIES ENTITLED—RECOVERY OF ALTERNATIVE RELIEF.

Where plaintiff sued to quiet title to lands purchased by him at a tax sale, and prayed in the alternative for a refundment of the taxes paid by him, with interest, and recovered the latter, he was entitled to costs in the chancery court and also on his appeal to the Supreme Court from the judgment granting the alternative relief and taxing costs against him.

Appeal from St. Francis Chancery Court; Edward D. Robertson, Chancellor.

Suit by E. Bonner against board of directors of the St. Francis Levee District. From the decree rendered, plaintiff appeals. Modified.

R. J. Williams, for appellant. H. F. Roleson and N. W. Norton, for appellee.

BATTLE, J. This suit was brought by E. Bonner against the board of directors of the St. Francis Levee District to quiet title to certain lands. He alleged in this complaint that the defendant purchased at a sale on the 24th day of January, 1898, for unpaid levee taxes, and by virtue of its purchase acquired a deed thereto, and on the second Monday in June, 1898, he purchased the same lands at a sale for state and county taxes. He asked "that his title be declared superior to the defendant's claim of title, and that it be quieted, and the deed to defendant be canceled, or, if the courts should find that defendant had the best title, that defendant be required to refund to plaintiff all sums of money paid out on account of taxes both to the state of Arkansas and to the board of directors of the St. Francis Levee District, together with interest from date of such payments."

After hearing the evidence the court found the sale to plaintiff was void, and that he had paid the taxes on the lands, which, to-

gether with interest, amounted to \$101.50, and declared a lien in his favor for that amount, but taxed plaintiff with all the costs.

The taxbooks, as originally made and delivered to the collector of St. Francis county, showed that the S. $\frac{1}{2}$ of sections 34 and 35 in township 6 N. and in range 5 E. had been listed in the name of A. H. Chatfield, as entire tracts, and that taxes were extended against each tract of 320 acres; that the total taxes on each tract were \$7.20, the tax rate being $2\frac{1}{4}$ mills on the dollar. Some one paid the taxes on the S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of said sections 34 and 35, and the taxes on the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of each of said sections was not paid before the sale of the same therefor. The N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of each of said sections were returned delinquent for taxes of 1897, and were sold at the tax sale on the second Monday in June, 1898, and purchased by the plaintiff. These are the lands in controversy.

The statutes of this state provide that real property, belonging to the same owner, shall be assessed by section, or the largest subdivision of which the same is capable; and that "in all cases, when practicable, and the land is owned by one person, or one or more persons jointly, description of lands, both on the taxbooks and delinquent lists, shall be in tracts not less than one hundred and sixty acres"; and that lands shall be described on the delinquent lists as they are described on the taxbooks; and, impliedly, that they shall be sold at tax sale in the same manner. Kirby's Dig. §§ 6976, 7024, 7083, 7085. The effect of these statutes is to prohibit the collector or other person changing the assessment of lands after the taxbooks have been delivered to the proper officer. The assessor is authorized only to make the assessment.

The south halves of sections 34 and 35 were each assessed as a whole. The value of no particular part was fixed, and from the assessment it could not be ascertained. One part may be worth more than another. For the purposes of taxation they could not be subdivided, except by reassessment. The offer of the north half of the south half of the sections, as separate tracts, for sale, was without authority, and the sale was void.

The lands in controversy continued subject to taxation after they were acquired by the St. Francis Levee District. School District of Ft. Smith v. Howe, 62 Ark. 481, 37 S. W. 717; Brodle v. Fitzgerald, 57 Ark. 445, 22 S. W. 29.

The decree of the chancery court is approved, except as to costs. Plaintiff having asked for a decree to quiet title, or for taxes and interest, and recovered the latter, is entitled to costs of the chancery and supreme courts; and it is ordered that he recover the same.

METZ v. WRIGHT et al.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

1. WILLS—CONSTRUCTION—OPERATIVE WORDS.

A devise exists by implication when the testator uses words which manifest an intention to give land by so strong a probability that the contrary intent cannot be supposed to have existed in his mind when he made the will, although the word "devise" is not used in the will.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 241.]

2. SAME—ASCERTAINMENT OF INTENT.

In construing a will, effect is to be given to the intention of testator as disclosed by the instrument, and technical rules of construction, if they stand in the way of testator's manifest intent, may be disregarded.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 955.]

3. SAME—DEVISES—WHAT CONSTITUTES.

A clause of a will reading "my son * * * I have given * * * 120 acres of land priced at \$600.00," and then containing a description of the land, constitutes a devise of the land to the son.

4. GUARDIAN AND WARD—SALES OF LAND—DESCRIPTION OF PREMISES—CORRECTION OF ERRORS.

Where a petition and order for the sale of land by a curator correctly described the land, a wrong description made in the certificate of appraisal and copied into the order approving the sale and the curator's deed will be regarded as clerical errors which may be corrected by the court and the parties, although such correction is not made until some years after the sale.

5. VENDOR AND PURCHASER—TITLE OF VENDOR.

Under Rev. St. 1899, § 3054, making an entry under the land laws of the United States sufficient to support an action of ejectment, the absence of a patent to land does not vitiate the title, when the land has been duly entered upon and the entryman has complied with all the essentials necessary to entitle him to a patent.

6. MORTGAGES—SATISFACTION—PRESUMPTIONS.

It will be presumed, in the absence of evidence to the contrary and after a considerable lapse of time, that marginal entries of satisfactions of trust deeds and releases of mortgages were made in compliance with the law.

7. VENDOR AND PURCHASER—TIME OF PERFORMANCE—WAIVER OF CONTRACT PROVISIONS.

Where the vendee in a contract for the sale of land called for additional evidences of title after the expiration of the time limited in the contract for performance, and did not formally terminate the contract until two months after the contract period had expired, he thereby waived the necessity of performance by the vendor within the time limited by the contract, and was bound to accept a good title when tendered prior to the date of the formal termination of the contract by him.

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

Action by A. H. Metz against W. L. Wright and others. From the judgment rendered, both parties appeal. Reversed.

Fry & Rodgers, for plaintiff. P. H. Cullen, for defendants.

BLAND, P. J. Plaintiff, Metz, and defendant Wright entered into the following articles of agreement:

"Articles of agreement made this seventeenth day of October, 1903, by and between W. L. Wright, agent, of Vandalia, Audrain county, state of Missouri, party of the first part and A. H. Metz, of Forrest, Livingston county, state of Illinois, party of the second part, Witnesseth: That the said party of the first part, in consideration of the promises and agreements of the said party of the second part hereinafter contained, hereby agrees to convey to said party of second part by general warranty deed with dower of his wife relinquished, properly acknowledged, the following described real estate, situated in the county of Ralls, and state of Missouri, to wit: The east half of S. $\frac{1}{2}$ N. W. and the east $\frac{1}{2}$ of S. W. qr. of section 15, township 53—5. Said conveyance to be subjected to right of way of all public roads as they are now located, subject also to the taxes for the year of 1904, which the said party of the second part agrees to pay, said deed to be executed contemporaneously with this agreement and placed in escrow with Missouri Land Co., or F. & M. Bank of Vandalia, Mo. The said party of the second part, in consideration of said conveyance, has this day paid to said party of the first part the sum of ——— dollars (\$———), the receipt of which is hereby acknowledged, and agrees to pay as additional consideration the further sum of five hundred dollars (\$500), on the first day of March, 1904, and his stock of groceries at Forrest, Ill., said stock to be invoiced at market value and five per cent. added for carriage, fixtures at their market value and the balance of purchase price of \$5,400, by trust deed on said land at 5 per cent. Said party of the first part agrees to furnish to the party of the second part an abstract of the title of said real estate on or before March 1, 1904, showing good and merchantable title, certified to by competent abstractors and shall surrender and give possession on the first day of March, 1904, possession to be delivered by said first party to second party in as good order and repair as same now are, usual and ordinary wear and tear, and unavoidable accident by fire or otherwise or providential destruction only excepted. Said first party to keep buildings on said premises insured until possession is turned over to said second party. It is mutually agreed by and between the parties hereto that time shall be an essential part of this contract, and that all the stipulation and covenants herein contained shall extend to and be obligatory upon the heirs, executors administrators and assigns of the respective parties. Witness the hands and seals of the said parties on the day and year first above written. Purchase price \$5,400. Cash March 1st, \$500. Grocery stock to be invoiced soon as title to land is established. Balance trust deed on said land to bear interest from March 1, 1904.

"W. L. Wright. [Seal]

"A. H. Metz. [Seal]

"First party to pay for insurance at \$2.00 per month for unexpired term and to allow interest at rate of 5 per cent. per annum for amount over \$500 the grocery stock invoices."

On November 9, 1903, plaintiff and defendant made the following supplemental agreement:

"It is hereby agreed that if first party cannot get a correct abstract or deed from Dunbar, guardian to S. E. of N. W. qr. 15-58-5, that first party shall have time to take the matter through the Missouri probate or circuit court by giving bond for the amount of the purchase price of said land, limited to April 20, 1904, for completion.

"W. L. Wright,
"A. H. Metz."

In compliance with the supplemental agreement, Wright, as principal, and the other defendants, as sureties, executed and delivered to plaintiff the following bond:

"November 9, 1903.

"Bond in Trust. Know all men by these presents, that we, W. L. Wright and C. B. Ellis, of Vandalla, Mo., as principal, and F. B. Detienne, as security, acknowledge ourselves indebted to Mr. A. H. Metz, of Forrest, Ill., in the sum of three thousand dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators. The condition of the above obligation, that whereas the said W. L. Wright and C. B. Ellis, of Vandalla, Mo., shall deliver to the said A. H. Metz, of Forrest, Ill., warranty deed and abstract, showing good title in the party who deeds the land of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the east half of the S. W. $\frac{1}{4}$, all in section fifteen (15), township fifty-three (53), range five (5) west, Ralls county, Missouri, containing one hundred and twenty acres (120) more or less according to U. S. survey; and whereas, in failure to comply with the above condition, we, W. L. Wright and C. B. Ellis, of Vandalla, Mo., shall turn over to said A. H. Metz, of Forrest, Ill., the amount equivalent to their stock of merchandise as will be invoiced on November 9, 1903. In case of failure of A. H. Metz to comply with contract made and entered into by and between W. L. Wright, party of the first part, and A. H. Metz, party of the second part, on Oct. —, 1903, the above obligation will be null and void. Time for completion limited to April 20, 1904.

W. L. Wright,
"C. B. Ellis,
"F. B. Detienne."

On November 11, 1903, an inventory was made of plaintiff's stock of goods in Illinois, as provided for in the contract, and the value agreed upon, as shown by the following indorsement on the back of the original contract:

"Forest, Hill, Ill., Nov. 11, 1903.

"Inventory of grocery stock, \$1,020. Carriage 5 per cent. on grocery stock, \$51. Fixtures, \$246. Unexpired insurance, \$14. In-

terest on amount over \$500, \$11. Total amount credited on with contract, \$1,342.

"W. L. Wright,
"A. H. Metz."

The goods were delivered to Wright and he disposed of them. Wright was unable to furnish an abstract of title to the lands, satisfactory to the plaintiff, and the suit is on the bond to recover the agreed value of the goods. The answer alleged a compliance with the terms of the contract, and also stated that extensions of the time in which the contract might be performed, had been made from time to time, and stated a readiness on the part of Wright to remove any real or apparent defects in the title to the lands. The abstract as first submitted was certified on October 20, 1903. A supplemental abstract from Pike county, beginning with the last will of Robert Rose, of said county, certified by the abstracter and the judge of the probate court, was furnished Herbert Powell, Esq., plaintiff's attorney, who made certain objections, and the abstract was again extended on March 25, 1904. On April 16, 1904, plaintiff submitted the abstract and extension to Messrs. Fry and Rodgers, of Mexico, Mo., who gave an opinion in which certain additional evidence of title was called for, and special objections to proceedings had in the Ralls county probate court, resulting in a sale of the lands by a curator, were made. A further extension of the abstract was made and delivered to plaintiff on May 18, 1904, and on May 28th, Wright wrote Powell as follows:

"Vandalla, Mo., May 28th. Friend Powell: Your letter to hand and will say that I am sorry that the abstract does not meet with your approval. We have done several things that we did not think necessary and further desire to make everything as agreeable as possible to all concerned, and if you will name the parties that you deem necessary defendants to perfect this title we will bring suit in the circuit court to perfect same and proceed at once. Thanking you for past favors, I am very truly, W. L. Wright."

On May 31st, Powell, as attorney for plaintiff, wrote Wright that he (Powell) understood that Metz would not accept the title. On June 20th, Metz wrote Wright as follows:

"Forrest, Ill., June 20, 1904. W. L. Wright, Vandalla, Mo.: You will please take notice that I elect to terminate the contract of date October 17, 1903, and the several extensions thereof existing heretofore between us, for failure on your part to comply with its terms, and I further demand return to me at once of all consideration advanced by me under the terms of said contract and likewise under and in accordance with the bond of date Nov. 9, 1903, executed by you, C. B. Ellis and F. B. Detienne. Yours respectfully, A. H. Metz.

"Fairbury, Ill., June 20, 1904. W. L. Wright, Vandalla, Mo.—Dear Sir: Your letter of June 18th is received and contents

noted. You have nothing on which to base your action taken, since you were informed that the title was not approved or acceptable. To save all further question I inclose formal termination and demand. I trust you will see your way clear to comply with it, as you had given me to understand you would do, and so save trouble and expense for both of us. Yours, etc., A. H. Metz."

Before this suit was commenced, Wright offered to bring suit in the Ralls circuit court to quiet the title, or to take any other proper proceedings to remove the objections raised by plaintiff to the abstract. The abstract shows that the platbook on file in Ralls county shows that the lands were entered by Robert Rose on August 22, 1853. Robert Rose's last will contains the following clause: "My son, Asbury W. Rose, I have given one colt at one hundred dollars, bridle and saddle at twenty dollars, and one hundred and twenty acres of land, priced at six hundred dollars, known by the following numbers: West half of northwest quarter and southeast fourth of northwest quarter of section 15, town, 53, range 5 west. I wish him to have fifty-two dollars in property to make him equal in property to the above named heirs."

1. If Asbury W. Rose acquired title under the will, his title passed by mesne conveyance to Thomas Dunbar, who died August 10, 1897, intestate, leaving a widow, Ella J., and a minor child, Mary E. Dunbar. Ella J. Dunbar, as curator of Mary E. Dunbar, by virtue of proceedings had in the probate court of Ralls county, on February 13, 1900, made a deed conveying the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 15, township 53, range 5, to Frazier Rose. Plaintiff objected to the abstract on account of the misdescription of 40 acres of the lands in the curator's deed, and on account of the insufficiency of the clause quoted from Robert Rose's will to devise the lands to Asbury Rose. The word "devise" is the proper word to use in a testamentary disposition of real estate. This word is not found in the will, but a devise exists, by implication, when the testator uses words manifesting an intention to give, by so strong a probability that the contrary intent cannot be supposed to have existed in his mind when he made the will. *Hanneman v. Richter*, 50 Atl., loc. cit. 906, 62 N. J. Eq. 865. The rule is, in construing a will, that effect is to be given to the intention of the testator as disclosed by said instrument. *Crecelius v. Horst*, 78 Mo. 566; *Small v. Field*, 102 Mo. 104, 14 S. W. 815; *Briant v. Garrison*, 150 Mo. 655, 52 S. W. 361; *Zimmerman v. Hafer* (Md.) 32 Atl. 316. And technical rules of construction, when they stand in the way of the manifest intent of the testator, may be disregarded. *Suydam v. Thayer*, 94 Mo. 49, 6 S. W. 502. In the disposition made of the lands, the testator used the past tense of the word "give" instead of the present, indicating that he had

theretofore conveyed the lands to his son Asbury, when, in truth and in fact, he had not done so; but nevertheless we think his intention was that his son Asbury should have the lands, paying therefor the sum of \$600, and conclude that the clause of the will in question should be construed as devising the lands to Asbury W. Rose. But if there should be any doubt about the construction of this clause of the will, it was adjudicated to have the effect to devise the lands to Asbury Rose, in a decree of the probate court of Pike county, rendered at the April term, 1865, thereof, in a partition suit to which all the heirs at law of Robert Rose were parties, and we conclude that the objection to the abstract on account of the want of title to the lands in Asbury W. Rose, as devisee of Robert Rose, is without merit.

2. Ella J. Dunbar administered on her husband's estate. In her inventory of the estate the lands are correctly described as the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, section 15, township 53, range 5 W., incumbered by a deed of trust executed by Thomas W. Dunbar, her deceased husband, to D. D. Rose, amounting to \$1,400. After the administration was closed she was appointed curator of her minor child, and as such petitioned the probate court for an order to sell the interest of her ward in the lands, correctly describing the same in her petition. The order for the sale also correctly described the lands, but the appraisers appointed by the probate court to appraise the lands, misdescribed the same in their certificate of appraisal, and this error was carried forward in the curator's deed and in the order of the probate court approving the sale. These proceedings were had in 1899. After the discovery of the misdescription of the lands in the curator's deed, etc., Wright, through his counsel, filed a petition in the probate court of Ralls county, praying the court to correct the error on its record approving the sale, and that the appraisers be allowed to correct the error in their certificate of appraisal, and that the curator be ordered to make a correct deed. The petition was heard and, on February 11, 1903, the court made the following entry upon its records:

"In the Matter of the Estate of Mary E. Dunbar, a Minor. Ella J. Dunbar, Curator. Now, on this eleventh day of February, 1903, comes William L. Wright, agent, of Frazier Rose, by his attorney, J. O. Barrow, and presents to the court his petition, praying the court for an order requiring L. Ragland, J. T. Riney, and W. B. Ragland to appear in court and file their corrected certificate of appraisal of certain real estate in said petition described and belonging to said Mary E. Dunbar, minor, and for a further order requiring the said Ella J. Dunbar, curator aforesaid, to execute and deliver to the said Frazier Rose her corrected curator's deed conveying to him, the said Frazier Rose, all

of the interest of the said Mary E. Dunbar, minor aforesaid, to said real estate, and in said petition described as follows, to wit: The southeast fourth of the northwest quarter and the east half of the southwest quarter, all in section fifteen (15), township fifty-three (53), range five (5) west, in Ralls county, Missouri, and for a further order of this court correcting its record approving the sale of said real estate to conform with the facts in the premises, and as in said petition set out, and said petition is ordered filed, and the matters and things relating thereto, coming on to be heard, and the court hearing the evidence in relation thereto and duly considering of the same finds that at its November term, to wit, on December 13, 1899, that said Ella J. Dunbar, the curator aforesaid, filed with the court her curator's petition, praying the court to make an order empowering her as such curator to sell at private sale all the interest of her said ward, the said Mary E. Dunbar, in and to certain real estate in said petition described, and that in pursuance with the prayer of said petition, this court did, at its November term, to wit, on December 13, 1899, make an order of record authorizing and empowering her as such curator to sell, at private sale the land described in said petition as follows, to wit: The southeast fourth of the northwest quarter and the east half of the southwest quarter, all in section fifteen (15), township fifty-three (53), range five (5) west, in Ralls county, Missouri, and the court further finds that the said L. Ragland, J. T. Riney, and W. B. Ragland, three disinterested householders of Ralls county, Missouri, were appointed as appraisers by the said curator, and being duly qualified as appraisers and did view and appraise said land at the sum of \$2,100, and the court further finds that the said appraisers returned into this court their certificate of appraisement by which it is shown that they appraised the east one-half of the southwest quarter and the southeast of the northeast quarter of section fifteen (15), township fifty-three (53), range five (5) west, Ralls county, Missouri, and that said description was an error, wherefore it is considered, ordered, and adjudged that the said L. Ragland, J. T. Riney, and W. B. Ragland, appraisers aforesaid, appear in court and file herein their corrected certificate of appraisement of said land, to wit: The southeast fourth of the northwest quarter and the east half of the southwest quarter, all in section fifteen (15), township fifty-three (53), range five (5) west, in Ralls county, Missouri, and the court further finds that the said curator did, at the February term, 1900, to wit, on the thirteenth day of February, 1900, present to this court her report of the sale of the real estate belonging to the estate of the said Mary E. Dunbar, minor aforesaid, and in said report described as follows, to wit: The southeast fourth of the northwest quarter and the east

half of the southwest quarter, all in section fifteen (15), township fifty-three (53), range five (5) west, in Ralls county, Missouri, and the court further finds that in its order of approval of said report of sale described therein said land as follows, to wit: The east one-half of the southwest quarter and the southeast one-fourth of the south— one-fourth, in section fifteen (15), township fifty-three (53), range five (5) west, in Ralls county, Missouri, and that said description was incorrect, and that the land actually sold and the sale which was intended to be approved by said order was the following land, to wit: The southeast one-fourth of the northwest one-fourth and the east one-half of the southwest one-fourth, all in section fifteen (15), township fifty-three (53), range five (5) west, in Ralls county, Missouri, wherefore the court doth now correct its order, approving the aforesaid report of the sale of the real estate belonging to the said Mary E. Dunbar, minor aforesaid, and in said report described as follows, to wit: The southeast one-fourth of the northwest one-fourth and the east one-half of the southwest one-fourth, all in section fifteen (15), township fifty-three (53), range five (5) west, in Ralls county, Missouri, to conform with the facts and finding herein set out and as in said petition prayed for, and it is further ordered that the said Ella J. Dunbar, curator aforesaid, do now execute and deliver to the said Frazier Rose, her corrected curator's deed, conveying to him all the right, title and interest of said Mary E. Dunbar, minor aforesaid, in and to the real estate in the petition, the order of sale, and the report of sale herein referred to and described as follows, to wit: The southeast one-fourth of the northwest one-fourth and the east one-half of the southwest one-fourth, all in section fifteen (15), township fifty-three (53), range five (5) west, in Ralls county, Missouri."

The appraisers made the following certificate of appraisement, on November 4, 1903: "Appraisement. Appraisement of all the real estate belonging to the estate of Thomas M. Dunbar, Mary E. Dunbar, minor, under the age of three years, of Ralls county, Missouri, produced before the undersigned, L. T. Ragland, J. T. Riney, and W. B. Ragland, appraisers, duly qualified, this twenty-sixth day of December, A. D. 1899, by Ella J. Dunbar, guardian of said minor.

"Description of Property—Appraised Value. The southeast fourth of the northeast quarter and the east half of the southwest quarter, all in section fifteen, of township fifty-three, in range five, west, containing 120 acres, more or less, according to U. S. Survey in Ralls county, Mo.,—\$2700.00.

"Total Amount of Appraisement—\$2,700. We, the undersigned appraisers, certify the above to be a full and fair appraisement of the real estate of the estate of Thomas M. Dunbar, Mary E. Dunbar, minor, as pro-

duced before us by Ella J. Dunbar, guardian of said minor.

"Given under our hands this fourth day of November, A. D., 1903.

"J. T. Riney,

"W. B. Ragland,

"L. T. Ragland,

"Appraisers."

On March 25, 1904, Ella J. Dunbar, as curator of the estate of Mary E. Dunbar, made a deed conveying the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 15, township 53, range 5 W., to Frazier Rose, in consideration of \$457.37. Plaintiff was advised by his counsel that the probate court was without jurisdiction to make the order correcting the mistake in the description of the lands, and that the deed of March 25, 1904, made by Ella J. Dunbar as curator, was ineffectual to convey title to Rose. The contention of defendants is that the misdescription of the lands above noted are mere clerical errors and the court had the right at any time to correct the errors. In *Agan v. Shannon*, 108 Mo. 661, 15 S. W. 757, it is said: "It will be presumed that the administrator committed a clerical error in inserting a wrong description of land in his report of sale and deed, where the description differs from that contained in the order of sale." In *Loring v. Groomer*, 110 Mo. 682, 19 S. W. 950, it was held: "An interlocutory judgment in partition is the commissioners' authority to act, and it will be presumed they acted in accordance with it, and that any variance in the description of the land between it and the final decree is a clerical error." The order of the probate court for the sale of the land was equivalent to a judgment. It furnished the appraisers a correct description of the lands, and the wrong description made in their certificate of appraisal must be presumed to be a clerical error. This error was copied into the court's order approving the sale, and in the curator's deed. These errors were all clerical, and it was clearly within the power of the court and the parties to make the corrections they did make. *Ross v. Ross*, 83 Mo., loc. cit. 102; *Weeke v. Senden*, 54 Mo. 129; *Allen v. Sales*, 56 Mo. 28; *Turner v. Christy*, 50 Mo. loc. cit. 146. We conclude that the objection to the Dunbar title is without merit.

3. In an early stage of the correspondence between the attorneys of Metz and Wright in regard to the abstract, Metz's attorney called attention to the fact that it failed to show the issuance and recording of the patent, and suggested that a patent or copy be procured and recorded. No attention was paid to this suggestion, and the objection, if it was an objection, was not again alluded to in the subsequent correspondence. By section 3054, Rev. St. 1899, an entry under the land laws of the United States is sufficient to maintain an action of ejectment. In *Wirth*

v. Branson, 98 U. S., loc. cit. 121, 25 L. Ed. 86, the court, in respect to entries of the public lands, said: "The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside." The abstract shows the recording and satisfaction of a number of deeds of trust on the lands. Some objections were made in respect to the marginal entries of the satisfaction of some of these deeds, and also to deeds of release of some of these mortgages. The presumption is that they were made in compliance with the law, and, nothing to the contrary appearing, considering the length of time since these satisfactions have been entered of record and remained undisturbed, we think the objections are frivolous.

4. Plaintiff is entitled to a merchantable title. Did Wright offer him a deed conveying such a title? *Waterman on Specific Performance*, § 412, says: "Every purchaser of land has a right to demand a title which shall protect him from anxiety, lest annoying, if not successful, suits be brought against him, and probably take from him, or his representatives, land upon which money was invested. He should have a title which would enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value." This section is approvingly quoted in *Mastin v. Grimes*, 88 Mo., loc. cit., 490, and in *Mitchner v. Holmes*, 117 Mo., loc. cit. 205, 22 S. W. 1070. It cannot be seen from the abstract that any one has a shadow of a right to disturb the peace of Metz in the possession of the lands, should he carry out his contract and accept the conveyance tendered him by Meyers, and there is no flaw in the title, that we can see, that will in the least disturb the market value of the land.

A good deal was said on the oral argument to the effect that time was of the essence of the contract, and that the defects, or apparent defects, in the title, in respect to the satisfaction of unsatisfied mortgages and the identification of parties to certain conveyances, were not removed until after the expiration of the time limited by the supplemental contract for the completion of the abstract, April 20, 1904. If time was of the essence of the contract, and we think it was, the evidence is conclusive that Metz waived performance within the time limited by calling on Wright for additional proofs,

etc., after April 20, 1904. His letter of June 20, 1904, shows that he did not consider the contract at an end until he gave Wright formal notice terminating it on that day. The abstracts and proof of identity of persons, etc., were all made and furnished plaintiff or his attorney prior to June 20, 1904. A good and sufficient deed containing the usual covenants of warranty was also tendered him prior to that date, and we think he was obliged, under the terms of his agreement, to accept the deed and complete the contract.

Wherefore, the judgment is reversed. All concur.

McKNIGHT-KEATON GROCERY CO. v. HUDSON et al.

(St. Louis Court of Appeals, Missouri, Feb. 13, 1906.)

1. APPEAL—INSTRUCTIONS—OBJECTIONS AND EXCEPTIONS—RECORD—BILL OF EXCEPTIONS.

Objections and exceptions to the giving or refusing of instructions are no part of the record proper, but can only be preserved by a bill of exceptions.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2376.]

2. APPEAL—PREJUDICIAL ERROR—INSTRUCTIONS—SINGLING OUT PARTICULAR FACTS IN EVIDENCE.

Where the good faith of the purchaser of goods in making the purchase was in issue, an instruction singling out a particular fact in evidence and charging that it was an act of good faith on the purchaser's part, and, if found to be a fact by the jury, should be so considered by them in arriving at their verdict, was prejudicial error.

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by the McKnight-Keaton Grocery Company against Lee Hudson and another, with S. J. Hudson as interpleader. Judgment for interpleader, and plaintiff appeals. Reversed.

Brewer & Collins, for appellant. Duncan, Bragg & Jeffers, for respondent.

BLAND, P. J. The plaintiff, on August 28, 1903, brought suit by attachment against Lee Hudson and Emery Carte, in the Pemiscot circuit court, on an account for goods sold and delivered to them while they were doing a mercantile business in said county, under the firm name of Hudson & Carte. The writ of attachment, issued in the case, was levied upon a stock of merchandise found in the possession of S. J. Hudson, who, on October 19, 1903, filed an interplea, claiming the attached property as his own, to which plaintiff filed a general denial. At the March term, 1904, of the Pemiscot circuit court, the interplea was tried by a jury, resulting in verdict and judgment for the interpleader. The evidence for the interpleader tended to show that he purchased the attached goods of Hudson & Carte, paying value therefor, and assumed the pay-

ment of two small bills, which the firm owed for goods, believing, as he was informed by Hudson & Carte, that the bills assumed by him were the only debts owing by the firm on the stock of goods. Plaintiff's evidence tends to show that the interpleader's purchase of the goods was made without taking any invoice; that the trade was made hurriedly, and Hudson and Carte left the county immediately after turning the goods over to the interpleader. Plaintiff also offered evidence of admissions made by the interpleader, tending to show that his purchase of the stock of merchandise was not made in good faith.

The only error assigned by the plaintiff is the giving of the following instruction: "The court instructs the jury that if you find and believe from the evidence that if the said interpleader made inquiries of Hudson & Carte as to their indebtedness at the time of the purchase of said stock of goods and thereupon was informed by said Hudson & Carte that their indebtedness was comparatively small and that he sought to assume and did assume all the indebtedness that was made known to him, then in that case said act was an act of good faith on the part of the interpleader, and should be considered as such by you in arriving at your verdict." The bill of exceptions shows the plaintiff objected and excepted to the giving of the instruction, as well as to all other instructions for the interpleader at the time they were given. On suggestion of the interpleader, the clerk of the circuit court was ordered by us to send up an amended transcript. In lieu of the amended transcript, the following stipulation (omitting caption) has been filed in the case: "In this cause it is agreed by and between Brewer & Collins, attorneys for appellant, and Duncan & Bragg, attorneys for respondent, that the records now on file in this court in the above-entitled cause contains a true copy of the bill of exceptions now on file in the office of the clerk of the circuit court of Pemiscot county, Mo., but that neither the minutes of the clerk, the minutes of the court nor the records of the court, other than said bill of exceptions, show that any objections or exceptions were made and saved to the giving of any of the instructions of the interpleader (respondent). It is further agreed that this agreement is to be used by this court instead of and is to take the place of the amended transcript as ordered by this court at the last term of this court."

Objections and exceptions to the giving or the refusing of instructions is no part of the record proper, and the clerk is not required to keep a minute of them, nor is the judge required to note such exceptions on his docket. They, like exceptions to the admission or rejection of evidence, can only be preserved by a bill of exceptions. They were properly saved in this case, as shown

by the bill of exceptions. The instruction complained of is erroneous for the reason it singles out a particular fact in evidence (that interpleader sought to assume all the indebtedness of Hudson & Carte) and told the jury that such attempted assumption was an act of good faith on the part of the interpleader, and if found to be a fact by the jury it should be so considered by them in arriving at their verdict. *Meyer v. Railroad*, 40 Mo. 151; *Id.*, 45 Mo. 137; *First National Bank of Warsaw v. Currie*, 44 Mo. 91; *Spohn v. Railway*, 87 Mo. 74; *McAllister v. Irvine*, 69 Mo. App. 442; *Dobbs v. Cates' Estate*, 60 Mo. App. 658; *Steinwender v. Oreath*, 44 Mo. App. 358.

We think the instruction was prejudicial and, being erroneous, calls for a reversal of the judgment. The judgment is reversed and the cause remanded. All concur.

WATKINS v. GREEN.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906.)

1. APPEAL—RECORD—MATTERS IN RECORD—MOTION FOR NEW TRIAL.

A motion to set aside the verdict and for a new trial is not a part of the record proper, and can only be made a part of the record by being incorporated therein by bill of exceptions.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2387.]

2. REPLEVIN—QUESTIONS FOR JURY—ASSESSMENT OF DAMAGES.

Rev. St. 1890, § 3916, requires the jury in actions of replevin to assess the value of a party's interest in the property replevied in case he has only a special interest in the same. In replevin for certain cows, a verdict was rendered for defendant, and thereupon defendant made known to the court that he only claimed a special interest in the cows as pound master and held them merely for the payment of his charges, naming them. *Held*, that the court should have submitted the value of defendant's special interest in the cows to the jury, and it was error for the court itself to assess that value and to render judgment therefor on defendant's bare statement.

Error to Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by J. H. Watkins against Dennis Green. There was a judgment for defendant, and plaintiff brings error. Reversed.

J. S. Gossom for plaintiff in error. R. L. Ward, for defendant in error.

BLAND, P. J. The suit is in replevin begun before a justice of the peace where the plaintiff recovered judgment. Defendant appealed to the circuit court of Pemiscot county, where on a trial anew, verdict and judgment were for him. Neither the transcript nor abstract filed show that a bill of exceptions was ever filed, hence there is nothing before us for review, except the record proper. The record shows that on the 2d day of March, 1906, the issues were submitted to a jury, who, after hearing the evidence, returned into court the following verdict: "J. H. Wat-

kina, Plaintiff, v. D. E. Green, Defendant. We, the jury, find that the defendant, D. E. Green, was entitled to the possession of the cows sued for at the time of the institution of this suit. O. F. Grimes, Foreman." After recording the verdict, the record of the judgment proceeds as follows: "And thereupon come the defendant, D. E. Green, and makes known to the court that he disclaims any right, title, claim, or interest in or to the cows involved in this lawsuit, except the sum of \$4, due him as pound master of the city of Caruthersville, for the impounding of said stock. The premises considered, it is ordered and adjudged by the court that the defendant, D. E. Green, have and recover of and from the plaintiff, J. H. Watkins, as principal, and J. O. Tinsley, security on the replevin bond, the possession of said cows, or in lieu thereof, the sum of four dollars (\$4) the amount of defendant's demand against the plaintiff for impounding of said cattle, together with the cost in and about this suit expended, both in this court, and in the court below, and hereof have execution therefor."

Incorporated in the record, as certified by the clerk, is a motion to set aside the verdict and for new trial. But this motion cannot be considered for the reason a motion to set aside a verdict and for new trial is not a part of the record proper. Such motions can only be made a part of the record by being incorporated in the bill of exceptions. It nowhere appears in the record or abstract that plaintiff claimed a special interest in the property replevied, however, in the statement of the case (in the briefs of both parties) it is said that defendant, as pound master of the city of Caruthersville, impounded the cows and held them for the payment of charges. So far as the record discloses, this special claim or interest was not made known at the trial until after the verdict was rendered, when the court of its own motion, and on the bare statement of defendant, assessed the value of defendant's special interest and rendered judgment therefor. The assessment of defendant's interest in the cows should have been submitted to the jury. Rev. St. 1890, § 3916. The decision of this question by the court deprived plaintiff of one of his constitutional rights, to wit, to have all the issues of fact in the case passed upon by the jury.

Wherefore the judgment is reversed, and the cause remanded. All concur.

HEINEMAN v. MARSHALL et al.

(St. Louis Court of Appeals. Missouri. Dec. 12, 1905. Rehearing Denied Feb. 27, 1906.)

1. CORPORATIONS — OFFICERS — BREACH OF TRUST—LIABILITY FOR PROCEEDS.

The act of the officers of a beneficial association in surrendering control of the association and transferring their offices to others for a money consideration was a breach of trust,

which rendered them liable to account to the association for the money which they received.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1350-1353.]

2. SAME—RIGHTS OF SUBSEQUENT CREDITOR.

Where officers of a beneficial association, in violation of their trust, transferred control of the association and surrendered their offices to others for a money consideration, a subsequent creditor of the association was not entitled to recover from the delinquent officers the proceeds of the illegal transaction.

Norton, J., dissenting.

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by Carrie Heineman against Albert H. Marshall and others. From a judgment for plaintiff, defendants appeal. Reversed.

Edwin S. Puller and Barclay & Fauntleroy, for appellants. Boogher, Pearce & Davis, for respondent.

GOODE, J. Plaintiff is a judgment creditor of the Supreme Council, Knights of Equity of the World, an incorporated society organized, according to the avowal of its charter, to disseminate good principles, alleviate suffering and furnish fraternal insurance. Its active existence ceased in 1903, and since then it has had no meetings and done no business. Judgment was rendered against it in plaintiff's favor on December 21, 1903, for over \$1,200, including the costs of the action. There was a payment on the judgment of \$123, but the balance still remains unpaid. An execution was issued for this balance and returned nulla bona, February 1, 1904, thus proving that the association is insolvent. After the return was made, the plaintiff instituted this action to enforce payment of her judgment out of assets of the association alleged to be in the hands of the defendants, who were in 1899, trustees of the association and its principal officers. At that time, the defendant Marshall held the chief office of supreme commander, and the defendant Cunningham the second office of supreme vice commander. The two defendants dominated the board of trustees and, according to their own admissions, completely controlled the affairs of the society. On May 23, 1899, pursuant to an arrangement entered into previously, and for a pecuniary consideration received and retained by them, they turned over the control of the order to L. Dow Moore and his associates. That result was accomplished in this manner: The members of the board of trustees, at the instigation of the defendants, resigned in succession, and as soon as a vacancy was created by the resignation of one member, it was filled by the remaining members electing some person selected by Moore in his stead. This course was followed until Moore and his associates had been given all the places on the board. Thereupon Marshall and Cunningham resigned their executive offices and Moore was chosen supreme commander and some dummy of his supreme vice commander. The association had practi-

cally no assets at the time and was more than \$1,000 in debt. Moore's purpose was to use the business of the order for his own benefit, and the purpose of the defendants was to make a profit by selling the control to Moore. They obtained \$1,800 or more of notes and real property in the transaction. Marshall was the active party in the negotiation with Moore leading to the sale, and in testifying both he and Cunningham, who is his father-in-law and solvent, as he is not, endeavored to exonerate Cunningham from complicity in the affair, but in our opinion failed to do so. However, it is not necessary to recite the facts which implicate Cunningham, because we hold that the plaintiff has no standing in court to compel either defendant to account for the proceeds of the transaction.

The grounds on which plaintiff founds her claim to do so are that the profit the defendants procured by selling their offices and the control of the association accrued to them as trustees; consequently belongs of right to their cestui que trust, the association, and will be treated by a court of equity as an asset of it, which she may reach by this proceeding in the nature of an equitable garnishment, and have applied to satisfy her judgment. The general theory on which the plaintiff proceeds is sound, but not applicable to her case; because, so far as is shown, her debt arose four years after the fraud of which she complains. She is a subsequent creditor.

Stress is laid in the briefs on several questions to which we will not attend; for we consider the fact just mentioned an insuperable obstacle to the relief invoked. As all emoluments received by trustees in dealing with the subject-matter of their trust, inure in equity to the benefit of the trust estate, the property delivered to defendants by Moore for transferring their offices to him, belonged to the association. They were free to resign their offices, no doubt; but in doing so for pay, and pursuant to an agreement that they would use their influence with obsequious trustees to have a new set of corporate officials installed, a flagrant breach of trust was committed, and they stood liable to account for the proceeds, either to the order itself, a receiver of it, or any other party having the right to sue. *Bent v. Priest*, 10 Mo. App. 543; *Id.*, 86 Mo. 475; *McClure v. Law*, 161 N. Y. 78, 55 N. E. 388, 76 Am. St. Rep. 262; *Gaskell v. Chambers*, 26 Beav. 360.

Whether a creditor whose demand arose prior to the commission of the fraud might call on the defendants to account for what they received as an asset of an insolvent company which the creditor was entitled to have applied on his debt, is a question we need not examine. Prior creditors may annul transfers of property made by their debtors without consideration, or with a general fraudulent purpose; whereas subsequent creditors can do so only when the transfer was executed with a view to incurring the subsequent debts and evading pay-

ment. *Kinealy v. Macklin*, 89 Mo. 433, 14 S. W. 507; *Snyder v. Free*, 114 Mo. 360, 21 S. W. 347; *Krueger v. Vorhauer*, 164 Mo. 156, 63 S. W. 1098. This rule of law governs in transactions wherein the debtor acted fraudulently. A different doctrine prevails where a third person obtains by fraud, property belonging to a debtor who is innocent; and, in such instances, creditors, though the loss of the property lessened the estate to which they must look for payment, cannot recover the property. The right to recover it belongs exclusively to the debtor himself, or some one who has succeeded to his right. *Parker v. Roberts*, 116 Mo. 662, 22 S. W. 914. In recognition of this rule, a plaintiff who sought to enforce a judgment against property in the hands of a trustee of a corporation, and alleged to have been received under circumstances which made it a corporate asset, was denied relief. *Ready v. Smith*, 170 Mo. 163, 175, 70 S. W. 484. The facts of that case were quite similar to those before us.

Cases may arise in which the enforcement of this rule against a prior creditor of an insolvent company would be unfair; instances wherein it appeared that the company itself could not sue to redress the fraud because it was prevented by recreant officials. The present case is such a one, as was also the precedent in which the Supreme Court of the United States refused to redress, at the suit of a subsequent creditor of a corporation, a fraud perpetrated by its directors. The new management composed of Moore and his satellites would do nothing, of course, to recover for the association what they themselves had paid to the defendants in fraud of the association; and if creditors are denied standing in court, in such a predicament, they would have to ask the appointment of a receiver who could sue. But this would needlessly raise an impediment to the collection of their demands; and, in the case of prior creditors, who enjoy an undeniable right to reach all the assets of the company for the satisfaction of their debts, an exception might be made when corporate officers participated in or connived at the fraud. Procuring a receiver is, as we shall see, the remedy to which a subsequent creditor must resort.

The question regarding the right of a creditor of a corporation to sue a party for the recovery of corporate property fraudulently obtained by said party is altogether distinct from the question of the creditor's right to sue without first demanding of the company officials that they take action in the name of the company. As to the latter point, which is dwelt on in the briefs of counsel, we will say nothing; for it is not essential to our decision. Nor are we bound to ascertain whether the rule that creditors cannot expose a fraud practiced on their debtors is applicable to the present cause. The decisive fact is that the plaintiff's debt accrued

after the occurrence of the breach of trust which constitutes the basis of her proceeding against the defendants. We have been cited to adjudications which merely enforced the firmly established remedy of equitable garnishment, and to others wherein corporate directors and trustees were made to account to their company or to a shareholder, receiver, or assignee thereof, for profits made by means of their fiduciary positions; but we have been cited to no precedent, nor have we found one, wherein a director or trustee was compelled to account at the suit of a subsequent creditor. Precedents of high authority are to be found denying the relief to that class of complainants, and they are, in accord with the general rules of equity governing the rights of subsequent creditors. The most apposite discussion of this subject is *Graham v. Railroad Co.*, 102 U. S. 148, 26 L. Ed. 106, a case which furnishes the rule of decision in the cause at bar; for, in relation to the point of law involved, its facts are not materially unlike those we are considering, and the doctrine of the opinion was cited and approved by the Supreme Court of Missouri in *Ready v. Smith*, supra. It was averred in the bill, and the averment was supported by the evidence, that the directors of the railroad company had sold land belonging to the company to an ostensible buyer, the directors themselves being the real buyers, or interested in the purchase. Three years afterwards the complainants recovered judgments against the railroad company on debts which arose after the sale, and had executions levied on the land as still belonging to the company. Complainants then sued in equity to have the deed made in consummation of the alleged fraudulent sale set aside, the land made subject to the lien of the executions, and the railroad directors, who had acquired title through the sale made by themselves as directors, enjoined from asserting their title. The position taken for the complainants was that as the railroad company had been defrauded of its property and might have proceeded to recover it, so any judgment creditor of the company might proceed for the same purpose. The opinion conceded for the argument that existing creditors could do so, but said no authority except dicta of judges could be found for allowing a subsequent creditor to interfere. The points adjudged were that subsequent creditors can neither assail a fraudulent conveyance of property by their debtor, unless the fraud was directed against them, nor question a transaction by which, before their debts arose, the debtor was defrauded. The first proposition has been decided frequently; the second has been presented for decision rarely, and we know of no judgments maintaining a doctrine contrary to the one declared by the Supreme Court of the United States.

One perceives that permitting a creditor to pursue property out of which a debtor

has been cheated, would facilitate the collection of the debt. So would permitting a subsequent creditor to challenge previous transfers fraudulently made by the debtor. But this consideration has not induced the courts to accord the right of interference to such creditors; presumably because they did not extend credit in reliance on the property fraudulently parted with by, or withdrawn from, the debtor. It is true that a better reason can be brought forward why a creditor of a corporation should be allowed to pursue property belonging to it in the hands of a party who procured the property by fraud, than can be given for allowing the creditor of an individual to do so; for an individual can always exercise his right to seek redress against a fraud; whereas a corporation may be under the control of directors or trustees, who are interested in taking no step to redress the wrong. This was the situation in the Graham Case, and in the present one. That argument was pressed and overruled in the Graham Case; and in disposing of it the court said, among other things, that when a corporation becomes insolvent, a court of equity will take charge of it and collect its assets for the benefit of creditors. The judgment is reversed.

BLAND, P. J., and NORTONI, J., concur.

NORTONI, J. (dissenting). At first I concurred in the opinion of the court as expressed by the learned judge, but on motion for rehearing I became persuaded that the case does not fall within the influence of the principles so clearly and forcibly stated in the opinion of the court. I know that as a rule no good can come from dissenting opinions. The time consumed in their preparation might be more profitably occupied in disposing of cases not decided. Notwithstanding this fact, however, I cannot refrain from attempting to point out what seems to me a feature of this case which distinguishes it from the authorities cited and relied upon in the opinion of the court. With the statements of law in that opinion I find no fault. It appears to me that those principles which are pertinent to a transaction voidable only are not pertinent to this transaction, which was wholly and absolutely void, so that in no sense could it have been ratified. Now, in the first instance, it is well settled, and the broad principle is, that whatever a director of a corporation acquires in virtue of his fiduciary relation by way of secret profit, or otherwise, except in open dealing with the company, such as directors in common with strangers may sometimes have, belongs not to him, but to the company, and it is said that nothing less than this satisfies the law. *Bent v. Priest*, 10 Mo. App. 543-558; *Sugden v. Crossland*, 3 Sm. & Giff. 192; *Bent v. Priest*, 86 Mo. 475. In the case last cited, our Supreme Court said: "These cases are all quite clear to the effect that the trustee

will not be allowed to make gain to himself, beyond his allowed compensation, by reason of his office and influence as such trustee. By accepting the office the director undertakes to give his judgment and influence to the interests of the corporation in all matters in which he represents or professes to represent it. That judgment and influence, of right, belongs to the corporation, and so does that which it produces, and the bonds received by the director are its property, as between it and the defendant."

From these considerations it appears to me that the moneys or other secret profit which Marshall received by selling out his trust, belonged, "not to him, but to the insurance company," and therefore it was competent for the plaintiff in this case, a judgment creditor of the insurance company, to garnish the same as assets of the insurance company. The transaction which Marshall had with Moore, and out of which the assets arose, was void as against public policy. The transaction being in fraud, with which all parties participating therein were contaminated, the law would not aid Moore to recover from Marshall the moneys or property he had paid him to vacate his office and turn the insurance company over to him, and, had Moore refused to pay the same to Marshall, the law would not have aided Marshall to recover from Moore thereon. Therefore, as Moore had paid the amount agreed upon to Marshall, the title thereto had divested from Moore and had vested in the insurance company; for in a case of such an absolutely void transaction no title could vest in Marshall no more than could the title of stolen property vest in the thief who stole it nor title vest in the grantee of a void deed. It seems to me that this feature of the case falls within the influence of the same principle which controls in cases of stolen goods, in which cases the law forbids the vesting of the title in the thief. The transaction between Marshall and Moore, by which there came into being a profit in virtue of Marshall's office, being absolutely void as against public policy, the legal title to the profit could not have vested in Marshall, and, it having divested from Moore, it was absolutely necessary for it to vest some place. As has been said: "As nature abhors a vacuum, so the common law abhors the absence of absolute ownership somewhere in property of whatever description." *Cape Girardeau v. Harbison*, 58 Mo. 94. And while I concur in the opinion that the assets thus in the hands of Marshall are in their nature equitable assets, which are liable to be sought and called in by proper bill in equity for that purpose by the insurance company or its receiver, I am also of the opinion that under the authorities they are assets of the insurance company and to which the insurance company owns the legal title. This conclusion is enforced largely from the principle

that, as nature abhors a vacuum, so the common law abhors the absence of absolute ownership somewhere in property of whatever description, and I am persuaded that the authorities bear me out on this question. The Supreme Court said, in *Bent v. Priest*, 86 Mo., loc. cit. 486: "The bonds received by the director are its [the company's] property, as between it and the defendant." And again, on the same page: "However that may be, what the director makes in his office as such belongs to the corporation." And in the same case, 10 Mo. App. 558, in speaking of the asset which arose by the director selling out his company, very much as in this case, the court said: The asset "belongs, not to him, but to the company. * * * That profit belongs to the company." And in recognition of this principle, that the asset thus created and brought into being by such wrongful and fraudulent conduct of the director belongs to the company, the Court of Appeals of New York, in *McClure v. Law*, 161 N. Y. 78, 55 N. E. 388, 76 Am. St. Rep. 262, sustained an action for money had and received by the receiver of an insolvent insurance company against a director who had sold out his trust and resigned his office, as in this case, and held that the amount of moneys thus obtained by the director were assets of the company for which money had and received was a proper action; citing *Sugden v. Crossland*, supra, in which case *Horsefield* was a trustee under a will and *Crossland* paid him £75 to withdraw from the trust and have him (*Crossland*) appointed in his place. It was held that the £75 belonged to the society. *Sugden v. Crossland* was a case in equity, to be sure; but the principle of it is that which was deduced by the Court of Appeals of New York in *McClure v. Law*, supra; that is, that "the £75 belonged to the society." In the latter case the court concluded its opinion in the following words: "And that the corporation may compel the director to turn over to it all the money or property so received by him." While it is clear to my mind that the asset of the insurance company in the hands of *Marshall* was one for which he could properly be called upon to account in a court of equity by the company or its receiver, it is equally clear from the principle involved and the authority of that case that the insurance company had such a title to the asset as would have enabled it to maintain an action for money had and received for the same, and if *Marshall* had received a horse for his perfidy, instead of other property, that the insurance company would not have been compelled to go into equity for an accounting, but could have maintained replevin against *Marshall* for the same. The horse would have been the property, not of *Marshall*, but of the insurance company. As said in *Bent v. Priest*, supra: "That judgment and influence [speaking of the judg-

ment and influence of the director] of right belongs to the corporation, and so does that which it produces, and the bonds received by the director are its property, as between it and the defendant." It thus appearing that the asset which was created by the fraudulent transaction of the debtor was an asset of the company, I am of the opinion that it was liable to the equitable garnishment herein sought to satisfy a judgment and execution against the company even though the judgment be subsequent, and that the principle applicable to the case of subsequent and prior creditors, relied upon in the majority opinion, is inapplicable. It seems to me that it is sufficient that the plaintiff is a judgment creditor of the insurance company, and that she has discovered an asset of the judgment debtor, and seized upon the same to satisfy her judgment debt, and that it is wholly immaterial whether that judgment was obtained subsequent to the transaction out of which the asset arose.

Now the court lays stress upon the fact that plaintiff was a subsequent creditor, and applies to this case the principles which obtain in the case of a subsequent creditor attempting to set aside a conveyance of the debtor's property which has been obtained by fraud perpetrated upon the debtor. I am unable to appreciate how this principle is pertinent to this case. Indeed, it is true as a general proposition that a creditor will not be allowed to unravel the fraud perpetrated upon the debtor when the debtor is innocent, inasmuch as such transactions are not void, but are voidable only, and, being such, they are capable of being disaffirmed or ratified by the debtor upon whom the fraud is perpetrated, and the creditor is precluded from unraveling the same upon the principle that, the transaction being voidable only, the debtor himself may see fit to ratify it. Now, in this case the creditor is not seeking to unravel the fraud perpetrated upon the debtor in a transaction that could be ratified and rendered valid by the debtor upon whom the fraud was perpetrated, but she is seeking to avail herself of the assets of her debtor, which were created and came into existence by virtue of the fraud committed, and which fraud is of such a nature as to render the transaction absolutely void, and not voidable only. In no sense could the debtor ratify this transaction and render it valid, and therefore I am persuaded that she should not be denied relief upon the principle applied in cases of subsequent creditors seeking to unravel the debtor's fraud. The court relies upon *Graham v. Railway Company*, 102 U. S. 148, 26 L. Ed. 108, as a precedent. Let us examine the case. It will be observed, by reference to page 134 of 102 U. S. (26 L. Ed. 108), that the real question in decision was: "The question still remains whether, the debtor being unwilling to disturb the transaction, subsequent creditors have such an interest that they can reach the property

for the satisfaction of their debts." And the court very properly answered, "No." Let us admit all of this, for it is undoubtedly true; but that is not this case. The court was there treating, not of a void transaction, but one that was voidable only. For instance, a fraud had been perpetrated upon the debtor, and it had made a deed conveying certain lands. It was this deed that the subsequent creditors were endeavoring to set aside. That case is similar to this in so far as the fraud perpetrated was upon, not by, the debtor, there the railroad company, here the insurance company; in each case the debtor being the party aggrieved. In either case, the debtor stands with clean hands, and both companies, the railroad company there, the insurance company here, could have proceeded to set aside and recover the fruits of the transaction, because in neither case was the debtor guilty of fraud. So far, the two cases are in principle identical. But here we come to the parting of the ways, in so far as they are concerned, as follows. Now, in the *Graham Case*, the transaction being only voidable in the first instance, the debtor, the railroad company, could have ratified the voidable deed, as in fact it did. It stood as the innocent party having been defrauded, and it had the right, and it was competent for it, to disaffirm the voidable transaction and recover that of which it had been defrauded; or it could, upon discovering the fraud, if it saw fit, have ratified the transaction, and if it chose the latter course, as it did, thereupon the deed that had theretofore been voidable became valid. But in the case now before the court it is wholly impossible for the insurance company to ratify this transaction by which Marshall sold out the company and pocketed the proceeds. It is true that the insurance company itself, being the innocent party, could have proceeded, upon discovering Marshall's fraud, and recovered the funds from him; but it is true as well that upon such discovery it could not ratify and render valid the transaction by which Marshall converted to his own use large sums of money, being the property of the company. To have ratified this would practically have amounted to the ratification of an embezzlement of the company's funds, which are properly held to the use of the policy holders. The transaction being thus void, no right or title could have vested in Marshall to these assets which it was competent for the insurance company to have ratified and made secure in him. The transaction was no more susceptible of being rendered valid by ratification than if Marshall had purloined from the till of the insurance company the same amount of money, and under these circumstances the right and title to the money would have remained in the insurance company.

Now the case of *Ready v. Smith*, 170 Mo. 163, 173, 70 S. W. 484, 486, was that of a prior creditor seeking to subject the property

to the satisfaction of his debt, out of which Ready alleged his debtor had been defrauded, and the Supreme Court denied the relief upon the same principle as in the *Graham Case*, and said that, as the transaction set out in the bill was not fraudulent, "at most it was voidable only"; that, as it was competent for the debtor to ratify the same, the creditor had no right to complain. The same principle controls in each of those cases, as I understand them; and that is that the subsequent creditor in one and the prior creditor in the other is precluded from relief, not on the ground that one is a subsequent and the other a prior creditor, although in the *Graham Case* the fact of the plaintiff being a subsequent creditor was mentioned, but the relief is denied on the principle that the transactions which they sought to impeach were frauds perpetrated upon the debtor, and of which the debtor was innocent, and therefore they were capable of being disaffirmed or ratified, and that, inasmuch as the debtor had made no move to disaffirm the same, the creditor would not be permitted to come in and do so. Now there is a marked distinction in the case of a transaction which is absolutely void as against public policy and one which is voidable only. While nothing can pass by a deed absolutely void, from deeds which are voidable only fair titles may flow. *Crocker v. Bellangee*, 6 Wis. 645, 70 Am. Dec. 489; *Somes v. Brewer*, 2 Pick. (Mass.) 184, 13 Am. Dec. 406. In *Armstrong v. Tuttle*, 84 Mo. 432, it is held that, when a party has taken possession of goods as trustee under a deed of trust which is void as to the creditors of the grantor, the party so taking possession becomes the debtor of the grantor under the void deed of trust to the amount of the goods, and may be garnished by the judgment creditor of the grantor. The principle of this case is an undoubted truism—that, the deed being void, nothing could pass from the grantor to the trustee thereunder, and that, if the trustee sold or retained the goods under such void deed of trust, he became the debtor of the grantor, in whom the title still resided, for the very sufficient reason that it was impossible for the title to pass from him by virtue of the void conveyance. It seems to me that this distinguishing feature between a void and a voidable transaction is the principle which should influence the judgment of the court in this case. In other words, I am of the opinion that a transaction, absolutely void, ought to be measured and ascertained by the principles applicable to void, as distinguished from voidable, transactions; that it ought not to be measured by the principles applicable to voidable transactions; on the other hand, that voidable transactions ought to be measured and ascertained by the principles applicable to voidable, as distinguished from absolutely void, transactions, and ought not to be measured by principles applicable to void transactions.

Entertaining this view, I have found my-

self wholly unable to appreciate the pertinency of the principles applied by my very learned and esteemed associate to the case in judgment. Now, this transaction, void as it is against public policy, no reason exists that I can see for applying the principle of the cases cited in the majority opinion to this, for they were cases involving voidable and not void transactions. Suppose, for instance, an extreme case to illustrate, that Marshall had purloined or wrongfully appropriated \$5,000 from the insurance company's till; would this plaintiff, a judgment creditor of the insurance company, be compelled to await the action of the insurance company to recover it, or would she be denied relief upon the principle that it was her duty to stand idly by and wait to see whether or not the insurance company would ratify or disaffirm the act of Marshall in thus wrongfully appropriating the company's funds? The answer must be, "No." And why is the answer "No"? Because the transaction would be of a nature which rendered it incapable of ratification, and there would be no reason to await the action of the insurance company in that behalf. Nor would there be reason to deny the plaintiff relief in that case on the principle that the debtor alone is permitted to proceed, inasmuch as the debtor could not ratify such transaction; for the debtor would be unable to ratify, because its very nature rendered it incapable of ratification. I am persuaded that in such a case, the transaction being absolutely void, as a matter of course, it would be quite competent for this plaintiff to proceed and garnish those moneys in the hands of Marshall as assets of her judgment debtor. The title to the \$5,000 thus wrongfully taken from the till would remain in the insurance company on the same principle that title to property under a deed which is absolutely void remains in the grantor, or title to stolen property remains in the owner from whom it was stolen.

Entertaining these views, with the very fullest measure of regard and esteem for my learned associates and their great learning and ability, I most respectfully dissent from the order overruling the motion for rehearing.

CARP v. QUEEN INS. CO.

(St. Louis Court of Appeals. Missouri. Feb. 13, 1906. Rehearing Denied Feb. 27, 1906.)

1. TRIAL—QUESTIONS FOR JURY—INFERENCES.

Where letters written between insurer and insured with reference to an arbitration did not constitute a compact or obligation between the parties to carry out such arbitration, but were mere evidence that either or both of the parties did not in fact desire the arbitration to be effectual, the inference to be drawn from such letters was for the jury, and not for the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 337.]

2. APPEAL—VERDICT—CONTRADICTORY EVIDENCE—REVIEW.

A verdict, in an action on a policy, finding that a fire had not been set either by assured or with his connivance, based on conflicting evidence, will not be set aside on appeal.

3. SAME—CONTINUANCE—DENIAL—PREJUDICE.

Where defendant applied for a continuance because of the absence of certain witnesses, and after the denial of such application the testimony of the witnesses which was contained in full in a former bill of exceptions was introduced by defendant in that form, and fully covered every fact which the application for a continuance stated the witnesses would swear to if present, the denial thereof was harmless.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4121.]

4. INSURANCE—IRON-SAFE CLAUSE—CONSTRUCTION.

A policy required assured to take an inventory of the stock insured at least once every 12 months during the life of the policy, and unless an inventory had been taken within a year prior to the date of the policy that one should be taken in detail within 30 days thereafter, and that assured should keep a set of books showing a complete record of the business transacted, together with the last inventory of the business, and keep the same securely locked in a fire-proof safe at night, etc. *Held*, that such provision required insured to keep books from the issuance of the policy, and not merely after the taking of the new or the old inventory.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Insurance, § 853.]

5. SAME—CONDITION SUBSEQUENT.

An iron-safe clause in an insurance policy requiring insured to keep and preserve his account books and inventories of his business in an iron safe, etc., constituted a mere condition subsequent, which the insurer had power to waive.

6. SAME—WAIVER—EVIDENCE.

After a fire which destroyed plaintiff's stock defendant insurer claimed the fire was of incendiary origin, and without demanding production of plaintiff's books and inventories demanded an appraisal. On an issue duly submitted it was found that such demand was insincere, and defendant went to trial of an action on the policy the first time on an answer charging plaintiff with having committed several perjuries, and alleging that the action was prematurely brought, because of the terms of the policy making appraisal a condition precedent to the right to sue; a breach of the iron-safe clause in the policy not having been urged until after remand of the case for retrial by the Court of Appeals. *Held*, that insurer had waived its right to claim a breach of such iron-safe clause.

Appeal from Circuit Court, Stone County; Asbury Burkhead, Judge.

Action by H. Carp against the Queen Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

For opinion on former appeal, see 79 S. W. 757, 104 Mo. App. 502.

E. J. White and Barger & Hicks, for appellant. H. H. Bloss and McNatt & McNatt, for respondent.

GOODE, J. This is an action on an insurance policy written by the defendant on the plaintiff's stock of merchandise. The goods were kept in a two-story brick building at

117 East Olive street, in Aurora, Mo. A fire which occurred January 29, 1902, destroyed the stock. The petition alleged full compliance by the plaintiff with the terms of the contract, and that the defendant had vexatiously refused to pay the amount of the loss. In defense the answer set up six separate defenses. There was, first, a general denial of all the statements contained in the petition, except those admitted in the answer to be true, and, second, a denial that the plaintiff had complied with the terms and conditions of the policy or had sustained loss or damage on the property insured to the amount of \$12,000 as alleged in the petition, or that defendant had vexatiously and unlawfully refused to pay the loss or was indebted to the plaintiff in any sum whatever.

In the third paragraph of the answer defendant pleaded a clause or stipulation of the policy providing that, if the insured and the company differed about the amount of the loss, the amount should be ascertained by three appraisers, one appointed by the company, one by the insured, and a third by those two; that the amount of loss or damage was not agreed to between plaintiff and the company, but a difference arose between them regarding it; that thereupon the defendant demanded an appraisal, and a written agreement submitting the amount of damage to the appraisers was signed by both parties; that afterwards each of them selected an appraiser pursuant to the terms of the agreement, but the amount of loss had never been determined by the appraisers thus appointed, and, as by the terms of the policy no action could be maintained on it until after the ascertainment of the loss by appraisers, the action was prematurely brought.

The fourth paragraph of the answer contains the special defense of a breach of the clause of the policy providing that if the insured concealed or misrepresented any material fact concerning the insurance, or the subject thereof, or in case of any fraud or false swearing of the insured touching any matter relating to the subject of the insurance, whether before or after the loss, the policy should be void. In this paragraph it is alleged that the plaintiff on May 17, 1902, after the fire, made out and delivered to the defendant verified proofs of loss under said policy, in which he falsely stated the value of the goods insured at the time of the fire to be \$11,689.36, and the loss or damage to be the same sum, when, in truth, the plaintiff knew the value of said goods was not nearly so great as alleged, and that the damage done by the fire did not exceed \$1,000. This defense further stated that plaintiff's purpose in making the false oath and furnishing the false proofs of loss was to deceive the defendant and induce it to pay him a sum largely in excess of what plaintiff knew his loss had

been. As part of the same defense, it was further averred that plaintiff falsely stated, under oath, that the fire which consumed the property originated from an unknown cause, and that this averment was untrue and made with the intention of defrauding the defendant. Another part of the defense was that plaintiff had falsely stated, under oath, that at the time of the fire he was the owner of the property consumed, which statement was untrue and made with the intent to cheat and defraud the defendant. It was averred that, by reason of said facts, plaintiff had forfeited whatever claim he might otherwise have had under the policy, which had become null and void, and the defendant was not liable in this action.

The fifth defense was that plaintiff, with the intention of fraudulently obtaining from defendant the amount of the policy, set, or caused to be set, the fire which burned the insured property, and that said fire was caused by the act or connivance of the plaintiff for the purpose of defrauding defendant; wherefore the policy became and was void.

The foregoing five separate and distinct defenses were pleaded in the original answer, and were the issues before the jury on the first trial of the cause. The trial resulted in a verdict for the plaintiff and an appeal was taken to this court, which reversed the judgment because the lower court had erred in instructing the jury regarding the waiver by the defendant company of compliance by the plaintiff with the clause of the policy requiring an arbitration of the loss before suit could be brought. The cause was remanded for retrial to the circuit court of Lawrence county, whence the first appeal was taken. Afterwards a change of venue was awarded to the circuit court of Stone county. In the latter court the defendant filed an amended answer in which it renewed all the previous defenses, and in addition pleaded a sixth one based on the failure of the plaintiff to comply with what is known as the "Iron-safe clause" of the policy, which reads as follows: "Iron-safe clause: The assured under this policy hereby covenants and agrees to take an inventory of the stock hereby covered at least once every twelve months during the life of this policy; and unless such inventory has been taken within one year prior to the date of this policy, one shall be taken in detail, within thirty days thereafter; and to keep a set of books, showing a complete record of business transaction, including all purchases and sales both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fire-proof safe at night, and at times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss the assured agrees and covenants to pro-

duce such books and last inventory, and in event of failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

It is alleged in the answer that the insured had not taken an inventory of his stock of merchandise within one year prior to the acceptance of the policy, and that he did not take one within 30 days thereafter, or at any time afterwards, and that prior to the loss he did not keep a set of books and proper inventory, showing the requisite facts, in a fire-proof safe, or any other secure place unexposed to a fire which would destroy the building, nor did he produce such books and inventory after the fire for the inspection of the company. Wherefore the answer avers that the policy had become void before the loss occurred, and all rights thereunder were forfeited prior to the commencement of the present action. There is no averment that the company ever demanded the production of the inventory and books for its inspection, nor is there any proof that it did. On the contrary, the evidence tends to show it had no wish and made no request for them. In answer to questions propounded by defendant's counsel for the purpose of eliciting proof that plaintiff and the company had disagreed about the amount of the loss, plaintiff swore repeatedly that there was no one to agree with; thereby indicating that no one representing the company approached him after the fire to adjust the loss. The facts bearing on the point of plaintiff's compliance with the "iron safe clause," as shown by the testimony for the plaintiff, are these: An inventory of the stock had been taken within 12 months of the issuance of the policy. This inventory was twofold, as we understand, and covered merchandise already owned by the plaintiff and a stock which he had bought and added to it. The evidence goes to show it was a complete inventory of all the merchandise on hand, and was made within the 12 months previous to September 17, 1901, the day the policy was issued. In January, 1902, just prior to the fire, plaintiff and his employees were engaged in taking another inventory of the stock, which was practically complete when the loss occurred on January 20th; everything having been inventoried except a few suspenders and some jewelry, about \$50 worth of goods. This inventory showed the value of the goods on hand to be about \$12,000. Neither of the two inventories was burned, and both were available to the defendant if it wished to use them. From August 8, 1901, more than a month before the policy was issued to the day of the fire, plaintiff kept a cashbook in which every item of merchandise sold was registered at the time of the sale by the clerk who sold it; and, as no goods were sold on credit, this cashbook contained a complete

register of the sales. It, too, was saved. The book of purchases kept by the plaintiff consisted of the bills or invoices of merchandise made by the wholesale firms from whom he bought and which were transmitted to him when his purchases were shipped. Plaintiff owned no safe, but was accustomed to take his inventories and books of sales and invoices to his home every night to keep them out of danger of any fire which might consume the stock. He had the inventories and the salesbook at home on the night of the fire, but had left at the store the book of purchases; that is, the one containing the bills of merchandise bought. It was burned. After the fire plaintiff procured duplicates of those invoices from the wholesale merchants for the use of the company, if it desired them, in ascertaining the amount of the loss.

On the issue of plaintiff's compliance with the stipulation regarding inventories and books, the court, at plaintiff's request, instructed the jury that plaintiff was bound to keep such books as would enable a person of ordinary intelligence and accustomed to accounts to ascertain the amount of stock on hand at any time during the life of the policy, and the business transacted, and that, if the jury found he had done so, the stipulation was performed. Another instruction declared that, although the bills of purchases were left in the store and burned, yet, if the jury found that plaintiff had practically completed an invoice in conformity to the policy, and had it on hand, and the burned bills showed the purchases prior to the invoice, and that since the invoice plaintiff had kept a set of books as required, his action could not be defeated for noncompliance with the "iron-safe clause." For defendant, the court instructed on the issue that if the jury found plaintiff did not keep a set of books showing a complete record of business transacted, including all purchases and sales of merchandise, or if he did keep a set of books and they were destroyed by the fire, the verdict should be for defendant. A positive charge for a verdict for defendant on the ground that plaintiff "did not keep a set of books showing a complete record of business transacted, including all purchases and sales," as required by the policy, was asked and refused. Instructions on the other issues were given. In a general one the jury were told that, if they found plaintiff was the owner of the property burned, he was entitled to recover, unless he had violated the conditions of the policy and defendant had not in the manner defined by other instructions, waived its right to bar his recovery because of the violation.

As to the defense that the action could not be maintained because there had been no appraisal of the loss, the jury were advised that if they found plaintiff and defendant had both endeavored to prevent an ap-

praisal, or to render abortive the agreement they had signed for one, the arbitration clause of the policy ceased to be a condition precedent to plaintiff's right to sue. For defendant, the court instructed that, unless the jury found the failure of the two appraisers appointed by the respective parties to agree on an umpire and return an award was due to the company's fault, the verdict must be in its favor. An instruction to find for defendant because the amount of the loss had neither been agreed on by the parties nor fixed by appraisal was refused, as was one that plaintiff could not recover, unless the jury found defendant had agreed with him that the loss need not be appraised, or had done something which induced him, as a reasonable man, to believe it need not be. For defendant, the court also instructed that if Harry Carp, the plaintiff, was not the sole and unconditional owner of the insured property at the time of the fire, or if the jury found the fire was caused by the willful act of plaintiff, or with his knowledge, consent, or connivance, the verdict must be for defendant.

The jury having found the issues for plaintiff, judgment was rendered on the verdict, and the company appealed.

1. We held on the former appeal that whether or not plaintiff had worked a forfeiture of his policy by false swearing or incendiarism, and whether the action was premature because brought before the loss was appraised, were matters for the jury, as was likewise the amount of damage. In other words, we held that all the defenses raised by the original answer presented issues of fact. We are still of that opinion; and, as those issues were left to the jury at the second trial on practically the same facts shown at the first one, and on instructions conforming to our previous opinion, we will not again inquire particularly concerning them. Though Carp and the company signed an agreement for an appraisal and appointed appraisers, nothing was accomplished towards fixing the amount of damage, because the appraisers would not proceed until an umpire was appointed, and they failed to select one. The two appraisers never met. Everything done under the appraisal agreement is shown by the correspondence between them, which extended over 2½ months and was but a prolonged bickering about an umpire. We digested this correspondence in our previous opinion, and held it was for the jury to say who was to blame for the failure to appraise the damage. A second reading of the letters confirms us in that conclusion. It is tenaciously insisted by defendant's counsel that, instead of the letters affording ground for a finding that the company was to blame, they show conclusively the plaintiff was. It is further urged that the effect of the letters is a court matter. The letters constituted no compact or obligation between

the parties, but were evidence tending to prove a fact; and as they would support a finding that neither party was desirous of fixing the loss by appraisement, or sincere in the agreement to do so, the inference regarding the facts to be drawn from them was a jury matter. The letters do not, as defendant's attorneys contend, demonstrate that plaintiff was gulleful and defendant guileless. They have produced the belief in our minds that both parties were suspicious and held back from an appraisal; and so we would find were the question for our decision.

We are asked to reverse the case on the evidence tending to show the fire was set by the plaintiff or with his connivance. This was very contradictory, and the issue has been twice determined for the plaintiff. In fact, it was stated on the argument, and not denied, that in the different cases growing out of the fire 5 juries, or 60 men, have exonerated the plaintiff. We consider that the instructions given on the arson and appraisal issues afford the defendant no just ground of complaint. The defendant asserts that it was wrongly denied a continuance. The testimony of the several witnesses said to be absent was contained in full in the former bill of exceptions, and was introduced in that form by the defendant. This testimony covered fully every fact which the application for a continuance said the witnesses would swear to if present. There is no cause for interfering with the lower court's exercise of discretion in this matter.

2. No point raised on this appeal merits attention except the one presented by the sixth defense, which related to plaintiff's supposed failure to take an inventory of his merchandise and keep it and books recording the business transacted, where they would not burn along with the stock. In this connection, the complaint is directed against the submission to the jury of the question of plaintiff's performance of the stipulation, rather than against the instructions as to what constituted performance. It is contended that the evidence shows affirmatively a failure to perform. Such stipulations in different insurance policies are much alike, but vary some in their requirements; and in any case where a forfeiture is asserted for an alleged violation of the clause it is essential to ascertain exactly what duty was imposed on the insured. Cases have been cited in support of the proposition that the plaintiff was required to keep a book showing only those purchases made after the second invoice, not those made before. In the cited cases the language was that a book of purchases should be kept after the required inventory had been taken. *Forehand v. Ins. Co.*, 58 Ill. App. 161; *Continental Ins. Co., etc., v. Waugh*, 83 N. W. 81, 60 Neb. 348; *Same v. Cummings et al.*, 81 S. W. 706, 98 Tex. 115. The stipulation before us contains no such

words, and in our judgment meant that books should be kept from the issuance of the policy; not, as plaintiff contends, only after the new invoice, nor, as defendant contends, from the old one. Plaintiff was bound to take an inventory every 12 months, and, unless one had been taken within a year of the date of the contract, to take one in 30 days. He was also bound to keep books showing a complete record of the business, including sales and purchases, and preserve them and the inventory at night and when the store was not open for business, where they would not be exposed to a fire which would destroy the storehouse. It was further provided that in case of loss the plaintiff should produce the inventory and books, and that in the event of a failure to produce them the policy should become void and no action should lie on it. It will be seen from the stated facts that plaintiff complied literally with the terms of the policy in respect to taking inventories of the stock and keeping complete books of sales and purchases. Thus far he was in no respect remiss. His only fault was that, contrary to his habit, the book of purchases was left in the store on the night of the fire, and perhaps a few nights before. This grew out of his opinion that, as he had taken a second inventory, it was not necessary, in order to comply with the policy, to preserve his book of purchases; a view taken by the trial court in instructing the jury. That is to say, the plaintiff and the court interpreted the policy to mean that he was to keep a list of his purchases subsequent to the last invoice—an inaccurate interpretation, we think. *Sun Mutual Ins. Co. v. Dudley*, 45 S. W. 539, 65 Ark. 240.

Though the courts continue to talk about affirmative and promissory warranties and the same kinds of representations, no consistent effect is given to these distinctions in laying down rules for the decision of insurance litigation. Likely this has resulted partly from the extreme difficulty of distinguishing, in many instances, between warranties and representations and the classes of each, and partly from statutory changes in the law. What is important to the sound decision of a cause wherein such a question is involved is to know how closely it was necessary for the insured to keep the particular clause of the policy which the company asserts he violated, and the effect of a violation on his right to indemnity. The proper technical name and classification of the clause are often of minor importance; and we think they are in the present instance. In this jurisdiction, and in most others, the insured is required to perform substantially a stipulation like the one under advisement. When applied in particular cases, this rule means that, though the insured has failed to keep the clause in all respects, yet, if he has so far kept it that its purpose will not

be defeated, his right to indemnity remains intact. *Malin v. Insurance Co.*, 105 Mo. App. 625, 80 S. W. 56; *Meyer Brothers v. Insurance Co.*, 73 Mo. App. 166; *Burnett v. Insurance Co.*, 68 Mo. App. 343; *Western Assur. Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619; *McNutt v. Virginia, etc., Ins. Co.* (Tenn. Ch. App.) 45 S. W. 61. It was decided in some of those cases that preserving the bills of purchases rendered by wholesale merchants is a compliance with the requirement that the insured keep a book of purchases. *Malin v. Insurance Co.* and *Burnett v. Same*, supra. It is obvious that such bills constitute a record of purchases of the most trustworthy kind; for they are made out by third persons having no motive to overvalue the stock in order to increase the indemnity to be paid if a loss occurs. The purpose for which such stipulations as the one in hand are inserted in insurance policies is to provide for the preservation by the merchant of memoranda which, in the event of a fire, will assist the company to ascertain the extent of the loss and prevent it from being magnified by the insured. It was held by the Tennessee Court of Chancery Appeals, on facts like those before us, that the production of duplicate invoices was a compliance with the policy. *McNutt v. Insurance Co.*, supra. In that case the insured, on the night of the fire, had left his inventory of stock out of the safe where he kept it usually, and it was burned; but he procured duplicate invoices. The foregoing authorities would support us in holding that the plaintiff substantially complied with his agreement, and this is all the law required of him to prevent a forfeiture.

If the plaintiff's omission, after the new inventory was taken, to keep the book of purchases away from the storeroom, was a breach of his agreement, and not cured by obtaining duplicate invoices of purchased goods, the question occurs whether that breach in itself worked a forfeiture of the right to indemnity. Our statute providing that a warranty in a fire policy not materially affecting the risk shall be construed as a representation is said to control this point. Rev. St. 1889, § 7974. To my mind that statute is obscure, when read in the light of the rules of the common law regarding warranties and representations; and in some instances there is great uncertainty about the propriety of applying it to the particular warranty said to have been broken. A statute similar in many respects has been applied to the "iron-safe clause," and the jury left to say if it materially affected the risk. *Continental Ins. Co. v. Whitaker*, 112 Tenn. 151. 79 S. W. 119, 64 L. R. A. 451, 105 Am. St. Rep. 916. Such a stipulation is an undertaking or covenant by the insured to do something, and our statute speaks of warranties regarding "any fact or condition." The language of the statute would need to be

liberally construed to make it cover what the insured agrees to do. The records provided for tend to diminish the risk of a fire occurring; for there is less temptation to incendiarism when there is a check on demands for exaggerated indemnities. There is likewise a diminution of risk, in that, if a fire occurs of innocent origin, the company can more certainly learn the damage done. Does not this matter go to the risk as directly as overinsurance or the institution of foreclosure proceedings, which courts hold affect the risk? *Dolan v. Insurance Co.*, 88 Mo. App. 666. We put the statute aside for the reason that its application must be doubtful until the Supreme Court construes it, and the defense under consideration falls at common law. Whether the clause in question is a warranty or a representation, it is in the nature of a condition subsequent, like the agreement to furnish proofs of loss; and this the defendant's attorneys concede. Being akin to conditions subsequent, the contract for insurance took effect without regard to whether it was performed, and a breach of it did not necessarily and of its own force forfeit plaintiff's right to indemnity. In strict law conditions subsequent pertain to grants of realty; but there are analogous terms in contracts regarding personalty which are governed by the same rules. A breach of such a condition in a conveyance does not work a forfeiture of the estate granted unless the grantor so elects. And he may waive the forfeiture expressly or by implication. 6 Am. & Eng. Ency. Law (2d Ed.) p. 508, and cases cited. The same thing is true of like terms, such as the "iron-safe clause", and the requirements of proofs of loss in insurance policies. *Bersche v. Insurance Co.*, 31 Mo. 546; *Springfield Laundry Co. v. Same*, 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521; *Keet-Roundtree Dry Goods Co. v. Same*, 100 Mo. App. 504, 74 S. W. 469; *Schmidt v. Same*, 2 Mo. App. 339; *Raymond v. Same*, 86 Mo. App. 391. At most, plaintiff's nonperformance of his agreement about the inventories and books afforded cause for forfeiture if defendant had taken the requisite step of demanding, after the fire, that those documents be produced and asserting a forfeiture when plaintiff failed to produce them. It might waive the claim if that course was preferred, and, having once done so, its right was gone and could not be recalled. *Porter v. Insurance Co.*, 62 Mo. App. 526. There is no proof that defendant demanded the inventories and books, or that plaintiff has ever failed to comply with such a demand.

A forfeiture is claimed on the ground that what he testified to in court showed he had broken his agreement. But by the words of the stipulation the policy was to be avoided if plaintiff, in case of loss, failed to produce the books and inventory. Now, it was shown that not only was no demand for them made, but that no agent of the company to

whom they might have been tendered came about the plaintiff after the fire. What was the defendant's attitude and conduct regarding the stipulation in question, and was a purpose exhibited prior to the filing of the last answer to take advantage of plaintiff's breach or to waive it as a defense? In making this inquiry, we do not forget that, as defendant's counsel say, plaintiff pleaded in reply performance of the stipulation, and not an election by defendant to waive this defense. Proof of waiver may be given in insurance cases under a plea of performance. This is an invidious rule, but it is the law. *McCullough v. Insurance Co.*, 113 Mo. 606, 616, 21 S. W. 207. In the present instance, at least, it may be applied with justice. If the company never demands the documents, the condition on which a forfeiture might be invoked does not happen. And the very condition must happen for a court to enforce so harsh a right. *Illinois Fire Ins. Co. v. Stanton*, 57 Ill. 354; *Forehand v. Insurance Co.*, 58 Ill. App. 161; *McCullum v. Insurance Co.*, 61 Mo. App. 352. The testimony shows that from the first defendant claimed the fire was of incendiary origin and started by plaintiff himself or with his complicity, and that, instead of demanding the production of his books and inventories to ascertain the loss, it demanded an appraisalment; and on an issue duly submitted to the jury it has been found that this demand was insincere, and not made with the desire to have the loss fixed by an appraisalment. Defendant went to trial the first time on an answer charging plaintiff with having committed several perjuries and also arson, alleging that his loss was trifling and did not amount to \$1,000, and that he had brought his action prematurely and before compliance with the terms of the policy, making an appraisalment a condition precedent to the right to sue. The answer said nothing about the present defense, though, so far as appears, the facts in regard to it were as well known to defendant then as afterwards. After plaintiff had been forced to overcome all those defenses, and there had been a reversal for an error in the instructions, defendant, for the first time, interposed the plea in bar that the "iron-safe clause" had been violated. We do not hesitate to say that this supplemental defense came too late, and after it was obvious that the defendant had elected to ignore it and stand on other defenses. If a motion had been filed to strike that part of the answer out, it would have been right to sustain it. As none was filed, we must look to the evidence and not the pleadings, and the undisputed evidence shows both that the condition of a forfeiture never occurred and that the defendant trusted to other defenses. The amended answer completely shifted the defendant's position and raised a new issue on facts which could have been as well plead in the first one and tried at the first trial. We hold that defendant's failure to

attempt to adjust the loss, or demand a production of the plaintiff's books and papers, and its subsequent trial of the cause on various other defenses going to the merits of the action, show this subsequent plea is a makeshift, purely technical, without substantial merit, and affording no just cause to forfeit the plaintiff's rights or defeat his action.

The judgment is affirmed.

BLAND, P. J., and NORTON, J., concur.

STONE v. GRAND LODGE A. O. U. W. OF MISSOURI.

(Kansas City Court of Appeals. Missouri. Feb. 5, 1906. Rehearing Denied March 3, 1906.)

1. JUDGMENT—REVERSAL WITHOUT REMAND—RES JUDICATA.

The simple reversal of a judgment by the Court of Appeals without remanding the cause destroys its effect as an estoppel and leaves the whole matter open for further litigation.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1175.]

2. TRIAL—DIRECTION OF VERDICT.

Where in an action on a policy, insurer's sole contention was that a prior judgment in mandamus proceedings was *res judicata* and a bar to the suit in question, it thereby admitted plaintiff's *prima facie* case and defendant having failed to establish such plea in bar, plaintiff was entitled to a directed verdict.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Mary F. Stone against the Grand Lodge of the Ancient Order of United Workmen of Missouri. From a judgment for plaintiff, defendant appeals. Affirmed.

Frederick H. Bacon and Grant I. Rosenzweig, for appellant. E. W. Shannon and M. A. Fyke, for respondent.

BROADDUS, P. J. On September 30, 1892, the defendant, a beneficiary organization, issued to one, B. D. Stone, a policy of insurance, wherein plaintiff, Mary F. Stone, was made the beneficiary. On October 7, 1903, said Stone died. This suit was commenced December 23, 1903. The petition is in the usual form on contracts of insurance of the same kind, and alleges performance by the insured with all the conditions of the contract, and that defendant had waived all formal proof of death. The answer sets up several defenses, but, as the defendant only relied on one of them, we are not required to notice the others. The defense relied on is substantially as follows: That the said D. B. Stone, by his guardian, he being insane, brought a mandamus proceeding in the circuit court of Jackson county, Mo., on March 8, 1897, to require appellant to reinstate him in defendant company; that said mandamus proceeding resulted in a judgment for a peremptory writ being awarded by said court, which judgment, on appeal, was reversed by the Court of Appeals and the proceeding dis-

missed. This trial resulted in a judgment for plaintiff and defendant appealed. The defendant contends that the judgment of the Kansas City Court of Appeals was *res adjudicata*.

The question turns upon a proper construction of section 4285, Rev. St. 1899. It is not a new question in this state. In *Musser v. Harwood*, 23 Mo. App. 495, it was held that: "The appellate courts of this state have the power, and have always exercised it, to determine a case before them finally by simply reversing the judgment of the lower court." But that case was expressly overruled by this court in *Lumber Co. v. Lumber Co.*, 72 Mo. App. 248, wherein the court uses the following language: "The simple reversal of a judgment without remanding will destroy its effect as an estoppel and throw the whole matter open." The Supreme Court has also passed on the question. In *Atkison v. Dixon*, 96 Mo. 582, 10 S. W. 163, the court holds that a judgment when reversed by the Supreme Court becomes a nullity and thereafter confers no rights, and has no vitality for any purpose. See, also, *Hewitt v. Steele*, 136 Mo. 327, 38 S. W. 82. The defendant's argument is not applicable to the question. The defendant's sole contention was that the judgment in the mandamus proceedings was *res adjudicata* and therefore a bar to the prosecution of this suit. It assumed the burden of proof on the trial, which was an admission of the plaintiff's *prima facie* case, and having failed to establish its special plea in bar, the plaintiff was entitled to have an instruction directing a verdict in her favor.

Affirmed. All concur.

SMITH v. COUCH.

(Kansas City Court of Appeals. Missouri. Feb. 5, 1906. Rehearing Denied March 3, 1906.)

1. ATTORNEY AND CLIENT—ACTION FOR COMPENSATION—INSTRUCTIONS.

In an action by an attorney for compensation for services rendered under an employment in a particular case, an instruction that if the plaintiff performed the services at the request of the defendant, or that if the services were rendered and defendant accepted them, the verdict should be for plaintiff, was not objectionable as authorizing a recovery for services not referred to in the petition, where there was no evidence of the rendition of services other than those mentioned in the petition.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 375.]

2. TRIAL—INSTRUCTIONS—APPLICATION TO CASE.

In an action by an attorney for services, an instruction that, in fixing the amount of the verdict, the jury should take into consideration the plaintiff's standing and character in the legal profession, was erroneous, where there was no evidence of his standing or character.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 596-612.]

3. SAME—ADMISSIBILITY OF EVIDENCE.

In an action by an attorney for the reasonable value of services rendered by him

in an action for specific performance, where he was to receive no compensation if he were unsuccessful, evidence of an increase of value of the property, relative to which the services were rendered pending the litigation, was admissible in evidence.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by James G. Smith against Joseph W. Couch. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Harry E. Colvin, James A. Reed, and C. O. Tichenor, for appellant. Peak & Strother, for respondent.

BROADDUS, P. J. This suit is to recover the reasonable value of plaintiff's service, as an attorney at law, rendered by him for defendant in a certain proceeding for specific performance of a contract to convey land to the defendant, made by one Angeline Parish. There was a trial by a jury and a verdict returned for plaintiff for \$1,438.31, which the court set aside on defendant's motion, and granted a new trial for error in giving instruction No. 1 for plaintiff. From the order granting a new trial, plaintiff appealed.

The gist of the petition is that, in August, 1899, the defendant employed the plaintiff, at such a compensation as his services should be reasonably worth, to give to him such legal advice from time to time as said defendant might require in the premises, and also to do any and all conveyancing needful to the premises, and also to do such copying and engrossing of instruments, and to make such journeys in and about the said business, and such attendance of court, as might be deemed necessary. The petition then proceeds to allege that between August, 1899, and June, 1903, the plaintiff performed certain legal services for defendant at his request, of the reasonable value of \$2,000. The answer was a general denial. On the trial, defendant's liability was admitted and the only question before the jury was the reasonable value of plaintiff's services under his contract with defendant, as shown by the evidence.

Instruction No. 1, which the court, on motion for new trial, found to be error, is as follows: "The court instructs the jury that, if from the evidence you find and believe that the plaintiff performed the services, described in the petition and in the testimony, or any of them, at the request of defendant, or, if from the evidence in the case you find and believe that such services, or any of them, were rendered by plaintiff for defendant, and that defendant accepted such services of the plaintiff, then your verdict will be for the plaintiff in such sum as you believe and find from all the evidence in the case will fairly and reasonably compensate the plaintiff for such service performed by him," etc. The objection to the instruction is that it authorized the plaintiff to recover for services had and received by defendant outside of the contract of employment. And, as the allega-

tions of the petition did not include a claim for such services, the instruction in that respect was technically erroneous. But, as the defendant's liability is in fact admitted, we do not see how the instruction could have affected the result. There was no evidence introduced that plaintiff had rendered other services than those stated in his petition. There was nothing in the instruction that could mislead the jury.

The motion assigned several grounds for setting aside the verdict; (1) that the court committed error in giving instruction No. 2, wherein it authorized the jury, in fixing the amount of the verdict, to take into consideration plaintiff's standing and character in the legal profession. We have been unable to find any evidence in the record as to plaintiff's standing and character in the legal profession. It is a well-known fact that physicians, surgeons, and lawyers of high standing in their profession for skill base, to some extent, their compensation for services upon their eminence in that respect. The idea was embodied in the instruction criticized. But it should not have been given because there was no evidence to support it. And its tendency was to mislead the jury, as it assumed also that he had a standing and character in his profession. Of course, we assume that he had some standing, and that his character was good, or he would not be allowed to practice as a lawyer. But there was nothing to show plaintiff's standing in either respect. It left to the jury to conjecture what it was.

The motion also contained a ground for rehearing, because the court committed error in permitting plaintiff to prove the increased value of the property in controversy in the suit for specific performance of the contract pending the litigation. The property was shown to have been worth about \$4,300 at the time of plaintiff's employment, and that it increased in value to \$9,000 or \$10,000 during the litigation. Plaintiff also testified that he was to receive no compensation for his services, unless he succeeded enforcing specific performance of the contract. We find no case has been cited from the Missouri courts on the question. Our attention has been called to the following: In *Robbins v. Harvey*, 5 Conn. 335, a case, in which plaintiff was suing for a reasonable compensation for legal services rendered, and wherein he offered to show that when he engaged in the defendant's business she was poor, so that his ultimate remuneration depended wholly upon her recovery, the court held that such evidence was inadmissible; the only question being what was the worth of the services rendered, which could not be affected by the poverty of the defendant. In *Haish v. Payson*, 107 Ill. 363, it was held that: "While the amount involved in the litigation may not improperly be considered in fixing the value of the services of an attorney in the case which led to a settlement of the matters in

dispute, and the securing of certain rights and privileges to his client, yet it was not admissible to go into an inquiry concerning prospective benefits, which may accrue in the future to the client from such settlement." The principle applied in the Connecticut case was undoubtedly correct, for no good reason can be assigned why a poor man should pay a greater fee than a rich one, merely upon the theory that the latter was the more solvent. And no fault is to be found to the law as determined in the Illinois case for the reason given, that prospective benefits, which may accrue in the future, are too indefinite and leave too much room for conjecture and speculation. But it seems to us that, where an attorney undertakes a case upon the understanding that, unless he succeeds and accomplishes for his client what he has agreed to do, he is not to have any compensation for his services, the value of the magnitude of the result achieved ought to be considered in estimating the value of such services. It is well known that in such cases it is the universal practice of lawyers to charge more for the same amount of services than is usually charged when there is a fixed compensation for the same. Suppose, for instance, the property in this case, at the end of the litigation, had depreciated in value until it was only worth \$2,000, it would hardly be reasonable to say that plaintiff's services are to be measured entirely by the amount of the labor and skill he bestowed on the case, without taking into consideration the value of the property realized. As the value of the property in litigation increased in value, the responsibility of the plaintiff increased in like proportion.

Other points raised by respondent are not well founded.

For the reasons given, the action of the court in setting aside the verdict of the jury is affirmed. All concur.

KOHR v. METROPOLITAN ST. RY. CO.
(Kansas City Court of Appeals. Missouri. Feb. 5, 1906. Rehearing Denied March 3, 1906.)

1. CARRIERS—INJURIES TO PASSENGER—EVIDENCE.

In an action for injuries to a person attempting to board a street car, where it is shown that the usual signal for starting the car was given at such a time as to cause injury to the plaintiff, the presumption is that it was given by the conductor.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1286.]

2. SAME.—NEGLIGENCE.

Where other persons had boarded a street car before the plaintiff, and she attempted to board it while it was still standing, the conductor's failure to see her, and his act in starting the car while she was attempting to board it, was negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1159, 1160.]

3. EVIDENCE—CONCLUSION OF WITNESS.

In an action for injuries to a person attempting to board a car, where a witness

testified that he was familiar with the sound of a gong used by the gripman, as distinguished from the sound of the bell the conductor used for starting signals, his further testimony that it was the bell to start the car he heard ring at the time of plaintiff's injury was not inadmissible as a conclusion.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2159, 2232.]

4. TRIAL—INSTRUCTIONS—STATEMENT OF ISSUES.

An instruction authorizing the jury, if they find for the plaintiff, to assess the damages received by her as the direct result of the negligence of defendant, without any further reference to the issues in the case, and leaving the jury to determine them, was error.

Appeal from Circuit Court, Jackson County; A. F. Evans, Judge.

Action by Marion O. Kohr against the Metropolitan Street Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

John H. Lucas, for appellant. Boyle, Guthrie & Smith, for respondent.

BROADBODUS, P. J. The plaintiff's suit is for damages alleged to have been sustained as the result of the negligence of the defendant. The gist of the petition is that, while the plaintiff was in the act of boarding one of the defendant's cars as a passenger at Twelfth and Main streets, Kansas City, Mo., the defendant's conductor gave the signal for starting, and the car suddenly started forward and threw her to the ground, injuring her; "that the plaintiff's position at the time the conductor gave such signal at the time said car was started was such that the said conductor knew, or by the exercise of reasonable care could have known, the position and danger of plaintiff; and that the probable result of the giving of said signal and the sudden starting of said car would be to the injury of the plaintiff." The trial resulted in a judgment for the plaintiff, and the defendant appealed.

The defendant's principal contention is that the court erred in not directing a verdict for it, as asked upon the close of the evidence. It was shown that the car plaintiff attempted to board was a cable car being operated on Twelfth street. The car was going west, and had crossed Main street, and stopped at the usual place for taking on and discharging passengers. The plaintiff and a man by the name of Huber, her escort, were together at the place mentioned to take passage on the car. The plaintiff, in her testimony on her examination in chief, testified that when she had placed one of her feet on the step of the car, and as she raised the other to get on, the conductor gave the signal for starting, and the car suddenly started forward, and that she held to the railing for some distance when she was thrown to the ground. Upon cross-examination, she stated that "I put my foot upon the car and grasped the handle as was my custom, and just as I placed my foot on the step and grasped the

handle of the car a signal was given and the car was jerked forward throwing me." And further stated that she did not know at what period the bell was rung, whether before or after she fell. Huber, her escort, testified that plaintiff put her foot on the step to get on the car, the bell rang, and the car started, and the result was she fell down, and that at the time she had hold of the handle of the car. He was asked these questions: "Mr. Huber, did you hear the bell of the car rung that evening?" He answered: "I did." "Where were you and Miss Kohr at the time the bell was rung?" Answer: "She was just in the act—just had her first foot on the step and was in the act of taking another step when the bell was rung." He did not see any one ring the bell, and did not know where the conductor was at the time, and did not know whether the bell that was rung was on the coach or grip car. The conductor testified that he rang the bell, but that it was the emergency bell, and was not rung until after plaintiff fell. He denies seeing plaintiff before the car started while she was attempting to take passage. Defendant's evidence tends to show that plaintiff attempted to get on the car while it was in motion, going at the speed of about eight miles an hour. It is proper to state that plaintiff's evidence on her cross-examination that she did not know whether the bell was rung before or after she fell was made after her attention had been called to a former statement, and she affirmed that such statement was correct. According to the testimony of the plaintiff and her escort, the car was standing when she attempted to board it, and according to Huber's evidence the bell was rung before the car was started, but by whom he did not state. But he does state the usual signal for starting was given.

The question raised is that there is no evidence that the conductor gave the signal for starting, and therefore the specific allegation that the conductor was guilty of negligence in starting the car was not proven and plaintiff failed to prove her case as alleged. It having been shown that the usual signal for starting was given, the presumption of law is that it was given. The court takes cognizance that the movements of street cars are directed solely by the conductor. And when it is shown that a signal for the starting of a car is given, the presumption is that it was given by the conductor, and the presumption is conclusive until it is overthrown by evidence to the contrary. It is true that the conductor, and other witnesses who support him, testified that the signal given was not for the starting of the car, but that it was an emergency signal, and not given until after plaintiff fell to the ground. And there was evidence going to show that the conductor by the exercise of reasonable diligence might have discovered plaintiff's situa-

tion while she was attempting to get upon the car before he gave the signal for it to start. Both plaintiff and her escort testified that they were at the car while other persons were getting on, and that the plaintiff waited for the others to get on, and that when she attempted to get on the car started. If he did not see her, he ought to have seen her, if the evidence of plaintiff is true; and we must assume he did for the purposes of the case. The defendant asked, and the court gave, instruction No. 5, which concedes that its conductor had no right to start its car when some person was in the act of getting off or on. If the car was at a stand when plaintiff was in the act of getting on, it was negligence if the conductor failed to see her. The case does not, therefore, fall within the rule, as construed by defendant, as announced in *Barton v. Railroad*, 52 Mo. 253, 14 Am. Rep. 418; *Sharp v. Railroad*, 161 Mo. 214, 61 S. W. 829, 84 Am. St. Rep. 738, and *Tanner v. Railroad*, 161 Mo. 497, 61 S. W. 828.

Objections are made to the action of the court in admitting incompetent evidence. The witness Huber was asked: "Was that the gong (the gripman uses a gong) you heard, or was it some bell you heard to start the car?" This was objected to as calling for a conclusion, and then this question was propounded: "Are you familiar with the sound of the gong the gripman uses, distinguished from the sound of the bell the conductor uses to give the signals for starting and stopping cars?" Answer: "Very definitely." He then stated that it was the bell to start the car he heard ring. It is true the statement of the witness is a conclusion, but it is a statement of fact notwithstanding. There can be no statement of any fact without it involves to some extent a conclusion. It would be impossible for a witness to state the fact in any other manner. The differences in sound are recognized by the organ of hearing, and if the witness knows when a bell, and not a gong, is sounded, he may state which. He would not be required to imitate the sound for the enlightenment of the jury. Other objections to the admission of evidence are even of less importance.

Objection is made to instruction No. 1 given for plaintiff, because it wholly fails to limit the jury to the issues tendered by the pleadings, thereby leaving to the jury to determine for themselves what the issues were. The instruction reads: "The jury are instructed that, if they find for the plaintiff, they will assess her damages * * * if any, received by her, as the direct result of the negligence, if any, of defendant, as defined by these instructions," etc. There is no further reference in plaintiff's instructions to the issues in the case. The defendant asked and was given nine instructions, in none of which the issue upon which plaintiff relied for recovery is stated; but sev-

eral of them state, if the jury find certain facts, the plaintiff is not entitled to recover. The case falls within the principle found in *Allen v. St. Louis Transit Co.*, 183 Mo. 411, 81 S. W. 1142, where the instruction was similar to the one under consideration, and where the defendant set out a number of facts which, if found to be true, the plaintiff could not recover. The court holds that: "The instructions should submit to the jury the issues they are to try. They should not permit plaintiff to recover on any unspecified theory of negligence whatsoever which a carrier may commit against a passenger." A similar ruling by this court is found in *Hamilton v. Metropolitan St. Ry. Co.* (not yet officially reported) 89 S. W. 893.

For the error noted, the cause is reversed and remanded. All concur.

RILEY v. AMERICAN CENTRAL INS. CO.
(Kansas City Court of Appeals. Missouri.
Feb. 5, 1906. Rehearing Denied March
3, 1906.)

1. INSURANCE—WAIVER OF PROVISION IN POLICY—AUTHORITY OF AGENT.

An agent who solicited, issued, and countersigned a policy of fire insurance, and collected the premiums, had authority to waive a provision requiring the books of the insured to be kept in a fireproof safe.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 948-953.]

2. SAME—EVIDENCE.

Evidence that an insurance agent, who had authority to waive a provision in a fire policy requiring the insured to keep his books in a fireproof safe, knew at the time of issuing the policy that the insured had no such safe, and on the day before the fire, while he saw that insured still failed to comply with the provisions of the policy, instead of canceling the policy, solicited additional insurance, authorized a finding that the provision of the policy was waived.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1028, 1038.]

3. SAME.

In an action on a fire policy, evidence of the insurance agent's knowledge, prior to the execution of the written contract, that the insured would not comply with an iron-safe clause in the policy, is admissible to connect with evidence that, after the execution of the contract, he had knowledge that the assured was not complying with the provision, for the purpose of showing a waiver.

Appeal from Circuit Court, Jasper County; Hugh Dabbs, Judge.

Action by J. P. Riley against the American Central Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Fyke & Snider, for appellant. Thomas & Hackney and Howard Gray, for respondent.

ELLISON, J. This is an action on a fire insurance policy in which plaintiff prevailed in the trial court. It appears from the terms of the policy that plaintiff was a retail merchant in a small town in Jasper county, and

that it was stipulated that: "The assured shall keep such books and last inventory, and also last preceding inventory, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy or the portion thereof containing the stock described therein, is not actually open for business; or, failing in this, the assured will keep such books and inventories at night, and at all such times in some place not exposed to a fire which would ignite or destroy the aforesaid building." The evidence showed that a loss occurred by fire about six months after the policy was issued. It also showed that plaintiff did not comply with those provisions of the policy.

Plaintiff, in support of the judgment, relies upon a waiver of the provisions. There was evidence tending to show that defendant's agent had been insuring plaintiff for about 10 years, a great portion of the time in this defendant company. That during all that time he told the agent, and the agent knew, that he did not have a safe, and that he would not get one, and that he would not keep his books in a safe, nor would he take them home at night, but would leave them at the store. That he showed the agent the kind of books he kept, and where he kept them. That he told him that at the issuance of the present policy, as well as before. The evidence further tended to show that on the day before the fire occurred this agent was in plaintiff's store and solicited him to take out additional insurance as he (the agent) did not think what was then on it was enough. And that in this conversation they talked about "the books and matters," and the agent said to him, when thus soliciting more insurance, that "You are still going ahead, keeping your books like you have been?" And he told him that he was. The instructions on the subject of waiver were to the effect that, if the jury believed that the agent had the knowledge thus testified to, and failed to cancel the policy, or to make any objection thereto, it was a waiver. The first question, then, is on the power of the agent to waive the provisions in controversy. In view of the rulings of the courts in this state in the last few years, there can be no doubt of the authority of the agent. He solicited, issued, and countersigned the policy, and collected premiums, and was therefore the alter ego of the company. *James v. Ins. Co.*, 148 Mo. 1, 49 S. W. 978.

The remaining question is, did he waive such provisions? We have already stated the evidence in plaintiff's behalf bearing on that question. From such evidence, it appears that the agent was informed by plaintiff, when he issued the policy, that he would not do what is therein provided he should do; and that after he issued the policy he knew that plaintiff, in keeping with what he had told him, was not complying with those provisions. That, on the day before the fire, the agent saw that he was not complying

with those provisions, and, instead of objecting or taking steps for forfeiture, he solicited additional insurance. Undoubtedly, this was sufficient upon which to base a finding of waiver. In *Springfield Laundry Co. v. Insurance Co.*, 151 Mo. 90, 98, 52 S. W. 238, 74 Am. St. Rep. 521, it was provided in the policy that, if the property should be advertised for sale under a mortgage thereon, the policy should become void. The property was advertised, and the local agent knew that it was, but he took no steps towards canceling the policy. It was held that such nonaction, with that knowledge, was a waiver of the forfeiture. In *Thompson v. Insurance Co.*, 169 Mo. 12, 25, 68 S. W. 889, it was held that, where the agent of the company knew of additional insurance not taken out in the manner provided in the policy, and did not object, it was a waiver of the forfeiture; the court remarking that, if it was desired to rely upon the forfeiture, action should have been taken. So in *Pelkington v. Insurance Co.*, 55 Mo. 172, it was held that, if the agent knew of additional insurance, and did not object, it was a waiver of the forfeiture on that account. And that it was the agent's duty to express his dissent when he learned of cause for a forfeiture, if he intended to enforce it. And so we held in the recent case of *Polk v. Insurance Co.* (not yet officially reported) 90 S. W. 397.

But it is said that, under the case of *Gillum & Co. v. Fire Ass'n*, 106 Mo. App. 673, 80 S. W. 283, the judgment in this case cannot be sustained. That, under the law as there stated, all prior and contemporaneous understandings between plaintiff and the defendant's agent became merged in the policy. On the other hand, we are cited to the cases of *Bush v. Insurance Co.*, 85 Mo. App. 155, and *Hanna & Co. v. Insurance Co.*, 109 Mo. App. 152, 82 S. W. 1115, in support of the judgment. These, defendant contends, are not in harmony with the *Gillum Case*. In the *Gillum Case*, the policy, like the one in controversy, contained the iron-safe clause. The judgment was reversed, and the cause remanded on account of an instruction given for the plaintiff, which, in terms, directed the jury to find for the plaintiff if before the policy was issued the agent agreed with plaintiff that the iron-safe clause would be omitted from the policy. That, as stated by the presiding judge writing the opinion in that case, was a clear violation of one of the fundamental rules of law that all prior or contemporaneous agreements are conclusively presumed to be merged or included in the written contract finally executed. That instruction put the case to the jury, not upon a waiver by conduct after the policy was issued, but upon what was agreed to before the contract was finally embodied in the written policy. That, of course, could not be allowed without violating "one of the plainest and most beneficial rules of law." The

criticism made of the instruction in the *Gillum Case* is upheld in *Ijams v. Insurance Co.*, 185 Mo. 466, 499, 84 S. W. 51. But neither the case of *Bush v. Insurance Co.*, supra, nor *Hanna & Co. v. Insurance Co.*, supra, are inconsistent with the *Gillum* or *Ijams Cases*. It will be observed that in the *Hanna Case* it was conceded by the parties that there was sufficient evidence of waiver to go to the jury. In the *Bush Case*, the point, as now presented, was not suggested, and in consequence the statement made of that case is not broad enough to show certain prominent facts which therein appeared in evidence, which made of the case one of waiver as applied to contracts of this nature. The evidence in that case showed that the agent delivered the policy to the assured and then accepted a note due in six months for one-half of the premium and a check for the other half, and that, with knowledge that the assured did not keep, and was not keeping, an iron safe, cashed the check and did not return the note. Thus, a clear case of waiver was made out under the cases of *Springfield Laundry Co. v. Insurance Co.*, *Thompson v. Insurance Co.*, and *Pelkington v. Insurance Co.*, supra.

It seems to us that the decisions, to which we have referred herein, were all made in recognition of well-understood principles of law: First, that all prior and contemporaneous conversations and understandings of the parties to a written contract, in the absence of fraud, accident, or mistake, count for nothing as against the provisions of the contract which are finally reduced to writing. But that such rule is in no way contradictory of, and is in no way inconsistent with, the further rule that the obligations of a written contract may be waived by conduct of the parties occurring after its execution. If a contract includes provisions which, if not complied with, involve a forfeiture, and the party, for whose benefit the provisions were inserted, knowing the other party is not complying with them, makes no objection and acquiesces therein, he waives the forfeiture. Authorities, supra. The waiver cannot rest alone on the agent's prior knowledge or understanding which is inconsistent with the writing afterwards made, for the contract is not then in existence. It is necessary that there be subsequent conduct which is inconsistent with an intention to insist on the forfeiture. If an agent for an insurance company, at the time he solicits the insurance and delivers the policy, is informed that the party solicited has no iron safe, and that he will not procure one, and will not keep his books away from the store, yet, after the policy is delivered, accepts of a premium covering the continuing risk, and with such knowledge takes no exception to the continued violation of the forfeiture provision, and takes no steps, by objection or otherwise, in recognition of his right of forfeiture, he will be deemed to have

waived it; for he thereby causes the assured to believe the forfeiture will not be insisted upon. "If a party, by his silence, directly leads another to act to his injury, he will not be permitted, after the injury has happened, to then allege any thing to the contrary, for he, who will not speak when he should, will not be allowed to speak when he would." *Pelkington v. Insurance Co.*, supra. Evidence of the agent's knowledge prior to the time of the execution of the written contract will not be received to vary or alter such contract; but, on the subject of waiver of the contract, it can, in a proper case, be rightly admitted to connect with and aid in the proof that he, after the execution of the contract, had knowledge that the assured was not complying with the forfeiture provisions.

Under these views, objections to testimony made by defendant were not well taken, and there was no error in giving plaintiff's second instruction. While that instruction refers to knowledge of defendant's agent before the policy was issued, and that the agent was informed that plaintiff would continue to do as he had in the past, yet, such reference to prior knowledge was, for the purpose of connecting knowledge of the same condition existing after the policy was issued (of which there was evidence), and submitting the hypothesis of defendant, with such knowledge, collecting the premium on the policy and allowing it to run without objection or cancellation.

We do not discover any error materially affecting the merits of the controversy, and hence affirm the judgment. All concur.

MYTON v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Kansas City Court of Appeals. Missouri.
March 5, 1906. Rehearing Denied
April 2, 1906.)

1. INSURANCE — EMPLOYERS' LIABILITY — ATTACHMENT COSTS.

Under an employers' liability insurance policy, where the insurer appeared for the insured and defended an action against her in which the only jurisdiction otherwise acquired by the court was by virtue of an invalid attachment, the insurer waived the objection that the liability for attachment costs was not included within the terms of the policy.

2. SAME — SETTLEMENT OF SUIT.

Under an employers' liability insurance policy, where the insurer appeared for the insured in an action against her, in which the only jurisdiction otherwise acquired by the court was by virtue of an attachment, and afterwards made a settlement with the plaintiff under which judgment was entered for a certain sum and costs, the insured became bound for payment of attachment costs included in the judgment, though the attachment was invalid.

Appeal from Circuit Court, Jasper County; Howard Gray, Judge.

Action by Mary P. Myton against the Fidelity & Casualty Company of New York. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

H. W. Currey and Frank L. Forlow, for appellant. A. E. Spencer and McAntire & Scott, for respondent.

JOHNSON, J. Action upon a policy of insurance. The material facts are not disputed, and may be stated as follows:

On October 2, 1899, defendant issued the policy under consideration to a Mr. Sully, the owner of certain mines in Galena, Cherokee county, Kan. Sully, in December following, sold the property to plaintiff and assigned the policy to her with the consent of defendant. The undertaking of the insurer, as disclosed by the terms of the policy, was to indemnify the insured "against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any employé or employés of the assured while on duty at the places and in the occupation mentioned in the schedule, hereinafter given, in and during the continuance of the work described in the said schedule."

Among the provisions of the policy, these are material to the present inquiry: "If, thereafter, any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the home office of the company every summons or other process as soon as the same shall have been served on him, and the company will at its own cost defend against such proceeding in the name and on behalf of the assured (and pay) the indemnity or settle the same, unless it shall elect to pay to the insured the indemnity provided for in clause A of special agreements, as limited therein." "The assured shall not settle any claim except at his own cost, nor incur any expense, nor interfere with any negotiation for settlement, or in any legal proceeding, without the consent of the company previously given in writing. * * * The assured, when requested by the company, shall aid in securing information, evidence and the attendance of witnesses, and in effecting settlements and in prosecuting appeals." "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment," etc.

On May 3, 1900, while the policy was in force, a laborer named Ross, employed in the mine by plaintiff, was fatally injured. Shortly after his death, his father and mother, B. H. and Sarah Ross, brought suit in the district court of Cherokee county, Kan., a court of competent jurisdiction, against the assured, alleging in the petition filed that the death of their son was the direct result of the negligence of his said employer. The deceased was an unmarried minor and, under the Kansas law, a right

of action such as that pleaded vested in his parents. The defendant there (plaintiff here) was a nonresident of the state of Kansas, and the plaintiffs in that suit, at the commencement thereof, procured the issuance of a writ of attachment and caused the same to be levied by the sheriff upon a large amount of personal property owned by the defendant, Myton, and used in the operation of the said mine. The Kansas law authorized an attachment in aid of an action of this character, but required as a step preliminary thereto the filing of an attachment affidavit containing, among other requisite averments, the statement of one or more statutory grounds. Nonresidence in the state is one of such grounds. An affidavit was filed, but it failed to allege any ground for attachment. Nevertheless, the writ was issued, and defendant Myton's property was seized and held thereunder by the sheriff until the final termination of that suit. The only service upon the defendant Myton was by publication. The insurance company (defendant here) was notified of the bringing of the Kansas suit, and, conceding that the liability, if any, was one covered by the policy, immediately assumed entire charge of the defense. It took no steps to contest the jurisdiction of the Kansas court on account of the defective affidavit, and filed no motion or plea in the attachment proceeding, but answered to the merits of the principal suit in the name of the defendant, Myton, and thereby entered her personal appearance. After the suit had been pending for more than a year, the insurance company entered into a stipulation with the plaintiffs therein for a settlement of the controversy, the terms of which appear in the judgment, which the parties had entered by consent, on October 17, 1901. It is as follows: "Now, on this day, this cause came on for trial, the plaintiffs herein appeared by their attorneys * * * and the defendants herein by * * * their attorneys, and now a jury being waived, the trial of this cause was submitted to the court; and, thereupon, as per stipulation, in open court, it was agreed that the plaintiffs should have judgment against the defendants for the sum of \$700.00 and the costs of suit. It is therefore considered, ordered, adjudged and decreed that the plaintiffs, B. H. Ross and Sarah E. Ross, do have and recover of and from the defendant * * * Mary Myton the sum of seven hundred dollars and the costs of this suit, taxed at \$1,201.90, and that the attachment lien herein issued by the clerk of this court upon the 11th day of October, 1906, be preserved and continued, and that an order of sale issue, for the sale of the attached property herein, after a period of thirty days from this date; that the question of fees for guarding the property be hereafter determined by the court at some later day of this term of this court." The costs amounting to \$1,201.90 were composed of these items:

Clerk's costs.....	\$ 28 00
Sheriff's costs.....	22 00
Sheriff's costs, guard hire.....	1,113 90
Appraiser's fees.....	4 00
Printer's fee.....	10 00
Plaintiffs' witnesses.....	24 00
Total.....	\$1,201 90

The insurance company satisfied the judgment of \$700 on November 11, 1901, and paid these items of costs, clerk's costs \$28, sheriff's costs \$22, and plaintiffs' witnesses \$24; but refused to pay the remaining items of sheriff's costs, guard hire \$1,113.90, printer's fee \$10, and appraiser's fee \$4. At the January term following, the court heard the application for an order retaxing the sheriff's costs for guarding the attached property and reduced the amount of those charged to \$900. Myton, under threat of having her property sold under execution, was compelled to pay the costs of \$914, which the insurance company refused to pay, and brought the present suit to recover the amount so expended. The cause of action pleaded in her petition is founded upon the alleged obligation of defendant to pay the costs incurred in the attachment proceeding in the Kansas case. In its answer, defendant did not interpose any defense based upon the alleged invalidity of the attachment lien resulting from the insufficiency of the attachment affidavit, but sought to escape liability under the contention appearing in the following paragraph of the answer: "That under the laws of the state of Kansas neither the affidavit in attachment, the order of attachment, nor the writ of attachment constitutes any part, or are regarded as embraced in the pleadings in the said action of B. H. Ross and Sarah E. Ross against the said * * * Mary P. Myton; and that said ancillary proceeding in no way affected the issues between the said B. H. Ross and Sarah E. Ross, * * * and Mary P. Myton in the aforesaid suit for the negligent killing of their son, J. H. Ross; and defendant avers that, under and by virtue of the contract of indemnity expressed in the foregoing insurance policy, this defendant was under no obligations to defend against said attachment or to release the said defendant's, * * * Mary P. Myton's, property from the levy of the said attachment or to interfere or intermeddle with the proceeding in re of the said B. H. Ross and Sarah E. Ross against the property of * * * Mary P. Myton in the ancillary proceeding aforesaid, and that no right of action accrued to the plaintiff by reason of the failure of the defendant to pay the amount of money which the district court of Cherokee county, Kansas, in the aforesaid ancillary proceeding taxed against the said * * * Mary P. Myton for the care and preservation of their said property." A jury was waived, and the court, upon hearing, gave judgment for plaintiff, from which defendant appealed.

Among the declarations of law asked by defendant and refused by the court is one de-

claring that by reason of the infirmity in the attachment affidavit the Kansas court "had no jurisdiction to issue an attachment against the property, * * * and that the levy thereon was wholly void; that the plaintiff, Mary P. Myton, was not compelled to pay any judgment rendered against her property by reason of said attachment; and that defendant is not liable under its contract of insurance and indemnity for the payment of the judgment rendered," etc. The argument advanced here by defendant is suggested in these quotations from the answer and instruction, and thus may be summarized: (1) The attachment was but an auxiliary proceeding engrafted upon the principal suit, and therefore, even if properly brought, was not one directly involving the merits of the cause of action, for which, if sustained, defendant under the terms of the policy stood liable. (2) The attachment affidavit, in failing to state any ground for attachment, was fatally defective, the court was without jurisdiction to issue the writ of attachment, the sheriff in seizing and holding the property of the assured thereunder was a trespasser, the judgment sustaining the attachment lien was a nullity, and could be attacked, either in a direct or collateral proceeding. Consequently, plaintiff did not pay the costs of this void proceeding under legal compulsion, but, as a mere volunteer, and therefore defendant should not be held liable to reimburse plaintiff, even though it might be said that defendant's duty under the policy required it to defend and indemnify plaintiff against loss on account of a valid attachment issued in aid of a suit covered by the policy.

We will concede for argument, without so deciding, that the questions now urged may be raised in a collateral proceeding, such as the one before us; that the attachment affidavit was so defective that the Kansas court was without jurisdiction to issue the writ; that the caption and custody of plaintiff's property was unlawful; that the attachment was ancillary to, and not an integral part of, the action on the merits; and that prior to the making of the settlement agreement the Kansas court had no jurisdiction to assess any of the costs incurred under a void proceeding against the attachment defendant—and yet, despite these concessions, it is very clear the judgment should be sustained. Defendant entirely ignores the effect of its own conduct. In the assertion of its contract right, it took out of plaintiff's hands the defense of the suit brought against her and assumed and exercised the exclusive management thereof. According to defendant's contention, plaintiff was under no compulsion to appear at all in the Kansas court, for that tribunal had acquired no jurisdiction over her or her property, but defendant, acting in plaintiff's name, subjected her to the jurisdiction of that court and, in pleading to the merits of the suit, conceded, so far as it could, the validity of the attachment lien asserted against her property.

Instead of leaving plaintiff free to obtain the release of her property from a void levy, defendant, acting under its assumed right to control the entire litigation, in effect pushed plaintiff aside and permitted her property to remain tied up for more than a year. It must be borne in mind that defendant was not only in privity with plaintiff in that suit, but, as between them, was the real defendant, and, in thus dealing so cavalierly with plaintiff's property, we must assume that defendant was acting in its own interest and sought to benefit itself by using the invalidity of the attachment proceedings as a weapon with which to coerce the plaintiffs in that suit into a compromise agreement favorable to defendant. But, however this may be, it is overshadowed in importance by what occurred in the settlement of that case. At that time, the costs of the attachment, amounted to over \$1,100 and were increasing daily. The plaintiffs in that suit were confronted with the likelihood of having to pay those costs regardless of the result in the principal suit. In this situation, they very naturally obtained from defendant, acting as the spokesman of plaintiff, the agreement to free them from that liability as a part of the consideration they exacted for the satisfaction of their claim for damages. The judgment entered by the consent of the parties was, in effect, a judicial pronouncement of the agreement made by them. Therefore the obligation of the plaintiff here to pay those costs rested upon her contract merged into the judgment, and was in nowise affected by any question relating to the validity of the attachment lien, nor by the fact that before the settlement agreement was made the costs could not be assessed against her legally; and defendant's obligation to plaintiff became coextensive with that of hers to the plaintiffs in the Kansas suit because of the fact, if for no other reason, that it negotiated and made the very agreement, under which the attachment costs were to be treated, as a part of the consideration for the satisfaction of the cause of action.

Thus, defendant's liability to reimburse plaintiff may be placed upon two grounds: (1) By its course of conduct preceding the settlement of the Kansas suit, as hereinbefore outlined, it waived the objection that the liability for the attachment costs was not included within the terms of its policy. 11 A. & E. Ency. of Law, 13; Cement Co. v. Insurance Co., 11 App. Div. 411, 42 N. Y. Supp. 285; Roby v. Insurance Co., 120 N. Y. 510, 24 N. E. 808; Fuller v. Casualty Co., 94 Mo. App. 490, 68 S. W. 222; Davis v. Wakeloe, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578; Riley v. Insurance Co. (not yet officially reported) 92 S. W. 1147; Polk v. Assurance Co. (not yet officially reported) 90 S. W. 397. And (2) in the settlement made by it, as evidenced by the consent judgment, it expressly made these costs an integral part of a judgment for the enforcement of a cause of action concededly within the terms of its

policy, and thereby became bound for their payment by its own contract. *Murphy v. Smith*, 86 Mo., loc. cit. 338; *Thompson v. Elevator Co.*, 77 Mo. 520; *Beckner v. McLinn*, 107 Mo., loc. cit. 288, 17 S. W. 819; *Bent v. Alexander*, 15 Mo. App. 181; *Casler v. Chase*, 160 Mo., loc. cit. 425, 60 S. W. 1040; *Browne v. Appleman*, 83 Mo. App. 79.

We have considered other points raised by defendant and find the record free from substantial error.

The judgment is for the right party, and is affirmed. All concur.

GILROY v. ST. LOUIS TRANSIT CO.

(St. Louis Court of Appeals. Missouri.
March 27, 1906.)

1. CARRIERS—CARE IN TRANSPORTING PASSENGERS.

A carrier of passengers is bound to exercise the care a very prudent person would exercise under similar circumstances.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1087-1106.]

2. SAME—INJURY TO PASSENGER ALIGHTING FROM STREET CAR.

It was the custom of a street railway company to stop its cars to receive and discharge passengers at a switch, about fifty feet from an intersecting street, though an ordinance required the stopping of cars for taking and discharging passengers after crossing intersecting streets. A car on which a passenger was riding stopped at the switch. The passenger, using ordinary care, undertook to alight, and the car was started before he could alight, causing him to fall. Held, that the company was liable for the injuries received.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1228, 1229.]

3. APPEAL—HARMLESS ERROR.

Where instructions present the theory of the defense fully, and are favorable to the defendant, it has no ground to complain that error was committed in refusing other instructions asked.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4229.]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by James Gilroy against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

In November, 1903, the defendant operated street cars over Grand avenue and Natural Bridge road, in the city of St. Louis. Grand avenue runs north and south and crosses Natural Bridge road (running east and west) at the southeast corner of the fair grounds. The defendant's Eighteenth street, Cherokee and Jefferson avenue lines are deflected west at this point on to Natural Bridge road by a switch located in Grand avenue about 50 feet south of the south line of Natural Bridge road. Cars running north on Grand avenue usually have to be stopped or slowed down to enable the motorman to throw the switch. On November 1, 1903, the plaintiff was a passenger on one of defendant's cars, traveling north on Grand avenue. His residence was in the neighborhood of the crossing of

Grand avenue and Natural Bridge road, and when the car arrived at the switch, it was stopped, or nearly so, and the plaintiff attempted to leave the car and fell, or was thrown to the street, and injured. The suit is to recover for the injury. It was brought against the St. Louis Transit Company and the United Railways Company, and the verdict was for plaintiff against both defendants. On motion of defendant United Railways Company, the verdict was set aside as against it but was permitted to stand against the Transit Company and it alone appealed.

Plaintiff's evidence tends to show that it was, and had been for a number of years, the custom of the defendant's servants, operating cars traveling north on Grand avenue, to stop the cars at the switch for passengers to get off and on, and that plaintiff had habitually alighted from cars at this point for several months prior to his injury. The evidence also tends to show that the cars did not usually stop on the north side of Natural Bridge road and if passengers desiring to get off at that point did not alight when the car stopped at the switch they would be carried to the next street north before they would have an opportunity to leave the car. In regard to the facts attending plaintiff's injury, his testimony tends to show that just before the car reached the switch he gave the usual signal of his wish to leave the car, and the conductor, in response to the signal, gave the motorman a bell to stop at the switch; that the car stopped and plaintiff proceeded to alight; that two other passengers preceded him, and reached the street in safety, but when plaintiff reached the lower step of the rear platform, the car was started forward with a sudden jerk, causing plaintiff to fall upon the street, resulting in serious and permanent injury to one of his hips. Defendant read in evidence the following city ordinance, to wit: "Street cars shall be stopped for taking or discharging of passengers as follows: Those going southward shall stop on the south side of the intersecting streets; those going northward shall stop on the north side of the intersecting streets," etc. And offered evidence tending to show that its carmen were instructed and required to observe the ordinance, and that the managing officers of the company had never given their assent to the discharging of passengers from its north-bound cars running on Grand avenue at the switch, and, if such was the practice, they were wholly ignorant of it. The defendant's evidence also tends to show that the employes of the company did not stop cars at the switch for the purpose of receiving and discharging passengers, and further tends to show that the plaintiff did not signify to the conductor his desire to leave the car at the switch; that the conductor did not give the motorman a bell to stop at that point and the car did not come to a full stop, but the speed was checked sufficiently

to enable the motorman to reach over the vestibule with a bar and throw the switch; that while the car was thus moving slowly, plaintiff hurried out, descended the steps, and stepped off in the opposite direction from which the car was moving, and fell into the street.

Boyle & Priest, for appellant. Earnest Q. Wood, for respondent.

BLAND, P. J. (after stating the facts). Error is assigned in the giving of plaintiff's instructions, and also in the refusal of certain instructions asked by the defendant. Plaintiff's instructions are as follows:

"(1) The court instructs the jury that a common carrier of persons, such as a street railway company, carrying passengers for profit, is bound to exercise a high degree of care for the safety of its passengers, that is, such care as a very prudent person would exercise under similar circumstances.

"(2) The court instructs the jury that if you find and believe from the evidence that the plaintiff in this action was a passenger on one of the cars owned and operated by the defendants on the first day of November, 1903, and that the car upon which the plaintiff was a passenger stopped at a usual stopping place established by defendants where by custom it was a practice for passengers to leave the car, at or near the intersection of Natural Bridge Road with Grand avenue of the city of St. Louis, state of Missouri, and that while the car was so stopped plaintiff attempted to alight therefrom, and that while plaintiff was leaving the said car and before he had time to safely leave it, the said car, on account of negligence of the agent of the defendants in charge thereof started suddenly forward causing plaintiff to be thrown to the street whereby he was injured, and that plaintiff was at the time exercising ordinary care for his own safety, then you should find in favor of the plaintiff and against the defendants.

"(3) The court instructs the jury that after a street car has once stopped at a usual stopping place where passengers leave the cars, it is then the duty of the agents in charge thereof to exercise a high degree of care to prevent the starting of the car while any passenger or passengers are attempting to alight therefrom. And if the jury believe from the evidence that the plaintiff was a passenger on a car operated by the defendants, and that the car stopped on Grand avenue in the city of St. Louis at a usual stopping place, and that while plaintiff was attempting to alight therefrom the agent or agents of the said defendants in charge of its said car failed to exercise a high degree of care to prevent the starting of the car while the plaintiff was in the act of alighting therefrom and the failure, if the jury so find, to exercise said high degree of care caused plaintiff to be injured, and that plaintiff was

in the exercise of ordinary care, then the jury should find for the plaintiff and against the defendants.

"(4) If under the evidence and the instructions the jury find in favor of the plaintiff, you will assess his damages at such sum as you believe from the evidence will fairly compensate plaintiff for such injuries, if any, as you find from the evidence he sustained at the time of the accident mentioned in the evidence, and in assessing the damages of the plaintiff, if the jury find in his favor, you will take into consideration the nature and character of the injuries, if any, sustained by the plaintiff at the said time, the pain and suffering and mental anguish plaintiff has endured, if any, as a direct result of his injuries sustained at the time of the accident; the pain of body and mental anguish you believe from the evidence plaintiff will suffer in the future as a direct result of the injuries, if any, sustained at the time of the accident; the reasonable valuation of the loss of time, if any, which the jury believe from the evidence plaintiff has been compelled to lose from his occupation as a direct result of the injuries sustained at the said time; the reasonable valuation of the loss of time, if any, the jury believe from the evidence plaintiff will be compelled to lose in the future as a direct result of his injuries sustained at the time of the accident; and the reasonable valuation of the medical service, if any, necessarily rendered the plaintiff as a direct result of the injuries sustained at the time of the accident, which you believe that the plaintiff is legally bound to pay."

The first instruction given for plaintiff properly declared the degree of care a carrier of passengers is required to exercise for their safety. *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799; *Furnish v. Railway*, 102 Mo. 438, 18 S. W. 1044, 22 Am. St. Rep. 781; *O'Connell v. Railway*, 106 Mo. 482, 17 S. W. 494; *Clark v. Railroad*, 127 Mo. 197, 29 S. W. 1018; *Magrane v. Railway*, 183 Mo. 119, 81 S. W. 1158; *Posch v. Railroad*, 76 Mo. App. 601; *Chouquette v. Railway*, 80 Mo. App. 515; *Muth v. Railway*, 87 Mo. App. 422; *Young v. Railway*, 93 Mo. App. 267; *Tillman v. St. Louis Transit Co.*, 102 Mo. App. 553, 77 S. W. 320; *Robinson v. Railway*, 103 Mo. App. 110, 77 S. W. 493. And the rule applies as well to street as to steam railroads. *Willmott v. Railway*, 106 Mo. 535, 17 S. W. 490; *Jackson v. Railroad*, 118 Mo. 199, 24 S. W. 192; *Sweeney v. Railway*, 150 Mo. 385, 51 S. W. 682; *Buck v. Railway*, etc., 48 Mo. App. 555; *Powers v. Railway*, 60 Mo. App. 481; *Parker v. Railway*, 69 Mo. App. 54; *Freeman v. Railway*, 95 Mo. App. 94; *Heyde v. St. Louis Transit Co.*, 102 Mo. App. 537, 77 S. W. 127.

Plaintiff's second and third instructions are grounded on the theory, that notwithstanding the city ordinance required cars running north to stop on the north side of

intersecting or cross streets, yet if it was and had been the custom of the defendant's servants operating cars on Grand avenue, to stop cars traveling north at the switch to receive and discharge passengers, and the car on which plaintiff was traveling was stopped at that point, and plaintiff, using ordinary care, undertook to alight, and the car was started before he could get off, causing him to fall upon the street, and injury resulted, the defendant was liable. In *McCarty v. Railroad*, 106 Mo. App. loc. cit. 601, 80 S. W. 8, this court, through Goode, J., said: "If there was a usage to take passengers at the switch, the carmen would have been bound to watch and be as careful about starting there as at far crossings, the common and appropriate localities for taking passage; for then persons would have a right to board cars, and the operatives good reason to expect them to do so. *Washington, etc., Railroad v. Grant*, 11 App. D. C. 107; *McNulta v. Euch*, 184 Ill. 46, 24 N. E. 631; *West Chicago St. Ry. v. Manning*, 170 Ill. 417, 48 N. E. 958; *Id.*, 70 Ill. App. 239." The instructions are in harmony with the doctrine of the *McCarty Case*, and are approved.

The court gave the following instructions for the defendants:

"(3) If you find from the evidence that the plaintiff stepped from or left the car while the same was in motion, even though the said motion may have been slight, and as a result he was thrown and injured, your verdict will be for the defendants."

"(7) The court instructs the jury that the opinions of expert witnesses are admissible in evidence, and are to be given such weight and value as the jury may think right and proper under the circumstances. The value of an expert opinion depends not only upon the qualifications and experience of the witness, but the facts which he takes into consideration and upon which he bases his opinion. If the facts assumed, and which are made the basis of the opinion, are not true and are not established by the proof, then the opinion has no basis upon which to rest, and would be of no value, and in weighing such opinions, the jury must look to see whether the facts assumed by the expert witness are established by the proof or not, and you cannot take the facts assumed by the expert witness to be true simply because they were so assumed, but you must look to the proof to determine whether they are proved or not.

"(8) If you find from the evidence that the purpose of stopping the car or cars of the defendant on the south side of Natural Bridge road at its intersection with Grand avenue was [only] to permit or enable the motorman to throw the switch in order that his car might proceed north or west as desired, and that while said car was stopped and the motorman was engaged in throwing the switch persons got upon or got off the car,

this does not establish such a custom and practice, and does not impose any duty upon the defendant to stop the car on which the plaintiff was a passenger at said point for the purpose of allowing him to alight; and if you find from the evidence that the car was either stopped or slowed down and continuing in motion, however slight, upon the occasion when the plaintiff was a passenger [only] for the purpose of enabling the motorman to throw the switch that his car might proceed north, and that the plaintiff attempted to alight from said car, either while the car was standing still south of Natural Bridge road, or moving slowly, and was thereby thrown to the ground and injured, plaintiff is not entitled to recover and your verdict will be for the defendants.

"(12) The burden of proof is on the plaintiff to show by the preponderance of the evidence that defendant's car came to a stop at place of the accident—that while plaintiff was in the act of alighting the car suddenly moved forward without notice to plaintiff and plaintiff was thrown to the street and injured, and then plaintiff is not entitled to recover unless he has shown by the preponderance or greater weight of the evidence that defendant transit company had established by custom and practice a stopping place for passengers to alight at the place where the car stopped or slowed down south of the switch. And unless plaintiff has so shown by the preponderance of the evidence all the foregoing facts you will find for defendants."

These instructions presented the theory of the defense fully, and were favorable to the defendant, hence it has no ground to complain that error was committed in refusing other instructions asked by it.

The judgment is affirmed. All concur.

RODGERS v. ST. LOUIS TRANSIT CO.

(St. Louis Court of Appeals. Missouri.
March 27, 1906. Rehearing Denied April 10, 1906.)

1. STREET RAILROADS—OPERATION OF CARS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Where plaintiff desiring to cross a street car track, immediately after the passing of a west-bound car, attempted to cross the track without waiting until the west-bound car had proceeded far enough to be out of his line of vision so that he could see a car approaching from the west on the opposite track by which his vehicle was struck, and he was injured before he had time to cross the track, he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 210-216.]

2. SAME—LAST CLEAR CHANCE.

Where the motorman of a street car could have stopped his car and avoided a collision with plaintiff's wagon if he had used reasonable care and kept a vigilant watch ahead on the first appearance of danger, plaintiff was entitled to recover for the injuries sustained, not-

withstanding he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroad, § 219.]

3. TRIAL—INSTRUCTIONS—CURING ERROR.

In an action for injuries to plaintiff in a collision between a street car and his wagon, an instruction objectionable as ignoring the defense of contributory negligence was cured by other instructions that though defendant's agents failed to sound any bell or gong and did not stop or slow up the car and avert the collision, and did not keep watch for persons on or approaching the track, and did not stop the car in the shortest time and space possible on the first appearance of danger, still, if plaintiff saw the approaching car, or, by looking, could have seen the car in time to have kept his horse and wagon off the track, and avoid the collision, and failed to see or heed what he saw, then plaintiff could not recover, etc.

4. STREET RAILROADS—INJURY TO PERSONS ON TRACK—LAST CLEAR CHANCE—EVIDENCE.

Where two persons on the front platform of a street car by which plaintiff's wagon was struck, testified that they saw plaintiff's horse on the track 150 feet distant from the crossing, and that the motorman made no effort to apply the brakes until the car had run from 75 to 100 feet from the point where the horse was first seen on the track, and the car, after it struck the wagon, did not run its length, such evidence was sufficient to justify an inference that if the motorman applied the brakes when he first saw, or, by the exercise of ordinary care, would have seen, the horse on the track, the car would have been stopped in ample time to have avoided the collision.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Harry D. Rodgers against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Olive street runs east and west through the city of St. Louis. It is crossed near Union Station by Nineteenth street, running north and south. In June, 1903, the defendant maintained a double railroad track in the center of Olive street, over which it operated cars for the carriage of passengers. At low 12 on the night of June 21, 1903, the plaintiff was driving south on Nineteenth street in a one-horse covered wagon. When he reached the south railroad track in Olive street, a car travelling east struck his wagon with such force as to throw him from the seat to the pavement, causing severe injuries to his person and damaging him, as found by the jury, in the sum of \$2,500. Plaintiff's evidence tends to show that the night was dark and foggy; that he was driving along in a trot on the west side of Nineteenth street, near the curb, and when he arrived within about 10 feet of Olive street, a car traveling west came along, and he stopped his horse with a sudden jerk; that as soon as the car passed, he drove on, and, as his wagon was passing over the south track, it was struck near the hind wheels by an east-bound car. The wagon was pushed around, but not injured in the least. Plaintiff, however, was hurled in the air, and fell with his head in front of the rear trucks of the car,

which, fortunately, had come to a standstill by the time he struck the ground.

With respect to what took place at the scene of the accident, plaintiff's evidence is as follows: "Q. You were going to the depot to meet a train? A. Yes, sir; to meet an excursion. * * * Q. You looked up and down to see if there was cars? A. Yes, sir. Q. What did you see? A. There was one pulled across, and I looked west, too, and I pulled up to let it go by. Q. Did you pull across behind or in front of it? A. Behind it. * * * Q. Then what did you do? A. I started across the track. Q. When your horse got over the second track, did you see a car coming then? A. I looked up the street and saw a car—it seemed to me, looked to be 100 to 125 feet away, and I whipped up my horses and tried to cross the track. Q. How far were you across then? A. I guess the horse had crossed the track."

On cross-examination plaintiff testified as follows: "Q. You looked east and you looked west? A. Yes, sir. Q. And you stopped about 10 feet from the track? A. Yes, sir. Q. And were you towards the left hand side of the street or the right hand side? A. Right hand side. Q. Right back up against the curb? A. Close to the curb; yes, sir. Q. There is buildings there flush with the corner, is there not? A. I am not sure about it but I don't believe it does. I think it is kind of a round corner there. Q. And the buildings are right on the building line there? A. Yes, sir; I think so. Q. So then you were right bank up against the right hand side of the curb, that is, you were on the right hand side of the street, and you stopped 10 feet from the track? A. Yes, sir. Q. And the buildings are right on the building line on that corner. A. Yes, sir. Q. And there was a car going west which had just stopped, hadn't it? A. Yes, sir. Q. And it proceeded a few feet when you attempted to get across? A. It had left the crossing, going west. Q. Did you notice how far that car had gotten up the street? A. How far it had got west? Q. Yes. A. It had left there quite a few feet before I started, started to drive across the street. Q. You didn't stop and look after that? A. Yes, sir; I did. Q. You first stopped ten feet from the track? A. Yes, sir. Q. You then crossed the west track and stopped before entering the east track, did you? A. No, sir. Q. Your only stop then was ten feet north of the west-bound track? A. Yes, sir. Q. And having looked, then you started right across? A. Yes, sir; I started right across when I saw there was nothing in sight. Q. You didn't see any car coming east on the east-bound track? A. No, I did not. Q. You didn't see any car at all? A. No, sir. Q. How far up the street could you see? A. Oh, I think I could see, I guess I could see, 200 feet, I believe. Q. And is that as far up the street as you could see—200 feet? A. I could see that

far that kind of a night. Q. You could not see any further up the street? A. I might have seen up to the next corner. I guess I could."

Witnesses, present at the scene of the accident, introduced by plaintiff, testified that they saw him crossing the street, saw the car coming from the west, and halloed to plaintiff to look out, but he had gone too far to turn off the street, and whipped up his horse in an effort to clear the track before the car could arrive, but was not quick enough. Two boys testified for plaintiff, that they were riding on the front platform of the car; that the car had no headlight, was running at a rapid rate of speed, and that there was an electric light on the corner of Nineteenth and Olive streets, directly over the horse, and they could see the horse in the street when the car was half a block west of the crossing; that the motorman did nothing to stop the car until he was within about 50 feet of the wagon, when he commenced to turn on the brake. The evidence shows that after striking the wagon, the car ran less than its length before coming to a stop, as one of the witnesses expressed it, "It was a good stop." There was counter-vailing evidence offered on the part of the defendant.

Boyle, Priest & Lehman, for appellant. E. E. Wood, for respondent.

BLAND, P. J. (after stating the facts).
1. There are two assignments of error relied on for a reversal of the judgment. The first is that the court erred in refusing defendant's instruction in the nature of a demurrer to the evidence, offered at the close of plaintiff's case. In support of this contention, defendant relies upon the case of *Giardina v. Railroad*, 185 Mo. 330, 84 S. W. 928. In the *Giardina* case, the plaintiff stepped from behind a car on to a parallel track and was immediately struck by a car traveling in an opposite direction from that traveled by the car from behind which he had stepped. The car by which *Giardina* was struck was running at a high rate of speed, and the motorman in charge was guilty of negligence in failing to sound the gong as he approached the crossing. The trial court sustained a demurrer to the plaintiff's evidence, and the Supreme Court affirmed this ruling on the ground that the plaintiff was guilty of negligence that directly contributed to his injury. This ruling supports the minority opinion of this court in *Hornstein v. United Railways Co.*, 97 Mo. App. 271, where (at page 278, 70 S. W. 1105, at page 1107) are collected the cases in this state, holding that a plaintiff cannot recover when his own evidence shows that he was guilty of negligence that directly contributed to his injury, notwithstanding the defendant was also guilty of negligence. Counsel for appellant cites *Green v. Railroad*, 90 S. W. 806 and *Deane v. Transit Company*,

91 S. W. 505 (Missouri Supreme Court cases, not yet officially reported) as having approved and followed the *Giardina* case. The opinions in these two cases are not at hand, but we have no doubt that the ruling is well established in this state, that where the plaintiff's own evidence conclusively shows he was guilty of negligence that directly contributed to his injury, a verdict against him should be directed by the court, although the evidence shows that the defendant was also guilty of negligence; and we think that in this case, plaintiff's own evidence shows that he was guilty of negligence in failing to remain stationary on Nineteenth street until the west-bound car had proceeded far enough to be out of his line of vision, so that he could see whether or not a car was coming from the west on the other track, and too near to allow him to cross the street in safety. But there is another principle of the law almost universally acknowledged, which we think takes the plaintiff's case out of the rule, that a plaintiff should be nonsuited when his own evidence shows that his negligence concurred with that of the defendant to produce the injury.

This principle is nowhere better stated than by *Shearman & Redfield on Negligence*. It is as follows: "It is now perfectly well settled that the plaintiff may recover damages for an injury caused by the defendant's negligence, notwithstanding the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after becoming aware of the plaintiff's danger, to use ordinary care for the purpose of avoiding injury to him. We know of no court of last resort in which this rule is any longer disputed; although the same rule, in substance, but inaccurately stated, has been made the subject of strenuous controversy. But, furthermore, the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice. This rule is almost universally accepted. The most reckless persistence, on the part of one exposed to danger, will not justify another in consciously refraining from using care to avoid injury to him. This qualification of the doctrine of contributory negligence, often called 'the rule in *Davies v. Mann*,' from the leading case on this subject, has been much criticized. But those criticisms turn mainly upon

the language used by Baron Parke in that case, which is, perhaps, too broad, and which has not been here adopted; although it has been literally repeated in the highest court of England, as well as in that of the United States. It is possible, too, that the application of the principle in *Davies v. Mann* was erroneous; but that does not affect the validity of the principle which lay at the foundation of that case. That principle is that the party who has the last opportunity of avoiding accident, is not excused by the negligence of any one else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury." 1 *Shearman & Redfield on Negligence* (5th Ed.) § 90.

This statement of the principle is approvingly quoted by this court in *Klockenbrink v. Railroad*, 81 Mo. App. loc. cit. 356; and the opinion of this court was approved and the principle declared to be the settled law of the Supreme Court in *Klockenbrink v. Railroad*, 172 Mo. 678, 72 S. W. 900. Expressions are to be found in some recent opinions of the Supreme Court which seem to qualify or restrict the application of this principle, but there is no case to be found in our Supreme Court reports that authoritatively overturns or in anywise weakens this salutary principle of the law. The plaintiff's evidence tends to show that had the motorman discharged the duty he was under, both at common law, and under the ordinance offered in evidence, to keep a watch ahead and on the first appearance of danger use reasonable care to check or stop his car to avoid colliding with plaintiff's wagon, the accident would not have happened. We think, on this evidence, plaintiff was entitled to have his case submitted to the jury.

2. The second assignment is that the court erred in giving the following instruction for plaintiff: "(1) The court instructs the jury that if they believe from the evidence that the plaintiff was driving on Nineteenth street of the city of St. Louis, on the 21st day of June, 1908, and that while he was crossing the tracks of the defendant, the St. Louis Transit Company, at the intersection of Nineteenth street with Olive street of the said city, plaintiff's vehicle was struck by a car operated by the defendant, the St. Louis Transit Company, on account of the failure of the motorman of the said defendant to use ordinary care in stopping the said car with the means and appliances at hand and with safety to the passengers upon the first appearance of danger to the said plaintiff, whereby the said plaintiff was injured, then they should find in favor of the plaintiff and against the said defendant, unless they believe that the plaintiff himself was guilty of negligence at the said time and place."

The instruction ignores the defense of contributory negligence pleaded in the answer, but we think this omission was cured by the

following instructions given for defendant: "(10) Although the jury may find from the evidence that defendant's, the St. Louis Transit Company's agents in charge of the car did fail to sound any bell or gong on said car, and did not stop or slow up said car and avert the collision, and did not keep a watch for persons on or approaching the track, and did not stop the car in the shortest time and space possible after the first appearance of danger, still, if you find from the evidence that plaintiff saw the approaching car, or, by looking, could have seen said car in time to have kept the horse and wagon off the track and avoid the collision, and failed to see or heed what he saw, then the plaintiff cannot recover and your verdict must be for the said defendant. (11) If the jury find from the evidence that the plaintiff's alleged injuries were caused by the mutual and concurring negligence of plaintiff and the defendant's, the St. Louis Transit Company's motorman in charge of said car, and that the negligence of either, without the concurrence of the negligence of the other, would not have caused the injury, then your verdict must be for the said defendant. (12) If the jury believe from the evidence that plaintiff was driving a wagon south on Nineteenth street, and that Nineteenth street was crossed by the railroad tracks of the defendant, St. Louis Transit Company, laid in Olive street, then it was the duty of plaintiff, in approaching said street railway tracks to look in the direction from which the car was approaching and also to listen for the purpose of ascertaining whether a car was approaching or not, and if he found by such means that a car was approaching so near that there was danger of a collision, then it was the plaintiff's duty to stop before going upon the track and let the car pass without delay or hindrance; and if the jury find from the evidence that the plaintiff failed to look or listen, or if he looked or listened, that he failed to heed what he saw or heard, and to stop his horse and keep off the track, and that said failure directly contributed to plaintiff's alleged injuries, then the plaintiff cannot recover and your verdict must be for the defendant."

With these instructions before them, the jury could not have lost sight of the defense of concurring or contributory negligence. Plaintiff's instruction correctly declares the principle of what is commonly called the "last fair chance doctrine" and was appropriate under the evidence in the case. It is insisted, however, that as there is no evidence in the record that the car could have been stopped sooner than it was, or as to the distance in which it could have been stopped, it was improper to submit to the jury to find whether or not the car could have been stopped in time to have avoided the injury. The two witnesses, on the front platform with the motorman, testified that they saw the horse

on the track one-half block (150 feet) distant from the crossing. If they saw the horse, the motorman also saw him or would have seen him, if he had looked, as it was his duty to do. These two witnesses also testified that the motorman did not begin to apply the brakes until the car had run from 75 to 100 feet from the point where they first saw the horse on the track; and all the evidence shows that the car did not run its full length after it struck the wagon. On this evidence, the inference is irresistible that had the motorman applied the brakes when he first saw, or by the exercise of ordinary care would have seen the horse on the track, the car would have been stopped in ample time to have avoided the collision.

Discovering no reversible error in the record, the judgment is affirmed. All concur.

KELLEY v. LAWRENCE et al.

(Supreme Court of Missouri, Division No. 2.
March 29, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—APPLIANCES—USE.

While a master is bound to use reasonable care and prudence in providing his servants with suitable appliances, he is not liable for injuries to servants caused by their negligent use of the appliances supplied.

2. SAME—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

A servant, knowing that a wooden railing along a viaduct between two buildings was intended merely to disclose the sides of the platform, and not for persons to sit on, negligently attempted to sit on such railing while talking to a customer. The railing broke, causing the injuries complained of. In an action against the master therefor, there was no evidence that the part of the viaduct intended to be used for travel was defective in any manner, as alleged in the complaint. *Held*, that the servant's contributory negligence was the proximate cause of his injury.

Error from Circuit Court, Daviess County; J. W. Alexander, Judge.

Action by J. F. Kelley against M. W. Lawrence and others. From a judgment for defendants, plaintiff brings error. Affirmed.

This cause is here upon a writ of error sued out by the plaintiff for the purpose of having the judgment and proceedings of the Daviess county circuit court in the above cause reviewed by the court. This is an action for personal injuries, and is predicated upon substantially the following state of facts: On the 22d day of March, A. D. 1900, and prior, defendants M. W. Lawrence and John J. Eneyart were engaged in the sale of hardware, implements, buggies, etc., at Gallatin, Daviess county, Mo. The hardware was kept in the first floor of the building on the east side of the square, and the buggies, after being uncrated and ready for sale, were kept in the second story of the building across the alley some 16 feet from the main store building. This room was known and used as the buggy salesroom. In the lower part of this last-mentioned building was kept

implements of various kinds. The entrance to the salesroom was had by porch and steps at the east end of the hardware room connecting with viaduct and this viaduct extending from said storeroom building to the salesroom, across the 16-foot alley before mentioned. This viaduct or passageway was built and used for a passage or walkway from said main store building to the buggy room for the purpose of employes of said defendants engaged in the showing and selling of the buggies to make use thereof in passing to and fro with customers. It had been erected as early as 1898, during the occupancy of a Mr. Pierce, and was built by the use of three stringers or sleepers running across the alley from the stairway to the building in which the buggies were situated. A floor about four feet in width of pine lumber being placed upon these sleepers and a railing or banister of 2x4 pine lumber about 2½ feet high being placed on either side thereof. It was not fastened at the stairway. It had been nailed to an upright piece on the implement building and was fastened in the middle by being nailed to an upright piece running from said sleepers. It was about 16 feet from this viaduct to the surface of the alley below. This alley had been macadamized, at least a large amount of rock had been placed therein prior to the date of plaintiff's injury. The buildings and viaduct before mentioned were the property of defendant, Thomas Crain and leased by him to the defendants, Lawrence & Eneyart. On the 22d day of March, 1900, the two last-named defendants employed the plaintiff as general salesman for hardware, implements, and buggies. Plaintiff continued in said defendants' employ until the 16th day of July, 1900, at which time he went with Mr. Cyrus Musselman from the general salesroom to the buggy room, by means of a viaduct before mentioned, for the purpose of showing, and if possible selling to Mr. Musselman a buggy. After examining the buggies, remaining in the buggy room from 10 to 20 minutes in so doing, Mr. Musselman proposed exchanging his old bugy for one shown him by plaintiff. Mr. Musselman and plaintiff started to leave the buggy room by means of the viaduct; upon reaching the viaduct plaintiff halted, and while discussing the buggy deal with Mr. Musselman, started to sit down, or did sit down, he is not positive which, upon the railing on the south side of this viaduct, and while making use of the viaduct in that manner, the railing or banister gave away, plaintiff and railing or banister falling from said viaduct to the surface of the alley below, by reason of which fall he was injured. The negligence complained of is thus stated in the petition: "That on the 16th day of June, 1900, defendant, Thomas Crain was the owner of the buildings occupied by said defendants, Lawrence & Eneyart in conducting their said business, and was for a long time prior and a long time after said date the

owner thereof, and the landlord and lessor of said firm for the said purpose of conducting said business. That it was the duty of said Crain as said landlord and lessor, and the defendants, Lawrence & Enyeart, as well, to put the said premises and keep the same in reasonably safe condition for the purpose and use for which they were let to and used by said defendants, Lawrence & Enyeart, their agents and servants. That the buildings occupied and used by said last-named defendants, Lawrence & Enyeart, in conducting their said business consisted of two two-story buildings with a stone-paved alley or passageway between the same. That the upper stories of the said two buildings were used by said defendants as storage and salesrooms in and about their said business, and connection was had and passage was made from one to the other of said upper story rooms of said buildings by means of a wooden viaduct, bridge, or passageway placed there for that purpose and so maintained and used by said defendants as owner and lessor and users and tenants as aforesaid. That it was the duty of said defendants Lawrence & Enyeart, and of said Crain as well, to see that said viaduct, bridge, or passageway was in a reasonably safe condition, for which it, as they and each of them well knew, it was to be, and was so used, and to keep the same in such reasonably safe condition for such use. That plaintiff was in the month —, 1900, and a short time prior to the 16th day of June, 1900, employed by defendants, Lawrence & Enyeart, as clerk and salesman in and about their said business, and entered upon the discharge thereof. That on the said 16th day of June, 1900, the said viaduct, bridge or passageway was in a rotten, unsafe, and dangerous condition for use for the purpose for which it was let and used, which rotten, unsafe, and dangerous condition all of said defendants well knew, or by the exercise of reasonable diligence might and would have known. * * * That the part thereof which by reason of its said condition gave way and caused plaintiff's falls as aforesaid, was the guard rail or banister and rotten parts thereon unknown to plaintiff, all of which were rotten, insecurely fastened and unsafe."

To this charge of negligence the defendants filed the following answer: "Come now defendants and for their amended answer to plaintiff's petition herein deny each and every allegation therein contained. Further answering, defendants say that plaintiff's injuries, if he was injured, was caused by the breaking of a certain guide rail, built of light two by four-inch pine stuff, the purpose thereof being to mark the sides of a certain bridge or viaduct constructed across the alley, and connecting the store or salesroom in which defendants Lawrence & Enyeart were doing business and the wareroom in which their surplus stock was stored; that said bridge or viaduct was built safely as a passway be-

tween said storeroom and wareroom; that said guide rail was not built to set on or lean against, but was built and solely intended as a guide rail to mark the sides of said bridge or viaduct to prevent persons thereon from walking thereoff; that plaintiff had been employed for a long time, to wit, about six months by said defendants, Enyeart & Lawrence; that during all of that time he had worked in and about said premises and well knew that said guide rail was built solely for the purpose of preventing persons on said bridge or viaduct from walking thereoff, and solely to mark the sides thereof, and well knew that said guide rail was not built or intended as a seat to sit upon, or to bear weight; that said plaintiff had daily opportunity to see and observe said guide rail; that he knew or by the use of ordinary care might have known the condition thereof; and that the defects therein, if any, were fully apparent to him; that his opportunity for knowing the condition thereof was equal to that of defendants', and that at the time of the injury, if any, plaintiff was sitting and bearing his weight on said rail, well knowing at the time that it was not constructed for or intended for that purpose. And for further answer defendants say that plaintiff's injuries, if any he received, were due to and caused by plaintiff's own negligence, carelessness, and want of due care contributing thereto. And, having fully answered, defendants ask to go hence with their costs in this behalf laid out and expended."

It is unnecessary to give a detailed statement of the testimony. It will suffice in order to dispose of the legal propositions presented, to say that the testimony of plaintiff tended to establish the facts as heretofore indicated, upon which this action was predicated. It is conceded by plaintiff in error that the plaintiff testified in this cause substantially as follows, as to this accident: He said: "In standing there talking to Mr. Musselman about the buggies I backed up against the banister and I started to sit down and may have got down * * * still talking, you understand, not thinking that I was going and over it went. I went over backwards into the alley. * * * I could not say positively that I sit on the railing. I know I started to sit down and may have gotten my weight on the railing. I was talking to Mr. Musselman about the buggy deal and was not thinking of anything else. * * * I never looked to see whether the banister was cracked or split. If I had taken the pains to have examined it, I could have seen, but I never thought about doing it * * * I don't absolutely know whether I sat down on the banister or not. Know I started to and that it broke. * * * I know I started to sit down and might have gotten my weight on the banister. Would not swear that I did not. * * * About selling that buggy was what I had in my mind. * * * There was nothing hidden about

It that I could not have seen if I had wanted to examine it. But I did not do it. Supposed that the place was safe. It was not absolutely necessary for me to sit down there in discharging my duties. It is true that they were not paying me a salary to go out there and sit on that railing. I did not know anything about whether it was put there to sit on. Of course, it was not put there for a seat. Did not think about that. Was not discussing in my mind as to whether this thing was put there to sit on or not to sit on. The fact is that it was there and I backed up against it to sit down on it, just like any other man would have done under the same circumstances. I know and you know that any other man would have done just as I did under the same circumstances. * * * Nobody directed me to sit down. I did not direct myself. * * * I just simply backed up against it like that, and it struck me along here, and I was talking buggy. And I may have got down; I don't say that I did or did not, and I went down."

At the close of plaintiff's evidence the court sustained a demurrer to the evidence, as requested by defendants, and instructed the jury that plaintiff was not entitled to recover. Plaintiff took a nonsuit, with leave to move to set the same aside and judgment was rendered in favor of defendants. Plaintiff in proper time filed his motion to set aside the judgment of nonsuit and for a new trial, which motion was by the court overruled. Upon the judgment as heretofore indicated plaintiff sued out of this court a writ of error, and the cause is now before us for consideration.

C. W. Bolster and Harber & Knight, for plaintiff in error. Boyd Dudley, for defendant in error.

FOX, J. (after stating the facts). The record in this case presents for our consideration but one legal proposition, and that is in respect to the action of the court in sustaining the demurrer to the evidence interposed by defendants at the close of plaintiff's case. Plaintiff in this action seeks to recover damages for personal injuries received while in the employ of defendants by the use of a viaduct provided by defendants in the transaction of their business. This viaduct or passageway was used by defendants for a passage or walkway from their main store building to the buggy room; it was built across an alley or open space about 16 feet and was used by the employees of the defendants in going to and from the main building to the room in which buggies were kept in showing and selling to customers buggies located in that room. It was erected in 1898 during the occupancy of the premises by a Mr. Pierce; it was built by the use of three stringers or sleepers running across the alley to the storeroom or building in which the buggies were situated. The floor of this viaduct was about four feet in

width, being made of pine lumber placed upon these sleepers or stringers, and there was placed on either side of the viaduct a railing or banister, made of two by four pine lumber and this banister or railing was about two feet and a half high. Plaintiff on the day that he was injured, went with Mr. Musselman from the salesroom to the buggy room over this viaduct for the purpose of showing and selling him a buggy; they were in the buggy room a short time and started to leave it, returning by way of the viaduct. Upon reaching the viaduct, plaintiff still talking to Mr. Musselman about the buggies, undertook to sit down or at least started to sit down upon the banister or railing on one of the sides of the viaduct, the banister or railing not being sufficient to support his weight, gave way, receiving injuries of which he is complaining in the petition filed in this cause. Upon this state of facts we are simply confronted with the question as to whether the trial court properly or improperly sustained the demurrer to the evidence interposed in this cause.

We have carefully considered the disclosures of the record before us and have read in detail all of the testimony developed at the trial, and we are unable to conceive upon what theory plaintiff can maintain this action, and have reached the conclusion that the court very properly sustained the demurrer to the evidence. It will be observed that in the statement of the cause in the petition that the plaintiff alleges that this viaduct was rotten and unsafe and by reason of the negligence of defendants in failing to keep it in proper repair the plaintiff received the injuries complained of; but when we reach the testimony upon which the plaintiff seeks a recovery the record is absolutely silent as to any defect in the viaduct which caused his injuries, except the defect in the banister or railing. It is not pretended in this case that the injuries complained of resulted from any defective, rotten, or unsafe condition of the part of this viaduct upon which plaintiff had to walk in order to reach the buggy room or in returning from it, but it is earnestly urged that he is entitled to recover by reason of the defective condition of the banister or railing which gave way, under the circumstances detailed by him in his testimony. There is no dispute as to the rules of law applicable to the relation of master and servant. The law upon that subject is firmly established by the uniform and unbroken line of decisions in this state. That it is the duty of the master to use reasonable care and prudence for the safety of those in his service in providing them with machinery and appliances reasonably safe and suitable for their use, and that the master will be held liable for any injury from any accident that may happen through any defect in the machinery or appliances provided by him for the use of his servant, which was or ought to have been known to him, no one will

seriously question. On the other hand it is equally well settled that the master is not liable for the negligent and careless use of appliances provided for him by the master or in using such appliances in a manner or for a purpose for which they were not intended or designed.

Applying these well-settled rules of law to the conceded facts in this case, there is no escape from the conclusion that whatever injuries plaintiff received were the result of his own carelessness and negligence in the use of a part of an appliance provided for him by the defendants. The floor of this viaduct was four feet wide, and it was such floor that was designed as the passageway or walkway for the use of employes in going to the buggy room or returning therefrom, and so long as plaintiff was walking upon this floorway or standing upon it he was entirely safe, and it was not until he undertook to improperly use the banister or railing which were placed on either side of this walk, for a purpose for which such banister or railing was not intended or designed, that he was in any danger of being injured. That this railing or banister on either side of this viaduct was not placed there to be used as a seat or resting place for employes in using such viaduct, is too plain for discussion. No one will seriously contend that in the placing of that railing or banister on either side of the viaduct that it was designed for any other purpose than simply a guard rail and to prevent those who should use the viaduct in an ordinarily careful manner from being hurt. That plaintiff knew that this railing or banister was not intended for the purpose of a seat or resting place by persons going backward and forward over the viaduct is not disputed, for he says in his testimony, in speaking of this railing or banister, "of course it was not put there for a seat." It being conceded by plaintiff that this railing or banister was not placed on either side of this viaduct to be used as a seat, it must be held that if he undertook to use it for a seat and sit down upon it, or attempted to sit down upon it, that he did so at his own risk, and any injuries received by him by reason of such improper and careless use of such railing or banister cannot be made the basis of a complaint that such injuries were the result of the negligence of his employers. In order to maintain this action the negligence of the defendants must be the proximate cause of the injury, and when we look to the evidence as to what was the proximate cause of this injury, there is but one answer, and that is the improper, careless, and negligent use of a railing or banister by the plaintiff for a purpose not intended or designed in the erection of such railing or banister.

In *York v. Railway Co.*, 117 Mo. 405, 22 S. W. 1081, it was ruled by this court that the plaintiff was not entitled to recover for injuries received in the use of a push car in

a manner and for a purpose for which the car was not intended or designed, and this court in announcing its conclusion in that case, said: "The death of the deceased was not caused by any defect or deficiency in the car affecting its safety when used in the usual manner and for the purposes for which it was designed, and there was no negligence on the part of the defendant in ordering its use." So it may be said in the case at bar, that the injuries received by plaintiff were not caused by any defect or deficiency in the viaduct affecting its safety when used in the usual manner and for the purpose for which it was designed, but such injuries as is clearly disclosed by the testimony of the plaintiff, were received by reason of the improper and careless use of a banister or railing on the side of the viaduct for purpose for which such banister or railing was neither intended nor designed. In *Sindlinger v. Kansas City*, 126 Mo. 315, 28 S. W. 857, 26 L. R. A. 723, plaintiff sought a recovery from the defendant city for injuries received by reason of a defective railing or banister on a viaduct in one of the streets of said city. Gantt, J., speaking for this court, in that case, very clearly indicated the views of this court as to the purposes of a railing or banister on the side of a viaduct. He said: "The railing was put there as a warning of the danger and to prevent those who should use the viaduct in an ordinarily careful manner from being hurt. It will be remembered that the way was constructed solely for pedestrians. It was not to be supposed that grown-up men would expect to propel themselves against it in running races, and of course was not constructed with such a view. But that it was entirely sufficient for the purpose for which it was erected we think clearly appears, not only from the plaintiff's evidence, but was abundantly established by that of defendant." So it may be said in the case at bar, that in the placing of this railing or banister on the sides of this viaduct it was not to be supposed that employes or any other person using it, would expect to use such railing or banister as a place to sit upon and rest, for it was certainly apparent to any person of ordinary intelligence in using it that such railing or banister was not constructed for the purpose of furnishing a seat or resting place for anybody. Such railing or banister on the sides of the viaduct now under consideration was clearly placed there for no other purpose than a guard rail or to mark the limits of that part of the viaduct within which persons might safely travel and to furnish a warning of the danger. In *Stickney v. City of Salem*, 3 Allen, 374, the Supreme Court of Massachusetts, in an opinion by Chief Justice Bigelow, held that the city was not liable in damages to one who, while stopping in a highway for the purpose of conversation, leaned against a defective railing and was injured. He said: "The legal obligation of keeping a sufficient railing

upon a highway is imposed only when it is necessary to mark the limits of the part of the road within which persons may safely travel, or to furnish a guard against dangerous places, so that proper protection may be afforded to those who, in the exercise of due care as travelers, while passing or standing on the way, might otherwise be exposed to accident or injury," and a demurrer to the evidence was sustained.

We see no necessity for pursuing this subject further. The plaintiff in this cause, as disclosed by the evidence preserved in the record, was entirely familiar with the use of this viaduct; he used it frequently for a considerable length of time; he concedes that he knew that this railing or banister was not placed on the sides of the viaduct to be used as a seat or a resting place, and that it was not intended or designed for that purpose, hence the use of it by him in the manner disclosed by the evidence, which resulted in the injuries complained of must be attributed to his own carelessness and negligence, and this being so, the defendants should not be held liable for such injuries, and the court properly sustained the demurrer to the evidence interposed by defendants at the close of the plaintiff's case.

The judgment in this cause should be affirmed, and it is so ordered. All concur.

MCCORMICK v. PARSONS et al.

(Supreme Court of Missouri, Division No. 2.
March 29, 1906.)

1. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE—EQUITY.

In an equity suit, the admission of evidence is not ground for reversal of a judgment, since incompetent evidence will be disregarded on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4185.]

2. MORTGAGES—RELEASE—DESCRIPTION OF PROPERTY.

Where a deed of trust contains a provision that for every \$600 paid one acre of the tract conveyed shall be released from the lien of the deed of trust, the provision is void for indefiniteness of description of the part to be released.

3. SAME.

A provision in a deed of trust for the release of one acre of a tract on payment of every \$600 cannot be aided by the demand of the parties giving the deed that a certain part of the tract which they definitely described be released on account of the payments made by them.

Appeal from Circuit Court, Jackson County; Andrew F. Evans, Judge.

Action by James P. McCormick against Elsie F. Parsons and others. On death of plaintiff, action revived in the name of Mary J. McCormick. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

John A. Sea, for appellants. Peak & Strother and Wm. D. Majors, for respondent.

BURGESS, P. J. This suit was instituted in the circuit court of Jackson county by James P. McCormick in his lifetime for the purpose of determining and quieting the title to certain real estate lying in said county, and described as being all of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 34, township 50, range 20, except one acre out of the northwest corner thereof. The plaintiff obtained judgment in the circuit court, from which judgment defendants appeal. Since the appeal to this court the original plaintiff died, and the cause has been duly revived in the name of his widow, his legatee.

On March 14, 1888, Herbert E. Tuttle and Ida C. Tuttle, his wife, who were the owners of the land in suit, executed to Archibald C. Majors and Erastus Smith two negotiable promissory notes, each for the sum of \$8,500, and due on or before one year and on or before two years after date, respectively, with 8 per cent. compound interest from date; said notes being given for part of the purchase price of said land. To secure the payment of said notes, they executed a deed of trust, dated March 14, 1888, whereby they conveyed said land to William D. Majors, as trustee for said Smith and Majors. This deed of trust, which was duly recorded in the office of the recorder of deeds at Independence, Jackson county, Mo., contained this provision: "And for every \$600 that is paid on said notes said parties of the third part obligate themselves to release one acre of the tract hereby conveyed from the lien of this deed of trust, said notes being given as part of the purchase money of said tract of land." Shortly after the execution of said notes, and before their maturity, they were for value sold, indorsed, and delivered to James P. McCormick, the original plaintiff herein. Thereafter, on the 21st day of November, 1888, Tuttle and wife conveyed the said tract of 39 acres, together with another tract of 4 acres, to Lyman F. Parsons, the ancestor of the defendants in this suit, by a warranty deed duly recorded in the office of said recorder of deeds at Independence on December 14, 1888, which said deed contained the following provision: "Said forty-three acres of land are hereby conveyed subject to the incumbrances placed thereon by the said H. E. and I. C. Tuttle, and of record in the said county of Jackson, all of which incumbrances are assumed by said grantee herein."

On the 1st day of September, 1894, the trustee named in said deed of trust sold at public sale, under the terms of said trust, said property at the front door of the courthouse in the city of Independence, the same being purchased by James P. McCormick, the holder of the notes described in said deed of trust, at the price and sum of \$4,000; but on the same day, and prior to the execution of the trustee's deed, the said Lyman F. Parsons caused to be served upon the said Majors and McCormick, trustee and purchaser, re-

spectively, a notice stating that \$9,500 had been paid on said notes, and demanding that they release from the operation of said deed of trust 16 acres, or 15% acres, of said land, off of the east side of said tract of 89 acres, which notice further stated that he, the said Parsons, would hold them responsible for any loss by reason of said sale. Notwithstanding said notice, the trustee, on the 3d day of September, 1894, executed to said purchaser a deed under said sale, which deed was duly recorded in the said recorder's office. Thereafter, on the 16th day of July, 1902, said James P. McCormick instituted this suit in the circuit court of Jackson county, under the provisions of section 650, Rev. St. 1899, against the heirs and legal representatives of Lyman F. Parsons, said Parsons having died after the sale of said property by the trustee aforesaid, and the cause was tried at the December term, 1902, of said circuit court.

Plaintiff offered in evidence, in support of the issues on his part, the record of a certain suit which had been instituted by him against said Lyman F. Parsons, after the sale aforesaid, in the circuit court of Kansas City, Mo., on September 7, 1894, which said suit was for the purpose of recovering a balance of \$4,947.50 remaining unpaid on one of the notes after crediting the same with the net proceeds of the sale made as aforesaid, in which said suit the answer of said Parsons alleged that the assumption of the note, as set out in the deed to him, was wholly without his knowledge, and was in direct violation of the terms of the contract; said deed having been placed of record without his having examined the same. It appeared from the record of said suit that said Parsons died before the termination of said suit, and the same was revived in the name of John A. Kerr as administrator, and said cause was prosecuted to a judgment, which was against said administrator, that the administrator appealed, and that the suit was afterwards settled and compromised for the sum of \$3,000. Plaintiff also offered in evidence the record of a suit brought by said administrator against the said McCormick for the purpose of setting aside said trustee's sale and releasing the 15 acres of the land from the lien of the said deed of trust. He further introduced in evidence the said note, deed of trust, warranty deed, and trustee's deed.

On the offer to introduce the records and papers in the cause of McCormick v. Parsons aforesaid, defendants objected for the reason that they were immaterial, irrelevant, and showed on their face that there had been an adjustment of the matters between the parties themselves in the nature of a compromise. The court then and there said that he would hear and pass upon the objection later on. On the introduction of the second suit the same objections were made, and the same answer was made by the court; but it does not appear that the court ever made any ruling

thereon. Plaintiff then offered in evidence extracts from the printed testimony of Lyman F. Parsons in the case of McCormick v. Parsons, aforesaid, to the introduction of which defendants objected on the ground that such evidence was incompetent, irrelevant, and immaterial, and that the said cause was dismissed for the purpose of carrying out a compromise between the parties, and was not finally litigated, but compromised and settled, to which objection the court answered, "I will consider further, and pass on all of it together." The plaintiff further offered, in support of the issues on his part, a receipt which was given to Elsie F. Parsons, administratrix of the estate of Lyman F. Parsons, in full settlement of the issues set out in the cause of McCormick v. Parsons, aforesaid, which was objected to by defendants as being irrelevant, but which objection was not passed upon by the court.

On the part of the defendants it was shown that said Parsons was ignorant, until about the time of the sale by said trustee, that the deed from Tuttle and wife to him contained a clause "assuming" the incumbrance on the land, but supposed that he had bought "subject to" the same. It also appeared that Parsons was ignorant of his rights under the deed of trust until about the date of the sale, and that, as soon as he learned of the clause in the deed to him rendering him personally liable for the debt on the land, he took all steps in his power to protect his rights, and that before the completion of the said trustee's sale the said Parsons, by and through his agent, John A. Kerr, notified the trustee, Majors, and the purchaser, McCormick, that he demanded a release of 15% acres of the land, under the terms of the deed of trust.

The reply of plaintiff admits the making of the deed of trust and the payment of \$9,500 on said notes, admits that said deed of trust contained the aforesaid release clause, but sets up as a defense that said release clause was void by reason of being vague and uncertain in its terms. It also sets up that the defendants are barred by the 10-year statute of limitations from making claim to said property, and, further, that Parsons, having made no payments on the note for a long time prior to the sale, was guilty of such neglect and laches as would estop him, or those claiming under him, from making any claim to said land.

The defendants claim that the release clause set out in said deed of trust entitled said Parsons, and those claiming under him, to a release of one acre of land on the payment of each and every \$600, and that on such payment one acre of the tract of 89 acres became free from the lien of the deed of trust, and that, if parties did not select and set out such acre, an undivided one-thirty-ninth of the lands was released by such payment; that decedent, Lyman Parsons, was not guilty of negligence or laches during his

lifetime, but acted promptly as soon as he was informed that he was personally bound by his assumption of the incumbrance on said land, and did all in his power to protect his rights; that Parsons was owning and holding said land at the time of the sale, September 1, 1894, subject to said deed of trust, and that McCormick took adversely to him only from September 4, 1894, the date of the execution and delivery of the trustee's deed, and that plaintiff had been in possession of the land only eight years at the time of the commencement of this suit.

Defendants also complain of the failure of the court, upon objections made by them to the admission in evidence of the various records and proceedings in former suits, to pass upon such objections at the time. But neither the action of the court in admitting this evidence over the objection of defendants, nor its failure to pass upon the objections, would justify a reversal of the judgment, this being an equity case; for in such cases evidence improperly admitted will be disregarded by this court. In the case of *State ex rel. v. Jarrott*, 183 Mo. 204, 81 S. W. 876, Gantt, J., in speaking for the court, said: "Indeed, this court has held in a number of cases that on an appeal in an equity case it would consider evidence which was improperly excluded by the trial court or reject evidence improperly admitted, when preserved in the bill of exceptions, without reversing the judgment for that reason." *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Hanna v. South St. Joseph Land Co.*, 126 Mo. 16, 28 S. W. 652; *Goodrich v. Harrison*, 130 Mo. 269, 32 S. W. 661; *Davis v. Kline*, 96 Mo. 401, 9 S. W. 724, 2 L. R. A. 78; *Kleimann v. Gieselmann*, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761. It is said for defendants: That, when the deed of trust was made by Tuttle and wife to secure the two notes of \$8,500 each, the parties to that instrument intended that each part of it should have a meaning. That when they inserted the following clause, to wit: "And for every \$600 that is paid on said notes, said parties of the third part obligate themselves to release one acre of the tract hereby conveyed from the lien of this deed of trust, said notes being given as a part of the purchase money of said tract of land"—it was intended to have some force and effect, and that the holder of the notes, on payment of \$600 thereon, became obligated to release one acre of the land, whether demand was made or not. The tract of land described in the deed of trust contains 39 acres, and the position of plaintiff is that if this were a contract to convey out of a tract of 39 acres of land one acre for every \$600 paid, and there were a payment of \$9,500, there could be no specific performance of such contract because of lack of certainty in the description of the land to be conveyed, and the contract would be void. It may be conceded that if a person who owns a certain tract of land enters into

an agreement, otherwise valid, to convey to another a certain undivided interest therein, there may be specific performance of such contract to release one acre out of a tract of 39 acres, without designating or describing the particular acre to be released.

Campbell v. Johnson, 44 Mo. 247, was a suit in ejectment, brought to recover possession of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 11, township 53, range 16, in Randolph county, embracing an area of 40 acres; but the deed on which the suit was based only described the land as the S. W. $\frac{1}{4}$ of section 11. It was held that a quarter section contained four 40-acre tracts, and as there was nothing in the deed to show to which 40 acres it applied the ambiguity was patent, and because the description was inaccurate and rendered the identity of the land sought to be conveyed wholly uncertain the deed was void for uncertainty. So in the case at bar the acre of land claimed to have been released from the lien of the deed of trust upon the payment of the sum of \$600 was merely described as "one acre of the tract," which description was wholly insufficient to identify the acre to be released, and under the rule announced in the *Campbell Case*, supra, rendered that particular provision in the deed of trust void for uncertainty of description. 2 Devlin on Deeds (2d Ed.) § 1010. *Bell v. Dawson*, 32 Mo. 79, was an action of ejectment, wherein plaintiff relied for title on a deed which described the land as follows: "A lot of one arpens in front by forty arpens in depth, situated in the Grand Prairie, bounded on the one side by Mr. Laclede and on the other side by the said vendor, such as it now exists, which the said Ortez says he knows and is satisfied therewith." At the time of the execution of the deed the grantor owned a tract of land 3 arpents wide by 40 arpents deep bounded on both sides by lands of Laclede. It was held that the deed was void for uncertainty of description. In *Brandon v. Leddy*, 67 Cal. 43, 7 Pac. 33, it is held that a deed which shows upon its face that there are two lots to which the description equally applies is void for uncertainty, and parol evidence is inadmissible to explain the ambiguity. In this case the description of any one acre to be released from the lien of the deed of trust applies alike to each and every acre of the tract of 39 acres. *Armstrong v. Short*, 95 Ind. 326, was an action to correct the description of land in a mortgage, and to foreclose it. One of the tracts was described as the south part of the N. E. $\frac{1}{4}$ of section 30, etc., containing 17 acres; the other, as the north part of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 31, etc., containing 45 acres. The court said: "It is very clear from appellant's testimony that there was no mistake of fact as to the descriptions; that they are just what he understood and knew them to be, and apparently just what he wished them to be. If he is not able to recover anything by them, it is not because

there was any mistake in the insertion of them in the mortgage, but because he misconceived the legal effect and import of them. It is just as clear that the descriptions are entirely defective and insufficient."

Nor could the clause in the deed of trust which we hold to be void for uncertainty of description of the acre of land to be released upon the payment of \$600 be aided by a demand for the release of 16 acres, or 15 $\frac{1}{2}$ acres of land, off of the east side of said tract of 39 acres after the payment of the full amount of said notes. The records that were read in evidence by plaintiff were immaterial as to the vital issues in this case—that is, the validity of the release clause in the deed of trust—which depends entirely upon the sufficiency of the description of any one acre of the 39-acre tract which might be released from the lien of said deed of trust upon the payment of \$600 upon the notes secured by said deed, which description is wholly insufficient. It must, therefore, follow that the result of this appeal in no way depends upon the various records in question, but upon the validity of the release clause alone.

Our conclusion is that the judgment should be affirmed. It is so ordered. All concur.

MEMORANDUM DECISIONS.

STATE v. HARDY. (Supreme Court of Missouri, Division No. 2. May 22, 1906.) Appeal from Circuit Court, Jasper County; Howard Gray, Judge. William Hardy was convicted of assault with intent to ravish, and he appeals. Affirmed. Thompson & Thompson and Mooneyham & McCawley, for appellant. The Attorney General and N. T. Gentry, for the State.

FOX, J. This cause is here upon appeal by the defendant from a judgment of the circuit court of Jasper county convicting him of assault upon one Minnie L. Stotts with intent to ravish. The prosecuting attorney on the 14th day of June, 1905, filed an information charging the defendant with the commission of the offense as above indicated. At the June term, 1905, of said circuit court, the defendant was tried and convicted. His punishment was assessed at five years in the penitentiary. After filing unsuccessful motions for a new trial and in arrest of judgment, defendant appealed. Although given time in which to file his bill of exceptions, defendant failed to do so; so there is nothing before this court except the record proper. We have carefully examined the record proper, which is all that is before us for consideration, and find that the information charges the offense in such form as has frequently met the approval of this court. The record discloses the arraignment of the defendant in accordance with the requirements of the statute, and the subsequent proceedings respecting the impaneling of the jury, the return of their verdict, and the sentence and judgment in accordance with the verdict appear to be in every particular regular and in strict accord with the law and an orderly trial; hence it follows that the judgment of the trial court should be affirmed, and it is so ordered. All concur.

PETERS v. CITY OF ST. JOSEPH. (Kansas City Court of Appeals. Missouri. April 2, 1906.) Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge. Action by John F. Peters against the city of St. Joseph. From a judgment for plaintiff, defendant appeals. Affirmed. William B. Norris and Edwin M. Spencer, for appellant. Motter & Shultz, for respondent.

ELLISON, J. The plaintiff fell upon one of defendant's sidewalks and was seriously injured. He brought this action for damages and recovered judgment in the trial court. There was a heavy fall of snow in the city of St. Joseph on the 7th of February, 1905, and a light fall on the 8th and 9th, and at noon of the last date plaintiff fell while walking along at a place as much or more used by pedestrians than any other part of the city. The evidence does not show the cause in a sufficiently satisfactory way for as clear a statement of the facts as we would like. As we gather from the record, pedestrians had made a path in the snow, one witness said wide enough for two to pass. This path was made by packing the snow into a hard and compact mass of snow and ice, such as will come about from tramping snow in freezing weather. There was evidence tending to show that plaintiff was in the exercise of ordinary care and that he fell without any fault upon his part. The case is much like that of *Reno v. St. Joseph*, 169 Mo. 642, 70 S. W. 123, and the instructions complained of come near being a literal copy of those given in that case. We have noted the instances in which there was a change of phraseology, but find that such change was of no practical or substantial character. We think, also, there was no error committed as to the measure of damages. Defendant cites the case of *Reedy v. St. Louis Brewing Co.*, 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805, in support of its theory of defense; but that case is altogether unlike the one at bar, which, as before stated, is controlled in all essential particulars by the *Reno Case*. Finding no cause for interference, we affirm the judgment. All concur.

CARR et al. v. CALVERTS. (Court of Appeals of Kentucky. May 11, 1906.) Appeal from Circuit Court, Bath County. "Not to be officially reported." Action between Amelia Carr and others and F. M. Calverts, administrator. From the judgment, Amelia Carr and others appeal. Affirmed. Alex. Connor and W. D. Cochran, for appellants. R. Guggell & Son and Thos. R. Rhister, for appellee.

PER CURIAM. Affirmed by an equally divided court.

COMMONWEALTH v. CHESAPEAKE & O. R. CO. (Court of Appeals of Kentucky. May 9, 1906.) Appeal from Circuit Court, Johnson County. "Not to be officially reported." Action by the commonwealth against the Chesapeake & Ohio Railroad Company. From an adverse judgment, the commonwealth appeals. Affirmed. R. J. Breckinridge and N. B. Hays, Atty. Gen., for the Commonwealth. Wardsworth & Cochran, for appellee.

PER CURIAM. Affirmed by an equal division of the court.

FITZSIMMONS v. MAYSVILLE & B. S. R. CO. (Court of Appeals of Kentucky. May 9, 1906.) Appeal from Circuit Court, Campbell County. "Not to be officially reported." Action between James H. Fitzsimmons and the Maysville & Big Sandy Railroad Company. From a judgment for the latter, the former appeals. Affirmed. Lucius Desha and M. R. Lock-

hart, for appellant. L. J. Crawford, for appellee.

PER CURIAM. Affirmed by an equal division of the court.

HUNTER v. COMMONWEALTH. (Court of Appeals of Kentucky. May 11, 1906.) Appeal from Circuit Court, Jefferson County, Criminal Division. "Not to be officially reported." Sam Hunter was convicted of larceny, and he appeals. Affirmed.

BARKER, J. The appellant, Sam Hunter, was indicted by the grand jury of Jefferson county, charged with the offense of grand larceny. To this indictment he pleaded not guilty. A trial before a jury resulted in his conviction, his punishment being fixed at confinement in the penitentiary for a period of five years. Of the judgment based upon this verdict he is here on appeal. The evidence showed the guilt of appellant beyond a reasonable doubt. A careful reading of the record discloses no reason for reversing the judgment, and it is therefore affirmed.

LOUISVILLE & N. R. CO. v. MERSCHALL. (Court of Appeals of Kentucky. May 18, 1906.) Appeal from Circuit Court, Campbell County. "Not to be officially reported." Action by Robert H. Merschall against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded. Benjamin D. Warfield and James C. Wright, for appellant. Samuel C. Bailey, for appellee.

O'REAR, J. On the former appeal of this case (85 S. W. 710, 27 Ky. Law Rep. 465) it was held that if appellee, the plaintiff below, could sustain the material allegation of his petition against appellant, he would be entitled to recover. On the trial after the return of the case the trial court allowed the case to be submitted to the jury. We have examined but one question raised on this appeal, and that is whether there was any evidence of negligence on the part of appellant. We find there was none whatever. The court should have sustained appellant's motion for a peremptory instruction. Judgment reversed, and cause remanded for proceedings not inconsistent herewith.

WELHAUSEN v. TERRELL, Land Com'r, et al. (Supreme Court of Texas. April 18, 1906.) Petition by G. A. Welhausen for mandamus against J. J. Terrell, as Commissioner of the General Land Office, and others. Written argument invited. C. C. Clamp, for relator.

GAINES, C. J. This is a motion to file a petition for a writ of mandamus. We are not satisfied that we ought to grant the motion, and therefore invite a written argument from counsel for the proposed relator upon the points suggested by the following remarks: According to the allegations of the petition and the agreed statement of facts accompanying it, the purported affidavits which were a part of the applications to purchase were in due form as required by the statute, and were sworn to and subscribed by the affiant before the county clerk of La-salle county, and were signed by him as such clerk, but were not attested by his seal of office. Can these be considered as affidavits? It would seem that they should have had the seal affixed to the jurat; but we have found no statute that expressly requires this, nor any decision of this court which so holds. If not good affidavits, were not the applications defective and void for that reason? The applications being for a purchase by a lessee, we incline to think that they were not invalidated by reason of the fact that

the name of the applicant appeared upon the corner of the envelope; but we would be pleased to hear from counsel on that question also.

ARNOLD v. STATE. (Court of Criminal Appeals of Texas. April 18, 1906.) Appeal from District Court, Tarrant County; Irby Dunklin, Judge. R. H. Arnold was convicted of a criminal offense, and he appeals. Affirmed. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record is before us without bill of exceptions or statement of facts. There are several grounds of the motion which cannot be considered in the absence of the statement of facts. The indictment contains five counts, each of which charge an abortion by different means. In the attitude of the record there is no question requiring a review at the hands of the court. The judgment is affirmed.

BROOKS, J., absent.

BAILEY v. STATE. (Court of Criminal Appeals of Texas. April 18, 1906.) Appeal from Coryell County Court; R. E. West, Judge. J. M. Bailey was convicted of violating the local option law, and appeals. Affirmed. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a local option conviction. The record does not contain the evidence, nor were any bills of exception reserved during the trial. This leaves the record before us without anything for consideration. The judgment is therefore affirmed.

BROOKS, J., absent.

COHEN v. STATE. (Court of Criminal Appeals of Texas. March 14, 1906.) Appeal from District Court, Harris County; J. K. P. Gillaspie, Judge. Jake Cohen was convicted of establishing a lottery, and he appeals. Reversed. Brockman & Kahn, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This is a companion case to that of Leonard Howard v. State, 91 S. W. 785, from Harris county, decided February 14, 1906. Appellant was charged and convicted of establishing a lottery; and evidence was introduced, over appellant's objection, tending to show the sale of lottery tickets, as in Howard's Case, supra. Upon the authority of that case, and for the reasons there set out, the judgment herein is reversed, and the cause remanded.

Ex parte MURRAY. (Court of Criminal Appeals of Texas. April 25, 1906.) Appeal from District Court, Coleman County; Jno. W. Goodwin, Judge. Habeas corpus proceedings by Will Murray to obtain bail. From a judgment remanding him to custody, he appeals. Reversed. Woodward, Baker & Woodward, for appellant. J. E. Yantis, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with the murder of Rena Taylor, and resorted to the writ of habeas corpus for the purpose of obtaining bail. Upon the hearing the district judge remanded him to custody without bond. Following our usual practice, we do not enter into a discussion of the evidence. It is sufficient to say that after a careful review of the testimony contained in the record we are of opinion that the case is bailable, and there was error on the part of the court remanding relator to custody. The judgment is reversed, and bail fixed in the sum of \$3,000, which being given in the terms of the law, to be approved by the officer having him in charge, he will be released from custody; and it is so ordered.

PERKINS v. STATE. (Court of Criminal Appeals of Texas. March 21, 1906.) Appeal from District Court, Montgomery County; L. B. Hightower, Judge. John Perkins was convicted of hog theft, and he appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of hog theft, and his punishment fixed at two years' confinement in the penitentiary. There is neither statement of facts nor bill of exceptions in the record. In the condition of the record, no question is presented which can be reviewed. The judgment is affirmed.

POWELL v. STATE. (Court of Criminal Appeals of Texas. April 18, 1906.) Appeal from District Court, Travis County; Geo. Calhoun, Judge. Fred Powell was convicted of burglary, and appeals. Affirmed. J. E. Yantis, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment fixed at four years' confinement in the state reformatory; hence this appeal. As the record is presented, we find neither statement of facts, bill of exceptions, nor motion for new trial. The charge of the court is applicable to a state of facts provable under the indictment, which follows approved precedents. No error appearing, the judgment is affirmed.

BROOKS, J., absent.

CLARK v. CITY OF MINERAL WELLS. (Court of Civil Appeals of Texas. April 21, 1906.) Error from District Court, Palo Pinto County; W. J. Oxford, Judge. Action by the city of Mineral Wells against Mrs. Lucinda Clark. There was judgment for plaintiff, and defendant brings error. Reversed and remanded. C. M. Templeton, for plaintiff in error.

STEPHENS, J. Plaintiff in error brings before us a judgment rendered in a tax suit on citation by publication, in which the city of Mineral Wells was plaintiff and "unknown owner" was defendant. The questions raised by the assignments of error have been distinctly passed on by this court in the following cases: *Babcock v. Wolfarth*, 80 S. W. 641, 10 Tex. Ct. Rep. 164, and cases there cited; *Garvey v. State*, 88 S. W. 873, 13 Tex. Ct. Rep. 646, and authorities there cited. On the authority of these decisions the judgment is reversed, and the cause remanded.

PALMO v. S. W. SLAYDEN & CO. (Supreme Court of Texas. June 6, 1906.) On motion for rehearing. Overruled. For former opinion, see 92 S. W. 796.

BROWN, J. The error in stating that "no motion for new trial was filed at that term" is immaterial, but for the sake of accuracy the opinion is corrected so as to read: "A motion for a new trial was filed at that term." The motion for a rehearing is overruled.

KOGER et al. v. KOGER et al.

(Court of Appeals of Kentucky. June 13, 1906.)

WILLS—CONSTRUCTION—DEVISE BY IMPLICATION.

A will reciting that the testator has deeded all his land to certain heirs does not constitute a devise by implication where the deeds referred to are invalid.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 999.]

"Not to be officially reported."

On petition for rehearing. Overruled.

For former opinion, see 92 S. W. 961.

HOBSON, C. J. Having considered the petition for rehearing, we only deem it necessary to answer so much of it as insists that the refer-

ence in the will made September 1, 1903, to the deeds declared invalid, was a devise by implication. The recital in the will which it is claimed is a devise by implication is as follows: "After first deeding all my lands to my two youngest sons, Elijah Koger and William Koger, Jr., I am desirous of willing the remainder of my estate equally among all of my heirs, except Elijah and William Koger, whom I have deeded all my lands to." In support of the contention that this is a devise by implication, counsel call our attention to certain excerpts from Page on Wills. As we understand the doctrine that controls devises by implication, it is this: That where the testator has previously made a valid disposition of his property, and in his will refers to this disposition theretofore made, it will be considered as a devise by implication of the property mentioned; but whether devises by implication will stand or not depends primarily on the question as to whether or not the previous disposition was a valid or enforceable one, or such a one as the law would permit the persons therein named to hold and claim as their part of the estate. On the other hand, if the previous disposition of the property mentioned in the will was not a valid disposition, or such a one as the parties could take and hold the property under, then it cannot be held a devise by implication, because, when the previous conveyance or contract is set aside or held invalid, the devise by implication necessarily falls with it. A devise by implication presupposes a previous valid disposition of the property mentioned in the will.

In *Benson v. Hall*, 150 Ill. 60, 86 N. E. 947, it appears that Wm. Hall died in 1892, having previously made his last will, in which he gave each of his sons one dollar, stating that "it and the real estate I have deeded them is to be in full satisfaction of their share of my estate." In a controversy arising after his death, the sons mentioned in the will relied in their answer upon the deeds made previous to the will conveying to his sons certain real estate, and they claimed title under the deeds and under the will, insisting that, although it might appear that the deeds under which they claimed had not been delivered to them, together with the will of the grantor they vested the title to the property in them. In support of this position they relied on the case of *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185, cited in the petition for rehearing; but the court said: "This case is directly to the contrary. We there said: 'But where the recital in the will is to the effect that the testator has by some instrument other than the will given to a certain person named in the recital property, when in fact and in truth he has not done so, such an erroneous recital does not disclose a purpose and intent on the part of the deviser to give by the will, and in such case resort must be had to the other instrument, and not to the will, by persons interested.'" And the court held that it was not a devise by implication, and looked entirely to the validity of the deeds to determine whether or not the property passed under them, and not under the will.

In *Zimmerman v. Hafer*, 81 Md. 347, 32 Atl. 316, one Bitner conveyed to Zimmerman a valuable farm. Afterwards he made a will, in which he stated: "Whereas, I have this day made and executed a deed conveying to J. Monroe Zimmerman the farm whereon I now reside, I do hereby give and bequeath unto the said Zimmerman all my personal property of whatever description and wheresoever situated." After the death of the testator, the deed was assailed on the ground that it had been procured by undue influence, and upon a trial of the case the deed was set aside and annulled on this ground. After the judgment canceling the deed, Zimmerman brought an action against the heirs of Bitner, asserting title to the real estate mentioned in the deed by virtue of the pro-

vision relating to it in the will; but the court held that the clause in the will presupposed that the land had been disposed of by the deed, and that there was no intention to give the same by the will. The court said: "If the deed had been sustained, Zimmerman would have held title under it, and not under the will. Clearly, he could not have held the same estate under both the deed and the will at the same time. If the deed had prevailed, he would then have held under it, and it only, because it would then have conveyed the grantor's entire interest to the grantee; there being ostensibly a deed in fee simple. If it had effectively conveyed a fee, then it would have divested the grantor's whole interest in the property, and, having been executed prior to the will, there would have been no estate left to the grantor for the will to operate upon. But, as the deed was in form sufficient, had it been allowed to stand, to convey to the donee the grantor's entire title to the farm, the will, which does not purport, or even inferentially profess, to give the same farm to the same or any other person in the event or on the contingency that the deed should fail to be operative, can upon no known rule of construction be interpreted as alternately disposing of the property if it failed to pass under the deed. The deed was stricken down because it was void, and it was void because it had been procured by undue influence. It was consequently tainted from the beginning. In

truth and in fact, though he had executed the deed, he had not by reason of the deed's invalidity conveyed that property to Zimmerman at all. The recital in the will was, or at least turned out to be, erroneous, because the deed did not convey the title, although it was actually made and executed. Such an erroneous recital does not disclose a purpose or intention on the part of the testator to give the same property by the will."

Quoting from Page on Wills a part of a section cited by counsel in the petition, the author supports the Maryland case in the following language: "But, where the testator in his will recites erroneously that he has conveyed certain of his real estate by deed to a certain named person, it does not show an intention to dispose of the property by will, but merely the testator's opinion as to the legal effect of some pre-existing instrument. If, therefore, such pre-existing deed is for any reason invalid, a reference to it in the will cannot be held to amount to a devise by implication of the property described in such deed to the grantee therein." In *American & English Encyclopedia of Law* (1st Ed.) vol. 29, p. 883, it is said: "A recital which in effect merely amounts to a declaration that the testator supposes the party referred to has an interest independent of the will is no evidence of the intent to give by the will, and does not raise a gift by implication."

Petition is overruled.

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*Under Act March 18, 1899 (Acts 1899, p. 117, No. 66), adverse possession of unimproved lands *held* to commence with payment of taxes, and not after payment of taxes for seven years.—*Cottonwood Lumber Co. v. Hardin* (Ark.) 1118.

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*A deed *held* to sufficiently describe the land to sustain the five-year statute of limitations.—*Club Land & Cattle Co. v. Wall* (Tex. Sup.) 984.

*In trespass to try title, a defendant *held* not to have acquired title by adverse possession, under the five-year statute of limitations, because of the failure to pay taxes.—*Club Land & Cattle Co. v. Wall* (Tex. Sup.) 984.

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Ky. St. 1903, c. 122, allowing rural communities to adopt stock laws to prohibit running at large of cattle, *held* not to repeal by implication city charters permitting cities to legislate on same subject.—*City of Paducah v. Ragsdale* (Ky.) 13.

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In an action for injuries, defendant *held* not entitled on appeal to urge the fact of non-tender or return of the consideration paid for a release of damages alleged by plaintiff to have been obtained through fraud.—*Robertson v. George A. Fuller Const. Co.* (Mo. App.) 130.

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§ 5. — Objections and motions, and rulings thereon.

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A party cannot complain that an instruction is couched in too general terms where he has requested no specific instruction.—*Gamache v. Johnston Tin Foil & Metal Co.* (Mo. App.) 918.

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Motion to fully define proximate cause *held* not ground for reversal in the absence of a request.—*Galveston, H. & S. A. Ry. Co. v. Paschall* (Tex. Civ. App.) 446.

In an action between applicants for the purchase of public lands, the exclusion of certain evidence, if error, *held* harmless.—*Winans v. McCabe* (Tex. Civ. App.) 817.

*Objections to evidence in the appellate court which were not presented below will not be reviewed.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

Failure to make findings *held* not open to complaint in the absence of request therefor.—*Caplen v. Cox* (Tex. Civ. App.) 1048.

§ 6. — Exceptions.

*Grounds of exceptions not relied on in the circuit court will not be considered on appeal.—*Brumley v. Nichols & Shepherd Co.* (Ky.) 548.

An objection to an amended petition and a reply on the ground that they constituted a departure from the original petition *held* waived.—*Walker v. Wabash R. Co.* (Mo. Sup.) 83.

Argument of counsel will be reviewed, though no exception was taken, where the trial court had established a rule that he would not sustain an objection to improper argument, and would not instruct the jury to disregard an argument.—*Galveston, H. & S. A. Ry. Co. v. Washington* (Tex. Civ. App.) 1054.

§ 7. — Motions for new trial.

*In the absence of motion and grounds for a new trial, there is nothing for the appellate court to consider except whether pleadings stated a cause of action.—*Orient Ins. Co. v. J. A. Meers & Son* (Ky.) 584.

Motion to set aside verdict *held* equivalent to motion for new trial for purpose of presenting questions for review.—*Morgan v. Keller* (Mo. Sup.) 75.

*A ruling on a demurrer to a petition is reviewable without any motion for a new trial or bill of exceptions.—*Crow v. Reliable Jewelry Co.* (Mo. App.) 742.

The refusal of instructions and the admission of evidence may be reviewed on appeal, notwithstanding the attention of the trial court was not directed thereto by motion for a new

* Point annotated. See syllabus.

trial.—*McFadden v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 989.

§ 8. Requisites and proceedings for transfer of cause.

An appeal dismissed because of the absence of an appeal bond, as required by Rev. St. 1895, arts. 1400-1402, 1408.—*Logan v. Gay* (Tex. Sup.) 255.

§ 9. Record and proceedings not in record.

*Alleged improper argument of counsel cannot be reviewed on appeal where it is not preserved in any bill of exceptions.—*George T. Stagg Co. v. Brightwell* (Ky.) 8.

*The filing of a complete transcript of the record on appeal does not dispense with the necessity of filing an abstract thereof, as required by Rev. St. 1899, § 813, and court rules 12, 13 (73 S. W. vi).—*Whiting v. Big River Lead Co.* (Mo. Sup.) 883.

The Supreme Court takes judicial notice of its own records.—*Chicago Herald Co. v. Bryan* (Mo. Sup.) 906.

*Where no bill of exceptions was filed in the trial court, there is nothing for review on appeal except the record proper.—*Scott v. Adams Express Co.* (Mo. App.) 169.

The filing of a motion for a new trial, the court's action thereon, the affidavit for appeal, etc., held matters to be shown by abstract of the record proper, and not by the bill of exceptions.—*State ex rel. Sons v. Holland* (Mo. App.) 362.

Abstract held to sufficiently comply with the St. Louis Court of Appeals rule governing cases where full transcript is filed.—*White v. Blankenbeckler* (Mo. App.) 503.

A mortgagee's right to recover mortgaged chattels before default could not be reviewed where the mortgage was not contained in the bill of exceptions.—*Carson v. Dewar* (Mo. App.) 723.

*Objections and exceptions to instructions must be preserved by bill of exceptions.—*McKnight-Keaton Grocery Co. v. Hudson* (Mo. App.) 1180.

*A motion to set aside the verdict and for a new trial can only be made a part of the record by bill of exceptions.—*Watkins v. Green* (Mo. App.) 1131.

Where a defect in the record was relied on as a ground for affirmance, and was pointed out in the reply brief, it was too late for appellant after affirmance to suggest a diminution of the record, and have the same perfected on a motion to rehear.—*La Follette Coal, Iron & Ry. Co. v. Smith* (Tenn.) 237.

Entry of judgment *nunc pro tunc* held part of the trial within Rev. St. 1895, art. 1379, authorizing the making of a statement of facts "after the trial" for purpose of appeal.—*Palmo v. S. W. Slayden & Co.* (Tex. Sup.) 796.

*On appeal, the record held such that an assignment of error to the exclusion of certain testimony could not be considered.—*Ramm v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 428.

A bill of exceptions to the admission of certain testimony, failing to set out the questions, held insufficient.—*Galveston, H. & S. A. Ry. Co. v. Paschall* (Tex. Civ. App.) 446.

Under Rev. St. 1895, art. 1383, appeal from an ex parte order appointing a receiver must be presented upon the petition and order of appointment alone.—*Haywood v. Scarborough* (Tex. Civ. App.) 815.

*Assignments of error as to the admission of testimony based on a bill of exceptions, which

falls to state what the answers were, will not be considered.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

Where statements of a witness were repeated several times in the evidence as contained in a statement of facts agreed to as correct, it will not be held on appeal that the evidence was excluded, though assignments of error are based on such exclusion; the statement of facts and the statements in the bills of exceptions being of equal dignity.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

§ 10. Assignment of errors.

*Under Court of Civil Appeals rules Nos. 24, 25, 26 (67 S. W. xv), certain assignments of error held multifarious and too general.—*Evans v. Jackson* (Tex. Civ. App.) 47.

Points presented by an assignment of error not embraced in a proposition will be regarded as waived.—*San Antonio & A. P. Ry. Co. v. Wood* (Tex. Civ. App.) 259.

An assignment of error to the exclusion of evidence, failing to state the objections interposed, will not be considered on appeal.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

An assignment and accompanying proposition held sufficient to raise the question of the sufficiency of the petition in an action.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1036.

Under Court of Civil Appeals rules 30, 34 (67 S. W. xvi), an assignment of error held insufficient.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1036.

§ 11. Briefs.

An assignment of error will not be considered where no statement is subjoined to the proposition under it in appellants' brief, as required by Court of Appeals rule 31 (67 S. W. xvi).—*Johnston v. Fraser* (Tex. Civ. App.) 49.

*Briefs discussing evidence and not referring to pages of record held not to be considered on appeal.—*Waggoner v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.) 1028.

§ 12. Review—Scope and extent in general.

*Where conclusions of law were not separated from conclusions of fact in trial by court, appellate court cannot review finding on law of the case.—*Orient Ins. Co. v. J. A. Meers & Son* (Ky.) 584.

*An order granting a new trial will not be reversed if sustainable on any of the grounds alleged.—*Metropolitan Lead & Zinc Min. Co. v. Webster* (Mo. Sup.) 79.

*A case will be considered on appeal on the same theory on which it was tried.—*Walker v. Wabash R. Co.* (Mo. Sup.) 83.

The court on an appeal from an interlocutory judgment appointing a receiver can only inquire into the merits of the action so far as the facts may bear on the question of the propriety of appointing a receiver.—*Cotton v. Rand* (Tex. Civ. App.) 296.

§ 13. — Presumptions.

Permission to allow witness to remain in courtroom during trial while other witnesses were excluded held presumed, on appeal, to have been for good cause.—*Hlass v. Fulford* (Ark.) 862.

Where an act of Congress authorized the construction of a bridge, but required it to be completed within a specified time, on appeal by defendants in condemnation proceedings instituted by the bridge company, it will be presumed that the bridge was completed within

*Point annotated. See syllabus.

the required time.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 475.

Where a judgment for \$100 attorney's fees was rendered in favor of defendants on dissolution of an injunction, it would be presumed on appeal, in the absence of a showing to the contrary, that such allowance was made for getting rid of the injunction.—*Sutliff v. Montgomery* (Mo. App.) 515.

On appeal, it will be presumed, in the absence of the pleadings, that they were sufficient to sustain the judgment.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

On appeal, it will be presumed, in the absence of evidence, that there was evidence to support the trial court's findings.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

On appeal in an action for damages for breach of a contract to lease *held* on the record that it must be deemed established that the contract was oral.—*Pinto v. Rintleman* (Tex. Civ. App.) 1003.

Testimony *held* to be presumed on appeal to be as to market value.—*Caplen v. Cox* (Tex. Civ. App.) 1048.

§ 14. — Discretion of lower court.

Under Ky. St. 1903, § 1096, a denial of a change of venue will not be reviewed except on abuse of discretion.—*Drake v. Holbrook* (Ky.) 297.

*The allowance of an amendment after the parties have announced themselves ready for trial is within the discretion of the court, and its action will not be reversed unless such discretion is abused.—*W. B. Walker & Son v. Hernandez* (Tex. Civ. App.) 1067.

§ 15. — Questions of fact, verdicts, and findings.

A verdict on conflicting evidence will not be reviewed on appeal.—*Drake v. Holbrook* (Ky.) 297; *Nashville, C. & St. L. Ry. Co. v. Higgins* (Ky.) 549; *Galveston, H. & S. A. Ry. Co. v. Paschall* (Tex. Civ. App.) 446.

*Findings on conflicting evidence will not be disturbed on appeal.—*Smith v. Wyatt* (Ky.) 587.

Where verdict is supported by substantial evidence, it will not be interfered with on appeal.—*Morgan v. Keller* (Mo. Sup.) 75.

The appellate court will not disturb the action of the trial court in submitting to the jury an issuable fact embraced in the pleadings and supported by substantial evidence.—*Smoot v. Kansas City* (Mo. Sup.) 863.

Findings of the trial court on questions of fact supported by substantial evidence will not be disturbed by the appellate court.—*Matthews v. French* (Mo. Sup.) 634.

A verdict finding that a fire had neither been set by assured nor with his connivance, based on conflicting evidence, will not be set aside on appeal.—*Carp v. Queen Ins. Co.* (Mo. App.) 1187.

Whether a husband, in designating a homestead on mortgaged land, acted in good faith, *held*, under the evidence, a question of fact for the trial court.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

*A finding supported by evidence will not be disturbed on appeal.—*Rutherford v. Mothershed* (Tex. Civ. App.) 1021.

§ 16. — Harmless error in general.

*A party cannot complain of an instruction more favorable to him than he is entitled to

under the evidence.—*Southern Cotton Oil Co. v. Spotts* (Ark.) 249.

*The giving of an instruction unduly favorable to appellant, and not followed by the jury, was not prejudicial to appellant.—*St. Louis, I. M. & S. Ry. Co. v. Dooley* (Ark.) 789.

An erroneous statement by the trial court, intended to induce the jurors to agree, which was ineffective, *held* harmless.—*O'Neal v. Richardson* (Ark.) 1117.

In an action on notes, the filing of an amendment to the petition after the time limited by the court *held* not to have harmed defendant.—*Bramblett v. Deposit Bank of Carlisle* (Ky.) 283.

Requiring contestant to elect whether to rely on the allegation that he was elected, or the allegation that the election was void, *held* harmless in view of his proof.—*Wilson v. Tye* (Ky.) 295.

Defendants in condemnation proceedings *held* not entitled to complain on appeal of the manner in which the commissioners were appointed.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 475.

Indefiniteness in instructions *held* harmless.—*Knoepker v. Redel* (Mo. App.) 171.

The fact that a clerk entered a judgment for damages on an injunction bond in favor of all of the defendants, when only one of them was interested in such damages, *held* a mere clerical error not prejudicial to plaintiff.—*Sutliff v. Montgomery* (Mo. App.) 515.

*The denial of a continuance for the absence of certain witness *held* harmless.—*Carp v. Queen Ins. Co.* (Mo. App.) 1137.

Under Rev. St. 1895, art. 1341, amendment of foreclosure judgment by adding a direction to the officer to place the purchaser in possession *held* not prejudicial to defendants.—*Johnston v. Fraser* (Tex. Civ. App.) 49.

In an action against a railroad for the loss of trunks, error in failing to require plaintiff to inform defendant of the contents of the trunks *held* harmless.—*Texas & P. Ry. Co. v. Weatherby* (Tex. Civ. App.) 58.

*The refusal of the trial court to allow appellant his statutory number of challenges to jurors is not ground for reversal, in the absence of a showing that any person objectionable to appellant was chosen as a member of the jury.—*Sweeney v. Taylor Bros.* (Tex. Civ. App.) 442.

*Argument of counsel, in an action against a railway company for insulting conduct of its conductor to a passenger, *held* not reversible error.—*Texas & P. Ry. Co. v. Zink* (Tex. Civ. App.) 812.

*In an action for the death of plaintiff's father, certain language of plaintiff's counsel in closing to the jury *held* not reversible error.—*International & G. N. Ry. Co. v. Briseno* (Tex. Civ. App.) 998.

Where there is evidence to sustain a verdict, the presumption that it was obtained by improper remarks of counsel does not prevail.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

Defendant *held* not prejudiced by the court's sustaining plaintiff's exceptions to a ground of application for change of venue.—*Jones v. Wright* (Tex. Civ. App.) 1010.

§ 17. — Harmless error in rulings on evidence.

Where incompetent testimony was admitted to show that the value of a team of horses was

*Point annotated. See syllabus..

\$280, the error was not harmless where one other witness testified that their value was \$280, and one that their value was \$260, and the verdict fixed their value at \$280.—*St. Louis, I. M. & S. Ry. Co. v. Courtney* (Ark.) 251.

Error in admitting evidence *held* harmless in view of the instructions.—*Tingle v. Kelly* (Ky.) 303.

In an action against a railway company for the death of a switchman, alleged to have been caused by defendant's negligent failure to block its tracks, the erroneous admission of evidence that other railways blocked their tracks *held* harmless.—*Lee v. Missouri Pac. Ry. Co.* (Mo. Sup.) 614.

*In equity, the admission of evidence is not ground for reversal.—*McCormick v. Parsons* (Mo. Sup.) 1162.

*In an action against a railroad for obstructing an alley by its road, admission of certain evidence *held* harmless.—*Mitchell v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 111.

*Where incompetent evidence was withdrawn from the jury, the verdict will not be set aside on appeal on account of error in admitting it in the first instance.—*Scharff v. Southern Illinois Const. Co.* (Mo. App.) 126.

In an action against a railroad for loss of trunks, admission of certain immaterial evidence *held* harmless.—*Texas & P. Ry. Co. v. Weatherby* (Tex. Civ. App.) 58.

In an action for breach of a contract to deliver cattle, certain evidence *held* not prejudicial to defendant.—*McKay v. Elder* (Tex. Civ. App.) 268.

In an action between applicants for the purchase of public lands, the exclusion of certain evidence, if error, *held* harmless.—*Winans v. McCabe* (Tex. Civ. App.) 817.

Defendants *held* not harmed by the court's refusal to require the production of letters for the purpose of proving a fact found by the court.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

*The exclusion of evidence is not prejudicial where the party has the full benefit of the same evidence from several other witnesses.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

In an action against a railroad for injuries to a passenger, the exclusion of certain evidence *held* harmless error.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

*Error in admitting evidence is rendered harmless by an instruction directing the jury not to consider it.—*Houston & T. O. R. Co. v. Craig* (Tex. Civ. App.) 1033.

*Any error in admission of evidence as to location of boundary, which, so far as it was material, was not disputed, was harmless.—*Camp v. League* (Tex. Civ. App.) 1062.

§ 18. — Harmless error in instructions to jury.

*The failure of the jury to follow an instruction which should not have been given was not prejudicial to appellant.—*St. Louis, I. M. & S. Ry. Co. v. Dooley* (Ark.) 789.

Instruction requiring proof of gross negligence, in action for personal injuries, *held* prejudicial to plaintiff, though verdict was in favor of plaintiff for a small sum.—*Pendly v. Illinois Cent. R. Co.* (Ky.) 1.

Where, in an action on a contract, the jury found for defendant, upon her contention that the contract was not made, error, if any, in an

instruction on the measure of damages, was harmless.—*Corwin v. Young* (Ky.) 930.

*In an action for negligent death, an erroneous instruction as to measure of damages *held* not cause for reversal, in view of the amount of damages awarded.—*Lee v. Missouri Pac. Ry. Co.* (Mo. Sup.) 614.

*Erroneous instructions are no ground for the reversal of a judgment for defendant if plaintiff was not, from any point of view, entitled to recover.—*Carr v. Missouri Pac. Ry. Co.* (Mo. Sup.) 874.

In an action against a railroad for obstructing an alley by constructing its road in the same, certain instruction *held* harmless.—*Mitchell v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 111.

*The assumption in instructions of facts proved by uncontradicted evidence *held* harmless error.—*McManus v. Metropolitan St. Ry. Co.* (Mo. App.) 176.

In an action against a street railway company for injuries to a passenger, an instruction, permitting recovery without proof of certain allegations of the petition, *held* not reversible error.—*McManus v. Metropolitan St. Ry. Co.* (Mo. App.) 176.

An instruction not calculated to mislead the jury *held* not prejudicial because abstract.—*Haines v. Neece* (Mo. App.) 919.

The giving of an instruction not within the issues, which could not have misled the jury, *held* harmless.—*Haines v. Neece* (Mo. App.) 919.

An instruction *held* erroneous as singling out a particular fact in evidence.—*McKnight-Keaton Grocery Co. v. Hudson* (Mo. App.) 1130.

*Where instructions present the theory of the defense fully and are favorable to the defendant, it has no ground to complain that error was committed in refusing other instructions asked.—*Gilroy v. St. Louis Transit Co.* (Mo. App.) 1152.

In an action for injuries caused by negligence, where the cause of the injury was clearly shown, any error in fully defining proximate cause was harmless.—*Galveston, H. & S. A. Ry. Co. v. Paschall* (Tex. Civ. App.) 446.

It was not reversible error to refuse a charge which was substantially covered by charges given.—*International & G. N. Ry. Co. v. Brisenio* (Tex. Civ. App.) 998.

In an action against a railroad for injuries to plaintiff while riding on a stock train, error in an instruction *held* harmless.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

§ 19. — Subsequent appeals.

The sufficiency of an answer not being questioned on the first appeal *held* that its sufficiency was conclusive on a subsequent appeal.—*Drake v. Holbrook* (Ky.) 297.

Questions passed upon by the Supreme Court on appeal are res judicata, and cannot be opened on a subsequent appeal.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 475.

Where a judgment was reversed by the Court of Civil Appeals on a jurisdictional question, other assignments of error would not be reviewed on a writ of error issued by the Supreme Court until they had been determined by the Court of Civil Appeals.—*Eastin & Knox v. Texas & P. Ry. Co.* (Tex. Sup.) 838.

§ 20. Determination and disposition of cause.

Where the members of the appellate court are evenly divided in opinion as to the sufficiency

* Point annotated. See syllabus.

of the evidence, the finding of fact remains in full force.—*Barnard & Leas Mfg. Co. v. Smith* (Ark.) 868.

Civ. Code Prac. § 341, prohibiting new trial on account of smallness of damages, *held* not to prevent reversal on other grounds.—*Pendly v. Illinois Cent. R. Co.* (Ky.) 1.

A remittitur will be permitted by an appellate court where it can reasonably estimate the excess in the verdict or judgment, and it is apparent that no injury can be done the defendant by such action.—*Smoot v. Kansas City* (Mo. Sup.) 363.

*Circumstances and evidence in the trial of an action for personal injuries *held* not to justify an entry of remittitur in the appellate court, after improper instructions as to damages.—*Smoot v. Kansas City* (Mo. Sup.) 363.

A mandate on appeal in condemnation proceedings *held* to authorize the appointment of commissioners by the trial court in vacation (Rev. St. 1899, § 1266).—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 475.

A judgment against a garnishee must be reversed on his appeal where the judgment against the principal defendant has been reversed.—*Chicago Herald Co. v. Bryan* (Mo. Sup.) 906.

APPEARANCE.

*Defendants *held* to have waived any objection to the jurisdiction for want of service by appearing and answering without urging such objection.—*Hearn v. Ayres* (Ark.) 768.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 2.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.
Of guardian ad litem for infant, see "Infants," § 2.
Of guardian ad litem for insane person, see "Insane Persons," § 2.
Of officers in general, see "Officers," § 1.
Of receiver, see "Receivers," § 2.
Of trustee, see "Trusts," § 2.

APPORTIONMENT.

Of tax, see "Taxation," § 3.

APPURTENANCES.

See "Easements," § 1.
Conveyance of, see "Deeds," § 2.

ARBITRATION AND AWARD.

Instructions in general in action on award, see "Trial," § 9.

§ 1. Submission.

It is not necessary that a person should have a legal cause of action against another to authorize a submission to arbitration.—*Houston Saengerbund v. Dunn* (Tex. Civ. App.) 429.

It is competent for the parties to submit matters in dispute between them to arbitration without any special reference to questions of law.—*Houston Saengerbund v. Dunn* (Tex. Civ. App.) 429.

* Point annotated. See syllabus.

§ 2. Award.

In an action on an award of arbitrators, the court *held* required to charge that defendant was bound if he or his agent agreed to the submission.—*Houston Saengerbund v. Dunn* (Tex. Civ. App.) 429.

ARGUMENT OF COUNSEL.

Exceptions for purpose of review, see "Appeal and Error," § 6.

Harmless error, see "Appeal and Error," § 16; "Criminal Law," § 30.

In civil actions, see "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 19.

Objections for purpose of review, see "Criminal Law," § 28.

Review dependent on record on appeal or error, see "Appeal and Error," § 9; "Criminal Law," § 29.

ASSAULT AND BATTERY.

Assault on passenger, see "Carriers," § 9.

Assault with intent to kill, see "Homicide."

Assault with intent to rape, see "Rape," § 1.

Requests for instructions, see "Criminal Law," § 22.

§ 1. Civil liability.

In an action for an assault and wrongful arrest, plaintiff *held* entitled to a certain instruction.—*Crocker v. Haley* (Ky.) 574.

§ 2. Criminal responsibility.

In a prosecution for assault, evidence *held* sufficient to establish that one of the defendants participated in the affray in a manner other than as a peacemaker.—*State v. Stuart* (Mo. App.) 345.

In a prosecution for aggravated assault, evidence of a difficulty between prosecuting witness and a third person after the assault *held* inadmissible.—*Honeycutt v. State* (Tex. Cr. App.) 421.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 3.

Of damages, see "Damages," § 5.

Of expenses of public improvements, see "Municipal Corporations," § 5.

Of loss on insured, see "Insurance," § 9.

Of tax, see "Taxation," § 3.

ASSETS.

Of estate of decedent, see "Executors and Administrators," § 2.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 10.

ASSIGNMENTS.

Fraud as to creditors, see "Fraudulent Conveyances."

Real party in interest in action on assigned contract, see "Parties," § 1.

Transfers of particular species of property, rights, or instruments.

See "Insurance," §§ 7, 9; "Judgment," § 7.

Corporate shares, see "Corporations," § 1.

Insurance policy, see "Insurance," § 15.

Lien of vendor, see "Vendor and Purchaser," § 6.

Mining rights, see "Mines and Minerals," § 1.

§ 1. Requisites and validity.

Good will and contract for its protection *held* valuable property rights and assignable.—*Bradford & Carson v. Montgomery Furniture Co.* (Tenn.) 1104.

Transfer of a claim to one living in a county in which the debtor did not reside, merely to authorize suit in a county other than that of defendant's residence, *held* ineffective for that purpose.—*Douglas v. Walker* (Tex. Civ. App.) 1028.

ASSOCIATIONS.

See "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 17.

ASSUMPSIT, ACTION OF.

See "Money Received"; "Work and Labor."

ASSUMPTION.

Instructions in general as to assumption of risk, see "Trial," § 10.

Of risk by employé, see "Master and Servant," §§ 5, 11.

ATTACHMENT.

See "Execution"; "Garnishment."

Conspiracy in suing out, see "Conspiracy," § 1.

Exemptions, see "Homestead."

Instructions in general in actions for wrongful attachment, see "Trial," § 9.

Priorities between vendors' liens and attachment liens, see "Sales," § 6.

Wrongful attachment as malicious prosecution, see "Malicious Prosecution," § 2.

§ 1. Nature and grounds.

*A debt resulting from a breach of a contract to deliver cattle is one for which attachment lies.—*McKay v. Elder* (Tex. Civ. App.) 268.

§ 2. Proceedings to procure.

An affidavit in attachment *held* not to state different grounds disjunctively.—*McKay v. Elder* (Tex. Civ. App.) 268.

§ 3. Levy, lien, and custody and disposition of property.

In proceedings for attachment of real estate, failure of sheriff to notify tenant in possession, as required by Rev. St. 1899, § 388, par. 3, *held* to render attachment and sale thereunder void.—*Siling v. Hendrickson* (Mo. Sup.) 105.

§ 4. Claims by third persons.

Where the property of an heir of the wife was taken and sold under attachment as the property of the husband, the heir is entitled to have the attachment set aside without first tendering to the purchaser the amount he paid for the property.—*Siling v. Hendrickson* (Mo. Sup.) 105.

Purchaser at attachment sale *held* not entitled to return of money paid by him before the setting aside of the attachment and sale.—*Siling v. Hendrickson* (Mo. Sup.) 105.

§ 5. Wrongful attachment.

In an action for wrongful attachment, certain evidence *held* inadmissible as showing the debtor's ownership.—*Terry v. Clark* (Ark.) 788.

ATTENDANCE.

Of juror, see "Jury," § 2.

ATTORNEY AND CLIENT.

Absence of counsel as ground for continuance, see "Continuance."

Argument and conduct of counsel at trial in civil actions, see "Trial," § 4.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 19.

Attorneys as public officers, see "District and Prosecuting Attorneys."

Continuance for inability to obtain counsel, see "Criminal Law," § 16.

Exceptions to argument of counsel for purpose of review, see "Appeal and Error," § 6.

Harmless error in argument of counsel, see "Appeal and Error," § 16; "Criminal Law," § 30.

Instructions in general in actions by or against, see "Trial," § 9.

Objections to argument of counsel for purpose of review, see "Criminal Law," § 23.

Presentation of grounds of review of argument of counsel in record on appeal, see "Criminal Law," § 29.

Presumptions on appeal as to allowance of attorney's fees, see "Appeal and Error," § 13.

Prior action as counsel in case as affecting qualification of judge, see "Judges," § 2.

§ 1. The office of attorney.

*Under Acts 1903, p. 576, c. 247, § 5, authorizing the issuance of preliminary certificates entitling the holder to practice law, the obtaining of such certificate by concealment of the fact that the applicant had been disbarred in another state *held* a fraud justifying, revocation.—*State Board of Law Examiners v. Williams* (Tenn.) 521.

§ 2. Compensation and lien of attorney.

In action for reasonable value of services of attorney in action for specific performance, evidence of increase of value of property pending litigation *held* admissible.—*Smith v. Couch* (Mo. App.) 1143.

*In action by attorney for services, an instruction *held* not objectionable as authorizing recovery for services not alleged in the petition, where there was no evidence of such services.—*Smith v. Couch* (Mo. App.) 1143.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.

AVERAGE.

General average, see "Shipping," § 2.

AWARD.

See "Arbitration and Award," § 2.

BAGGAGE.

Of passenger, see "Carriers," § 10.

BAILMENT.

See "Carriers," § 2; "Pledges."

BANKRUPTCY.

Collateral attack on judgment, see "Judgment," § 4.

Liability for malicious institution of bankruptcy proceedings, see "Malicious Prosecution," § 1.

*Point annotated. See syllabus.

BANKS AND BANKING.

§ 1. Functions and dealings.

A bank *held* not liable for the amount of a note on the ground that it acted fraudulently in procuring another bank to discount it.—*American Nat. Bank v. Warren Deposit Bank* (Ky.) 585.

Application by a chattel mortgagee of proceeds of mortgaged property *held* to give rise to no cause of action against it by the holder of a note executed by the mortgagor.—*American Nat. Bank v. Warren Deposit Bank* (Ky.) 585.

§ 2. Loan, trust, and investment companies.

Under Cr. Code Prac. § 122, relating to statement of offense in indictment, indictment for violation of Ky. St. 1903, § 2223a, subsec. 11, prohibiting transaction of business for investment company not holding license, *held* defective.—*Commonwealth v. Loving* (Ky.) 575.

BAR.

Of action by former adjudication, see "Judgment," § 5.

Of action by limitation, see "Limitation of Actions," § 4.

BATTERY.

See "Assault and Battery."

BAWDY HOUSE.

See "Disorderly House."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

Mutual benefit insurance associations, see "Insurance," § 17.

Sale of corporate office, see "Corporations," § 2.

BENEFITS.

Acceptance as ground of estoppel, see "Estoppel," § 3.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

BETTING.

See "Gaming."

BIAS.

Of juror see "Jury," § 3.

BICYCLES.

Injury to cyclist on street, see "Municipal Corporations," § 8.

BIGAMY.

Rev. St. 1899, § 2169, relating to bigamy, and denouncing an offense not constituting bigamy as defined in section 2167, *held* constitutional.—*State v. Stuart* (Mo. Sup.) 878.

*Under Rev. St. 1899, § 2169, relating to bigamy, an indictment *held* to sufficiently comply with the statute.—*State v. Stuart* (Mo. Sup.) 878.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF EXCHANGE.

See "Bills and Notes."

BILL OF LADING.

See "Carriers," § 2.

BILL OF PARTICULARS.

See "Pleadings," § 5.

BILLS AND NOTES.

See "Interest," § 1.

Action on note for good will, see "Good Will."

Admissions by payee of note, see "Evidence," § 4.

Amendment of pleading in action on notes, see "Pleading," § 4.

Assignment of vendor's lien notes, see "Vendor and Purchaser," § 6.

Declarations as evidence in action on note, see "Evidence," § 5.

Forgery, see "Forgery."

Harmless error in action on note, see "Appeal and Error," § 16.

Instructions in general in action on, see "Trial," §§ 7, 9.

Insurance premium notes, see "Insurance," § 6.

Larceny of check, see "Larceny," § 2.

Liability of bank for wrongful acts of officer or agent as to, see "Banks and Banking," § 1.

Of partners, see "Partnership," §§ 3, 4.

Pleading and evidence of limitation, see "Limitation of Actions," § 5.

Pledges of commercial paper, see "Pledges."

Purchase by guardian, see "Guardian and Ward," § 1.

Taxation of, see "Taxation," § 2.

§ 1. Requisites and validity.

In an action on a note given by a married woman for the purchase price of stock, facts *held* sufficient to put the seller upon notice that the value of the stock must have been misrepresented to the purchaser.—*Ditto v. Slaughter* (Ky.) 2.

A note executed by a mother to a son *held* invalid for want of a valuable consideration.—*Sullivan v. Sullivan* (Ky.) 966.

§ 2. Construction and operation.

*A note promising to pay a certain sum of money for value received, "interest at 8 per cent. per annum," *held* only a promise to pay interest at that rate from the date of the maker's default.—*Dunlap v. Kelly* (Mo. App.) 140.

§ 3. Actions.

Where, in an action on a note, the petition alleged that it was given in consideration of certain shares of stock, and such fact was also recited in the note, plaintiff could not prove facts showing another consideration.—*Ditto v. Slaughter* (Ky.) 2.

On an issue as to how much interest the maker had paid on a note, it could not be assumed, in the absence of convincing evidence, that he paid a greater rate than the note called for.—*Henderson v. Lightner* (Ky.) 945.

* Point annotated. See syllabus.

*An executor, having taken a note payable to himself in his representative capacity, is, after settling with all the distributees and devisees under the will of his testatrix and paying all that is due them, entitled to maintain an action on the note in his individual capacity without a formal assignment of the note to himself individually.—*Layne v. Power* (Ky.) 945.

The recovery on a note given in consideration of services rendered and to be rendered, *held* limited to the fair value of the services actually rendered.—*Sullivan v. Sullivan* (Ky.) 966.

An answer in an action on a note executed by a partner to his copartner on purchasing the firm assets *held* to allege the existence of facts constituting a part of the consideration of the note, so that the same could be shown under Ky. St. 1903, § 470, either to defeat or reduce a recovery.—*Davis v. Ferguson* (Ky.) 968.

*In a suit on a note, directing verdict for plaintiff for principal and interest from the date of the last payment *held* error in the absence of evidence that the payments indorsed were payments of interest up to the date of the last payment.—*Dunlap v. Kelly* (Mo. App.) 140.

An answer alleging that one of the notes sued on was given in renewal of a note which had been discharged and was void for want of consideration *held* sufficient.—*Eule v. Dorn* (Tex. Civ. App.) 828.

In an action on certain notes, allegations of an answer *held* to constitute a sufficient plea of payment as against a general demurrer.—*Eule v. Dorn* (Tex. Civ. App.) 828.

BLIND TIGERS.

See "Intoxicating Liquors," §§ 4, 7.

BOARD.

Distribution of governmental powers and functions as affecting validity of law creating dental board, see "Constitutional Laws," § 1.

BONA FIDE PURCHASERS.

At execution sale, see "Execution," § 3.

Of goods, see "Sales," § 4.

Of land, see "Vendor and Purchaser," § 5.

Of tax titles, see "Taxation," § 6.

BONDS.

As affecting tenure of trustee, see "Trusts," § 2.

Average bonds, see "Shipping," § 2.

Liquor dealer's bond, see "Intoxicating Liquors," §§ 3, 9.

Of corporation, see "Corporations," § 3.

Bonds for performance of duties of trust or office.

See "Sheriffs and Constables," §§ 1, 2.

Bonds in legal proceedings.

See "Appeal and Error," § 8; "Injunction," §§ 3, 4.

Appeal in criminal prosecutions, see "Criminal Law," § 27.

Appeal from justice's court, see "Justices of the Peace," § 2.

On filing equitable defense as affecting transfer of cause on docket, see "Trial."

* Point annotated. See syllabus.

BOUNDARIES.

See "Fences."

Harmless error in action relating to, see "Appeal and Error," § 17.

Instructions in general in actions relating to, see "Trial," § 8.

Requirements of statute of frauds as to agreements fixing boundaries, see "Frauds, Statute of," § 1.

§ 1. Description.

A conveyance of lots and blocks, describing them by numbers only, passes the fee to the center of the street and alleys on which they abut, subject to the rights of the public use of the same as highways.—*Dickinson v. Arkansas City Imp. Co.* (Ark.) 21.

*Where there is a conflict between courses and distances and well-known corners, the latter must control.—*Huff v. Woosley* (Ky.) 572.

*Corners established by the United States surveyors *held* conclusive as to the actual location of boundary lines.—*Frederitzle v. Boeker* (Mo. Sup.) 227.

Field notes of United States surveys of public lands will control, though monuments established by the government surveyor cannot be found.—*Bradshaw v. Edelen* (Mo. Sup.) 691.

§ 2. Evidence, ascertainment, and establishment.

Surveys to determine a boundary line *held* under the circumstances not to have been binding on either owner.—*Huff v. Woosley* (Ky.) 572.

In trespass, evidence *held* to show that line shown by survey and patent as 294 poles long was in fact only 194 poles long.—*Morgan v. Lewis* (Ky.) 970.

Instruction requested in boundary suit *held* properly refused as misleading.—*Nicholson v. Hopper* (Ky.) 979.

In an action involving the location of a boundary line, an instruction as to the issues in the case *held* not erroneous.—*Giddings v. Thompson* (Tex. Civ. App.) 1043.

Upon an issue as to the length of certain boundary lines, evidence *held* to require submission of the question to the jury.—*Giddings v. Thompson* (Tex. Civ. App.) 1043.

*Where two calls of a survey are inconsistent *held*, that the field notes of the surveyor may be looked to to throw light on the question.—*Giddings v. Thompson* (Tex. Civ. App.) 1043.

*A party wall contract with evidence of knowledge of the location of the wall and acquiescence of the former owners *held* to sustain a conclusion that the center of the wall was to be the boundary between the lots.—*Roberts v. Fellman Dry Goods Co.* (Tex. Civ. App.) 1060.

*In trespass to try title, deed of adjoining land *held* admissible in evidence in connection with other evidence on issue as to location of boundary.—*Camp v. League* (Tex. Civ. App.) 1062.

In trespass to try title, records of county commissioner's court *held* inadmissible on question as to location of boundary.—*Camp v. League* (Tex. Civ. App.) 1062.

Evidence *held* to support judgment sustaining contention of plaintiff as to location of boundary.—*Camp v. League* (Tex. Civ. App.) 1062.

BREACH.

Of condition, see "Insurance," § 9.
 Of contract, see "Contracts," § 4; "Sales," § 3; "Vendor and Purchaser," § 4.
 Of contract of lease, see "Landlord and Tenant," § 1.
 Of warranty, see "Sales," §§ 5, 7.

BRIBERY.

Under an indictment for an offer to bribe an officer to release a prisoner, certain evidence held admissible to show the officer had the prisoner in legal custody.—*Johnson v. State* (Tex. Cr. App.) 257.

Certain evidence held material, on a prosecution for an offer to bribe an officer to release a prisoner, to show that the officer had the prisoner in legal custody.—*Johnson v. State* (Tex. Cr. App.) 257.

An "attempt" to bribe, of which the verdict found defendant guilty, held the same as an "offer" to bribe, of which the judgment found him guilty.—*Johnson v. State* (Tex. Cr. App.) 257.

BRIDGES.

Presumptions on appeal in condemnation proceedings by bridge company, see "Appeal and Error," § 13.
 Railroad bridges, see "Railroads," §§ 7, 8.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 11.

BROKERS.

Allowance of commissions out of fund arising from partition sale, see "Partition," § 1.
 Breach of brokerage contract, see "Contracts," § 5.

§ 1. Compensation and lien.

Persons consummating sale negotiated by brokers held not entitled to claim that sale was not made within a reasonable time.—*Morgan v. Keller* (Mo. Sup.) 75.

In action for brokers' commissions, instruction assuming sale by brokers held not error under the evidence.—*Morgan v. Keller* (Mo. Sup.) 75.

Brokers negotiating sale on terms accepted by employers held entitled to commissions on entire price, whether it was all paid or not.—*Morgan v. Keller* (Mo. Sup.) 75.

§ 2. Actions for compensation.

In action for brokers' commissions, instructions as to extent of recovery held not conflicting under the evidence.—*Morgan v. Keller* (Mo. Sup.) 75.

BUILDING AND LOAN ASSOCIATIONS.

The transfer of a mortgage loan by a solvent building association to another is ultra vires.—*Cobe v. Lovan* (Mo. Sup.) 93.

Foreclosure of a building and loan association's mortgage and deed pursuant thereto held void (Rev. St. 1889, § 2813).—*Cobe v. Lovan* (Mo. Sup.) 93.

BURGLARY.

Testimony of accomplices, see "Criminal Law," § 14.

§ 1. Prosecution and punishment.

*An information for burglary which fails to allege the ownership of the building bur-

glarized is fatally defective.—*State v. James* (Mo. Sup.) 679.

*Presumption of guilt of accused arising from possession of stolen property stolen at the time of the burglarizing of a building held, in the absence of explanation, sufficient to authorize a verdict of guilty of larceny and burglary.—*State v. James* (Mo. Sup.) 679.

Evidence on a trial for burglary and larceny held to authorize a charge on the presumption arising from possession by accused of the stolen property.—*State v. James* (Mo. Sup.) 679.

BUSINESS.

Conspiracy to injure, see "Conspiracy," § 1.
 Contract for sale of, as in restraint of trade, see "Contracts," § 1.

BYSTANDERS.

Conduct at trial of criminal prosecution, see "Criminal Law," § 17.

CALENDARS.

Of causes for trial, see "Trial," § 2.

CANCELLATION OF INSTRUMENTS.

See "Quieting Title"; "Reformation of Instruments."
 Cancellation and release of mortgage, see "Mortgages," § 2.
 Cancellation of insurance policy, see "Insurance," § 8.
 Cancellation of partnership agreements, see "Partnership," §§ 1, 2.
 Cancellation of release, see "Release," § 1.
 Rescission of contract, see "Contracts," § 3; "Sales," § 2; "Vendor and Purchaser," § 3.
 Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CARGO.

See "Shipping."

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Amendment of pleading in action for delay in transportation of animals, see "Pleading," § 4.
 Bill of particulars in action for loss of baggage, see "Pleading," § 5.
 Carriage of passengers by vessels, see "Shipping," § 1.
 Conformity of judgment to pleading in action for ejection of passenger, see "Judgment," § 1.
 Documentary evidence in action for negligence in transportation of live stock, see "Evidence," § 7.
 Express companies as employers, see "Master and Servant," § 7.
 Harmless error in action for injuries to passenger, see "Appeal and Error," §§ 17, 18.
 Harmless error in action for insulting conduct to passenger, see "Appeal and Error," § 16.
 Harmless error in action for loss of baggage, see "Appeal and Error," §§ 16, 17.
 Hearsay evidence in action for delay in transportation of goods, see "Evidence," § 6.
 Hearsay evidence in action for negligent transportation of animals, see "Evidence," § 6.

* Point annotated. See syllabus.

Instruction in general in action against, see "Trial," § 6.
 Opinion evidence in action for injuries to passenger, see "Evidence," § 9.
 Service of process on officer, see "Corporations."

§ 1. Control and regulation of common carriers.

A carrier *held* not guilty of discrimination in furnishing cars to rival shippers in violation of Kirby's Dig. § 6804.—St. Louis Southwestern Ry. Co. v. Clay Gin Co. (Ark.) 531.

In an action against a carrier for failure to furnish cars, evidence *held* to relieve it from liability.—St. Louis Southwestern Ry. Co. v. Clay Gin Co. (Ark.) 531.

Kirby's Dig. § 6804, *held* declaratory of the common-law duty of carriers to furnish facilities for the transportation of freight and to require a carrier to furnish cars without discrimination.—St. Louis Southwestern Ry. Co. v. Clay Gin Co. (Ark.) 531.

§ 2. Carriage of goods.

A carrier failing to deliver the goods specified in a bill of lading to the legal holder thereof on his surrender thereof is liable, under Kirby's Dig. §§ 530, 531, for the damages sustained.—Arkansas Southern Ry. Co. v. German Nat. Bank. (Ark.) 522.

A carrier on the failure of the legal holder of the bill of lading to appear and receive the goods *held* required to store the goods with directions to deliver to the holder.—Arkansas Southern Ry. Co. v. German Nat. Bank (Ark.) 522.

*A bill of lading *held* to bind the carrier to deliver the goods only on the production of the bill of lading properly indorsed.—Arkansas Southern Ry. Co. v. German Nat. Bank (Ark.) 522.

A final carrier is justified in paying transportation charges of a previous carrier, or in holding the property according to lawful directions given for the enforcement of a lien for such charges, unless he has notice that the charges are unlawful.—Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co. (Mo. App.) 714.

It is only for charges connected with the transportation of property and essential to its conveyance from the point of shipment to destination that the carrier may assert a lien.—Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co. (Mo. App.) 714.

*A final carrier cannot be *held* liable for defaults of previous carriers on the theory that it was a connecting carrier, in the absence of evidence in support of that theory.—Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co. (Mo. App.) 714.

An agent of a carrier corporation and the corporation *held* joint tort-feasors in the transportation of plaintiff's cattle over a longer route than necessary, and suable jointly or separately at plaintiff's election.—Eastin & Knox v. Texas & P. Ry. Co. (Tex. Sup.) 838.

In an action against a carrier for delay in transporting a threshing outfit, an instruction on the measure of damages *held* erroneous as authorizing double damages for the same injury.—Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines (Tex. Civ. App.) 40.

An instruction on the subject of constructive notice of special damages, in an action against a carrier for delay in the transportation of threshing machinery, *held* erroneous.—Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines (Tex. Civ. App.) 40.

In an action against a carrier for delay in delivering threshing machinery, evidence that, if

the machinery had arrived on time, plaintiffs would have threshed all the grain that was threshed by certain others, *held* inadmissible.—Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines (Tex. Civ. App.) 40.

In a suit against a carrier for delay, a complaint *held* not objectionable for failure to allege notice that the delay would cause loss, and the specific amount thereof.—Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines (Tex. Civ. App.) 40.

A complaint against a carrier for delay in the transportation of a threshing outfit, failing to allege the names of the persons with whom plaintiffs had contracts for the threshing of grain *held* objectionable.—Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines (Tex. Civ. App.) 40.

*Under contract of shipment, carrier *held* not precluded from going behind bills of lading and freight bills signed by it, and showing weights furnished by shipper incorrect, and recovering for shortage.—Belton Oil Co. v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 411.

Contents of a written contract between a carrier and shipper *held* not binding on the latter under the facts.—Gulf, C. & S. F. Ry. Co. v. Funk (Tex. Civ. App.) 1032.

§ 3. Carriage of live stock.

*In an action against a carrier for negligent transportation of plaintiff's hogs, the measure of plaintiff's damages stated.—Illinois Cent. R. Co. v. Holt (Ky.) 540.

*Where hogs transported are in bad condition on arrival at their destination by reason of its negligence, the measure of the carrier's responsibility is the difference between the value of the hogs in their condition on arrival and what their value would have been had they been transported without negligence.—Illinois Cent. R. Co. v. Holt (Ky.) 540.

In an action against a carrier for negligent delay in transporting plaintiff's hogs, certain evidence *held* inadmissible.—Illinois Cent. R. Co. v. Holt (Ky.) 540.

*A carrier accepting for transportation hogs loaded on its cars by the shipper himself *held* not responsible under the contract of shipment for any injury done by the hogs to each other, or from suffocation by reason of their being crowded in the car, or from their eating cockleburrs.—Illinois Cent. R. Co. v. Holt (Ky.) 540.

*A carrier accepting hogs for shipment is bound to use reasonable care in handling and caring for them on the journey according to the usual course of business in such shipment.—Illinois Cent. R. Co. v. Holt (Ky.) 540.

*A carrier *held* not liable for failure to furnish cars for shipment of hogs earlier than they were furnished, where its agent made no positive engagement as to when the cars would be there.—Illinois Cent. R. Co. v. Holt (Ky.) 540.

*It is the duty of a carrier to transport hogs delivered to it for shipment with reasonable promptness according to the usual course of business, considering the connections to be made, the way they were carried, and the time usually taken for the journey.—Illinois Cent. R. Co. v. Holt (Ky.) 540.

*In an action against a carrier for damages resulting from alleged negligence in transporting plaintiff's hogs, an instruction *held* erroneous.—Illinois Cent. R. Co. v. Holt (Ky.) 540.

Where a carrier had but one freight rate between the points embracing a stock shipment, limited liability clauses contained in the con-

* Point annotated. See syllabus.

tract in consideration of a reduced rate were without consideration and unenforceable.—*Ficklin & Son v. Wabash R. Co.* (Mo. App.) 347.

Where experienced sheep shippers removed from certain cars 50 more sheep than was necessary to prevent overcrowding, knowing that they would deteriorate by being held for further cars, plaintiffs were not entitled to recover against the carrier for such deterioration.—*Ficklin & Son v. Wabash R. Co.* (Mo. App.) 347.

*Proximate cause of the killing of certain sheep before their transportation had been begun held the negligence of plaintiffs in overcrowding the cars, and not the failure of the carrier to provide other cars ordered of greater capacity.—*Ficklin & Son v. Wabash R. Co.* (Mo. App.) 347.

Proof that certain sheep in question were lost from the carrier's pens before transportation had begun held not to support an allegation that the loss was the result of the carrier's negligence and unnecessary violence in handling the trains carrying the sheep.—*Ficklin & Son v. Wabash R. Co.* (Mo. App.) 347.

Proof that delay in the transportation of plaintiffs' cattle was that of a connecting carrier held a material variance from the petition, alleging that the delay was that of the initial carrier, requiring an amendment on objection, under Rev. St. § 656.—*Ingwersen v. St. Louis & H. Ry. Co.* (Mo. App.) 357.

A bill of lading held a through contract of carriage, rendering the initial carrier liable for delay occurring through the negligence of a connecting carrier.—*Ingwersen v. St. Louis & H. Ry. Co.* (Mo. App.) 357.

In an action against a carrier for delay in transportation of plaintiffs' cattle, plaintiffs' alleged failure to file the claim within the time required by the bill of lading held waived.—*Ingwersen v. St. Louis & H. Ry. Co.* (Mo. App.) 357.

In an action against a carrier, a finding that it undertook to carry a shipment of live stock beyond its own line, held unauthorized.—*Texas & P. Ry. Co. v. Arnett* (Tex. Civ. App.) 57.

In an action against a carrier, the striking out of the answer setting up a contract limiting the carrier's liability to its own line held error in view of the petition failing to allege a through contract, as provided by Rev. St. 1895, art. 331a.—*Texas & P. Ry. Co. v. Arnett* (Tex. Civ. App.) 57.

Where plaintiff admitted that no injury to his horses occurred on the line of one of two connecting carriers jointly sued, it was proper to direct a verdict for such carrier.—*Ft. Worth & D. C. Ry. Co. v. Garlington* (Tex. Civ. App.) 270.

In an action against connecting carriers, certain charge held not to erroneously authorize the infliction of double damages.—*Atchison, T. & S. F. Ry. Co. v. Nation & Slavens* (Tex. Civ. App.) 823.

In an action against connecting carriers for injuries to cattle, charge held not subject to the objection of directing the jury to find against defendants for the combined negligence of themselves and their codefendants.—*Atchison, T. & S. F. Ry. Co. v. Nation & Slavens* (Tex. Civ. App.) 823.

In an action against connecting carriers for injury to cattle, it is not necessary for the court to require the jury to first find the whole amount of damage and divide the entire sum among defendants in proportion to the amount of dam-

age done by each.—*Atchison, T. & S. F. Ry. Co. v. Nation & Slavens* (Tex. Civ. App.) 823.

In an action against connecting carriers for damages to cattle, sum paid by one carrier in compromise of a claim against it held inadmissible.—*Atchison, T. & S. F. Ry. Co. v. Nation & Slavens* (Tex. Civ. App.) 823.

Carrier held liable for injuries caused by its negligence, notwithstanding the concurrence of inclement weather in causing the injury.—*Atchison, T. & S. F. Ry. Co. v. Nation & Slavens* (Tex. Civ. App.) 823.

§ 4. Carriage of passengers—Relation between carrier and passenger.

*Express messenger carried under contract with express company held a passenger for hire.—*Davis v. Chesapeake & O. Ry. Co.* (Ky.) 339.

*Where one remained on train after arrival at destination, relation as passenger held to have terminated.—*Kaase v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 444.

§ 5. — Fares, tickets, and special contracts.

A railway ticket stipulating for identification of a passenger as original purchaser held not to require identification to the satisfaction of the railway conductor.—*Southern Ry. Co. v. Cassell* (Ky.) 281.

In an action against a carrier for refusal to validate the return portion of a passenger's ticket, evidence held to support a finding that such refusal was unjustifiable.—*Baltimore & O. S. W. R. Co. v. Hudson* (Ky.) 947.

In an action against a carrier for refusal to validate the return portion of a ticket, the admission of certain testimony held not erroneous.—*Baltimore & O. S. W. R. Co. v. Hudson* (Ky.) 947.

*A passenger is bound to know the legal effect of the ticket on which he attempts to ride.—*Gulf, C. & S. F. Ry. Co. v. Riney* (Tex. Civ. App.) 54.

§ 6. — Performance of contract of transportation.

Under Civ. Code Prac. § 72, the circuit court of a county held to have jurisdiction of a connecting carrier in an action by a passenger for breach of a contract of transportation.—*Southern Ry. Co. v. Cassell* (Ky.) 281.

Civ. Code Prac. § 73, pertaining to common carriers, held not to include actions on contracts to carry passengers.—*Southern Ry. Co. v. Cassell* (Ky.) 281.

A cause of action held to exist against a carrier where it refuses to deliver a passenger at the usual station platform, and puts her off 300 yards from it.—*Kinney v. Yasoo & M. V. R. Co.* (Tenn.) 1116.

§ 7. — Personal injuries.

*Under Const. § 196, and Code Va. 1887, § 1296, contract whereby express messenger released liability for injuries held void.—*Davis v. Chesapeake & O. Ry. Co.* (Ky.) 339.

*A verdict in an action against a carrier for refusal to validate the return portion of a ticket held not excessive.—*Baltimore & O. S. W. R. Co. v. Hudson* (Ky.) 947.

*A common carrier is bound to use a high degree of care, but is not an insurer of the safety of its passengers.—*Evers v. Wiggins Ferry Co.* (Mo. App.) 118.

*A petition in an action against a street railway for injuries held to sufficiently state a cause of action to be amended by the insertion of the word "negligently."—*Keeton v. St. Louis & M. R. Ry. Co.* (Mo. App.) 512.

*Point annotated. See syllabus.

*The duty of a carrier to exercise the highest degree of care to protect a passenger from assaults, whether offered by strangers or by the carrier's own servants, continues until the passenger has left the vehicle in safety at his destination.—*McQuerry v. Metropolitan St. Ry. Co.* (Mo. App.) 912.

*In action for injuries to person attempting to board street car, where it was shown that the signal for starting the car was given, the presumption is that it was given by the conductor.—*Kohr v. Metropolitan St. Ry. Co.* (Mo. App.) 1145.

*Conductor's failure to see plaintiff attempting to board street car, and his act in starting the car, *held* negligence.—*Kohr v. Metropolitan St. Ry. Co.* (Mo. App.) 1145.

*A street railway company *held* liable for the injuries received by a passenger while attempting to alight from a car.—*Gilroy v. St. Louis Transit Co.* (Mo. App.) 1152.

*A carrier of passengers is bound to exercise the care a very prudent person would exercise under similar circumstances.—*Gilroy v. St. Louis Transit Co.* (Mo. App.) 1152.

*A passenger on a freight train acquiesces in the usual incidents and conduct of a freight train managed by prudent and competent men.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

In an action against a railroad for injuries to a passenger, remarks of defendant's counsel *held* not prejudicial to plaintiff.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

§ 8. — Contributory negligence of person injured.

*In an action against a street railway for injuries to a passenger, evidence *held* to show plaintiff guilty of contributory negligence.—*South Covington & C. St. Ry. Co. v. Physioc* (Ky.) 305.

*A passenger injured by jumping from a moving street car to avoid an apparently impending accident *held* not precluded from recovering.—*McManus v. Metropolitan St. Ry. Co.* (Mo. App.) 176.

*In an action against a street railway company for injuries to a passenger, evidence *held* to require submission of the issue of defendant's negligence.—*McManus v. Metropolitan St. Ry. Co.* (Mo. App.) 176.

In an action by a passenger for injuries received while alighting from a car, the refusal of a special charge *held* reversible error.—*St. Louis Southwestern Ry. Co. of Texas v. Bryant* (Tex. Civ. App.) 813.

§ 9. — Ejection of passengers and intruders.

*In an action against a railroad for wrongful ejection of a passenger at midnight from a train, a verdict of \$1,000 *held* not excessive.—*Southern Ry. Co. v. Cassell* (Ky.) 281.

In an action against a carrier for an assault on a passenger, an instruction *held* erroneous as permitting a recovery upon a theory not embraced in the petition.—*McQuerry v. Metropolitan St. Ry. Co.* (Mo. App.) 912.

The prohibition of smoking in a street car is a reasonable rule.—*McQuerry v. Metropolitan St. Ry. Co.* (Mo. App.) 912.

*A carrier *held* liable for an assault by a conductor on a passenger who had been ejected from a car.—*McQuerry v. Metropolitan St. Ry. Co.* (Mo. App.) 912.

*A passenger is bound to observe and obey reasonable rules established for the convenience

and comfort of other passengers, and on his failure to do so his ejection is warranted.—*McQuerry v. Metropolitan St. Ry. Co.* (Mo. App.) 912.

*If it becomes necessary to eject a passenger because of the latter's misconduct, no more force must be employed than is required to accomplish the removal.—*McQuerry v. Metropolitan St. Ry. Co.* (Mo. App.) 912.

*Facts in connection with an assault on a passenger by a conductor *held* to show a continuous assault embraced within the exercise of excessive violence in ejecting the passenger.—*McQuerry v. Metropolitan St. Ry. Co.* (Mo. App.) 912.

*Passenger ejected for refusal to pay fare *held* not entitled to immediately board the train again and complete his journey on payment of the fare for the balance of the distance.—*Gulf, C. & S. F. Ry. Co. v. Riney* (Tex. Civ. App.) 54.

*Where passenger remained on train after arrival at destination, carrier's employes *held* not guilty of unlawful assault in using reasonable means to get him off the train.—*Kaase v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 444.

Evidence *held* to justify jury in finding that carrier's employes resorted to no unnecessary means in getting passenger off train.—*Kaase v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.) 444.

§ 10. — Passengers' effects.

Railroad's failure to check baggage *held* no defense to an action for the loss thereof.—*Texas & P. Ry. Co. v. Weatherby* (Tex. Civ. App.) 58.

*In an action against a railroad for the loss of trunks, certain evidence as to the value of contents of the trunks *held* erroneously excluded.—*Texas & P. Ry. Co. v. Weatherby* (Tex. Civ. App.) 58.

CARRYING WEAPONS.

See "Weapons."

CASE ON APPEAL.

Making and settlement, see "Appeal and Error," § 9.

CATTLE.

See "Animals."

CATTLE GUARDS.

On railroads, see "Railroads," §§ 2, 9.

CAUSE OF ACTION.

See "Action"; "Attachment," § 1.

CERTIFICATE.

As evidence, see "Evidence," § 7.
To practice dentistry, see "Physicians and Surgeons."
To practice law, see "Attorney and Client," § 1.

CERTIORARI.

Existence of remedy by certiorari as ground for denial of prohibition, see "Prohibition," § 1.
In aid of record on appeal, see "Criminal Law," § 29.

§ 1. Nature and grounds.

The judgment of commissioners as to the value of an animal destroyed under Acts 1901,

*Point annotated. See syllabus.

p. 283, c. 156, *held* reviewable by certiorari to the circuit court.—*Lewis v. Shelby County* (Tenn.) 1088.

CHALLENGE.

To juror, see "Jury," § 3.

CHAMPERTY AND MAINTENANCE.

The statute of champerty has no application to sales which are made under judicial orders.—*Cook v. Burton* (Ky.) 822.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of civil action, see "Venue," § 1.
Of criminal prosecutions, see "Criminal Law," § 3.

CHARACTER.

Evidence of in prosecution for rape, see "Rape," § 1.
Of witness, see "Witnesses," § 3.

CHARGE.

By carrier, see "Carriers," § 2.
To jury in civil actions, see "Trial," §§ 6-11.
To jury in criminal prosecutions, see "Criminal Law," § 21.

CHARITIES.

§ 1. Construction, administration, and enforcement.

Under a will creating a trust *held* that the judge of the circuit court had no authority to institute a proceeding to compel trustees to file vouchers with their annual reports.—*Jenkins v. Berry* (Ky.) 10.

A hospital under the management of trustees under a will *held* not subject to the supervision of the circuit court, though some of the patients received in the hospital were cared for at public expense.—*Jenkins v. Berry* (Ky.) 10.

CHARTER.

City charter, see "Municipal Corporations," §§ 3, 4.
Of insurance company, see "Insurance," §§ 5, 7.
Of toll-road company, see "Turnpikes and Toll Roads," § 1.

CHATTEL MORTGAGES.

See "Pledges."

Bank as chattel mortgagee, see "Banks and Banking," § 1.

Review of issues as to rights of parties to chattel mortgage as dependent on record on appeal or error, see "Appeal and Error," § 9.

§ 1. Construction and operation.

Registration of chattel mortgage executed by married woman alone *held* not constructive notice of the mortgage.—*Sweeney v. Taylor Bros.* (Tex. Civ. App.) 442.

Pledgee of chattel *held* to have a lien prior to that retained by the seller of the chattel by a chattel mortgage.—*Sweeney v. Taylor Bros.* (Tex. Civ. App.) 442.

§ 2. Rights and liabilities of parties.

In an action to recover mortgaged chattels, evidence *held* to require submission to the jury of the questions whether defendant authorized the execution of a bill of sale to the mortgagor together with the mortgage.—*Carson v. Dewar* (Mo. App.) 723.

*A mortgagee in a chattel mortgage *held* entitled to sue one converting the mortgaged chattels.—*American Nat. Bank v. First Nat. Bank* (Tex. Civ. App.) 439.

In an action for the conversion of mortgaged chattels, the question whether defendants, non-residents of the county in which the chattels were situate when mortgaged and converted, could under the statutes be sued in the county, *held* for the jury.—*American Nat. Bank v. First Nat. Bank* (Tex. Civ. App.) 439.

CHEAT.

See "Fraud."

CHECKS.

For passenger's effects, see "Carriers," § 10.

CHILD.

See "Guardian and Ward"; "Infants"; "Parent and Child."

Care required as to children, see "Negligence," § 2.

Contributory negligence of child injured by operation of railroad, see "Railroads," §§ 6, 7.
Injuries to, caused by operation of street railroad, see "Street Railroads," § 2.

Liability of master for injuries to child caused by act of servant, see "Master and Servant," § 12.

CHOSE IN ACTION.

Assignment, see "Assignments."

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Citizenship ground of jurisdiction of United States courts, see "Removal of Causes," §§ 2, 3.

Equal protection of laws, see "Constitutional Law," § 4.

CIVIL DAMAGE LAWS.

See "Intoxicating Liquors," § 9.

CIVIL RIGHTS.

See "Constitutional Law," § 4.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate of decedent, see "Executors and Administrators," § 4.

To property levied on, see "Attachment," § 4.

* Point annotated. See syllabus.

CLERKS OF COURTS.

Failure of clerk to enter object of suit on docket as affecting his pendants, see "Lis Pendens."

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL ATTACK.

On tax judgment, see "Taxation," § 5.
On decree in divorce suit, see "Divorce," § 3.
On judgment, see "Judgment," § 4.
On judicial sale, see "Judicial Sales."

COLLATERAL SECURITY.

See "Pledges."

COLLATERAL UNDERTAKING.

See "Guaranty."

COLLECTION.

Of taxes, see "Taxation," § 4.

COLLISION.

Between vehicle and street car, see "Street Railroads," § 2.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy."

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."
Erroneous belief as to interstate character of dealings in intoxicating liquors as defense to prosecution for violation of liquor law, see "Intoxicating Liquors," § 4.
Of foreign corporations, see "Corporations," § 5.

§ 1. Subjects of regulation.

A consignment to one without his knowledge held not an interstate commerce transaction.—*Adams Express Co. v. Commonwealth (Ky.)* 932.

*Where property is received for transportation from one state to another, the shipment is an interstate one, and is not governed by state statutes.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co. (Mo. App.)* 714.

§ 2. Means and methods of regulation.

Kirby's Dig. §§ 530, 531, relating to bills of lading and the delivery of goods to the legal holder thereof, held not in conflict with the commerce clause of the federal Constitution.—*Arkansas Southern Ry. Co. v. German Nat. Bank (Ark.)* 522.

A statute making it a misdemeanor "to solicit an order for the sale" of intoxicating liquor within local option districts is a violation of the interstate commerce clause of the federal Constitution.—*Ex parte Massey (Tex. Cr. App.)* 1086.

COMMISSION.

To take testimony, see "Depositions."

* Point annotated. See syllabus.

COMMISSIONS.

Of broker, see "Brokers," § 1.

COMMITMENT.

On charge of crime, see "Criminal Law," § 6.

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Duty of railroads to build fences, see "Railroads," § 2.

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMMUNITY PROPERTY.

See "Husband and Wife," § 3.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.
Instructions in general in actions for, see "Trial," § 9.
Of attorney, see "Attorney and Client," § 2.
Of broker, see "Brokers," § 1.
Of insurance agent, see "Insurance," § 3.

COMPETENCY.

Of evidence in criminal prosecution, see "Criminal Law," § 8.
Of experts as witnesses, see "Evidence," § 9.
Of juror, see "Jury," § 3.
Of witnesses in general, see "Witnesses," § 1.

COMPLAINT.

For violation of municipal ordinance, see "Municipal Corporations," § 6.
In criminal prosecution, see "Criminal Law," § 6; "Indictment and Information."

COMPROMISE AND SETTLEMENT.

See "Release."

As affecting liability of connecting carrier, see "Carriers," § 2.

COMPUTATION.

Of interest, see "Interest," § 1.
Of period of limitation, see "Limitation of Actions," § 2.

CONCEALED WEAPONS.

See "Weapons."

CONCLUSION.

Of witness, see "Evidence," § 9.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONAL SALES.

See "Sales," § 8.

CONDITIONS.

Conditional delivery of deed, see "Escrows."
 In insurance policies, see "Insurance," § 9.
 In mortgages, see "Mortgages," § 2.
 Precedent to action for recovery of price paid for land, see "Vendor and Purchaser," § 7.
 Precedent to judgment on interposition of equitable defense, see "Trial," § 1.
 Precedent to recovery of money paid by purchaser at attachment sale, see "Attachment," § 4.

CONDONATION.

Of grounds for divorce, see "Divorce," § 2.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 15.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

CONFIRMATION.

Of partition sale, see "Partition," § 1.

CONFLICT OF LAWS.

Action for wrongful death, see "Death," § 1.

CONNECTING CARRIERS.

See "Carriers," §§ 2, 3.

CONSIDERATION.

Of bill of exchange or promissory note, see "Bills and Notes," §§ 1, 3.
 Of contract, see "Contracts," § 1.
 Of conveyances between husband and wife, see "Husband and Wife," § 1.
 Of deed, see "Deeds," § 3.
 Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.
 Of insurance premium notes, see "Insurance," § 6.
 Of sale, see "Sales," § 1.

CONSPIRACY.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 12.
 Proof of under allegations of indictment or information, see "Indictment and Information," § 5.

§ 1. Civil liability.

An action against several defendants for conspiring to injure plaintiff's business by maliciously suing out attachments without probable cause cannot be maintained against the defendants jointly, where there is no evidence of conspiracy.—*Sehon, Blake & Stevenson v. Whitt* (Ky.) 280.

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Appellate jurisdiction in cases involving constitutional questions, see "Courts," § 4.

Provisions relating to particular subjects.

See "Appeal and Error," § 3; "Bigamy"; "Commerce," § 2; "Eminent Domain," § 1; "Intoxicating Liquors," § 1; "Jury," § 1; "Schools and School Districts," § 1; "Sunday," "Taxation," § 3; "Trial," § 8; "Waters and Water Courses," § 1.

Limitation of liability by carrier of passengers, see "Carriers," § 7.

Municipal license tax, see "Municipal Corporations," § 9.

Special or local laws, see "Statutes," § 1.

Subjects and titles of statutes, see "Statutes," § 2.

§ 1. Distribution of governmental powers and functions.

Acts 1897, p. 166, regulating the practice of dentistry, *held* not unconstitutional as investing the dental board created thereby with judicial functions.—*State v. Doerring* (Mo. Sup.) 489.

§ 2. Vested rights.

A nonregistered physician, by having previously practiced medicine in Missouri, *held* not to have acquired a vested right to practice in that state, so as to render him immune from punishment for violating Acts 1901, pp. 207, 208.—*State v. Davis* (Mo. Sup.) 484.

§ 3. Obligation of contracts.

*Const. U. S. art. 1, § 10, prohibiting a state from passing a law impairing the obligation of a contract is not contravened by a decision changing the construction of a statute.—*King v. Phoenix Ins. Co.* (Mo. Sup.) 892.

§ 4. Equal protection of laws.

Gen. Laws 29th Leg. p. 91, c. 64, regulating storage of liquors in local option districts, is not unconstitutional as denying citizens the equal protection of the laws.—*Ex parte Massey* (Tex. Cr. App.) 1083.

§ 5. Due process of law.

*Ordinance providing for punishing owners of cattle permitting same to run at large in city *held* not repugnant to constitutional provisions inhibiting taking of property without due process of law, in view of Ky. St. 1903, § 3058, subsec. 12.—*City of Paducah v. Ragsdale* (Ky.) 13.

*Acts 1897, p. 166, regulating the practice of dentistry, *held* not unconstitutional as depriving citizens of their property without due process of law.—*State v. Doerring* (Mo. Sup.) 489.

§ 6. Right to justice and remedies for injuries.

That an ordinance providing for the fining of cattle owners who permit their cattle to run at large in the city, and for sale of the impounded cattle for payment of costs and expenses, does not provide for an appeal by the property owner, is no objection to its validity.—*City of Paducah v. Ragsdale* (Ky.) 13.

CONSTRUCTIVE TRUSTS.

See "Trusts," § 1.

CONTEST.

Of election, see "Elections," § 1.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 8.

*Point annotated. See syllabus.

CONTINUANCE.

Harmless error in rulings, see "Appeal and Error," § 16.

In criminal prosecution, see "Criminal Law," § 16.

Review of discretion of court on motion for, see "Criminal Law," § 30.

*Where there was a misunderstanding between counsel as to day case was to be tried, it was error to force plaintiff, an infant, to trial, in the absence of his counsel and main witnesses.—*Crocker v. Haley* (Ky.) 574.

A statement by a judge out of court as to granting a continuance held no ground for the contention that a party was misled, when the continuance was subsequently refused.—*Trimble v. Southwest Missouri Light Co.* (Mo. App.) 346.

Facts considered, and held that a continuance on the ground of sickness of defendant's counsel was properly refused.—*Trimble v. Southwest Missouri Light Co.* (Mo. App.) 346.

*Facts considered, and held that the trial court erred in setting aside a continuance and setting the cause for hearing four days thereafter.—*McDonald v. McDonald* (Mo. App.) 351.

*Under Rev. St. 1899, § 688, amending a pleading, does not entitle the opposite party to postponement of a trial as a matter of course.—*Keeton v. St. Louis & M. R. Ry. Co.* (Mo. App.) 512.

*Under Rev. St. 1899, § 688, the refusal of a continuance held not an abuse of discretion.—*Keeton v. St. Louis & M. R. Ry. Co.* (Mo. App.) 512.

*In an action for personal injuries caused by frightening of team by locomotive, testimony that it was going fast held not admissible, after admission to the contrary, to prevent continuance.—*St. Louis Southwestern Ry. Co. of Texas v. Hall* (Tex. Civ. App.) 1079.

CONTRACTS.

Actions in justice's court for breach, see "Justices of the Peace," § 1.

Agreements within statute of frauds, see "Frauds, Statute of."

Alteration, see "Alteration of Instruments."

Assignment, see "Assignments."

Attachment for breach of, see "Attachment," § 1.

Existence of contract as question for jury, see "Trial," § 5.

Harmless error in action on, see "Appeal and Error," § 18.

Impairing obligation, see "Constitutional Law," § 3.

Instructions in general in actions for breach of warranty, see "Trial," § 11.

Internal revenue stamp taxes, see "Internal Revenue."

Liability for fraud, see "Fraud," § 1.

Operation and effect of champerty, see "Champerty and Maintenance."

Operation and effect of gaming laws, see "Gaming," § 1.

Parol or extrinsic evidence, see "Evidence," § 8.

Presumptions on appeal in action for breach, see "Appeal and Error," § 13.

Real parties in interest in action on contract, see "Parties," § 1.

Reformation, see "Reformation of Instruments."

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Carriers," §§ 2, 5; "Corporations," § 3; "Husband and Wife," § 1; "Insane Persons," § 1; "Master and Servant"; "Municipal Corporations," § 5.

School teachers, see "Schools and School Districts," § 1.

Contracts relating to particular subjects.

See "Interest"; "Intoxicating Liquors," § 10; "Mines and Minerals," § 1.

Pasturage, see "Animals."

Sale of timber, see "Logs and Logging."

Transportation of goods, see "Carriers," § 2.

Transportation of passengers, see "Carriers," § 5.

Particular classes of express contracts.

See "Bills and Notes"; "Covenants"; "Exchange of Property"; "Guaranty"; "Indemnity"; "Insurance"; "Liens"; "Partnership"; "Sales."

Agency, see "Principal and Agent."

Bills of lading, see "Carriers," § 2.

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Sales of realty, see "Vendor and Purchaser."

Sales of timber, see "Logs and Logging."

Stipulations in actions, see "Stipulations."

Submission to arbitration, see "Arbitration and Award," § 1.

Subscription to corporate stock, see "Corporations," § 1.

Particular classes of implied contracts.

See "Indemnity"; "Money Received"; "Work and Labor."

Particular modes of discharging contracts.

See "Release."

§ 1. Requisites and validity.

*Circumstances under which one may avoid the obligation of a written contract signed by him stated.—*Paris Mfg. & Importing Co. v. Carle* (Mo. App.) 748.

*A contract for the sale of a business, including the good will, with an agreement on the part of the sellers not to re-engage in that business in the same city for three years, is not in restraint of trade, but valid and enforceable.—*Bradford & Carson v. Montgomery Furniture Co.* (Tenn.) 1104.

§ 2. Construction and operation.

*In an action for fraud in the purchase of property from plaintiff, the terms of the contract being evidenced by written letters and telegrams, it is the duty of the court to construe the contract and declare its terms to the jury.—*McDonough v. Williams* (Ark.) 783.

*In interpretation of written contracts, intention of the parties is the controlling factor.—*Wilson v. Wilson* (Mo. App.) 145.

*While the form of a contract should be considered as expressive of the intention of the parties, yet when form and substance conflict, the latter controls.—*Wilson v. Wilson* (Mo. App.) 145.

§ 3. Rescission and abandonment.

*If it appears from the facts and circumstances attending the cancellation of a contract that it was not intended that the cancellation should destroy previously vested rights, the agreement will be so construed as to preserve those rights.—*Alabama Oil & Pipe Line Co. v. Sun Co.* (Tex. Sup.) 253.

§ 4. Performance or breach.

Evidence held sufficient to go to the jury, whether land suited defendant within his contract to pay plaintiff for locating him on land

*Point annotated. See syllabus.

which suited him.—*Stanford v. Wright & Green* (Tex. Civ. App.) 269.

§ 5. Actions for breach.

In action for brokers' commissions, admission in evidence of conversations of each of defendants with plaintiffs *held* not error where they were connected with each other.—*Morgan v. Keller* (Mo. Sup.) 75.

In an action for breach of a contract, evidence *held* to require submission to the jury of the question whether or not a cancellation of the contract by mutual agreement was intended merely to annul it as to any future operations under it, and not to release a previously accrued right of action for breach.—*Alabama Oil & Pipe Line Co. v. Sun Co.* (Tex. Sup.) 253.

CONTRADICTION.

Of record, see "Appeal and Error," § 9.

Of witness, see "Witnesses," § 3.

CONTRIBUTION.

Between owners of ship and owners of cargo, see "Shipping," § 2.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," §§ 3, 4.

Instructions in general as to, see "Trial," §§ 9, 10.

Of owner of animal injured by operation of street railroad, see "Street Railroads," § 1.

Of owner or shipper of live stock, see "Carriers," § 3.

Of passenger, see "Carriers," § 8.

Of person injured by electricity, see "Electricity."

Of person injured by operation of railroad, see "Negligence," § 6; "Railroads," § 8.

Of person injured by operation of street railroad, see "Street Railroads," §§ 1, 2.

Of person injured on street, see "Municipal Corporations," § 8.

Of person injured or killed by operation of railroad, see "Railroads," § 7.

Of servant, see "Master and Servant," §§ 6, 8-10.

CONVERSION.

Wrongful conversion of personal property, see "Trove and Conversion."

*A will construed, and *held* that there was no equitable conversion of real estate into personality.—*Bennett v. Gallaher* (Tenn.) 66.

CONVEYANCES.

See "Public Lands," § 8.

Contracts to convey, see "Vendor and Purchaser," § 4.

In fraud of creditors, see "Fraudulent Conveyances."

In fraud of dower, see "Dower," § 1.

In trust, see "Trusts," § 1.

Registers, see "Registers of Deeds."

Conveyances by or to particular classes of parties.

See "Guardian and Ward," § 2; "Husband and Wife," § 1.

Conveyances of particular species of property.

See "Easements," § 1; "Homestead," § 2.

Particular classes of conveyances.

See "Assignments"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CORPORATIONS.

Corporate franchise to engage in pool selling, see "Gaming," § 1.

Fraud in sale of stock, see "Fraud," § 2.

Offenses by, against infants, see "Infants," § 1.

Quo warranto, see "Quo Warranto."

Particular classes of corporations.

See "Building and Loan Associations"; "Municipal Corporations"; "Railroads"; "Street Railroads," § 1.

Banks, see "Banks and Banking."

Insurance companies, see "Insurance."

Investment companies, see "Banks and Banking," § 2.

Turnpike and toll road companies, see "Turnpikes and Toll Roads."

Water companies, see "Waters and Water Courses," § 8.

§ 1. Capital, stock, and dividends.

A corporation *held* a mere fraud and sham, and incapable of enforcing a stock subscription contract.—*Metropolitan Lead & Zinc Min. Co. v. Webster* (Mo. Sup.) 79.

Purchaser of stock in corporation *held* to take the same subject to an agreement by his vendor of which he had knowledge.—*Senn v. Union Premium & Mercantile Co.* (Mo. App.) 507.

*Assignee of shares of stock ordinarily has the right to have them transferred to his name on the books of the company.—*Senn v. Union Premium & Mercantile Co.* (Mo. App.) 507.

Assignee of stock in corporation *held* entitled to a transfer on condition that he should be bound by an agreement entered into by his assignor.—*Senn v. Union Premium & Mercantile Co.* (Mo. App.) 507.

The inadequacy of consideration paid for stock in a corporation or the fact that it is given to the assignee does not affect the assignee's right to have the stock transferred to him on the books of the corporation.—*Senn v. Union Premium & Mercantile Co.* (Mo. App.) 507.

*Motive for which shares of stock are assigned does not affect the right of the assignee to acquire them and have them registered in his name.—*Senn v. Union Premium & Mercantile Co.* (Mo. App.) 507.

Subscription to stock of cotton oil mill company *held* binding, though charter gave corporation power to erect and operate cotton gins necessary as feeders for the mill.—*Comanche Cotton Oil Co. v. Browne* (Tex. Sup.) 450.

§ 2. Officers and agents.

*The act of the officers of a beneficial association in transferring their offices to others for a money consideration *held* a breach of trust, rendering them liable to the association for the money which they received.—*Heineman v. Marshall* (Mo. App.) 1131.

Where officers of a beneficial association in violation of their trust surrendered their offices to others for a money consideration, a subsequent creditor of the association was not entitled to recover from the delinquent officers the proceeds of the illegal transaction.—*Heineman v. Marshall* (Mo. App.) 1131.

§ 3. Corporate powers and liabilities.

Under Civ. Code Prac. § 51, subsec. 3, 4, service of a summons, in an action against a common carrier, on defendant's chief officer or agent in a county other than that wherein the action was instituted, *held* invalid.—*Cincinnati, P., B. S. & P. Packet Co. v. Thomas Malone & Co.* (Ky.) 306.

* Point annotated. See syllabus.

A corporation authorized to sell pools and book bets on horse races *held* not authorized to sell pools or to register bets with minors, prohibited by Rev. St. 1899, § 2193.—*State ex inf. Hadley v. Delmar Jockey Club* (Mo. Sup.) 185.

Const. art. 12, § 6, declaring that no corporation shall issue bonds except for money paid, labor done, or property actually received, *held* not to require that the corporation shall receive a dollar in money for each dollar of indebtedness, but that the amount received shall bear some reasonable approximation to the amount of indebtedness.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

Authority to a corporation to issue bonds for money and property is authority not only to sell them for such consideration.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

In a suit to establish the validity of certain railroad bonds, findings of the trial court *held* sufficient.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

One holding bonds pledged as collateral security *held* entitled to prove them up to the extent of their face value, and have a distribution out of the funds accruing from a sale under a foreclosure, on the basis of the bonds, to the extent of the amount of his primary debt and interest.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

In an action to determine the validity of certain railroad bonds issued and pledged by the corporation, it was proper for the court to decree the validity of certain of the bonds, without stating the amount of the debt for which they had been pledged.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

In an action to determine the validity of certain railroad bonds and to foreclose a mortgage securing them, the court having found the amount due a certain bondholder, it was not necessary to state the number of bonds he held.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

In an action by a corporation on a bond executed to another corporation, the petition *held* sufficient to show that the plaintiff had a right to sue on the bond.—*French, Finch & Co. v. Hicks* (Tex. Civ. App.) 1034.

Under Rev. St. 1895, art. 219, describing the requisites of an affidavit for garnishment against a corporation, it is not necessary to allege that the garnishee is "duly incorporated."—*First Nat. Bank v. Brown* (Tex. Civ. App.) 1052.

§ 4. Dissolution and forfeiture of franchise.

A corporation organized to maintain a fair, promote agriculture, etc., which merely used its franchise for the purpose of conducting a race course for gambling, *held* subject to a forfeiture of such franchises for failure to substantially fulfill the same.—*State ex inf. Hadley v. Delmar Jockey Club* (Mo. Sup.) 185.

§ 5. Foreign corporations.

*Railroad incorporated by act of congress *held* not a foreign corporation within Rev. St. 1895, art. 1194, cl. 25, relative to venue of actions against foreign corporations, but is within clause 23, relative to venue of actions against railroads.—*Texas & P. Ry. Co. v. Weatherby* (Tex. Civ. App.) 58.

*A certain railroad incorporated by an act of Congress, but which consolidated with Texas

railroads pursuant to legislative authority, *held* not within Rev. St. 1895, art. 1194, cl. 25, relative to venue of actions against foreign corporations. (Act Feb. 16, 1852; Laws 1870, p. 40, c. 26; Laws 1871, p. 489, c. 272, § 11; and Laws 1873, p. 318, c. 108).—*Texas & P. Ry. Co. v. Weatherby* (Tex. Civ. App.) 58.

A trust company in Missouri *held* entitled to sue in Texas to foreclose a mortgage, etc., without taking out a permit to do business there.—*Western Supply & Mfg. Co. v. United States & Mexican Trust Co.* (Tex. Civ. App.) 986.

In an action by a foreign corporation, petition *held* to show that plaintiff was engaged in interstate commerce.—*French, Finch & Co. v. Hicks* (Tex. Civ. App.) 1034.

The employment of an agent in this state by a foreign corporation to secure orders for goods to be shipped here from another state is interstate commerce, and the corporation is not required to obtain a permit.—*French, Finch & Co. v. Hicks* (Tex. Civ. App.) 1034.

Under Rev. St. 1895, arts. 745, 746, foreign corporation not doing business in the state *held* not required to procure a permit to sue in the state.—*King v. Monitor Drill Co.* (Tex. Civ. App.) 1046.

CORRECTION.

Of curator's deed, see "Guardian and Ward," § 2.

Of record on appeal or writ of error, see "Appeal and Error," § 9.

CORROBORATION.

Of accomplice, see "Criminal Law," § 14.

COSTS.

In action to construe will, see "Wills," § 3.

In replevin, see "Replevin," § 3.

§ 1. Nature, grounds, and extent of right in general.

Where plaintiff sued to quiet title to lands purchased by him at a tax sale, and prayed in the alternative for a refundment of the taxes paid by him, with interest, and recovered the latter, he was entitled to costs.—*Bonner v. Board of Directors of St. Francis Levee Dist.* (Ark.) 1124.

§ 2. Taxation.

A party objecting to witness' fees taxed as costs *held* bound to show that the witnesses objected to were subpoenaed and in attendance to testify to the same fact testified to by two other witnesses.—*J. B. Wallis & Co. v. Wallace* (Tex. Civ. App.) 43.

§ 3. On appeal or error, and on new trial or motion therefor.

Where defendant in error concedes error in the judgment by offering a remittitur, the costs in the appellate court will be taxed against him.—*Houston & T. C. R. Co. v. Craig* (Tex. Civ. App.) 1033.

Where the only error consisted of an erroneous taxation of costs, which could have been corrected if presented to the trial court, appellant was not entitled to costs on appeal.—*American Express Co. v. Adams* (Tex. Civ. App.) 1039.

*Where on appeal from a justice's judgment the appellant suffered judgment for an amount less than was recovered against it before the justice, it was entitled to costs on the appeal in the absence of a statement in the record showing why such costs were not awarded as

* Point annotated. See syllabus.

provided by Sayles' Ann. Civ. St. 1897, arts. 1436, 1438.—*American Express Co. v. Adams* (Tex. Civ. App.) 1039.

COUNCIL.

See "Municipal Corporations," § 3.

COUNTERFEITING.

See "Forgery."

COUNTIES.

County attorneys, see "District and Prosecuting Attorneys."

County court, see "Courts," § 3.

Decree in suit in equity against county clerk, see "Equity," § 3.

De facto officers, see "Officers," § 1.

Pleading in equity in suit against county clerk, see "Equity," § 2.

Power to levy tax, see "Taxation," § 1.

§ 1. Government and officers.

The election of an entry taker by the justices of a county court, as provided by Acts 1879, p. 65, c. 46, can only be evidenced by the minutes of the court, and cannot be proved by parol.—*Heard v. Elliott* (Tenn.) 764.

COURTS.

Decision changing construction of statute as impairment of obligation of contract, see "Constitutional Law," § 3.

Judges, see "Judges."

Justices' courts, see "Justices of the Peace."

Mandamus to inferior courts, see "Mandamus," § 1.

Prohibition to inferior courts, see "Prohibition," § 1.

Province of court and jury, see "Trial," §§ 6-11.

Removal of action from state court to United States court, see "Removal of Causes."

Repeal of laws relating to the administration of insolvent estates, see "Statutes," § 3.

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

Trial by court without jury of preliminary proceeding, see "Trial," § 1.

Jurisdiction of particular actions, proceedings, or subjects.

See "Charities," § 1; "Criminal Law," § 2.

By or against carriers, see "Carriers," § 6.

Special jurisdictions and proceedings therein.

Appellate jurisdiction, see "Criminal Law," § 27.

§ 1. Nature, extent, and exercise of jurisdiction in general.

*Jurisdiction is authority to hear and determine a cause.—*State ex rel. McNamee v. Stobie* (Mo. Sup.) 191.

A proceeding in prohibition to prevent the board of election commissioners from appointing certain officers *held* to involve only moot question, and hence not to be maintainable.—*Kalbfell v. Wood* (Mo. Sup.) 230.

§ 2. Establishment, organization, and procedure in general.

*While in an action for a negligent injury inflicted in another state the court must yield to the decisions of the highest court of that state as to the law of that state, it is at liberty to differ from the judgment of the foreign court as to the application of the law to the facts.—*Lee v. Missouri Pac. Ry. Co.* (Mo. Sup.) 614.

*A decision of the Supreme Court, sustaining a decree for injunction, *held* to be an adjudication that injunction and not quo warranto was the proper remedy, and was binding on the Court of Appeals within the amendment to the Constitution adopted November, 1884 (Const. art. 6, § 6).—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co.* (Mo. App.) 153.

*Where the Supreme Court transferred a case to the Court of Appeals, under Rev. St. 1899, § 1637, the opinion of the judges of the Supreme Court as to the merits *held* not binding on the appellate court within the amendment to the Constitution adopted November, 1884 (Const. art. 6, § 6).—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co.* (Mo. App.) 153.

*A court in determining whether a cause is removable to the federal court is controlled by the decisions of the federal Supreme Court.—*Texas & P. Ry. Co. v. Huber* (Tex. Sup.) 832.

§ 3. Courts of limited or inferior jurisdiction.

In an action on certain notes in a county court, that defendant pleaded payment by delivery of rice of a value exceeding \$1,000 did not defeat the jurisdiction of the court to determine whether an agreement for the delivery had been made and the rice delivered.—*Eule v. Dorn* (Tex. Civ. App.) 828.

A counterclaim *held* not beyond the jurisdiction of the county court, where the amount sought to be recovered after deducting plaintiff's claim was within such jurisdiction.—*Eule v. Dorn* (Tex. Civ. App.) 828.

§ 4. Courts of appellate jurisdiction.

Constitutional questions urged during the trial, but not referred to in the motion for a new trial, are abandoned, so that the Supreme Court has no jurisdiction on appeal.—*State v. Grant* (Mo. Sup.) 698.

An appeal from a decree of the county court in a bill for winding up the estate of a decedent as an insolvent estate, brought under Shannon's Code, §§ 4066, 4102, instead of under sections 4070-4101, *held* to lie to the Supreme Court directly, as authorized by section 4907.—*Key v. Harris* (Tenn.) 235.

§ 5. Concurrent and conflicting jurisdiction, and comity.

Under Gen. Laws 1899, p. 113, c. 75, district judge of one district court in a certain county may transfer to another district court in the same county a suit to set aside a judgment rendered in his own court.—*International & G. N. Ry. Co. v. Briseno* (Tex. Civ. App.) 998.

COVENANTS.

§ 1. Construction and operation.

*General covenants in a deed, whether express or implied, as provided by Rev. St. 1899, § 907, *held* not restricted by special covenants, unless the covenants are irreconcilable.—*Miller v. Bayless* (Mo. Sup.) 482.

General covenants of warranty and seisin in a deed *held* limited by subsequent covenants, so as to relieve the grantors from liability for claims arising outside their chain of title.—*Miller v. Bayless* (Mo. Sup.) 482.

§ 2. Actions for breach.

Statement of damages for breach of warranty of title.—*King v. D. Sullivan & Co.* (Tex. Civ. App.) 51.

COVERTURE.

See "Husband and Wife."

* Point annotated. See syllabus.

CREDIBILITY.

Of witness, see "Witnesses," § 3.

CREDITORS.

See "Fraudulent Conveyances."

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

See "Witnesses."

Conviction of offense included in that charged, see "Indictment and Information," § 6.

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

Prohibition against criminal prosecution, see "Prohibition," § 1.

Prosecuting officers, see "District and Prosecuting Attorneys."

Trial before judge of different circuit, see "Judges," § 1.

Offenses by particular classes of parties.

Dentists, see "Physicians and Surgeons."

Officers of turnpike companies, see "Turnpikes and Toll Roads," § 1.

Turnpike company, see "Turnpikes and Toll Roads," § 1.

Particular offenses.

See "Assault and Battery," § 2; "Bigamy"; "Bribery"; "Burglary"; "Disorderly House"; "Forgery"; "Gaming," § 2; "Homicide"; "Larceny"; "Malicious Mischief"; "Obscenity"; "Perjury"; "Rape"; "Receiving Stolen Goods"; "Robbery."

Abandonment of wife, see "Husband and Wife," § 4.

Against banking laws, see "Banks and Banking," § 2.

Against commerce regulations, see "Commerce," § 2.

Against election laws, see "Elections," § 2.

Against insurance laws, see "Insurance," § 17.

Against laws for protection of children, see "Infants," § 1.

Against liquor laws, see "Intoxicating Liquors," §§ 4-7.

Carrying weapon, see "Weapons."

Obstruction of road, see "Highways," § 2.

Practicing dentistry without license, see "Physicians and Surgeons."

Violation of municipal ordinances, see "Municipal Corporations," § 3.

§ 1. Parties to offenses.

*A person held not an accomplice.—*Best v. Commonwealth* (Ky.) 555.

§ 2. Jurisdiction.

A justice of the peace, in trying a criminal case under Rev. St. 1899, § 2769, does not lose jurisdiction by taking the same under advisement until the day following submission.—*State v. Davis* (Mo. Sup.) 484.

§ 3. Venue.

*Under Rev. St. 1899, § 2576, the failure to furnish an affidavit of two disinterested citizens in support of a petition for change of venue was fatal to the application.—*State v. Richardson* (Mo. Sup.) 649.

§ 4. Limitation of prosecutions.

*Under Kirby's Dig. § 2106, the state, in prosecutions for misdemeanors, must prove the commission of the offense within one year next prior to the finding of the indictment.—*Stelle v. State* (Ark.) 530.

§ 5. Former jeopardy.

Conviction of grand larceny of bank check, under Kirby's Dig. §§ 1821-1824, held not a bar to prosecution for forgery of the check.—*Crossland v. State* (Ark.) 776.

*Under Const. § 168, there cannot be a second conviction in the circuit court for gaming after conviction of the same offense in the police court of a city of the fourth class.—*White v. Commonwealth* (Ky.) 285.

*Facts held to constitute separate assaults justifying separate convictions.—*State v. Temple* (Mo. Sup.) 494.

*Where several witnesses were examined by the state when the trial was stopped by the prosecuting attorney because of the absence of a material witness, and the cause was continued, defendants were put in jeopardy.—*State ex rel. Meador v. Williams* (Mo. App.) 151.

Conviction of gaming held no bar to prosecution for setting up a gaming device.—*City of Mexico v. Harris* (Mo. App.) 505.

That another had been convicted of keeping a place open on Sunday was no bar to the prosecution of defendant for the same offense.—*Craig v. State* (Tex. Cr. App.) 416.

§ 6. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

Under Rev. St. 1899, § 2750, a justice of St. Louis county held entitled to issue a warrant immediately on the filing of a complaint against members of the metropolitan police force of the city of St. Louis, without being satisfied that the accused were about to escape to avoid arrest.—*State ex rel. McNamee v. Stobie* (Mo. Sup.) 191.

A justice of the peace held not required to execute any writing evidencing necessity for the issuance of a warrant, under Rev. St. 1899, § 2750.—*State ex rel. McNamee v. Stobie* (Mo. Sup.) 191.

§ 7. Arraignment and pleas, and nolle prosequi or discontinuance.

*The burden is on defendant to show in support of a plea of former acquittal that the former acquittal was for the same offense as that for which he is on trial.—*Kilcoyne v. State* (Tex. Cr. App.) 36.

§ 8. Evidence.

*On a trial for forgery, evidence explaining the absence of the person whose name was forged held admissible.—*Taylor v. Commonwealth* (Ky.) 292.

*On a prosecution for murder held proper to admit in evidence the chain with which defendant had chained deceased to a tree in order to inflict the beating that caused death.—*Young v. State* (Tex. Cr. App.) 841.

*On a prosecution for murder, it is proper to admit in evidence photographs of deceased taken after death, where they represent, or represent to a measurably true degree, the condition of the body of deceased.—*Young v. State* (Tex. Cr. App.) 841.

§ 9. — Facts in issue and relevant to issues, and res gesta.

In a prosecution for murder, certain evidence held admissible as a part of the res gesta.—*Powers v. Commonwealth* (Ky.) 975.

* Point annotated. See syllabus.

Certain evidence *held* admissible for purpose of identification.—*State v. Walker* (Mo. Sup.) 659.

*On a prosecution for assault with intent to murder *held* competent to permit the state to have the prosecuting witness identify the defendant as his assailant, and for that purpose to have the prisoner stand.—*State v. Ruck* (Mo. Sup.) 706.

*On a prosecution for assault with intent to murder, permitting accomplices of defendant to be brought into court to see if prosecuting witness could identify them as the men who were with defendant and taking part in the assault was competent.—*State v. Ruck* (Mo. Sup.) 706.

§ 10. — Other offenses, and character of accused.

*In a prosecution for incest, evidence of other acts of incest with prosecutrix, barred by limitations, is admissible to show the probability of the commission of the offense.—*Adams v. State* (Ark.) 1123.

On a prosecution for shooting with intent to kill, evidence *held* properly admitted as tending to show motive overcoming the defense of self-defense, as against private person seeking to arrest under Cr. Code Prac. § 37.—*Carpenter v. Commonwealth* (Ky.) 553.

*In prosecution for violating the local option law, certain evidence of distinct transaction *held* inadmissible to show system.—*Lane v. State* (Tex. Cr. App.) 839.

*On a prosecution for murder, it was error to require defendant to testify on cross-examination that he was tried about 20 years before on a charge of murder; the occurrence being too remote.—*Ware v. State* (Tex. Cr. App.) 1093.

§ 11. — Admissions, declarations, and hearsay.

*On a trial for forgery, a letter written by accused admitting the forgery and another forgery *held* admissible.—*Taylor v. Commonwealth* (Ky.) 292.

*In prosecution for murder, evidence of statement in presence of accused *held* admissible.—*Rains v. Commonwealth* (Ky.) 276.

*On a criminal prosecution, evidence as to a statement made by a codefendant to defendant and not denied by him *held* admissible.—*Finch v. Commonwealth* (Ky.) 940.

*Testimony as to statements made in presence of defendant *held* not admissible on ground of silent admissions.—*State v. Richardson* (Mo. Sup.) 649.

*Testimony of conversations between third persons out of the presence and hearing of accused, and tending to incriminate him, are inadmissible.—*Marks v. State* (Tex. Cr. App.) 414.

*On a prosecution for murder, a question to a witness *held* to call for irrelevant testimony.—*Young v. State* (Tex. Cr. App.) 841.

§ 12. — Acts and declarations of conspirators and codefendants.

*Where a husband and wife were jointly indicted, statements made by the wife not in the presence of her husband were inadmissible as against him.—*State v. Richardson* (Mo. Sup.) 649.

Certain evidence *held* admissible on prosecution for assault with intent to murder.—*State v. Ruck* (Mo. Sup.) 706.

§ 13. — Opinion evidence.

The opinion of a witness as to identity of things is competent when resting on facts with-

in the knowledge of the witness.—*State v. James* (Mo. Sup.) 679.

In prosecution for violation of local option law, testimony of express agent that, in his opinion, contents of package consigned to accused was whisky *held* inadmissible.—*McNeely v. State* (Tex. Cr. App.) 419.

§ 14. — Testimony of accomplices and codefendants.

The testimony of an accomplice *held* sufficiently corroborated to support a conviction.—*Best v. Commonwealth* (Ky.) 555.

Owner of burglarized premises *held* not rendered an accomplice by promising not to prosecute.—*Holley v. State* (Tex. Cr. App.) 422.

§ 15. — Confessions.

*Confessions by accused after his arrest *held* admissible, in the absence of a showing that they were induced by hopes or fears.—*Carpenter v. Commonwealth* (Ky.) 552.

*The court *held* authorized to find that a confession was voluntary.—*Pearsall v. Commonwealth* (Ky.) 589.

*It is the province of the court to determine whether a confession under the facts of a particular case is admissible.—*Pearsall v. Commonwealth* (Ky.) 589.

On prosecution for assault with intent to murder, admission of confession of accused *held* not erroneous.—*State v. Ruck* (Mo. Sup.) 706.

On prosecution for assault with intent to murder, certain testimony of police officer *held* admissible.—*State v. Ruck* (Mo. Sup.) 706.

§ 16. Time of trial and continuance.

*An affidavit on application for continuance *held* insufficient under Cr. Code Prac. § 189.—*Carpenter v. Commonwealth* (Ky.) 552.

Denial of continuance on the ground of defendant's inability to obtain counsel *held* not reversible error.—*Carpenter v. Commonwealth* (Ky.) 552.

*It was proper to refuse a continuance on the ground of absence of witnesses where subpoena was not issued until two days before the day set for trial, and one of the intervening days was Sunday.—*State v. Richardson* (Mo. Sup.) 649.

*An application for continuance on the ground of the absence of witnesses must state that the facts expected to be proved by such absent witnesses are true.—*State v. Richardson* (Mo. Sup.) 649.

Granting or denying application for continuance rests largely in discretion of trial court.—*State v. Richardson* (Mo. Sup.) 649; *Same v. Temple* (Mo. Sup.) 869.

*An application for a continuance of a criminal case for absence of a witness *held* defective for failure to allege what diligence had been used to secure the attendance of the witness.—*State v. Temple* (Mo. Sup.) 869.

In a prosecution for assault with intent to kill, denial of a continuance, in order to enable defendant to procure a witness who would testify to facts showing that defendant shot in self-defense, *held* not an abuse of discretion.—*State v. Temple* (Mo. Sup.) 869.

*Application for continuance *held* properly overruled, where the absent witnesses' testimony would not have changed the result.—*Holley v. State* (Tex. Cr. App.) 422.

*On a prosecution for murder *held* that a continuance in order to procure testimony should have been granted.—*Ware v. State* (Tex. Cr. App.) 1093.

*Point annotated. See syllabus.

§ 17. Trial—Course and conduct of trial in general.

*In a criminal prosecution, accused *held* not prejudiced by the fact that he was manacled while being brought from the jail into the courtroom, and again while he was being returned to the jail in the presence of some of the jurors during an intermission of his trial.—State v. Temple (Mo. Sup.) 494; Id. 869.

Action of the trial court in a criminal case in temporarily excusing a witness *held* not error.—Young v. State (Tex. Cr. App.) 841.

In a criminal case there was no error in the court calling a witness to the judge's bench and having a conversation with him in the presence, but not in the hearing, of the jury.—Young v. State (Tex. Cr. App.) 841.

The fact that spectators at the trial of a criminal case were permitted to lean on the jury box and crowd the courtroom was not error.—Young v. State (Tex. Cr. App.) 841.

§ 18. — Reception of evidence.

Where the bill of exceptions on appeal from a conviction in a prosecution for violation of the local option law shows that defendant agreed that the law was in force in the county in which the offense was alleged to have been committed, the failure to prove the fact on the trial was immaterial.—Hestand v. Commonwealth (Ky.) 12.

*An objection to evidence on the ground of immateriality amounts to no objection at all.—State v. Ruck (Mo. Sup.) 706.

Refusal of an offer of evidence to show the character of deceased *held* not error, where made before the details of the killing or threats by the deceased were admitted.—St. Clair v. State (Tex. Cr. App.) 1095.

§ 19. — Arguments and conduct of counsel.

Where an affidavit for a continuance was admitted as evidence, it was improper for commonwealth's attorney to tell the jury that the absent witness, if present, would not have made the statement contained in the affidavit.—Carroll v. Commonwealth (Ky.) 308.

Misconduct of commonwealth's attorney in commenting on an affidavit for continuance, admitted in evidence as the deposition of an absent witness, *held* ground for a new trial.—Carroll v. Commonwealth (Ky.) 308.

*In prosecution for murder, remarks of counsel *held* not ground for reversal when excluded from jury by court.—State v. Todd (Mo. Sup.) 674.

*An objection to remarks of counsel in argument "under the law" *held* too indefinite.—State v. Ruck (Mo. Sup.) 706.

*Allusion to evidence as "undenied, undisputed by no living or unliving witness," *held* not erroneous, under Rev. St. 1899, § 2638, though defendant did not testify.—State v. Ruck (Mo. Sup.) 706.

Argument of counsel on prosecution for assault with intent to murder *held* justified by evidence.—State v. Ruck (Mo. Sup.) 706.

In prosecution for violation of local option law, evidence *held* to justify the argument of counsel.—Choran v. State (Tex. Cr. App.) 422.

*Where, on a prosecution for murder, counsel for the state called defendant an assassin in his argument, the court should have restrained him and informed the jury not to regard it.—Ware v. State (Tex. Cr. App.) 1093.

§ 20. — Province of court and jury in general.

*An instruction in a criminal case defining reasonable doubt *held* correct.—State v. Temple (Mo. Sup.) 494; Id. 869.

In a prosecution for assault with a deadly weapon, refusal to direct an acquittal *held* proper.—State v. Groves (Mo. Sup.) 632.

Where testimony of a witness for the state as to declarations made in the presence of defendant showed that defendant said in his presence that the statement was not right, it was error to leave it to the jury to determine whether defendant assented or not.—State v. Richardson (Mo. Sup.) 649.

A statement by the court of the grounds of its ruling as to the competency of evidence is not objectionable as a comment on the evidence.—State v. Ruck (Mo. Sup.) 706.

*Where there is any substantial evidence of defendant's guilt, an instruction in the nature of a demurrer to the evidence is properly refused.—State v. Stuart (Mo. App.) 345.

§ 21. — Necessity, requisites, and sufficiency of instructions.

In a criminal prosecution, the submission of a form of verdict of guilty in connection with the instructions *held* not error.—State v. Davis (Mo. Sup.) 484.

*Error in instruction on presumption of guilt from possession of stolen property *held* cured by other instruction given.—State v. Walker (Mo. Sup.) 659.

Instruction as to testimony of impeached witness *held* not erroneous as bringing into prominence the testimony of witness impeached.—State v. Feeley (Mo. Sup.) 663.

Omission in one part of a charge of an essential of the crime of receiving stolen property *held* not error, other portions having stated it.—Sexton v. State (Tex. Cr. App.) 37.

§ 22. — Requests for instructions.

*In a prosecution for perjury, a charge that a conviction could not be had except on the testimony of two witnesses, or on that of one witness and corroborating circumstances, *held* not required unless requested.—Scott v. State (Ark.) 241.

It is not error for the court in a criminal case to refuse a request to charge which is substantially covered by the instructions given.—State v. Davis (Mo. Sup.) 484.

In a prosecution for assault, failure to charge on defendant's right to pursue one who had possession of his cap *held* not error.—State v. Groves (Mo. Sup.) 632.

§ 23. — Custody, conduct, and deliberations of jury.

*Under Cr. Code Prac. § 248, the court on a trial for forgery properly allowed the jury to take a letter introduced in evidence.—Taylor v. Commonwealth (Ky.) 292.

§ 24. — Verdict.

*The court *held* not authorized to interfere with the punishment imposed by a jury on finding one guilty of rape.—Pearsall v. Commonwealth (Ky.) 589.

Under Code Cr. Proc. 1895, art. 1145, verdict directing that defendant be sent to the reformatory instead of the penitentiary, but failing to state defendant's age, *held* fatally defective.—Watson v. State (Tex. Cr. App.) 807.

§ 25. — Waiver and correction of irregularities and errors.

In prosecution for murder, objections to remarks by counsel representing the state *held*

*Point annotated. See syllabus.

waived by acts of counsel for the defendant.—*State v. Todd* (Mo. Sup.) 674.

§ 26. Motions for new trial and in arrest.

Where alleged misconduct of a juror was simply called to the attention of the trial court in the motion for new trial, *held* that the motion for new trial was properly overruled.—*State v. Richardson* (Mo. Sup.) 649.

*A motion for a new trial for newly discovered evidence cannot be granted in the absence of an affidavit by accused.—*State v. King* (Mo. Sup.) 670.

*Alleged newly discovered evidence *held* merely cumulative, and insufficient to authorize a new trial.—*State v. King* (Mo. Sup.) 670.

*Defendant's proof of diligence *held* insufficient to justify the granting of a motion for a new trial for newly discovered evidence.—*State v. King* (Mo. Sup.) 670.

Action of trial court in denying new trial on the ground of alleged impeaching evidence *held* not an abuse of discretion.—*State v. Jeffries* (Mo. App.) 501.

Certain misconduct of jurors in a criminal case *held* such as to require a new trial.—*Gilford v. State* (Tex. Cr. App.) 424.

§ 27. Appeal and error, and certiorari.
Under Cr. Code, § 347, the Court of Appeals has no jurisdiction where the judgment on conviction for a misdemeanor fixes the fine at \$50.—*Bailey v. Commonwealth* (Ky.) 545.

Omission of names from jury list by the clerk *held* not shown to be error.—*Cowan v. State* (Tex. Cr. App.) 37.

A recognizance on appeal failing to state the punishment assessed, as required by Code Cr. Proc. art. 887, *held* not to confer jurisdiction.—*Ehlert v. State* (Tex. Cr. App.) 40.

§ 28. — Presentation and reservation in lower court of grounds of review.

*Under Cr. Code Prac. § 225, requiring instructions to be in writing, defendant in a prosecution for a misdemeanor cannot complain of the fact that oral instructions were given, where no objection was made.—*Mobile & O. R. Co. v. Commonwealth* (Ky.) 299.

*The denial of a motion to quash the panel of jurors will not be reviewed on appeal, where such ground of complaint was not called to the attention of the trial court in the motion for new trial.—*State v. Richardson* (Mo. Sup.) 649.

*Ruling as to remarks of counsel *held* not subject to review where no exception was saved.—*State v. Walker* (Mo. Sup.) 659.

Striking out of evidence *held* not subject to review where no exception was saved.—*State v. Walker* (Mo. Sup.) 659.

An assignment in a motion for a new trial, that the court erred in not instructing the jury on all points of the case under the evidence, *held* insufficient to require the Supreme Court to pass on the sufficiency of the instructions given.—*State v. King* (Mo. Sup.) 670.

Where the appeal record showed that there were no requested instructions and no exceptions to the failure of the court to charge, defendant could not object that the court failed to give cautionary instructions.—*State v. King* (Mo. Sup.) 670.

In the absence of an exception to the court's failure to charge on all the points in the case, an assignment that the court erred in failing

so to do was unavailable on appeal.—*State v. King* (Mo. Sup.) 670.

A verdict convicting accused of an offense *held* a part of the record proper, and reviewable on appeal without an exception in the trial court.—*State v. King* (Mo. Sup.) 670.

*The failure of the trial court to instruct on all the law in the case is no ground for reversal, unless appellant objected at the time the instructions were given, pointing out the alleged deficiency, and unless he excepted on refusal to instruct.—*State v. McCarver* (Mo. Sup.) 684.

*An objection to closing argument of prosecuting attorney cannot be considered on appeal, in the absence of a ruling on the objection adverse to defendant.—*State v. Jeffries* (Mo. App.) 501.

In a criminal case an instruction is no ground for reversal in the absence of a bill of exception.—*Young v. State* (Tex. Cr. App.) 841.

§ 29. — Record and proceedings not in record.

*Where the bill of exceptions does not show any objection to the argument of the prosecuting attorney, and does not set forth the argument complained of, the court, on appeal, cannot consider the objection.—*Taylor v. Commonwealth* (Ky.) 292.

Misconduct of counsel, not shown by bill of exceptions, *held* not to be considered on appeal.—*State v. Feeley* (Mo. Sup.) 663.

No record after being lodged with the clerk of the Supreme Court can be changed without the permission of the court, duly entered of record.—*State v. Feeley* (Mo. Sup.) 663.

*Improper remarks of the prosecuting attorney in his argument to the jury are not reviewable unless preserved in the bill of exceptions.—*State v. James* (Mo. Sup.) 679.

*Argument of counsel cannot be reviewed where not preserved in the bill of exceptions.—*State v. McCarver* (Mo. Sup.) 684.

*The question whether the court instructed the jury as to all the law covering all of the phases of the case cannot be raised on appeal where all the instructions given by the court are not incorporated in the record.—*State v. Ruck* (Mo. Sup.) 706.

Under Rev. St. 1899, § 866, *held* not competent for clerk of his own accord to make instructions part of record.—*State v. Ruck* (Mo. Sup.) 706.

Instructions *held* not in record and not reviewable on appeal.—*State v. Ruck* (Mo. Sup.) 706.

*An entry in the record of a criminal trial *held* sufficient to show that the jury was sworn to try the case.—*State v. Temple* (Mo. Sup.) 869.

Instruction in statement of facts to clerk to insert certain orders *held* not to give him authority to copy orders into the transcript.—*Davis v. State* (Tex. Cr. App.) 30; *Pinkard v. Same*, *Id.*

*In the absence of a statement of facts, it cannot be determined on appeal whether or not defendant sustained his plea of former acquittal by proof of identity of offenses.—*Kilcoyne v. State* (Tex. Cr. App.) 36.

Counsel for appellant in criminal case *held* guilty of such negligence in not securing approval by county judge of statement of facts that a writ of certiorari would be refused.—*Haskell v. State* (Tex. Cr. App.) 86.

*The statement of facts and questions depending thereon in a criminal case cannot be

*Point annotated. See syllabus.

considered in the absence of the approval of the trial judge to the statement.—*Haskell v. State* (Tex. Cr. App.) 36.

Where the record on appeal does not show that the statement of facts was approved by the trial judge, it cannot be considered.—*Ryans v. State* (Tex. Cr. App.) 413.

A plea of former conviction cannot be reviewed on appeal in the absence of a statement of facts.—*Bennett v. State* (Tex. Cr. App.) 417.

On appeal in a criminal case, a bill of exceptions showing that defendant objected to certain testimony on the ground that he objected to the same unless the matters inquired about occurred in a certain county could not be reviewed where the bill did not show that anything occurred.—*Young v. State* (Tex. Cr. App.) 841.

Exclusion of evidence *held* not ground for reversal, where bill of exceptions fails to show purpose for which it was offered.—*Cranfill v. State* (Tex. Cr. App.) 846.

The narrative form of perpetuating evidence for appeals is the better practice ordinarily, and is not a violation of the act giving the right to send up the stenographer's report.—*St. Clair v. State* (Tex. Cr. App.) 1065.

§ 30. — Review.

*Error in admitting evidence in a criminal case as to facts otherwise proven *held* harmless.—*Henry v. State* (Ark.) 405.

The Court of Appeals has no power to reverse a judgment of conviction in a criminal case on the sole ground that there was not sufficient evidence to sustain the verdict, being restricted to the single inquiry whether there was any evidence before the jury conducing to show the guilt of the accused.—*Hestand v. Commonwealth* (Ky.) 12.

Under Cr. Code, § 281, the Court of Appeals *held* not authorized to reverse a conviction on the ground that the court refused to grant a new trial.—*Brown v. Commonwealth* (Ky.) 542.

On a trial for crime, an instruction relating to the testimony of an accomplice, *held* proper, so as to prevent a reversal on the ground that the witness was an accomplice.—*Best v. Commonwealth* (Ky.) 555.

*A verdict in a criminal case supported by evidence is conclusive on appeal.—*Pearsall v. Commonwealth* (Ky.) 589.

It was not prejudicial error to fail to instruct that no conviction could be had on the uncorroborated testimony of an accomplice where the accused himself testified to substantially the same facts as the accomplice.—*Finch v. Commonwealth* (Ky.) 940.

The fact that an instruction required the jury to believe beyond a reasonable doubt that defendant acted in self-defense *held* harmless error.—*Powers v. Commonwealth* (Ky.) 975.

Under Cr. Code Prac. § 340, *held*, that the Supreme Court has no power to reverse a conviction when there is any evidence to show defendant's guilt.—*Powers v. Commonwealth* (Ky.) 975.

The action of the trial court in a criminal case in causing it to be heard at a term prior to the one regularly fixed under Ky. St. 1903, § 964, *held* not reversible on appeal in the absence of an abuse of discretion.—*Powers v. Commonwealth* (Ky.) 975.

*Where the record showed that accused was present when the jury were sworn, it will be presumed that he was also present at all subse-

quent stages of the trial.—*State v. Temple* (Mo. Sup.) 494.

*The Supreme Court will not interfere with the discretion of court in refusing a continuance unless abused.—*State v. Richardson* (Mo. Sup.) 649.

Notwithstanding Rev. St. 1899, § 2637, cross-examination of defendant as to presence of certain persons where difficulty between him and deceased took place *held* not ground for reversal.—*State v. Feeley* (Mo. Sup.) 663.

A verdict finding defendant guilty of murder in the second degree, and assessing his punishment at "teen years (10)," *held* sufficient to authorize the court to sentence defendant to 10 years' imprisonment, under Rev. St. 1899, § 2649.—*State v. King* (Mo. Sup.) 670.

Though defendant, appealing from a conviction for a felony, fails to call the court's attention to a defect in the information, it is the duty of the court to review the record and adjudge the information defective, if it is so.—*State v. James* (Mo. Sup.) 679.

*The error in permitting the state to prove before defendant testified that he had been a convict *held* not prejudicial.—*State v. James* (Mo. Sup.) 679.

*Where the evidence on an application for a change of venue is conflicting, the action of the trial court will not be disturbed on appeal in the absence of some fact indicating an abuse of discretion.—*State v. McCarver* (Mo. Sup.) 684.

On prosecution for assault with intent to murder, error in admission of certain evidence *held* harmless.—*State v. Ruck* (Mo. Sup.) 706.

*In a criminal prosecution, the record *held* to sufficiently show that defendant was present when the verdict was received, within Rev. St. 1899, § 2610.—*State v. Temple* (Mo. Sup.) 669.

Where the trial court took judicial notice that a certain person was county clerk when an information was filed, it would be so presumed on appeal, in the absence of a showing to the contrary.—*Bennett v. State* (Tex. Cr. App.) 417.

Part of a charge on a prosecution for theft from the person *held* harmless, in view of another part, notwithstanding the manner of commission of the theft charged in the indictment.—*Brewin v. State* (Tex. Cr. App.) 420.

*In prosecution for violation of local option law, argument of counsel *held* not ground for reversal, though not supported by the evidence.—*Choran v. State* (Tex. Cr. App.) 422.

Instruction stating minimum penalty correctly, but maximum incorrectly, *held* not reversible error, in view of finding of jury and subsequent instruction.—*Choran v. State* (Tex. Cr. App.) 422.

In a prosecution for violating the local option law, admission of evidence of a conversation between the purchaser of the liquor and another not in defendant's presence *held* not prejudicial.—*Smart v. State* (Tex. Cr. App.) 810.

*In a criminal case, testimony of a woman other than the one with whom defendant was living, to the effect that witness was married to him prior to the marriage to the other woman, *held* not prejudicial error.—*Young v. State* (Tex. Cr. App.) 841.

In a criminal case there was no reversible error in permitting a woman other than the one with whom defendant was living as his wife to testify to a prior marriage with her, and to the fact that she had never been divorced, where the testimony was given in the absence of the

*Point annotated. See syllabus.

jury, and was never introduced before the jury.—*Young v. State* (Tex. Cr. App.) 841.

*Erroneous admission of certain evidence *held* not to have been cured by an instruction.—*Ware v. State* (Tex. Cr. App.) 1093.

CROSS-BILL.

Collateral attack on judgment on cross-bill, see "Judgment," § 4.

CROSS-COMPLAINT.

See "Pleading," § 2.

CROSSINGS.

Accidents at railroad crossings, see "Railroads," § 6.

Signals at railroad crossings, see "Railroads," § 5.

CUMULATIVE EVIDENCE.

See "Criminal Law," §§ 26-30.

CURTESY.

See "Dower."

CUSTODIA LEGIS.

Property seized by replevin, see "Replevin," § 2.

CUSTODY.

Of child, see "Infants," § 1.

Of jury, see "Criminal Law," § 23; "Trial," § 12.

Of property levied on, see "Attachment," § 3.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Instructions in general as to, see "Trial," § 8.

Remission of part of recovery on appeal or error, see "Appeal and Error," § 20.

Damages for particular injuries.

See "Death," § 1; "Fraud," § 2; "Nuisance," § 1.

Breach by buyer of contract for sale of goods, see "Sales," § 6.

Breach by seller of contract for sale of goods, see "Sales," § 7.

Breach by vendor of contract for sale of land, see "Vendor and Purchaser," § 7.

Breach of pasturage contract, see "Animals." Breach of warranty, see "Covenants," § 2.

Division of water course in city, see "Municipal Corporations," § 8.

Injuries caused by public improvements, see "Municipal Corporations," § 5.

Injuries to live stock in transportation, see "Carriers," § 3.

Injuries to passenger, see "Carriers," § 7.

Trespass by animals, see "Animals."

Wrongful ejection of passenger, see "Carriers," § 9.

Recovery in particular actions or proceedings.

See "Trespass to Try Title," § 3; "Trove and Conversion," § 1.

On dissolution of injunction, see "Injunction," § 3.

On injunction bond, see "Injunction," § 4.

*Point annotated. See syllabus.

§ 1. Nominal damages.

Measure of recovery for breach of contract for sale of business and good will, with agreement on part of sellers not to re-engage in business, stated.—*Bradford & Carson v. Montgomery Furniture Co.* (Tenn.) 1104.

§ 2. Grounds and subjects of compensatory damages.

*In an action for injuries, plaintiff *held* entitled to recover for such future mental and physical suffering as was "reasonably probable," instead of "reasonably certain," to occur.—*Galveston, H. & S. A. Ry. Co. v. Paschall* (Tex. Civ. App.) 446.

*In an action against a railroad for injuries to a passenger, an instruction limiting plaintiff's recovery for medicines and medical attendance to such sums as he necessarily expended or incurred was correct.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

§ 3. Measure of damages.

*An instruction in an action for the loss of cattle escaping from the owner's pasture and for expenses in searching for them, with reference to a recovery for the expense or searching, *held* erroneous.—*Southwestern Telegraph & Telephone Co. v. Krause* (Tex. Civ. App.) 431.

*The measure of damages for the loss of cattle consisting of milch cows *held* the value of the cows as milch cows.—*Southwestern Telegraph & Telephone Co. v. Krause* (Tex. Civ. App.) 431.

*In an action for injuries, plaintiff *held* only entitled to recover the reasonable and present value of diminished earning power in the future.—*Galveston, H. & S. A. Ry. Co. v. Paschall* (Tex. Civ. App.) 446.

§ 4. Inadequate and excessive damages.

In an action for injuries, evidence *held* to sustain a verdict awarding plaintiff \$4,000 damages.—*Little Rock & H. S. W. R. Co. v. McQueeney* (Ark.) 1120.

*In action for personal injuries, \$7,000 damages *held* not excessive.—*George T. Stagg Co. v. Brightwell* (Ky.) 8.

*A verdict for \$1,500 for injuries *held* not excessive.—*Orendorff v. Terminal R. Ass'n of St. Louis* (Mo. App.) 148.

*In action against a street railway for personal injuries, a verdict for \$2,500 *held* not excessive.—*Keeton v. St. Louis & M. R. Ry. Co.* (Mo. App.) 512.

§ 5. Pleading, evidence, and assessment.

In an action for personal injuries for negligence, an instruction on the measure of damages *held* erroneous.—*Louisville Gas Co. v. Fuller* (Ky.) 566.

*In a personal injury action, mortality tables *held* admissible on the issue of damages.—*Louisville Belt & Iron Co. v. Hart* (Ky.) 951.

*That plaintiff's proof did not show that he had been damaged by an obstruction in a highway to the extent alleged in the petition *held* not to preclude him from recovering for whatever injury the evidence disclosed.—*San Antonio & A. P. Ry. Co. v. Wood* (Tex. Civ. App.) 259.

*A petition for injuries sustained by an obstruction in a highway *held* sufficient to entitle plaintiff to recover for time lost.—*San Antonio & A. P. Ry. Co. v. Wood* (Tex. Civ. App.) 259.

*In an action for injuries, probable duration of plaintiff's life may be found from evidence as to plaintiff's age and physical condition, without the introduction of mortality tables.—

Galveston, H. & S. A. Ry. Co. v. Paschall (Tex. Civ. App.) 446.

In an action for injuries, an instruction authorizing a recovery for such mental and physical suffering as was found from the evidence to result from the injuries *held* sufficient, in the absence of a request limiting them to such as naturally and directly resulted therefrom.—Galveston, H. & S. A. Ry. Co. v. Paschall (Tex. Civ. App.) 446.

On the issue of the value of property at a certain place at which there is no market value, proof of the market value at other places *held* admissible.—Atchison, T. & S. F. Ry. Co. v. Nation & Slavens (Tex. Civ. App.) 823.

Under evidence in action for personal injuries, instruction that plaintiff is not entitled to recover for pain or disability resulting from Bright's disease *held* improperly refused.—St. Louis Southwestern Ry. Co. of Texas v. Hall (Tex. Civ. App.) 1079.

DEATH.

Caused by operation of railroad, see "Railroads," §§ 7, 8.

Caused by operation of street railroad, see "Street Railroads," § 2.

Cure of defective pleading in action for, see "Pleading," § 7.

Harmless error in action for, see "Appeal and Error," §§ 16-18.

Instructions in general in action for, see "Trial," §§ 6, 8, 9.

Liability of master for death of servant, see "Master and Servant," §§ 2, 4, 5, 9-11.

Negligence in general as cause of, see "Negligence," § 4.

Objections for purpose of review in action for, see "Appeal and Error," § 5.

Suspension of running of statute of limitation, see "Limitation of Actions," § 2.

§ 1. Actions for causing death.

*In an action for wrongful death, it was unnecessary for plaintiff to aver that the deceased did not know or could not have known of the danger by the use of ordinary care.—Brown's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.) 583.

*In an action for death resulting from a negligent injury inflicted in the state of Kansas, plaintiff must rely upon the statute of that state both for the law governing the merits of the case and for his legal capacity to sue.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

*Under Rev. St. 1899, § 548, and Gen. St. Kan. 1901, pp. 1002, 1003, a widow *held* entitled to sue in this state on a cause of action arising from alleged negligence causing the death of her husband in Kansas.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

Petition in an action for negligence causing death of a resident of Kansas *held* sufficient in view of Rev. St. 1899, § 629.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

*In an action by a child for negligence causing the death of her father, elements of damage stated.—Gamache v. Johnston Tin Foil & Metal Co. (Mo. App.) 918.

*In an action by a child 13 years of age for negligence causing the death of her father, a verdict for \$4,200 was not excessive.—Gamache v. Johnston Tin Foil & Metal Co. (Mo. App.) 918.

DEBTOR AND CREDITOR.

See "Fraudulent Conveyances."

* Point annotated. See syllabus.

DECEDENTS.

Estates, see "Descent and Distribution"; "Executors and Administrators."
Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 5.

As evidence in criminal prosecutions, see "Criminal Law," § 11.

Dying declarations, see "Homicide," § 7.

DECREE.

In divorce suit, see "Divorce," § 3.

In equity, see "Equity," § 8.

DEDICATION.

Declarations as evidence, see "Evidence," § 5.

§ 1. Nature and requisites.

Certain evidence *held* insufficient to overcome the presumption of an intention to dedicate land lying between the platted lots and blocks of a town and the shores of a lake on which the land abutted.—Davies v. Epstein (Ark.) 19.

*One platting land abutting on a lake *held* to have dedicated to the public land between platted lots and blocks and the shores of the lake.—Davies v. Epstein (Ark.) 19.

The ownership of lots and blocks by the several alleged dedicators of property held in common and platted *held* to be of the same force in effectuating a dedication of streets and alleys inter sese as if sales of lots had been made to third parties.—Dickinson v. Arkansas City Imp. Co. (Ark.) 21.

*Revocation of dedication of streets and alleys of platted property *held* to remain within the power of the owners of the property.—Dickinson v. Arkansas City Imp. Co. (Ark.) 21.

*Revocation of a dedication of streets and alleys on a town plat may be accomplished either by an affirmative act in recalling it, or by an abandonment of the purpose for which the land was platted.—Dickinson v. Arkansas City Imp. Co. (Ark.) 21.

Evidence *held* to show a revocation of a dedication of streets and alleys in platted property by reason of an abandonment by the owners of the purpose for which the land was platted.—Dickinson v. Arkansas City Imp. Co. (Ark.) 21.

§ 2. Operation and effect.

When streets on which lots described by numbers only in the conveyance thereof are vacated, or the use abandoned, they revert to the owners of the abutting lots.—Dickinson v. Arkansas City Imp. Co. (Ark.) 21.

DEEDS.

See "Alteration of Instruments"; "Wills," § 2.

As color of title, see "Adverse Possession," § 1.

Best and secondary evidence, see "Evidence," § 3.

Covenants in deeds, see "Covenants."

Estoppel by deed, see "Estoppel," § 2.

Estoppel to assert invalidity of, see "Estoppel," § 3.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

On exchange of property, see "Exchange of Property."

Reception of copy of, in evidence, see "Trial," § 3.

Reformation, see "Reformation of Instruments." Registers, see "Registers of Deeds."

Deeds by or to particular classes of parties.

See "Guardian and Ward," § 2; "Husband and Wife," § 1.

Deeds of particular species of property.

See "Easements," § 1; "Homestead," § 2; "Public Lands," § 3.

Particular classes of deeds.

Of trust, see "Mortgages."

Partition deeds, see "Partition," § 1.

Sheriffs' deeds, see "Partition," § 1.

Tax deeds, see "Taxation," § 6.

§ 1. Requisites and validity.

*A deed *held* delivered.—Collings v. Collings (Ky.) 577.

*Facts *held* not to constitute a legal delivery of deeds.—Koger v. Koger (Ky.) 961.

*A grantor in a deed cannot deliver the same to himself as agent of the grantee.—Rendlen v. Edwards (Mo. App.) 731.

§ 2. Construction and operation.

*The right to the use of an alley *held* to have passed as an appurtenance.—Cook v. Burton (Ky.) 322.

A grantee in deeds *held* to acquire the life estate of one of the grantors and the interest in remainder in fee of two heirs of such grantor.—Clark v. Sires (Mo. Sup.) 224.

A deed for life with remainder to the heirs of the grantor *held* to leave in the grantor an estate in reversion.—Robinson v. Blankinship (Tenn.) 854.

§ 3. Pleading and evidence.

In an action to set aside a deed, evidence *held* to support a finding that the consideration was not in fact paid.—Allison's Ex'r v. Orndorff (Ky.) 287.

*Where a deed is beneficial to the grantee, and the grantor has caused it to be recorded the presumption arises of delivery and acceptance.—Collings v. Collings (Ky.) 577.

Evidence *held* to show that deeds were not such as grantor would have made if competent to understand the nature of the transaction.—Koger v. Koger (Ky.) 961.

Evidence *held* sufficient to establish that certain deeds to an heir's share of his ancestor's property were not delivered until after the ancestor's death.—Rendlen v. Edwards (Mo. App.) 731.

DE FACTO OFFICERS.

See "Officers," § 1.

DEFAMATION.

See "Libel and Slander."

DELAY.

In completing contract for sale of land, see "Vendor and Purchaser," § 4.

In delivery of message, see "Telegraphs and Telephones," § 1.

In transportation or delivery of goods by carrier, see "Carriers," §§ 2, 3.

*Point annotated. See syllabus.

DELEGATION OF POWER.

By municipality, see "Municipal Corporations," § 4.

DELIVERY.

Of deed, see "Deeds," § 1; "Escrows."

Of goods by carrier, see "Carriers," § 2.

Of goods sold, see "Sales," § 3.

Of goods sold within statute of frauds, see "Frauds, Statute of," § 2.

Of property taken in replevin, see "Replevin," § 2.

DEMAND.

For jury trial, see "Jury," § 1.

DEMONSTRATIVE EVIDENCE.

In criminal prosecutions, see "Criminal Law," § 8.

DEMURRER.

To evidence, see "Criminal Law," § 20; "Trial," § 5.

To information in quo warranto, see "Quo Warranto," § 2.

DENTISTS.

See "Physicians and Surgeons."

Regulation of practice of dentistry as deprivation of property without due process of law, see "Constitutional Law," § 5.

Distribution of governmental powers and functions as affecting validity of regulation of practice of dentistry, see "Constitutional Law," § 1.

Indictment or information for offenses by, see "Indictment and Information," § 3.

Title of statutes, see "Statutes," § 2.

DEPOSITARIES.

Of deeds delivered as escrow, see "Escrows."

DEPOSITIONS.

See "Witnesses."

*Under Rev. St. 1895, art. 2284, certain deposition *held* properly suppressed.—German Ins. Co. v. Gibbs, Wilson & Co. (Tex. Civ. App.) 1068.

DEPUTIES.

See "District and Prosecuting Attorneys."

DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators"; "Wills."

Declarations as evidence of advancement, see "Evidence," § 5.

Documentary evidence of advancement, see "Evidence," § 7.

Estoppel to claim interest in property of decedent's estate, see "Estoppel," § 1.

§ 1. Rights and liabilities of heirs and distributees.

Under Ky. St. 1903, § 1407, money given by a father to a son to enable the latter to obtain a professional education *held* advancements.—Hill's Guardian v. Hill (Ky.) 924; Gaibreath v. Same, Id.

*On a parent dying intestate, the question of advancements *held* regulated by Ky. St. 1903, § 1407.—Sullivan v. Sullivan (Ky.) 966.

DESCRIPTION.

Of property conveyed, see "Boundaries," § 1.
 Of property demised, see "Landlord and Tenant," § 4.
 Of property in deed of land sold for delinquent taxes, see "Taxation," § 6.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DICE.

See "Gaming," § 2.

DILIGENCE.

In procuring evidence ground for new trial, see "Criminal Law," §§ 26-30.
 Of party asking relief, see "Specific Performance," § 1.

DIRECTING VERDICT.

In civil actions, see "Trial," § 5.

DISBARMENT.

Of attorney, see "Attorney and Client," § 1.

DISCHARGE.

From indebtedness, see "Release."

DISCONTINUANCE.

Of action, see "Dismissal and Nonsuit," § 1.

DISCRETION OF COURT.

Amendment of pleading, see "Pleading," § 4.
 As to reception of evidence, see "Trial," § 3.
 As to transfer of causes on docket, see "Trial," § 2.
 Continuance, see "Criminal Law," § 16.
 New trial, see "Criminal Law," §§ 26-30; "New Trial," § 2.
 Review, see "Appeal and Error," § 14; "Criminal Law," § 30.

DISCRIMINATION.

By carriers, see "Carriers," § 1.

DISMISSAL AND NONSUIT.

At trial, see "Trial," § 5.
 Dismissal of action foreclosing mechanic's lien, see "Mechanics' Liens," § 1.
 Dismissal of action on appeal from justice's court, see "Justices of the Peace," § 2.
 Dismissal of cause removed from state court, see "Removal of Causes," § 4.
 Dismissal of motion for new trial, see "New Trial," § 2.
 Effect of dismissal of original suit on *lis pendens* as to cross-bill, see "*Lis Pendens*."

§ 1. Voluntary.

Under Sayles' Ann. Civ. St. 1897, art. 1301, the right of plaintiff to take a nonsuit *held* not affected by the fact that after the motion for a nonsuit defendant sought to amend his answer so as to claim affirmative relief.—*W. B. Walker & Sons v. Hernandez* (Tex. Civ. App.) 1067.

*Point annotated. See syllabus.

§ 2. Involuntary.

*That action was brought in ordinary, when it should have been in equity, *held* not ground for dismissal.—*Star Drilling Mach. Co. v. McLeod* (Ky.) 558.

DISORDERLY HOUSE.

*In a prosecution for keeping a disorderly house, evidence of the character of accused and other female inmates *held* admissible.—*State v. Price* (Mo. App.) 174.

*Evidence that women frequent a house and are visited there by different men in a manner not recognized by social usage *held* persuasive evidence that the place is used for prostitution.—*State v. Price* (Mo. App.) 174.

*In a prosecution for keeping a disorderly house, an instruction *held* not prejudicially erroneous as authorizing a conviction if defendant suffered lewd women or men to remain in her house.—*State v. Price* (Mo. App.) 174.

DISQUALIFICATION.

Of judge, see "Judges," § 2.
 Of juror, see "Jury," § 3.

DISSOLUTION.

Of corporation, see "Corporations," § 4.
 Of injunction, see "Injunction," § 3.
 Of partnership, see "Partnership," § 4.

DISTRIBUTION.

Of assets of partnership on dissolution, see "Partnership," § 4.
 Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 5.

DISTRICT AND PROSECUTING ATTORNEYS.

Arguments at trial, see "Criminal Law," § 19.
 Review of arguments, see "Criminal Law," § 29.
 Verification of information by, see "Indictment and Information," § 2.

Under Rev. St. 1899, §§ 3293, 3287 (Acts 1893, pp. 168, 169), *held*, that only one chief deputy prosecuting attorney can be appointed in a county having a population of 100,000 and less than 300,000.—*Elliott v. Jackson County* (Mo. Sup.) 480.

DITCHES.

See "Drains."

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," §§ 2, 3.

DIVERSION.

Of water course, see "Waters and Water Courses," § 1.

DIVORCE.**§ 1. Grounds.**

*By the express provisions of Ky. St. 1903, § 2117, a wife may have a divorce for habitual behavior on the part of the husband for not less than six months in such manner as indicates such a settled aversion to the wife as permanently destroys her peace or happiness.—*Hooe v. Hooe* (Ky.) 317.

§ 2. Defenses.

*Lewdness and adultery of a husband was not condoned by subsequent cohabitation, as provided by Ky. St. 1903, § 2120, where the offense was aggravated by inoculation of the wife with syphilis.—Muir v. Muir (Ky.) 314.

The ground for divorce given by Ky. St. 1903, § 2117, *held* not one that can be condoned by a wife.—Hooe v. Hooe (Ky.) 317.

§ 3. Jurisdiction, proceedings, and relief.

*So much of a decree for divorce and alimony as granted a divorce to the wife was unappealable.—Muir v. Muir (Ky.) 314.

Jurisdiction of a court in a foreign state to render a decree of divorce *held* to attach so as to make the decree binding on a nonresident defendant.—Stuart v. Cole (Tex. Civ. App.) 1040.

A warning order issued in a suit for divorce brought in the courts of Arkansas, warning defendant, a nonresident, to appear, *held* not a writ or judicial process within the statute of that state.—Stuart v. Cole (Tex. Civ. App.) 1040.

Affidavit of publication of a warning order in an action for divorce brought in the courts of Arkansas *held* to prove a sufficient publication within the statute of that state.—Stuart v. Cole (Tex. Civ. App.) 1040.

*A decree of divorce may be collaterally attacked by showing that the court which rendered it was without jurisdiction.—Stuart v. Cole (Tex. Civ. App.) 1040.

Under Sand. & H. Dig. Ark. § 4191, recitals in a decree of divorce granted by a court of that state *held* conclusive in a collateral attack.—Stuart v. Cole (Tex. Civ. App.) 1040.

*A decree of divorce *held* conclusive on the parties, though one of them was a nonresident of the state.—Stuart v. Cole (Tex. Civ. App.) 1040.

§ 4. Alimony, allowances, and disposition of property.

*A decree awarding a wife alimony in the sum of \$1,000 and \$10 a month for the support of the children *held* inadequate, and should be increased to \$5,000.—Muir v. Muir (Ky.) 314.

*Alimony is the provision made by law for the support of a wife out of the estate of the husband, in case of divorce, in lieu of his common-law obligation to support her as wife.—Muir v. Muir (Ky.) 314.

Ky. St. 1903, § 2122, *held* not to preclude a wife from obtaining alimony in a divorce proceeding in case her husband has no present estate.—Muir v. Muir (Ky.) 314.

That a husband *held* only an estate in possession of certain land owned by his father, and not a fee, did not preclude the wife from being allowed alimony therefrom.—Muir v. Muir (Ky.) 314.

*A husband's probable earnings and accretions of wealth from any other source may be considered in determining the amount of alimony to be awarded to his wife, in an action for divorce.—Muir v. Muir (Ky.) 314.

Under Ky. St. 1903, § 2126, mortgages executed by a husband, pending suit for divorce, to mortgagees, with notice should not be considered in determining the amount of alimony to be awarded to the wife.—Muir v. Muir (Ky.) 314.

*A wife entitled to alimony *held* entitled in any event to such a sum as her dower interest in her husband's estate would have amounted to.—Muir v. Muir (Ky.) 314.

*An allowance to a wife on divorce *held* a fair allowance.—Hooe v. Hooe (Ky.) 317.

DOCKETS.

Of causes for trial, see "Trial," § 2.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 7. As evidence in criminal prosecutions, see "Criminal Law," § 8.

DOWER.**§ 1. Nature and requisites.**

*A conveyance by a husband before his marriage *held* not in fraud of the marital rights of his wife.—Collings v. Collings (Ky.) 577.

DRAINS.

Drainage of surface waters, see "Waters and Water Courses," § 2.

In cities, see "Municipal Corporations," § 8. Limitation of action for injuries caused by, see "Limitation of Actions," § 2.

Proper mode of review in drainage proceedings, see "Appeal and Error," § 1.

§ 1. Establishment and maintenance.

Rev. St. 1899, § 1110, *held* not to authorize county court to compel railroad to construct ditches or drains.—Sanders v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 736.

DRUGGISTS.

Special or local laws relating to, see "Statutes," § 1.

DUE PROCESS OF LAW.

See "Constitutional Law," § 5.

DURESS.

Declarations as evidence of, see "Evidence," § 5.

DUTIES.

Excise duties, see "Internal Revenue."

DYING DECLARATIONS.

See "Homicide," § 7.

EASEMENTS.

See "Dedication"; "Highways."

§ 1. Creation, existence, and termination.

An easement of a right of way *held* to have ripened by prescription into a vested interest appurtenant to the lands for the benefit of which it was made.—Graham v. Olson (Mo. App.) 728.

A way appurtenant to two parcels of land remote from a highway, over other parcels, *held* to rest in implied grant as a way of necessity, and not in a mere parol license.—Graham v. Olson (Mo. App.) 728.

*An easement of a right of way based on a separate consideration *held* to pass as an appurtenance with each successive transfer of title to the land.—Graham v. Olson (Mo. App.) 728.

* Point annotated. See syllabus.

EJECTION.

Of passenger, see "Carriers," § 9.

EJECTIONMENT.

See "Trespass to Try Title."

Former judgment as bar, see "Judgment," § 5.
Transfer of action of, on docket, see "Trial," § 2.

§ 1. Right of action and defenses.

In a suit to recover the possession of land, plaintiff must recover on the strength of his own title.—*Wilson & Beall v. Gaylord* (Ark.) 26.

Under Kirby's Dig. § 6321, sale of land in suit in personam to enforce payment of levee taxes passes only the title of the parties to the suit.—*Wilson & Beall v. Gaylord* (Ark.) 26.

§ 2. Pleading and evidence.

In ejectment by one relying upon a deed given on the foreclosure of a trust deed, defendant under an answer stating facts showing such deed to be void was entitled to recover, though he did not ask to be permitted to redeem.—*Cobe v. Lovan* (Mo. Sup.) 93.

Notwithstanding Rev. St. 1899, § 626, answer in ejectment setting up partition and estoppel to deny validity of partition deeds held not to state an equitable defense.—*Ming v. Olster* (Mo. Sup.) 898.

In ejectment, answer setting up partition, without specifying whether it was oral or in writing, held not to present an equitable defense.—*Ming v. Olster* (Mo. Sup.) 898.

In ejectment, where genuineness of deed in partition was contested, evidence that parties went into possession thereunder held admissible.—*Ming v. Olster* (Mo. Sup.) 898.

§ 3. Trial, judgment, enforcement of judgment, and review.

In an action to recover an island in a navigable stream, whether a portion of the island was formed by gradual accretions or by sand bars held for the jury.—*Bradshaw v. Edelen* (Mo. Sup.) 691.

ELECTION.

Between counts in pleading, see "Pleading," § 6.
To prosecute for lower grade or degree of offense, see "Indictment and Information," § 6.

ELECTIONS.

Keeping saloon open on election day, see "Intoxicating Liquors," §§ 5, 6.

Local option elections, see "Intoxicating Liquors," § 2.

Of county officers, see "Counties," § 1.
Prohibition against action of election officer, see "Prohibition," § 1.

§ 1. Contests.

Under Act Oct. 24, 1900 (Ky. St. 1903, § 1596a), held the court has no authority, in an election contest, to pass on the question of eligibility for the office.—*Wilson v. Tye* (Ky.) 295.

§ 2. Violations of election laws.

Ky. St. 1903, § 1583, punishing election officers for refusing to receive the vote of a qualified voter, held not to apply to the clerks of election, when considered in connection with sections 1484, 1577.—*Barrow v. Commonwealth* (Ky.) 981.

* Point annotated. See syllabus.

ELECTRICITY.

*Facts held not to show negligence of a telegraph company by touching the wires of which, when overcharged by contact with the wires of another, a stranger was injured.—*Martin v. Citizens' General Electric Co. (Ky.)* 547.

Evidence held to authorize a finding of contributory negligence on the part of one injured by touching the wires of two companies, causing a short circuit.—*Martin v. Citizens' General Electric Co. (Ky.)* 547.

EMINENT DOMAIN.

Harmless error in condemnation proceedings, see "Appeal and Error," § 16.

Instructions in general in condemnation proceedings, see "Trial," § 6.

Mandate on appeal in condemnation proceedings, see "Appeal and Error," § 20.

Opinion evidence in condemnation proceedings, see "Evidence," § 9.

Presumptions on appeal in condemnation proceedings, see "Appeal and Error," § 13.

Public improvements by municipalities, see "Municipal Corporations," § 5.

§ 1. Nature, extent, and delegation of power.

Under Rev. St. 1899, c. 12, art. 7, § 1268, and Const. 1875, art. 12, § 4, party excepting to report of commissioners in condemnation proceedings held entitled to trial by jury, and failure to enter formal order setting aside the report held not error.—*Southern Missouri & A. Ry. Co. v. Woodard* (Mo. Sup.) 470.

§ 2. Compensation.

*Where land is condemned by a railroad company, the benefits peculiar to the portion of the property not taken, and which are not common to the public at large, may be set off against the landowner's damage.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 475.

A railroad in constructing its road through an alley which has not been legally vacated is a trespasser, and liable in damages to the owners of property abutting on the alley.—*Mitchell v. St. Louis, I. M. & S. Ry. Co. (Mo. App.)* 111.

*Under Const. art. 1, § 21, and Shannon's Code, § 1865, amount of compensation for right of way held to be determined with reference to time when possession was actually taken.—*Chicago, St. L. & N. O. R. Co. v. Mogridge* (Tenn.) 1114.

*Under Const. art. 1, § 17, an owner of a lot which is caused to depreciate in value by the operation of a railroad in the street is entitled to recover damages.—*Grossman v. Houston, O. L. & M. P. Ry. Co. (Tex. Sup.)* 836.

*The personal inconvenience and discomfort occasioned to the owner of abutting property by the operation of a railroad in the street gives rise to no cause of action.—*Grossman v. Houston, O. L. & M. P. Ry. Co. (Tex. Sup.)* 836.

§ 3. Proceedings to take property and assess compensation.

*In condemnation proceedings, the fact that there was no evidence to support the allegation of the petition that petitioner had endeavored to agree upon damages held not to oust the court of jurisdiction.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 475.

*In condemnation proceedings, it was not necessary that an attempt on the part of petitioner to agree with defendants on damages should be shown by oral evidence, but it might

be shown by facts and circumstances.—*Southern Illinois & M. Bridge Co. v. Stone* (Mo. Sup.) 475.

§ 4. Remedies of owners of property.

In an action against a railroad for obstruction of an alley by its road, certain deed held immaterial as evidence.—*Mitchell v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 111.

*A cause of action for damages from the operation of a railroad in the street in front of plaintiff's property held not to have arisen until a change in the use to which the road was put.—*Grossman v. Houston, O. L. & M. P. Ry. Co.* (Tex. Sup.) 836.

EMPLOYERS' LIABILITY INSURANCE.

See "Insurance," § 12.

EMPLOYÉS.

See "Master and Servant."

ENCROACHMENT.

On highways, see "Highways," § 2.

ENTRY.

Re-entry by landlord, see "Landlord and Tenant," § 6.

ENTRY TAKER.

Creation of office, see "Officers," § 1.
Election by county court, see "Counties," § 1.

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE CONVERSION.

See "Conversion."

EQUITABLE DEFENSES.

See "Action," § 1.
In ejectment, see "Ejectment," § 2.
Preliminary proceedings as to, see "Trial," § 1.
Transfer of cause on docket on filing, see "Trial," § 2.

EQUITABLE ESTOPPEL.

See "Estoppel," § 3.

EQUITY.

Bringing action in ordinary instead of equity as ground for dismissal, see "Dismissal and Nonsuit," § 2.
Equitable conversion, see "Conversion."
Equitable defenses in actions at law, see "Action," § 1.
Equitable defense in ejectment, see "Ejectment," § 2.
Equitable estoppel, see "Estoppel," § 3.
Harmless error, see "Appeal and Error," § 17.
Preliminary proceedings as to equitable defense, see "Trial," § 1.
Right to trial by jury, see "Jury," § 1.
Transfer of cause on docket on filing equitable defense, see "Trial," § 2.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Fraudulent Conveyances"; "Injunction"; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Obstruction of roads, see "Highways," § 2.
Relief against judgment, see "Judgment," § 3.

§ 1. Jurisdiction, principles, and maxims.

Defects in jurisdiction in a complaint held supplied by a cross-complaint seeking to restrain plaintiff from obstructing certain streets and alleys on which defendant's property abutted.—*Dickinson v. Arkansas City Imp. Co.* (Ark.) 21.

*Act of plaintiffs in injunction suit after verdict in their favor, but before judgment, held to bar their right to relief under the rule that he who comes into equity must come with clean hands.—*Little v. Cunningham* (Mo. App.) 734.

§ 2. Pleading.

Allegations of a bill against a county clerk and the sureties on his official bonds for successive terms of office held to justify a joinder of the several sureties in one suit.—*Place v. State* (Ark.) 242.

§ 3. Decree and enforcement thereof.

In suit to surcharge accounts of county clerk and recover from the sureties on his official bonds, decree for amounts of outstanding illegal warrants, with proviso that it might be satisfied by surrendering the warrants, held proper.—*Place v. State* (Ark.) 242.

ERROR, WRIT OF.

See "Appeal and Error."

ESCROWS.

*Where certain deeds were not placed in the possession of a depository to be held by him until the performance of some condition, they were not held in escrow.—*Rendlen v. Edwards* (Mo. App.) 731.

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 2.
Of drains, see "Drains," § 1.
Of highways, see "Highways," § 1.
Of turnpikes or toll roads, see "Turnpikes and Toll Roads," § 1.

ESTATES.

See "Life Estates."
Created by deed, see "Deeds," § 2.
Created by will, see "Wills," § 3.
Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."
Dower, see "Dower."
Estates for years, see "Landlord and Tenant."
Repeal of laws relating to insolvent estates, see "Statutes," § 3.

ESTATES TAIL.

Creation by will, see "Wills," § 3.

ESTOPPEL.

By judgment, see "Judgment," §§ 5, 6.
To assert invalidity of incumbrance of homestead, see "Homestead," § 2.
To attack release, see "Release," § 1.

* Point annotated. See syllabus.

To avoid or forfeit insurance policy, see "Insurance," § 10.

To declare forfeiture of rights in public lands, see "Public Lands," § 3.

To forfeit corporate franchise for pool selling, see "Gaming," § 1.

§ 1. By record.

*Where the husband of an heir of certain land disclaimed any interest therein in a proceeding to sell it for distribution, he was estopped thereafter to claim any interest as against the purchaser.—*Stine v. Goodman* (Ky.) 612.

§ 2. By deed.

A deed describing the land conveyed as including a portion of a roadway held not to estop the grantor from denying that the deed conveyed any part of the road.—*Graham v. Olson* (Mo. App.) 728.

§ 3. Equitable estoppel.

*One holding adverse possession, under a tax deed, of real property, held not estopped to deny validity of adverse title purchased by him.—*Fitch v. Gentry* (Ky.) 586.

A landowner held not estopped to assert the invalidity of a deed on the foreclosure of a trust deed.—*Cobe v. Lovan* (Mo. Sup.) 93.

Under Rev. St. 1890, §§ 4343, 4344, the act of a purchaser at a sale under a trust deed in defending an injunction suit on the ground that a statutory redemption bond was invalid held to preclude him from afterwards maintaining suit on the bond.—*Rieger v. Faber* (Mo. App.) 183.

EVIDENCE.

See "Depositions"; "Witnesses."

Applicability of instructions to evidence, see "Trial," § 9.

Assignments of error as to rulings, see "Appeal and Error," § 10.

Comments on, in instructions, see "Criminal Law," § 20.

Continuance for absence of, see "Criminal Law," § 16.

Demurrer to evidence, see "Criminal Law," § 20.

Harmless error in rulings on, see "Appeal and Error," § 17; "Criminal Law," § 30; "Homicide," § 10.

Newly discovered evidence ground for new trial, see "Criminal Law," §§ 28-30; "New Trial," § 1.

Objections for purpose of review, see "Appeal and Error," § 5; "Criminal Law," § 28.

Presumptions on appeal or writ of error, see "Appeal and Error," § 13.

Questions of fact for jury, see "Trial," § 5.

Reception at trial, see "Criminal Law," § 18; "Trial," § 3.

Review, see "Appeal and Error," § 15; "Criminal Law," §§ 29, 30; "Homicide," § 10.

Review of rulings as dependent on record on appeal or error, see "Appeal and Error," § 9.

Stenographers to take testimony in proceedings before grand jury, see "Grand Jury."

Tax deeds as evidence, see "Taxation," § 6.

As to particular facts or issues.

See "Adverse Possession," § 2; "Boundaries," § 2; "Costs," § 2; "Damages," § 5; "Dedication," § 1; "Deeds," § 3; "Fraudulent Conveyances," § 2; "Judgment," § 8; "Release," § 3; "Statutes," § 5; "Trusts," § 1.

Amount of rent, see "Landlord and Tenant," § 5.

Construction of contract of sale, see "Vendor and Purchaser," § 2.

Defense of statute of limitations, see "Limitation of Actions," § 5.

Testamentary capacity, see "Wills," § 1.

Waiver of iron safe clause in insurance policy, see "Insurance," § 10.

In actions by or against particular classes of parties.

See "Attorney and Client," § 2; "Carriers," §§ 2, 3, 5, 7, 10; "Executors and Administrators," § 7; "Master and Servant," § 9; "Municipal Corporations," § 8; "Principal and Agent," § 2; "Railroads," §§ 7-10.

Water company, see "Waters and Water Courses," § 3.

In particular civil actions or proceedings.

See "Ejectment," § 2; "Fraud," § 2; "Malicious Prosecution," § 2; "Negligence," § 4; "Quieting Title," § 2; "Trespass to Try Title," § 2.

Condemnation proceedings, see "Eminent Domain," § 3.

For breach of contract, see "Contracts," § 5; "Sales," § 7.

For compensation of attorney, see "Attorney and Client," § 2.

For death caused by operation of railroad, see "Railroads," § 8.

For death of servant, see "Master and Servant," § 9.

For delay in transportation and delivery of goods, see "Carriers," § 2.

Foreclosure, see "Mortgages," § 8.

For injuries from insufficient water supply, see "Waters and Water Courses," § 3.

For injuries to animals caused by operation of railroad, see "Railroads," § 9.

For injuries to animals caused by operation of street railroad, see "Street Railroads," § 2.

For injuries to live stock in transportation, see "Carriers," § 3.

For loss of or injury to passenger's effects, see "Carriers," § 10.

For negligence in delivery or transmission of message, see "Telegraphs and Telephones," § 1.

For personal injuries, see "Carriers," § 7; "Master and Servant," § 9; "Municipal Corporations," § 8; "Railroads," § 8; "Street Railroads," § 2.

For injuries from fire caused by operation of railroad, see "Railroads," § 10.

For price of goods, see "Sales," § 6.

For services, see "Work and Labor."

For violation of municipal ordinance, see "Municipal Corporations," § 6.

For wrongful attachment, see "Attachment," § 5.

On bill or note, see "Bills and Notes," § 3.

On insurance policy, see "Insurance," § 16.

On liquor dealer's bond, see "Intoxicating Liquors," § 3.

In criminal prosecutions.

See "Assault and Battery," § 2; "Bribery"; "Burglary," § 1; "Criminal Law," §§ 8-15; "Forgery," § 2; "Homicide," §§ 6-8; "Larceny," § 2; "Rape," § 1; "Receiving Stolen Goods"; "Robbery."

For abandonment of wife, see "Husband and Wife," § 4.

For carrying weapons, see "Weapons."

For keeping disorderly house, see "Disorderly House."

For obstructing road, see "Highways," § 2.

For offense against liquor laws, see "Intoxicating Liquors," § 6.

On plea of former acquittal, see "Criminal Law," § 7.

§ 1. Judicial notice.

*Courts will take judicial notice that the Tennessee river is a navigable river.—*Terrell v. City of Paducah* (Ky.) 310.

The Supreme Court will not take judicial notice that a racing association has paid over a certain fund for the making of agricultural exhibitions at the state fair when no such exhibitions were held by the association.—*State*

* Point annotated. See syllabus.

ex inf. *Hadley v. Delmar Jockey Club* (Mo. Sup.) 185.

§ 2. Relevancy, materiality, and competency in general.

*In an action against a street railroad company for the killing of a hog, it was proper to admit evidence that the motorman remarked at the time that the hog jumped on the track right in front of the car.—*Little Rock Ry. & Electric Co. v. Newman* (Ark.) 864.

*A statement of a foreman made about an hour after an injury to an employé held not a part of the res gestæ.—*Martin v. South Covington & C. St. Ry. Co.* (Ky.) 571.

§ 3. Best and secondary evidence.

Certified copy of deed held properly admitted in evidence, notwithstanding production of original showing certain erasures.—*Ming v. Olster* (Mo. Sup.) 898.

*Where pleadings in a suit are lost, parol evidence held competent to show what was in controversy.—*Latta v. Wiley* (Tex. Civ. App.) 433.

Where a contract for the sale of land was made in duplicate, parol evidence thereof was inadmissible without an effort to account for the nonproduction of both duplicates.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

*A notice to produce letters written by R. to B. and M. was insufficient to require the production of letters written by R. to M.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

Where a husband and wife executed an instrument designating a homestead, and failed, after being notified, to produce the original instrument of designation, a certified copy thereof was admissible in evidence.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

§ 4. Admissions.

In an action for breach of contract to sell, a forthcoming bond executed by the seller in a prior action held admissible, in view of Civ. Code Prac. §§ 215, 258, on the issue of the amount of the goods sold.—*Tingle v. Kelly* (Ky.) 803.

*Declaration of an employé held inadmissible as against employer.—*Shelbyville Water & Light Co. v. McDade* (Ky.) 568.

*A statement by a payee in a note held admissible as an admission against interest.—*Sullivan v. Sullivan* (Ky.) 966.

*In an action for breach of a contract to deliver cattle, certain admissions and declarations held admissible.—*McKay v. Elder* (Tex. Civ. App.) 268.

Statements of a witness in a suppressed deposition held not admissible without a certain predicate.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

§ 5. Declarations.

On the issue of a dedication to the public of land lying between lots and blocks shown on a town plat and a lake, evidence of a declaration of the owner of the land held competent as a declaration against interest.—*Davies v. Epstein* (Ark.) 19.

In an action against a married woman on a note, where the defense was duress, it was proper to permit defendant to testify as to threats made by the payee, alleged to have been communicated to her by her husband.—*Ditto v. Slaughter* (Ky.) 2.

A declaration by an employé held inadmissible as evidence in favor of his employer.—*Shelbyville Water & Light Co. v. McDade* (Ky.) 568.

*On an issue as to whether money given by a parent to a child was an advancement, declarations by the parent made after the gift are not competent.—*Hill's Guardian v. Hill* (Ky.) 924; *Gailbraith v. Same*, Id.

Letters containing admissions by a husband as to the land designated by him as a homestead out of a larger tract were admissible in evidence in a suit to foreclose a deed of trust on other land in the same tract.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

§ 6. Hearsay.

In an action against a carrier for negligent transportation of plaintiff's hogs, certain evidence held inadmissible as being a statement made out of court and not under oath.—*Illinois Cent. R. Co. v. Holt* (Ky.) 540.

In an action against a carrier for delay in the transportation of certain threshing machinery, certain evidence held inadmissible as hearsay.—*Missouri, K. & T. Ry. Co. of Texas v. Sproles & Vines* (Tex. Civ. App.) 40.

Statement by defendant to witness that she was not married held hearsay on the issue of defendant's coverture.—*Sweeney v. Taylor Bros.* (Tex. Civ. App.) 442.

In an action against a carrier for damages to a shipment of cattle owing to delay in transportation, the testimony of a witness as to the schedule time of the railroad was not objectionable as hearsay.—*Gulf, C. & S. F. Ry. Co. v. Funk* (Tex. Civ. App.) 1032.

§ 7. Documentary evidence.

In an action against a carrier for negligently transporting plaintiff's hogs, the report of the government inspector of hogs as to their condition at the point of destination held admissible.—*Illinois Cent. R. Co. v. Holt* (Ky.) 540.

On an issue whether money given by a parent to a child was an advancement, a book of accounts held admissible to show the amount of the advancements and their purposes.—*Hill's Guardian v. Hill* (Ky.) 924; *Gailbreath v. Same*, Id.

An entry in a book charging a certain amount against deceased, exhibited to and approved by him, held admissible against his estate.—*Britian v. Fender* (Mo. App.) 179.

*Field notes of surveyor held admissible in evidence in action of trespass to try title.—*Camp v. League* (Tex. Civ. App.) 1062.

§ 8. Parol or extrinsic evidence affecting writings.

In an action on a stock subscription contract, parol evidence of fraud in the organization of the corporation and in the execution of the contract held not objectionable as contradicting the terms thereof.—*Metropolitan Lead & Zinc Min. Co. v. Webster* (Mo. Sup.) 79.

Parol evidence that ash trees on certain land were all hollow at the butt held inadmissible to explain or enlarge any of the terms of an ambiguous contract for the sale of trees 15 inches in diameter.—*Strother v. American Cooperage Co.* (Mo. App.) 758.

*In an action for specific performance, certain evidence held not admissible because varying the terms of a written contract.—*Morrison v. Hazzard* (Tex. Sup.) 33.

*In an action for specific performance of a contract for the sale of a tract of land, parts of which were owned by different persons, parol evidence was admissible to show the location of each parcel.—*Morrison v. Hazzard* (Tex. Sup.) 33.

* Point annotated. See syllabus.

§ 9. Opinion evidence.

*In an action against a railroad company for damages from a fire alleged to have been caused by sparks from a locomotive, an experienced engineer may testify as an expert as to the proper manner of handling an engine when passing combustible material.—*St. Louis, I. M. & S. Ry. Co. v. Dawson* (Ark.) 27.

*In condemnation proceedings, witness *held* properly permitted to state his opinion as to damages caused by the taking of right of way for railroad.—*Southern Missouri & A. Ry. Co. v. Woodard* (Mo. Sup.) 470.

*A hypothetical question to an expert witness must be predicated on the evidence.—*Root v. Kansas City Southern Ry. Co.* (Mo. Sup.) 621.

The opinion of a witness as to the distance within which a cable car could be stopped when running at its usual rate of speed *held* properly excluded in the absence of a showing that the witness was qualified to express an opinion.—*Boring v. Metropolitan St. Ry. Co.* (Mo. Sup.) 655.

*In an action for injuries to a person attempting to board a street car, statement of witness that it was the bell to start the car he heard ring *held* not inadmissible as a conclusion.—*Kohr v. Metropolitan St. Ry. Co.* (Mo. App.) 1145.

In trespass to try title, testimony of a surveyor that meanderings would fit only one particular part of stream *held* admissible.—*Camp v. League* (Tex. Civ. App.) 1062.

*In trespass to try title, expert surveyor *held* properly permitted to testify whether property described in petition is embraced within that described in deeds.—*Camp v. League* (Tex. Civ. App.) 1062.

*In an action for injuries to a passenger, evidence as to the appearance of plaintiff after the accident, as to whether or not he seemed to be suffering, etc., *held* admissible.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

In an action against a railroad for injuries to a passenger, a witness *held* qualified to testify as to the force with which a coupling of cars was made.—*Mullen v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 1000.

§ 10. Weight and sufficiency.

In garnishment proceedings against an administrator, plaintiff's failure to formally prove that order of distribution had been passed in administration proceedings *held* cured by garnishee's admissions.—*Kiernan v. Robertson* (Mo. App.) 138.

EXAMINATION.

Of expert witnesses, see "Evidence," § 9.

Of impeaching witness, see "Witnesses," § 3.

Of person accused of crime, see "Criminal Law," § 6.

Of witnesses in general, see "Witnesses," § 2.

EXCEPTIONS.

For purpose of review, see "Criminal Law," § 28.

Necessity for purpose of review, see "Appeal and Error," § 6.

EXCEPTIONS, BILL OF.

Disqualification of judge to settle, see "Judges," § 2.

In criminal prosecutions, see "Criminal Law," § 29.

Necessity for purpose of review, see "Appeal and Error," § 9.

* Point annotated. See syllabus.

§ 1. Settlement, signing, and filing.

Under Rev. St. 1899, § 1679, where the judge was disqualified to act on an application for an extension of time for filing the bill of exceptions, the proper procedure would have been to have a special judge elected, and mandamus does not lie to compel the judge to extend the time.—*State ex rel. Gallivan v. Bradley* (Mo. Sup.) 464.

EXCESSIVE DAMAGES.

See "Damages," § 4.

For causing wrongful death, see "Death," § 1. For wrongful ejection of passenger, see "Carriers," § 9.

EXCHANGE OF PROPERTY.

Agent's commission on negotiating a loan on land *held* not interest on the loan within the meaning of a contract requiring the vendee of the land to pay interest on the loan after a certain date.—*Wilson v. Wilson* (Mo. App.) 145.

*Contract for exchange of land for goods *held* not extinguished by conveyance of the land pursuant thereto.—*Wilson v. Wilson* (Mo. App.) 145.

Provision of deed executed pursuant to contract for exchange of properties *held* not to impose on the grantee the obligation of paying a certain incumbrance.—*Wilson v. Wilson* (Mo. App.) 145.

Clause of deed modifying contract for exchange of property so as to impose certain obligations on the grantee *held* without consideration.—*Wilson v. Wilson* (Mo. App.) 145.

EXCISE.

Duties, see "Internal Revenue."

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Exemptions, see "Homestead."

§ 1. Property subject to execution.

The interest of a vendor in land which has been sold on a credit and a lien retained to secure the payment of the purchase money *held* not subject to levy and sale under execution.—*Rutherford v. Mothershed* (Tex. Civ. App.) 1021.

§ 2. Stay, quashing, vacating, and relief against execution.

*Irregularities of procedure occurring prior to a judgment will not support a motion to quash an execution.—*Harbert v. Durden* (Mo. App.) 746.

A motion to quash an execution because of a defective return of publication of process *held* properly denied on proof conclusively establishing that the process was properly published.—*Harbert v. Durden* (Mo. App.) 746.

§ 3. Sale.

*A bona fide purchaser under an unrecorded deed is protected against the claim of an execution creditor of the vendor subsequently purchasing the premises at the execution sale with notice of the purchaser's rights.—*Moore v. Faris* (Ky.) 592.

EXECUTIVE POWER.

See "Constitutional Law," § 1.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."
 Administrator as party to proceedings to revive judgment, see "Judgment," § 7.
 Documentary evidence of claim against estate, see "Evidence," § 7.
 Effect of administration on limitation, see "Limitation of Actions," § 2.
 Garnishment, see "Garnishment," § 1.
 Instructions in general in actions by or against, see "Trial," § 6.
 Limitation of actions on claim against decedent's estate, see "Limitation of Actions," § 2.
 Repeal of laws relating to insolvent estates, see "Statutes," § 3.
 Review in proceedings on claim against decedent's estate as dependent on issues and questions in lower court, see "Appeal and Error," § 4.
 Right of, to maintain action on note, see "Bills and Notes," § 3.
 Testamentary trustees, see "Trusts."
 Testimony as to transactions with decedents, see "Witnesses," § 1.
 Trover by or against, see "Trover and Conversion," § 1.

§ 1. Appointment, qualification, and tenure.

*Shannon's Code, § 3055, held to apply to time for appointment of administrators de bonis non as well as original administrators.—Gallatin Turnpike Co. v. Puryear (Tenn.) 763.

Persons sued by one acting as administrator de bonis non under authority of county court held entitled to sue to revoke administration on ground that letters were granted after time limited by statute.—Gallatin Turnpike Co. v. Puryear (Tenn.) 763.

*Where estate was administered, and final settlement made in 1895, appointment of administrator de bonis non in 1901 held not authorized.—Turner v. Wallace (Tex. Sup.) 31.

§ 2. Assets, appraisal, and inventory.

*Proper parties to bring an action on an injunction bond restraining defendant from removing timber from land determined in action after death of such defendant. (Civ. Code Prac. § 24).—Miller v. Smythe (Ky.) 964.

§ 3. Allowances to surviving wife, husband, or children.

Rev. St. 1899, §§ 105-107, 109, 111, relating to property distributable to a widower in case of the death of his wife intestate, held not to apply to the estate of a wife who died testate.—Black v. Brittain (Mo. App.) 500.

§ 4. Allowance and payment of claims.

*The requisites of demands filed against a decedent's estate, prescribed by Rev. St. 1899, § 188, held jurisdictional, and must be substantially complied with.—Brittan v. Fender (Mo. App.) 179.

Claimant's cause of action against a decedent's estate held in assumpsit for money had and received, and not on certain notes, and hence claimant was not required by Rev. St. 1899, § 188, to set out the notes in his statement of the claim.—Brittan v. Fender (Mo. App.) 179.

*A claim against a decedent's estate held to sufficiently state the nature of the claim, as required by Rev. St. 1899, § 188.—Brittan v. Fender (Mo. App.) 179.

*Point annotated. See syllabus.

§ 5. Distribution of estate.

Under Ky. St. 1903, § 3848, payment of legacy by executor under order of court held valid, though provision of will authorizing it was afterwards set aside.—Trustees of Home for Poor Catholic Men v. Coleman (Ky.) 342; Coleman v. Amis's Ex'r, Id.

§ 6. Sales and conveyances under order of court.

Sale of claim in favor of decedent's estate, under order of court having jurisdiction, held not to be set aside in absence of fraud procuring order.—Dorsey v. Connerly (Ark.) 771.

§ 7. Actions.

In an action against an executor for personal services rendered decedent, evidence of appraisers as to what they found in the kitchen and larder something like a month after decedent died was not admissible.—McGrew's Ex'r v. O'Donnell (Ky.) 301.

In an action against an executor for personal services rendered to decedent, allegations as to the amount of decedent's estate were immaterial, and should have been stricken out on motion.—McGrew's Ex'r v. O'Donnell (Ky.) 301.

*Action in which it was sought to charge executor personally with amount of legacy paid by him held barred by laches.—Trustees of Home for Poor Catholic Men v. Coleman (Ky.) 342; Coleman v. Amis's Ex'r, Id.

Administrator held not liable as for conversion of certain property used and disposed of by his testator.—White v. Blankenbeckler (Mo. App.) 503.

EXEMPLARY DAMAGES.

Instructions in general as to, see "Trial," § 3.

EXEMPTIONS.

See "Homestead."

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 9.

EXPLOSIVES.

Explosion as cause of loss under insurance policy, see "Insurance," § 11.
 Liens for explosives furnished in railroad construction, see "Railroads," § 4.

EXPRESS COMPANIES.

As employers, see "Master and Servant," § 7.
 Express messenger as passenger, see "Carriers," §§ 4, 7.
 Sales of liquor by, see "Intoxicating Liquors," § 4.

FALSE IMPRISONMENT.

See "Malicious Prosecution."

FALSE REPRESENTATIONS.

Inducing partnership agreements, see "Partnership," §§ 1, 2.

FALSE SWEARING.

See "Perjury."

FEDERAL QUESTIONS.

Ground for removal of cause, see "Removal of Causes," § 1.

FEES.

Of attorney, see "Attorney and Client," § 2.

FEE SIMPLE.

Creation by will, see "Wills," § 3.

FELLOW SERVANTS.

See "Master and Servant," § 4.

FENCES.

Railroad fences, see "Railroads," § 2.

*Under Pen. Code 1895, arts. 796, 797, the removal by a landowner of his fence to another location so as not to separate it from the fence of the adjoining proprietor is not an offense.—Camp v. State (Tex. Cr. App.) 845.

FERRIES.

Parties on appeal in proceedings for granting license to operate, see "Appeal and Error," § 3.

FILING.

Bill of exception, see "Exceptions, Bill of," § 1.
Criminal information or complaint, see "Indictment and Information," § 2.
Indictment or presentment, see "Indictment and Information," § 1.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 15.
Special findings by jury, see "Trial," § 13.

FINES.

Appellate jurisdiction as dependent on amount of fine, see "Criminal Law," § 27.

FIRE INSURANCE.

See "Insurance."

FIRES.

Caused by operation of railroad, see "Railroads," § 10.
Expert testimony in action for injuries caused by, see "Evidence," § 9.
Liability of water company for insufficient water supply, see "Waters and Water Courses," § 3.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

Recovery of demised premises, see "Landlord and Tenant," § 6.

§ 1. Civil Liability.

*Under Shannon's Code, § 5093, the action of unlawful detainer will not lie against one who entered under a conveyance from a tenant by curtesy.—Shepperson v. Burnette (Tenn.) 762.

*Point annotated. See syllabus.

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 1.
Of mortgage, see "Mortgages," § 8.

FOREIGN CORPORATIONS.

See "Corporations," § 5.

FORFEITURES.

Of compensation of insurance agent, see "Insurance," § 3.
Of franchise, see "Corporations," § 4.
Of insurance, see "Insurance," § 9.
Of rights in public lands, see "Public Lands," § 3.

FORGERY.

Admissions as evidence, see "Criminal Law," § 11.
Competency of evidence, see "Criminal Law," § 8.
Conduct of jury, see "Criminal Law," § 23.
Former jeopardy, see "Criminal Law," § 5.
Of deed as affecting its reception in evidence, see "Trial," § 3.

In a prosecution for forgery, charge authorizing conviction of uttering a forged instrument held erroneous under the indictment and proof.—Crossland v. State (Ark.) 776.

In a prosecution for forgery, certain evidence should have been admitted in support of defendant's theory of the rightfulness of his possession and indorsement of the forged instrument.—Crossland v. State (Ark.) 776.

An indictment for forgery of an indorsement on a note or check must set out the indorsement together with such averments as will make the offense affirmatively appear.—Crossland v. State (Ark.) 776.

*An indorsement of a note or check need not be set out in an indictment for forgery of the note or check.—Crossland v. State (Ark.) 776.

*Indictment for forgery should set forth the instrument forged according to its tenor.—Crossland v. State (Ark.) 776.

*An indictment for forgery, alleging that accused forged a note with intent to defraud a bank, held good, without averring what he intended to defraud the bank of.—Taylor v. Commonwealth (Ky.) 292.

FORMER ADJUDICATION.

See "Judgment," §§ 5, 6, 8.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 5.
Plea of former acquittal, see "Criminal Law," § 7.
Prohibition against criminal prosecution on ground of former jeopardy, see "Prohibition," § 1.

FORMS OF ACTION.

See "Action," § 1; "Ejectment"; "Replevin"; "Trespass," § 1; "Trove and Conversion."

FRANCHISES.

Forfeiture, see "Corporations," § 4.
Quo warranto to prevent exercise of, see "Quo Warranto."

FRAUD.**See "Fraudulent Conveyances."**

As an equitable defense in an action at law, see "Action," § 1.

Construction and operation of contracts in actions for fraud, see "Contracts," § 2.

Conveyances in fraud of dower, see "Dower," § 1.

In bringing suit for delinquent taxes as affecting title of purchaser at tax sale, see "Taxation," § 6.

Instructions in general in actions for, see "Trial," §§ 6, 9.

By particular classes of persons.

See "Attorney and Client," § 1; "Landlord and Tenant," § 1; "Principal and Agent," § 2.

Insurance agent, see "Insurance," §§ 8, 10.

Partners, see "Partnership," §§ 1, 2.

In particular classes of conveyances, contracts, or transactions.

See "Insurance," §§ 8, 10; "Judgment," § 3; "Partnership," §§ 1, 2.

Adjustment of loss under insurance policy, see "Insurance," § 14.

Leases, see "Landlord and Tenant," § 1.

Procuring release, see "Release," § 1.

Sales of land, see "Vendor and Purchaser," § 1.

Particular remedies.

Setting aside judgment, see "Judgment," § 3.

§ 1. Deception constituting fraud, and liability therefor.

*Representation that a body of ore through which a drill hole has been made is pay ore held a mere expression of opinion, for which action for fraud and deceit will not lie.—Brown v. South Joplin Lead & Zinc Min. Co. (Mo. Sup.) 699.

Representations inducing defendant to enter into a partnership agreement held made as a matter of fact, so that defendant was entitled to rely on them.—Caplen v. Cox (Tex. Civ. App.) 1048.

§ 2. Actions.

In an action for fraud and deceit in inducing plaintiff to sell shares of stock, evidence considered, and held that the question of fraud was for the jury.—McDonough v. Williams (Ark.) 783.

*In an action for fraud and deceit alleged to have been practiced by defendant upon plaintiff in the purchase of shares of stock from the latter, the measure of damages would be the difference between the price paid to plaintiff for his stock and the actual value thereof at the time if the latter exceeded the former.—McDonough v. Williams (Ark.) 783.

*Performance of an executory contract of sale induced by fraud of which the vendor had knowledge held to bar an action for damages for the fraud.—McDonough v. Williams (Ark.) 783.

In an action for fraud and deceit alleged to have been practiced by defendant upon plaintiff in the purchase of shares of stock from plaintiff, evidence was admissible to show the value of the property sold at the time of the sale.—McDonough v. Williams (Ark.) 783.

*In an action for damages for false representations in the sale of stock, the measure of damages was the difference between the value of the stock of the company in its actual financial condition at the time and its value had the company been in the condition represented.—Drake v. Holbrook (Ky.) 297.

*In an action for damages for fraudulent representations in a sale of corporate stock

to plaintiff, instructions held sufficient.—Drake v. Holbrook (Ky.) 297.

FRAUDS, STATUTE OF.

Requirements of, as affecting trust, see "Trusts," § 1.

§ 1. Real property and estates and interests therein.

*An oral contract to devise land in consideration of services rendered held within the statute of frauds.—Goodloe v. Goodloe (Tenn.) 767.

*An oral contract to lease premises for a term of five years is within the statute of frauds.—Pinto v. Rintleman (Tex. Civ. App.) 1003.

*A parol agreement fixing the boundary line between two lots as the center of a party wall, acquiesced in for 16 years, held not within the statute of frauds.—Roberts v. Fellman Dry Goods Co. (Tex. Civ. App.) 1060.

§ 2. Sales of goods.

*In an action for the price of a beef steer, facts held insufficient to establish a delivery and receipt by defendant sufficient to satisfy the statute of frauds.—Sotham v. Weber (Mo. App.) 181.

§ 3. Operation and effect of statute.

*A fully performed oral contract to convey land is not within the statute of frauds.—Welch v. Mann (Mo. Sup.) 98.

Partial performance of a parol contract to devise land in consideration of services held not to relieve the contract from the application of the statute of frauds.—Goodloe v. Goodloe (Tenn.) 767.

FRAUDULENT CONVEYANCES.**§ 1. Transfers and transactions invalid.**

*A voluntary conveyance from a brother to a sister is not fraudulent as to a subsequent creditor of the grantor unless actual fraud is shown.—Hunt v. Nance (Ky.) 6.

*That the grantor in a voluntary conveyance is indebted at the time does not render the conveyance fraudulent, if after the conveyance he still had ample means to pay his debts.—Welch v. Mann (Mo. Sup.) 98.

*A voluntary conveyance from husband to wife will not be set aside at the suit of a creditor of the husband, unless the husband was indebted at the time the conveyance was made, or later became insolvent from causes existing at that time, or executed the conveyance to withdraw the property from the hazard of a contemplated business venture.—Welch v. Mann (Mo. Sup.) 98.

§ 2. Remedies of creditors and purchasers.

In a proceeding by a judgment creditor to recover land conveyed by the judgment debtor before the cause of action resulting in the judgment arose, evidence held insufficient to show that the judgment debtor had the creation of the debt evidenced by the judgment in contemplation at the time of the conveyance.—Hunt v. Nance (Ky.) 6.

*That a grantor executed a deed for a fraudulent purpose held not to affect his subsequent creditors.—Collings v. Collings (Ky.) 577.

In a suit to set aside a voluntary conveyance as fraudulent, a certain indebtedness of the grantor held to have accrued at the time he assumed a contingent liability, and not at the

*Point annotated. See syllabus.

time the liability became fixed.—*Welch v. Mann* (Mo. Sup.) 98.

A conveyance from husband to wife in execution of an unenforceable parol promise, made before marriage, will not be set aside at the suit of a creditor of the husband who became such after the conveyance.—*Welch v. Mann* (Mo. Sup.) 98.

While a judgment creditor has a right to enforce his judgment by levy on and sale of property held by a grantee of the judgment debtor, and then sue to set aside the conveyance, the better practice is to first sue to set aside the conveyance.—*Welch v. Mann* (Mo. Sup.) 98.

The fact that at the time of a voluntary conveyance a corporation in which the grantor owned nearly all the stock was insolvent *held* not to show that the grantor was unable to pay his personal debts.—*Welch v. Mann* (Mo. Sup.) 98.

FREIGHT.

See "Carriers," § 2.

GAMING.

Forfeiture of corporate franchise for maintaining race course for gambling, see "Corporations," § 4.

Former jeopardy, see "Criminal Law," § 5.

Gaming by infant, see "Infants," § 1.

Municipal regulation, see "Municipal Corporations," § 6.

Power of corporation to sell pools and book bets on horse races, see "Corporations," § 3.

Prohibition against prosecution of police for interference with racing association, see "Prohibition," § 1.

Title of statutes, see "Statutes," § 2.

§ 1. Gambling contracts and transactions.

Acts 1895, p. 8, § 40, appropriating money received by the state from pool selling and book making, *held* to estop the state to deny the validity of Rev. St. 1890, § 7419, and to forfeit the franchise of a corporation because engaged in such business.—*State ex inf. Hadley v. Delmar Jockey Club* (Mo. Sup.) 185.

§ 2. Criminal responsibility.

In a prosecution for setting up a gambling device, certain evidence *held* competent to show that a certain table was a gambling device.—*City of Mexico v. Harris* (Mo. App.) 505.

*Certain complaint for violation of city ordinance relative to gambling devices *held* sufficient against a motion to quash.—*City of Mexico v. Harris* (Mo. App.) 505.

Certain municipal ordinance relative to setting up gambling devices *held* directed against owners, proprietors, or mere occupants of premises in which such devices are set up.—*City of Mexico v. Harris* (Mo. App.) 505.

An indictment *held* not to authorize a conviction for exhibiting a banking game.—*Waggoner v. State* (Tex. Cr. App.) 38.

*It is no offense to play a game with dice at a private residence.—*Waggoner v. State* (Tex. Cr. App.) 38.

In a prosecution for gaming, evidence *held* not sufficient to support a conviction.—*Ables v. State* (Tex. Cr. App.) 414.

*Evidence *held* insufficient to support a conviction for gaming at a private residence.—*Spencer v. State* (Tex. Cr. App.) 847.

*Point annotated. See syllabus.

Evidence *held* insufficient to sustain a conviction of gaming.—*Handy v. State* (Tex. Cr. App.) 848.

*House occupied only by two boys *held* not a private residence within the gaming law.—*McCollum v. State* (Tex. Cr. App.) 848.

Facts *held* not to show accused guilty of exhibiting a gaming table and bank unless he knew and acquiesced in the custom of betting the table fees.—*Berry v. State* (Tex. Cr. App.) 1081.

On a trial for exhibiting a gaming table, evidence *held* insufficient to support a conviction.—*Moore v. State* (Tex. Cr. App.) 1082.

Evidence *held* to warrant a conviction for exhibiting a gaming table.—*Moore v. State* (Tex. Cr. App.) 1083.

GARNISHMENT.

See "Attachment"; "Execution,"

Against corporation, see "Corporations," § 3. Conclusions in answer of garnishee, see "Pleading," § 1.

Reversal of judgment on appeal or error, see "Appeal and Error," § 20.

Sufficiency of evidence in general, see "Evidence," § 10.

Waiver of defects in pleading, see "Pleading," § 7.

§ 1. Persons and property subject to garnishment.

Where an order of attachment was served on executor after compromise of will contest, interest of legatee *held* subject to attachment only to amount received under compromise.—*Murphy v. Whitesides* (Ky.) 5.

Under Rev. St. 1890, § 3435, administrator *held* personally subject to garnishment by creditor of distributee after order of distribution has been passed.—*Kierman v. Robertson* (Mo. App.) 138.

§ 2. Proceedings to procure.

Under Rev. St. 1895, art. 1579, *held* that an erroneous recital in an affidavit for garnishment might be disregarded as a clerical error.—*First Nat. Bank v. Brown* (Tex. Civ. App.) 1052.

§ 3. Lien of garnishment and liability of garnishee.

Order of attachment served only on execution defendant *held* not to create lien on property in hands of third persons.—*Murphy v. Whitesides* (Ky.) 5.

The garnishment of funds in the hands of a garnishee for a certain amount does not authorize him to withhold from the defendant a greater amount, though he knows that the judgment was for a greater sum than the amount named.—*Murphy v. Whitesides* (Ky.) 5.

GENERAL AVERAGE.

See "Shipping," § 2.

GIFTS.

Charitable gifts, see "Charities."

GOOD FAITH.

Of party asking equitable relief, see "Specific Performance," § 1.

Of purchaser, see "Sales," § 4; "Vendor and Purchaser," § 5.

GOOD WILL.

Assignability of, see "Assignments," § 1.
 Contract for sale of, as in restraint of trade, see "Contracts," § 1.
 Nominal damages for breach of contract for sale of, see "Damages," § 1.

Sellers of partnership business including good will, under agreement not to re-engage in such business, *held* not released from their obligation.—Bradford & Carson v. Montgomery Furniture Co. (Tenn.) 1104.

Sellers of business and good will *held* entitled to maintain action on note for value of good will, notwithstanding breach of contract not to re-engage in business.—Bradford & Carson v. Montgomery Furniture Co. (Tenn.) 1104.

GRAND JURY.

See "Indictment and Information."

Mandamus to compel setting aside order directing the taking of testimony before grand jury, see "Mandamus," § 1.

Under Cr. Code Prac. § 110, the court *held* to have no authority to direct a stenographer to take the testimony before the grand jury.—Commonwealth v. Berry (Ky.) 936.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Indemnity."

§ 1. Requisites and validity.

Parties signing contract whose names do not appear in body of contract *held* bound as guarantors.—Bosworth v. Pearce (Ky.) 277.

GUARDIAN AD LITEM.

Of infant, see "Infants," § 2.

Of insane person, see "Insane Persons," § 2.

GUARDIAN AND WARD.

Guardian ad litem, see "Infants," § 2; "Insane Persons," § 2.

§ 1. Custody and care of ward's person and estate.

*Where a guardian acted in good faith in the purchase of a note, and exercised reasonable care, she was not liable for failure to realize on the note the amount expected at the time of its purchase.—Henderson v. Lightner (Ky.) 945.

Under Rev. St. 1899, § 3504, a curator *held* to have no power, even with the approbation of the court, to mortgage his ward's land to obtain money to satisfy a pre-existing incumbrance.—Capen v. Garrison (Mo. Sup.) 368.

§ 2. Sales and conveyances under order of court.

Certain errors in certificate of appraisement, order approving sale, and curator's deed, *held* merely clerical and subject to correction.—Mets v. Wright (Mo. App.) 1125.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," §§ 16-18.

In criminal prosecutions, see "Criminal Law," § 30; "Homicide," § 10.

*Point annotated. See syllabus.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 6.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Municipal Corporations," §§ 7, 8; "Navigable Waters," § 1; "Turnpikes and Toll Roads."

Accidents at railroad crossings, see "Railroads," § 7.

Instructions in general in actions for injuries from defects in, see "Trial," §§ 6, 7, 9.

Pleading damages in action for obstruction, see "Damages," § 5.

§ 1. Establishment, alteration, and discontinuance.

*The public character of a road does not turn on the quantity of travel if the thoroughfare is open and in use by all having occasion to go over it.—Dow v. Kansas City Southern Ry. Co. (Mo. App.) 744.

*The use of a road by the public for more than 10 years establishes it as a public highway by adverse use.—Dow v. Kansas City Southern Ry. Co. (Mo. App.) 744.

*On issue as to whether a road was a public highway, the fact that it had never been worked by the county was an immaterial circumstance where it appeared that the public had used the road for over 10 years.—Dow v. Kansas City Southern Ry. Co. (Mo. App.) 744.

§ 2. Regulation and use for travel.

*Equity has cognizance of an action to restrain one from obstructing streets and alleys upon which plaintiff's lots and blocks abut.—Dickinson v. Arkansas City Imp. Co. (Ark.) 21.

*A railroad company obstructing a public highway *held* liable to prosecution for maintaining a nuisance, notwithstanding Ky. St. 1903, § 4335.—Commonwealth v. Illinois Cent. R. Co. (Ky.) 944.

*The unauthorized exaction of tolls on a public highway is a public nuisance, the continuance of which will be restrained by injunction at the suit of the state on the relation of the prosecuting attorney of the county.—State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co. (Mo. App.) 153.

On a prosecution for obstructing a public road, evidence *held* insufficient to show that the obstruction was wilful.—Isham v. State (Tex. Cr. App.) 808.

On a prosecution for obstructing a public road, the refusal of instructions as to the statutory requirements on the establishment of a road *held* error.—Isham v. State (Tex. Cr. App.) 808.

On a prosecution for obstructing a public road *held*, that the testimony of a certain witness, that the road was a public road when defendant was alleged to have obstructed it, was incompetent.—Isham v. State (Tex. Cr. App.) 808.

*Where plaintiff was injured by an obstruction in a roadway negligently placed there by defendant railroad company, knowing that the way was commonly used by the public, defendant was liable whether the roadway was a public highway or not.—San Antonio & A. P. Ry. Co. v. Wood (Tex. Civ. App.) 259.

HOLIDAYS.

See "Sunday."

HOMESTEAD.

Best and secondary evidence of designation of, see "Evidence," § 3.
Review of findings in general as to good faith in designating homestead, see "Appeal and Error," § 15.

§ 1. Nature, acquisition, and extent.

A homestead may be designated upon mortgaged land.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

The head of a family, residing on a tract of more than 200 acres of rural land, may designate a 200-acre tract therefrom as a homestead.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

Evidence held to authorize a finding that certain land was impressed with a homestead character.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

Under Sayles' Rev. Civ. St. 1897, arts. 2403-2405, a husband may designate a homestead without the knowledge of his wife, and she need not join in the instrument of designation.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

*A family composed of a man and his illegitimate daughter may assert homestead rights.—*Rutherford v. Mothershed* (Tex. Civ. App.) 1021.

§ 2. Transfer or incumbrance.

*A homestead is subject to an actual bona fide sale.—*Johnston v. Fraser* (Tex. Civ. App.) 49.

Land embraced within a deed of trust, which was used as a homestead at the time of the execution of the deed, was not subject to the mortgage lien.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

Recital in deed of trust held not to estop grantor's wife from claiming land as a homestead.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1003.

HOMICIDE.

Argument of counsel, see "Criminal Law," § 19.
Confessions, see "Criminal Law," § 15.
Continuance, see "Criminal Law," § 16.
Conviction of offense included in charge of homicide, see "Indictment and Information," § 6.

Declarations as evidence, see "Criminal Law," § 11.

Demonstrative evidence, see "Criminal Law," § 8.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 12.

Evidence of other offenses, see "Criminal Law," § 10.

Harmless error in general, see "Criminal Law," § 30.

Photographs as evidence, see "Criminal Law," § 8.

Province of court and jury in general, see "Criminal Law," § 20.

Relevancy of evidence in general, see "Criminal Law," § 9.

Waiver of objections to argument of counsel, see "Criminal Law," § 25.

§ 1. Murder.

*Great passion brought on without provocation is not such insanity as constitutes a defense for a homicide.—*Dow v. State* (Ark.) 28.

*Point annotated. See syllabus.

On a prosecution for murder, an instruction on murder in the first degree held to have properly presented the law.—*State v. McCarver* (Mo. Sup.) 684.

§ 2. Manslaughter.

Provocation on the part of defendant's father-in-law does not justify his killing his wife.—*Dow v. State* (Ark.) 28.

*Mere words are not sufficient provocation to reduce a willful homicide to manslaughter.—*Dow v. State* (Ark.) 28.

§ 3. Assault with intent to kill.

*The language of the statute held not to require that assault with intent to kill should have been made with a deadly weapon per se.—*State v. Ruck* (Mo. Sup.) 703.

§ 4. Excusable or justifiable homicide.

*In prosecution for homicide, an instruction defining the right of self-defense held improper.—*Carroll v. Commonwealth* (Ky.) 308.

*One entering into difficulty voluntarily held not justified in killing in self-defense.—*State v. Feeley* (Mo. Sup.) 663.

*One by merely seeking a difficulty held not to forfeit the right of self-defense.—*Leito v. State* (Tex. Cr. App.) 418.

*An instruction, on a trial for homicide, on the subject of an abandonment of the difficulty, held erroneous.—*Renow v. State* (Tex. Cr. App.) 801.

§ 5. Indictment and information.

An information for murder in the first degree, failing to recite that it was on the prosecuting attorney's oath, held insufficient to sustain a conviction of murder in the second degree.—*State v. Minor* (Mo. Sup.) 466.

*In a prosecution for assault with intent to kill under Rev. St. 1899, § 1848, an information held not fatally defective for failure to charge that the assault was committed "with malice aforethought."—*State v. Temple* (Mo. Sup.) 494.

An information held to sufficiently charge the offense of assault with intent to kill, defined by Rev. St. 1899, § 1847.—*State v. Temple* (Mo. Sup.) 869.

§ 6. Evidence—Admissibility in general.

Defendant, on prosecution for murder of his wife, having testified that their separation was caused by her parents, it was proper to admit testimony that he had abused her.—*Dow v. State* (Ark.) 28.

In prosecution for homicide, evidence that accused threatened to shoot the children of deceased and that he retained pistol in his hand until the fatal shot was fired held admissible.—*Smith v. Commonwealth* (Ky.) 610.

On a prosecution for murder, certain evidence held admissible as tending to show the condition of defendant's mind at the time, and to contradict his theory of necessary self-defense.—*Powers v. Commonwealth* (Ky.) 975.

*On a prosecution for murder, it was proper to admit evidence that prior to the killing defendant had been heard to say that he did not like deceased.—*Powers v. Commonwealth* (Ky.) 975.

*In a prosecution for murder, it is error to permit the state to show defendant's quarrelsome reputation until he has first attempted to show his good reputation for peace and quiet.—*State v. Richardson* (Mo. Sup.) 649.

In a prosecution for murder, evidence of general threats by defendant, before he met deceased

held admissible in evidence.—*State v. Feeley* (Mo. Sup.) 663.

*In prosecution for murder, evidence that deceased was quarrelsome and dangerous when drinking *held* properly admitted.—*State v. Feeley* (Mo. Sup.) 663.

Where defendant introduced evidence that deceased was quarrelsome and dangerous when drinking, state *held* entitled to show his good reputation.—*State v. Feeley* (Mo. Sup.) 663.

On prosecution for assault with intent to murder, admission of certain evidence *held* not erroneous.—*State v. Ruck* (Mo. Sup.) 706.

In a prosecution for murder, certain testimony of a witness that she procured the weapon with which defendant brought about the death *held* not objectionable.—*Young v. State* (Tex. Cr. App.) 841.

*On a prosecution for homicide, evidence of the details of a quarrel between witness and deceased *held* not admissible.—*St. Clair v. State* (Tex. Cr. App.) 1095.

§ 7. — Dying declarations.

*In prosecution for murder, evidence of dying declaration *held* competent.—*Keith v. Commonwealth* (Ky.) 599.

Where the prosecuting attorney refused to examine a witness in the absence of the jury to determine the competency of the testimony excepted to, defendant's counsel should have been permitted to do so.—*State v. Minor* (Mo. Sup.) 466.

§ 8. — Weight and sufficiency.

Evidence in a prosecution for murder *held* sufficient to support a conviction.—*Rains v. Commonwealth* (Ky.) 276.

Evidence on a trial for homicide *held* to support a conviction of voluntary manslaughter.—*Brown v. Commonwealth* (Ky.) 542.

In prosecution for murder, evidence *held* sufficient to support a conviction.—*Keith v. Commonwealth* (Ky.) 599.

In a prosecution for homicide, the mere use of a deadly weapon is insufficient to justify a presumption of murder in the second degree, unless such use was intentional.—*State v. Minor* (Mo. Sup.) 466.

On a prosecution for an assault with intent to kill, *held*, that the evidence was sufficient to warrant a conviction for assault with intent to kill without malice.—*State v. Heimbarger* (Mo. Sup.) 479.

Matters to be considered by jury, on prosecution for assault with intent to murder, in arriving at conclusion as to intent.—*State v. Ruck* (Mo. Sup.) 706.

§ 9. Trial.

*Refusal of instructions on manslaughter is proper, there being no evidence to reduce the offense to manslaughter.—*Dow v. State* (Ark.) 28.

On a trial for homicide, the giving of an instruction on manslaughter *held* not erroneous.—*Brown v. Commonwealth* (Ky.) 542.

Instruction authorizing conviction of voluntary manslaughter if homicide was committed "in sudden heat of passion and in sudden affray" *held* erroneous.—*Smith v. Commonwealth* (Ky.) 610.

In a prosecution for homicide, the submission of the question of murder in the first degree *held* improper.—*State v. Minor* (Mo. Sup.) 466.

In a prosecution for homicide, an instruction *held* an improper qualification of another, as authorizing a conviction of murder in the second degree without a finding that the killing was "intentional."—*State v. Minor* (Mo. Sup.) 466.

Under Rev. St. 1899, §§ 1847, 1849, 2369, 2370, it was not error, in a prosecution for assault with intent to kill, to charge on and permit the jury to convict of a felonious wounding.—*State v. Groves* (Mo. Sup.) 631.

*In a prosecution for murder, whatever grades of the crime defendant's testimony may tend to prove should be covered by appropriate instructions.—*State v. Richardson* (Mo. Sup.) 649.

In prosecution for murder, evidence *held* to justify an instruction on defendant's right of self-defense where he voluntarily entered into the difficulty.—*State v. Feeley* (Mo. Sup.) 663.

In prosecution for murder, failure of court to instruct on motive of defendant *held* not error.—*State v. Feeley* (Mo. Sup.) 663.

Evidence in prosecution for murder *held* not to authorize instruction on manslaughter in the fourth degree.—*State v. Todd* (Mo. Sup.) 674.

In a prosecution for murder, instruction *held* to sufficiently indicate facts necessary to authorize conviction of murder in the second degree.—*State v. Todd* (Mo. Sup.) 674.

In prosecution for murder, evidence *held* to justify an instruction that, if killing were done willfully, premeditatedly, and of malice aforethought, but without deliberation, defendant was guilty of murder in the second degree.—*State v. Todd* (Mo. Sup.) 674.

On a prosecution for murder, certain instructions on self-defense *held* proper.—*State v. McCarver* (Mo. Sup.) 684.

*It was for the jury to say whether a heavy quart beer bottle in the hands of a powerful man was not likely to produce death or great bodily harm when aimed at a vital part of the victim's body.—*State v. Ruck* (Mo. Sup.) 706.

Whether an assault was made with intent to murder *held* a question for the jury.—*State v. Ruck* (Mo. Sup.) 706.

In the absence of evidence of defendant's provoking the difficulty, *held*, an instruction that if he did provoke it, he forfeited his right of self-defense, should not have been given.—*Leito v. State* (Tex. Cr. App.) 418.

Facts *held* not to authorize a charge on threats in a homicide case.—*Leito v. State* (Tex. Cr. App.) 418.

*When court, on a trial for homicide, is authorized to charge on provoking the difficulty, stated.—*Renow v. State* (Tex. Cr. App.) 801.

*Evidence on a trial for homicide *held* not to authorize a charge on provoking the difficulty.—*Renow v. State* (Tex. Cr. App.) 801.

Evidence on a trial for homicide *held* not to authorize a charge with regard to an abandonment of the difficulty on the part of defendant.—*Renow v. State* (Tex. Cr. App.) 801.

On a trial for homicide, the court *held* required, under the evidence, to call the attention of the jury to adequate cause under the statute.—*Renow v. State* (Tex. Cr. App.) 801.

*On a prosecution for murder, an instruction on manslaughter *held* not sufficiently applicable to the facts.—*Ware v. State* (Tex. Cr. App.) 1093.

An instruction on the right of self-defense on apparent intention of deceased to execute previous threats *held* erroneous for requiring

* Point annotated. See syllabus.

a finding that defendant had been warned that deceased was a dangerous man.—*St. Clair v. State* (Tex. Cr. App.) 1095.

An instruction on killing after abandonment of a difficulty held insufficient for failure to instruct on the degree of the crime.—*St. Clair v. State* (Tex. Cr. App.) 1095.

§ 10. Appeal and error.

*An erroneous instruction on murder in the first degree held not prejudicial, where the jury found accused guilty of voluntary manslaughter.—*Brown v. Commonwealth* (Ky.) 542.

In a prosecution for murder, the admission of incompetent testimony affords no ground of reversal where no objection was made below.—*State v. Richardson* (Mo. Sup.) 649.

In prosecution for murder, any error in admission of evidence held not prejudicial to defendant.—*State v. Todd* (Mo. Sup.) 674.

*Under Rev. St. 1899, §§ 2369, 2535, any error in prosecution for murder in the first degree in authorizing conviction of murder in the second degree held not ground for reversal.—*State v. Todd* (Mo. Sup.) 674.

HOSPITALS.

See "Charities," § 1.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Bigamy"; "Divorce"; "Dower."

As mortgagors or mortgagees, see "Chattel Mortgages," § 1.

Attachment as affecting rights of, see "Attachment," § 4.

Competency as witnesses, see "Witnesses," § 1.

Creation of life estate by conveyances between, see "Life Estates."

Declarations as evidence in action against married woman, see "Evidence," § 5.

Evidence of declarations of wife, in joint prosecution for crime, see "Criminal Law," § 12.

Limitation of action for recovery of property held in trust for wife, see "Limitation of Actions," § 2.

Ratification of agency of husband for wife, see "Principal and Agent," § 2.

Recovery by wife for injuries caused by sale of liquor to husband, see "Intoxicating Liquors," § 9.

Rights of survivor, see "Executors and Administrators," § 3.

Transactions between in fraud of creditor, see "Fraudulent Conveyances," § 1.

Trust in favor of, see "Trusts," § 1.

Validity of note of, see "Bills and Notes," § 1.

§ 1. Conveyances, contracts, and other transactions between husband and wife.

*A husband may waive whatever marital rights he has in his wife's estate, and settle it upon her to her separate use.—*Bohannon v. Bohannon's Adm'x* (Ky.) 597.

Marriage is a sufficient consideration to support a conveyance from husband to wife.—*Welch v. Mann* (Mo. Sup.) 98.

*Contract whereby husband agrees to convey property to wife in satisfaction of claim for dower, alimony, or maintenance, held valid.—*O'Day v. Meadows* (Mo. Sup.) 637.

Contract between husband and wife in satisfaction of claim for dower and alimony held not

rescinded by suit by wife for divorce and alimony.—*O'Day v. Meadows* (Mo. Sup.) 637.

§ 2. Wife's separate estate.

Where a husband took the proceeds of his wife's property under an agreement to hold it in trust for her, she was on his decease entitled to the residue of his estate after the payment of his debts.—*Bohannon v. Bohannon's Adm'x* (Ky.) 597.

An agreement by a husband to hold the proceeds of his wife's property in trust for her held based upon a sufficient consideration.—*Bohannon v. Bohannon's Adm'x* (Ky.) 597.

*Where husband buys property and has title placed in name of wife held presumed that it was intended as provision for her.—*Siling v. Hendrickson* (Mo. Sup.) 105.

§ 3. Community property.

*A ring purchased by a wife during coverture is community property, in the absence of evidence that it was purchased with her separate funds.—*Sweeney v. Taylor Bros.* (Tex. Civ. App.) 442.

A husband may sell or pledge community property purchased by the wife.—*Sweeney v. Taylor Bros.* (Tex. Civ. App.) 442.

§ 4. Abandonment.

Evidence held sufficient to warrant a conviction of wife abandonment.—*State v. Jeffries* (Mo. App.) 501.

*In prosecution for wife abandonment, held competent to show that defendant was at the time of his marriage under indictment for seduction. Rev. St. 1899, § 1844.—*State v. Jeffries* (Mo. App.) 501.

HYPOTHETICAL QUESTIONS.

To experts in civil actions, see "Evidence," § 9.

IDENTITY.

Proof of in criminal prosecutions, see "Criminal Law," § 9.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 8.

IMPEACHMENT.

Of record, see "Appeal and Error," § 9.

Of witness, see "Witnesses," § 3.

IMPLIED CONTRACTS.

See "Indemnity"; "Money Received"; "Work and Labor."

IMPROVEMENTS.

Allowance or recovery of compensation, see "Trespass to Try Title," § 8.

Liens, see "Mechanics' Liens."

Public improvements, see "Municipal Corporations," § 5.

INCEST.

Evidence of other offenses, see "Criminal Law," § 10.

INCOMPETENT PERSONS.

See "Insane Persons."

*Point annotated. See syllabus.

INCUMBRANCES.

On homestead, see "Homestead," § 2.

INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INDECENCY.

See "Obscenity."

INDEMNITY.

See "Guaranty."

Indemnity insurance, see "Insurance," § 12.

A judgment against a telegraph company in favor of a railway company against which a judgment for loss of cattle escaping from a pasture in consequence of the telegraph company cutting a right of way fence had been rendered *held* proper.—*Southwestern Telegraph & Telephone Co. v. Krause* (Tex. Civ. App.) 431.

INDEPENDENT CONTRACTORS.

See "Master and Servant," § 12.

Liability for negligence in general, see "Negligence," § 2.

INDICTMENT AND INFORMATION.

See "Grand Jury."

Information in quo warranto, see "Quo Warranto," § 2.

Against particular classes of parties.

Banks, see "Banks and Banking," § 2.

Dentists, see "Physicians and Surgeons."

Officers of turnpike companies, see "Turnpikes and Toll Roads," § 1.

Turnpike company, see "Turnpikes and Toll Roads," § 1.

For particular offenses.

See "Bigamy"; "Bribery"; "Burglary," § 1; "Forgery"; "Gaming," § 2; "Homicide," § 5; "Larceny," § 2; "Obscenity"; "Rape," § 1.

Against insurance laws, see "Insurance," § 17.

Against liquor laws, see "Intoxicating Liquors," § 5.

Practicing dentistry without license, see "Physicians and Surgeons."

Violation of municipal ordinance, see "Municipal Corporations," § 6.

§ 1. Finding and filing of indictment or presentment.

*Court in which an indictment was found held authorized under certain circumstances to permit a copy to be filed.—*State v. McCarver* (Mo. Sup.) 684.

§ 2. Filing and formal requisites of information or complaint.

*Under the express provisions of Rev. St. 1899, §§ 2477, 2479, an information by the prosecuting attorney may be verified on his information and belief.—*State v. Temple* (Mo. Sup.) 869.

A file mark on an information, as follows: "Filed August 15, 1905. R. L. R., County Clerk"—*held* sufficient.—*Franklin v. State* (Tex. Cr. App.) 414.

A motion to quash a complaint and warrant on the ground that it did not appear with sufficient certainty that it was filed in the county

court of that county, or by the clerk of the county court of that county, *held* properly denied.—*Bennett v. State* (Tex. Cr. App.) 415.

§ 3. Requisites and sufficiency of accusation.

*In a prosecution for practicing dentistry without a license in violation of Acts 1897, p. 166, it was not necessary that the state should allege in the indictment or prove that defendant was not within an excepted class to which the statute did not apply.—*State v. Doerring* (Mo. Sup.) 489.

*An indictment *held* defective because alleging offense to have been committed after its date.—*Wright v. State* (Tex. Cr. App.) 253.

§ 4. Amendment.

*Substitution of one name for another as defendant in an information *held* proper.—*Kilcoyne v. State* (Tex. Cr. App.) 36.

§ 5. Issues, proof, and variance.

It is competent to prove that others not indicted conspired with the defendant to commit the offense charged.—*State v. Ruck* (Mo. Sup.) 706.

§ 6. Conviction of offense included in charge.

*Under Rev. St. 1899, § 2369, defendant *held* to have no right to complain of election of state to prosecute for murder in the second degree under indictment for murder in the first degree.—*State v. Feeley* (Mo. Sup.) 663.

§ 7. Waiver of defects and objections, and aliter by verdict.

*An objection that an information was not verified on the prosecuting attorney's knowledge *held* waived when not raised by motion to quash.—*State v. Temple* (Mo. Sup.) 869.

INFANTS.

See "Guardian and Ward"; "Parent and Child."

As parties to proceedings for revival of judgment, see "Judgment," § 7.

Injuries to, caused by operation of street railroad, see "Street Railroads," § 2.

Judicial sale of property of, see "Judicial Sales."

Partition of property of, see "Partition," § 1.

Sales of liquor to minor, see "Intoxicating Liquors," § 3.

§ 1. Custody and protection.

In a prosecution of a corporation for selling pools to and booking bets with minors in violation of Rev. St. 1899, § 2193, it was no defense that the corporation through its officers had no knowledge of the minority of its customers.—*State ex inf. Hadley v. Delmar Jockey Club* (Mo. Sup.) 185.

§ 2. Actions.

Under Civ. Code Prac. § 38, failure to file an affidavit before appointment of a guardian ad litem for an infant defendant *held* not cause for reversal, unless the infant was thereby prejudiced.—*Downing v. Thompson's Ex'r* (Ky.) 290.

INFERIOR COURTS.

See "Courts," § 3.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INHERITANCE.

See "Descent and Distribution."

* Point annotated. See syllabus.

INJUNCTION.

Effect in appellate court of adjudication in supreme court, see "Courts," § 2.
 Estoppel to maintain suit on injunction bond, see "Estoppel," § 3.
 Harmless error in entry of judgments on injunction bond, see "Appeal and Error," § 16.
 Jurisdiction of equity in general, see "Equity," § 1.
 Jurisdiction on appeal as dependent on amount in controversy, see "Appeal and Error," § 2.
 Parties to action on injunction bond after death of defendant, see "Executors and Administrators," § 2.
 Presumptions on appeal on dissolution of injunction, see "Appeal and Error," § 13.
 Real party in interest, see "Parties," § 1.

Restraining particular acts or proceedings.

Diversion of water, see "Waters and Water Courses," § 1.
 Operation of toll road, see "Turnpikes and Toll Roads," § 2.
 Restraining collection of tax, see "Taxation," § 4.
 Unauthorized exaction of tolls on road, see "Highways," § 2.

§ 1. Nature and grounds in general.

*Rev. St. 1899, § 3649, was properly considered as showing intention to authorize the remedy by injunction, though quo warranto would be a proper remedy.—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co.* (Mo. App.) 153.

*Injunction to restrain the unlawful collection of tolls from persons traveling on public highway *held* proper; quo warranto being inadequate.—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co.* (Mo. App.) 153.

*Injunction to restrain unlawful collection of tolls *held* proper as preventing a multiplicity of suits.—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co.* (Mo. App.) 153.

§ 2. Subjects of protection and relief.

Injunction *held* to lie against the erection of an obstruction between plaintiff's property and the water front of a lake whereon the property abutted.—*Davies v. Epstein* (Ark.) 19.

*An injunction will not lie to restrain the cutting of timber where there is no showing of irreparable injury or that defendant is insolvent.—*Haggart & McMasters v. Chapman-Dewey Land Co.* (Ark.) 492.

One having a valid contract with a school district as teacher may have an injunction restraining one claiming under an invalid contract from molesting him in the performance of his contract.—*Treadway v. Daniels* (Ky.) 981.

A bill to restrain defendant from cutting timber on plaintiff's land in violation of a contract *held* sustainable to prevent a multiplicity of suits at law, and to restrain a continuing trespass.—*Strother v. American Coopers Co.* (Mo. App.) 758.

§ 3. Preliminary and interlocutory injunctions.

*Rev. St. 1899, § 3639, *held* not to require the actual assessment of damages on dissolution of an injunction at the same term the injunction was dissolved, if the proceedings for such assessment were begun at that term.—*Sutliff v. Montgomery* (Mo. App.) 515.

Where an original motion for the assessment of damages on an injunction bond was filed at the term at which the injunction was dissolved, but such motion and a judgment thereon were set aside at a subsequent term, and an amended

motion filed, the latter should be treated as a part of the original proceedings.—*Sutliff v. Montgomery* (Mo. App.) 515.

Plaintiff, by appearing and consenting that a motion be set for trial at a subsequent day, when he appeared, waived a jury, and proceeded to trial, *held* to have waived any informality as to the time of the filing of the motion.—*Sutliff v. Montgomery* (Mo. App.) 515.

§ 4. Liabilities on bonds or undertakings.

*In an action on an injunction bond restraining defendant from removing timber from certain land *held*, that damages owing to removal of timber by plaintiff in the injunction suit during the pendency of the injunction were recoverable from the sureties.—*Miller v. Smythe* (Ky.) 964.

Under Rev. St. 1899, § 3640, judgment may be rendered against sureties on an injunction bond without notice.—*Sutliff v. Montgomery* (Mo. App.) 515.

IN PAIS.

Estoppel, see "Estoppel," § 3.

IN REM.

Proceedings for seizure of liquor, see "Intoxicating Liquors," § 8.

INSANE PERSONS.

Insanity as defense to prosecution for homicide, see "Homicide," § 1.

§ 1. Contracts.

A claim for services *held* properly allowed on the ground that the services were necessities.—*Key v. Harris* (Tenn.) 235.

§ 2. Actions.

*Fact that knowledge of plaintiff's insanity first occurred to defendant at trial *held* not ground for suspending proceedings until guardian ad litem was appointed.—*Koenig v. Union Depot Ry. Co.* (Mo. Sup.) 497.

*Rev. St. 1899, § 3687, making it the duty of every guardian of an insane person to prosecute and defend all actions instituted in behalf of or against his ward, is inapplicable, where no inquest has been held and there has been no adjudication of insanity.—*Koenig v. Union Depot Ry. Co.* (Mo. Sup.) 497.

INSOLVENCY.

As affecting right to injunction, see "Injunction," § 2.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

Repeal of laws relating to insolvent estates, see "Statutes," § 3.

INSPECTION.

Of animals, see "Animals."

INSTRUCTIONS.

In civil actions, see "Trial," § 6-11.

In criminal prosecutions, see "Criminal Law," § 21; "Homicide," § 9.

INSURANCE.

Competency of witnesses in action on policy, see "Witnesses," § 1.

Review in general in action on policy, see "Appeal and Error," § 15.

*Point annotated. See syllabus.

§ 1. Control and regulation in general.

Where plaintiff in a suit on a policy was not entitled to recover, she could not recover any penalty against insurer for withholding the alleged proceeds of the policy, under Acts 1901, p. 248, c. 141.—*Thompson v. Fidelity Mut. Life Ins. Co. (Tenn.)* 1098.

§ 2. Insurance companies.

Ky. St. 1903, § 677, *held* not to affect the right of creditors of an insolvent assessment insurance company to apply for the appointment of a receiver.—*Richardson v. People's Life & Accident Ins. Co. (Ky.)* 284.

§ 3. Insurance agents and brokers.

Insurance company *held* not entitled to recover from an agent premium which he should have collected, where it consented to rebating premiums in violation of Ky. St. 1903, § 656.—*National Life Ins. Co. v. Anderson (Ky.)* 976.

Under terms of contract of employment of insurance agent where company withdrew from territory, agent *held* not entitled to compensation for balance of term.—*National Life Ins. Co. v. Anderson (Ky.)* 976.

Insurance company *held* not entitled to forfeit agent's right to compensation for legitimate services after rebating premiums.—*National Life Ins. Co. v. Anderson (Ky.)* 976.

*Instructions from an insurance company to its agent not to write policies on property of insolvent or financially crippled debtors does not avoid a policy written on such a risk, unless it appear that insured had knowledge of such inhibition.—*German Ins. Co. v. Gibbs, Wilson & Co. (Tex. Civ. App.)* 1068.

*A local insurance agent in issuing a fire policy *held* to have acted not as agent of insured or of the payee, but for the insurer.—*German Ins. Co. v. Gibbs, Wilson & Co. (Tex. Civ. App.)* 1068.

§ 4. Insurable interest.

A life policy void at its inception for lack of insurable interest is not rendered valid by a clause declaring it incontestable after one year.—*Bromley's Adm'r v. Washington Life Ins. Co. (Ky.)* 17.

*A life policy nominally payable to insured's estate, but in reality issued for the benefit of an assignee, *held* void.—*Bromley's Adm'r v. Washington Life Ins. Co. (Ky.)* 17.

§ 5. The contract in general.

*Where an insurance company rejected an application for \$10,000 life insurance and issued a policy for \$5,000, there was no acceptance, and no contract of insurance existed.—*New York Life Ins. Co. v. Levy's Adm'r (Ky.)* 325.

*Under Rev. St. 1899, § 974, *held* an insurance company may make a parol contract of insurance.—*King v. Phoenix Ins. Co. (Mo. Sup.)* 892.

*An insurance agent under the power given him *held* authorized to renew a policy by parol.—*King v. Phoenix Ins. Co. (Mo. Sup.)* 892.

*Provision in the charter of an insurance company for signing policies *held* not to prevent its making an oral contract of insurance.—*King v. Phoenix Ins. Co. (Mo. Sup.)* 892.

*Reputation by an insurer on the ground that its agent had acted for insured *held* under the facts not sufficiently prompt.—*German Ins. Co. v. Gibbs, Wilson & Co. (Tex. Civ. App.)* 1068.

§ 6. Premiums, dues, and assessments.

Where defendant discovered that certain policies had been issued to him through plaintiff's fraud before any part of the insurance con-

tract had been performed by the insurance company, there was an entire failure of consideration for notes given for the premium thereon.—*Curry v. Stone (Tex. Civ. App.)* 263.

§ 7. Assignment or other transfer of policy.

*The charter of a life insurance company, in effect the same as Ky. St. 1903, §§ 654, 655, *held* not to prohibit the insured in a paid-up policy from assigning the policy to the company as collateral for a loan.—*Mutual Life Ins. Co. v. Twyman (Ky.)* 335.

*An insured in a life policy payable to his wife *held* entitled to assign the same to the insurer without the consent of the wife, notwithstanding Ky. St. 1903, § 654.—*Crice v. Illinois Life Ins. Co. (Ky.)* 560.

§ 8. Cancellation, surrender, abandonment, or rescission of policy.

*The act of an insured in a life policy, surrendering it to the insurer and receiving the cash surrender value, *held* binding on his wife as beneficiary.—*Crice v. Illinois Life Ins. Co. (Ky.)* 560.

Where policies were issued on an application containing false statements written therein by insurer's agent, it was insured's duty, on discovering the fraud, to disclose the same to the insurance company, and tender the policy for cancellation.—*Curry v. Stone (Tex. Civ. App.)* 263.

§ 9. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

*A life insurance company loaning money to a policy holder and taking the paid-up policy as collateral *held* required to resort to equity to enforce its rights on the nonpayment of the debt, and thereby determine the surrender value of the policy in the manner provided by Ky. St. 1903, § 653.—*Mutual Life Ins. Co. v. Twyman (Ky.)* 335.

An iron-safe clause in a policy *held* a mere condition subsequent, which insurer had power to waive.—*Carp v. Queen Ins. Co. (Mo. App.)* 1137.

*An iron-safe clause in an insurance policy *held* to require insured to keep books from the issuance of the policy, and not merely either from the issuance of the new or the old inventory.—*Carp v. Queen Ins. Co. (Mo. App.)* 1137.

A course of business between insurer and insured by which the former accepted premiums after maturity *held* insufficient to require insurer to accept a premium to avoid a forfeiture which was not tendered until after insured's death.—*Thompson v. Fidelity Mut. Life Ins. Co. (Tenn.)* 1098.

Where the yearly premium on a policy is payable in installments, a failure to pay any installment works a forfeiture, though the requirement of payment be regarded as a condition subsequent.—*Thompson v. Fidelity Mut. Life Ins. Co. (Tenn.)* 1098.

An incontestable clause in a policy *held* to mean that the policy was incontestable for causes other than nonpayment of premiums.—*Thompson v. Fidelity Mut. Life Ins. Co. (Tenn.)* 1098.

A provision in a policy *held* merely to authorize the insurer to deduct installments not due on the death of insured, but which would mature before the end of the current year, and did not give insured the right to a whole current year's insurance from the date of his payment of an installment of premium.—*Thompson v. Fidelity Mut. Life Ins. Co. (Tenn.)* 1098.

*Point annotated. See syllabus.

§ 10. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Facts *held* to constitute a waiver of insurer's right to claim a breach of an iron-safe clause in a policy.—*Carp v. Queen Ins. Co.* (Mo. App.) 1137.

*Evidence *held* to authorize a finding that a fire insurance agent had waived the iron-safe clause in policy.—*Riley v. American Cent. Ins. Co.* (Mo. App.) 1147.

*Insurance agent *held* to have authority to waive a provision that books be kept in fire-proof safe.—*Riley v. American Cent. Ins. Co.* (Mo. App.) 1147.

*Mere indulgences in the payment of premiums do not constitute a waiver of a condition authorizing forfeiture for nonpayment of premiums when due.—*Thompson v. Fidelity Mut. Life Ins. Co.* (Tenn.) 1068.

*Facts *held* insufficient to establish a habitual course of dealing which would justify insured in believing that the insurer would not insist on a forfeiture of the policy for failure to pay premiums at maturity.—*Thompson v. Fidelity Mut. Life Ins. Co.* (Tenn.) 1068.

*An insurance company would not be bound by the fraud of its agent in inducing the execution of certain policies after such fraud had been discovered by insured, in case the latter concealed the same.—*Curry v. Stone* (Tex. Civ. App.) 263.

*Where the insurer in a fire policy ascertained that its agent at the time of writing the policy was also the agent of the insured, if it desired to avoid the policy, it was its duty to manifest such intention promptly.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

§ 11. Risks and causes of loss.

*Where an explosion is caused by a fire on the insured property, and is a mere incident of the preceding fire, the fire is the cause of the whole loss within the risk insured.—*Hall & Hawkins v. National Fire Ins. Co.* (Tenn.) 402.

Insurer *held* not liable for a loss caused by an explosion in a building adjoining that containing the goods insured, caused by fire in such adjoining building only, under a policy excepting losses by explosion unless fire ensues, etc.—*Hall & Hawkins v. National Fire Ins. Co.* (Tenn.) 402.

§ 12. Extent of loss and liability of insurer.

Under employers' liability insurance policy, insurer *held* to have waived objection that liability for attachment costs against insured was not included within the policy.—*Myton v. Fidelity & Casualty Co. of New York* (Mo. App.) 1149.

Under employers' liability insurance policy, where insured settled with the plaintiff in action against insured, insured *held* bound for attachment costs included in judgment.—*Myton v. Fidelity & Casualty Co. of New York* (Mo. App.) 1149.

A builder's interest *held* one in real estate, so that the valued policy law applies to his policy on the building.—*King v. Phoenix Ins. Co.* (Mo. Sup.) 892.

§ 13. Notice and proof of loss.

*Ignorance of insurer at the time of an adjustment under a fire policy of facts which might have defeated the claim of the policy *held* of no avail if the insurer might have known them and was not fraudulently prevented from

learning them.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

*A nonwaiver clause in a fire policy *held* not to apply after an adjustment of the loss has been made.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

§ 14. Adjustment of loss.

*An adjustment of a loss under a fire policy may be set aside on a showing that it was fraudulent or made through a mistake of fact.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

§ 15. Right to proceeds.

A fire policy may be assigned orally after the loss.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

Where a fire policy by its terms was payable to a third person, insured could not, after the loss, assign his claim, so as to defeat the rights of the payees under the terms of the policy.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

§ 16. Actions on policies.

Facts *held* to show that there was no contract of life insurance.—*Torpey v. National Life Ins. Co.* (Ky.) 982.

In action on fire policy, evidence of agent's knowledge of failure of insured to comply with iron-safe clause *held* admissible to show waiver thereof.—*Riley v. American Cent. Ins. Co.* (Mo. App.) 1147.

An instruction in an action on a builder's fire policy *held* not erroneous in speaking of the building as the property of plaintiff.—*King v. Phoenix Ins. Co.* (Mo. Sup.) 892.

In an action on a fire policy payable to plaintiff, the fact that insured, plaintiff's debtor, obtained from the clerk of the court the premium which had been paid for the policy, *held* not to affect plaintiff's right to prosecute the action.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

*A creditor holding a fire policy as collateral security for an indebtedness in excess of the face of the policy may sue alone and recover the loss; neither the insured nor his legal representatives being necessary parties.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

*Where the person to whom a loss is payable is stipulated on the face of a fire policy, he may sue alone; neither the insured nor his legal representatives being necessary parties.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

In an action on a fire policy, the adjustment *held* evidence of the value of the goods destroyed, and prima facie proof of the amount due under the policy.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

*In an action on a fire policy, certain evidence *held* admissible as tending to prove an oral assignment of the policy after the loss.—*German Ins. Co. v. Gibbs, Wilson & Co.* (Tex. Civ. App.) 1068.

§ 17. Mutual benefit insurance.

In a prosecution for collecting insurance dues without a license, a variance between the indictment and evidence as to the name of the person from whom the dues were collected *held* not fatal.—*Skelton v. Commonwealth* (Ky.) 298.

In a prosecution for collecting insurance dues without a license, evidence bearing on the character of the association *held* admissible.—*Skelton v. Commonwealth* (Ky.) 298.

*Point annotated. See syllabus.

A corporation, though falling within Ky. St. 1903, § 664, defining assessment or co-operative insurance companies, *held* to fall within section 633, imposing a penalty on the agent of a foreign insurance company collecting insurance dues without a license.—*Skelton v. Commonwealth* (Ky.) 298.

INTENT.

Fraudulent, see "Fraudulent Conveyances," § 1.
Of parties to contract, see "Contracts," § 2.

INTEREST.

Instructions in general in relation to, see "Trial," § 9.

Insurable interest, see "Insurance," § 4.

Liability for on agreement for payment of loan on exchange of property, see "Exchange of Property."

Necessity of interest to authorize appointment of receiver, see "Receivers," § 1.

On bill or note, see "Bills and Notes," §§ 2, 3.

§ 1. Time and computation.

The method adopted in calculating interest on certain notes *held* not to result in charging interest twice on the same principal.—*Bramblett v. Deposit Bank of Carlisle* (Ky.) 283.

*The proper method of applying partial payments on interest-bearing notes defined.—*Bramblett v. Deposit Bank of Carlisle* (Ky.) 283.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 3.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

INTERNAL REVENUE.

Possession of United States special tax stamp as evidence in prosecution for offense against liquor laws, see "Intoxicating Liquors," § 6.

An oral contract *held* not invalid because of the stamp act (Act June 13, 1898, c. 448, 30 U. S. Stat. 452, § 7 [U. S. Comp. St. 1901, p. 2292]).—*King v. Phoenix Ins. Co.* (Mo. Sup.) 892.

INTERROGATORIES.

To witnesses, see, "Depositions."

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Arguments of counsel on trial for violating liquor law, see "Criminal Law," § 19.

Commerce regulations affecting sale of, see "Commerce," § 2.

Evidence of other offenses, see "Criminal Law," § 10.

Harmless error in prosecution for violating liquor law, see "Criminal Law," § 30.

Liability of saloon keeper for injuries caused by act of employe, see "Master and Servant," § 12.

Opinion evidence, see "Criminal Law," § 13.

Reception of evidence at trial for violating liquor law, see "Criminal Law," § 18.

Regulations of, as denial of equal protection of laws, see "Constitutional Law," § 4.

Special or local laws relating to, see "Statutes," § 1.

Sunday laws relating to, in general, see "Sunday."

§ 1. Constitutionality of acts and ordinances.

Gen. Laws 29th Leg. p. 91, c. 64, regulating the storage of intoxicating liquors in local option districts, *held* not unauthorized by Const. art. 16, § 20.—*Ex parte Massey* (Tex. Cr. App.) 1083.

Statute making it a misdemeanor to solicit an order for sale of liquors in local option district *held* not authorized by Const. art. 16, § 20.—*Ex parte Massey* (Tex. Cr. App.) 1083.

§ 2. Local option.

No official or tribunal can lawfully issue a license to a brewer to establish a depot or agency for the sale of beer in a local option community.—*Hager v. Jung Brewing Co.* (Ky.) 573.

*Publication of a notice of a local option election *held* sufficient within Rev. St. 1899, § 3029.—*State v. Dobbins* (Mo. App.) 136.

*A sale of liquor to a minor in local option territory cannot be prosecuted under the statute prohibiting sales to minors, as it is a violation of the local option law.—*Dean v. State* (Tex. Cr. App.) 38.

The commissioners' court has no authority to combine school districts in a justice precinct for the purpose of holding a local option election therein.—*Anderson v. State* (Tex. Cr. App.) 39.

§ 3. Licenses and taxes.

*An appeal from a judgment canceling a liquor license did not authorize the licensee to sell liquor pending such appeal.—*Goldman v. Goodrum* (Ark.) 865.

Under Sayles' Rev. Civ. St. art. 5060c, the approval of a liquor dealer's bond *held* insufficient to create any liability under it, in the absence of a filing of the bond.—*Allen v. Houck & Dieter Co.* (Tex. Civ. App.) 993.

*Under Gen. Laws 1901, p. 315, c. 136, obligor and sureties on liquor dealer's bond *held* not liable for acts of a vendee committed after a sale of the business by the obligor.—*Allen v. Houck & Dieter Co.* (Tex. Civ. App.) 993.

*No action lies on a liquor dealer's bond for a violation of its terms committed before the filing thereof.—*Allen v. Houck & Dieter Co.* (Tex. Civ. App.) 993.

In an action on a liquor dealer's bond, evidence examined, and *held* sufficient to present a question for the jury on the issue as to the date of the filing of the bond.—*Allen v. Houck & Dieter Co.* (Tex. Civ. App.) 993.

In an action on a liquor dealer's bond, the burden of proof is on plaintiff, who must establish all the facts necessary to his recovery by a preponderance of the evidence.—*Allen v. Houck & Dieter Co.* (Tex. Civ. App.) 993.

Where, in an action on a liquor dealer's bond, there was evidence on the issue as to the date of the filing of the bond, no reference should have been made in an instruction to the presumption that the bond was filed on the day of its date; such presumption being one of fact.—*Allen v. Houck & Dieter Co.* (Tex. Civ. App.) 993.

§ 4. Offenses.

Under Kirby's Dig. §§ 5140, 5141, prohibiting the keeping of "blind tigers," the use or control of the house in order to constitute the offense

* Point annotated. See syllabus.

need not be habitual nor permanent.—*Henry v. State* (Ark.) 405.

Evidence of sale of Peruna *held* sufficient to sustain a conviction of illegal sale of liquor, although the Peruna was sold to be used as a medicine.—*Stelle v. State* (Ark.) 530.

*On a trial for the sale of liquor without a license, a conviction *held* unauthorized under the evidence.—*Bailey v. Commonwealth* (Ky.) 545.

Under Ky. St. 1903, § 2570, evidence in prosecution for unlawfully selling intoxicating liquor *held* to show a pretense within the meaning of the section, justifying conviction.—*Merritt v. Commonwealth* (Ky.) 611.

*An express company *held* guilty of violation of the prohibition law, though erroneously believing a transaction was interstate commerce.—*Adams Express Co. v. Commonwealth* (Ky.) 932.

Facts *held* not to show a sale of liquor by defendant.—*Dean v. State* (Tex. Cr. App.) 38.

*Order on express company for package of whisky given by accused to another, who paid the charges and procured the package, *held* a sale.—*McNeely v. State* (Tex. Cr. App.) 419.

In a prosecution for the illegal sale of liquor, evidence that the purchaser in fact purchased for another, and that the two thereafter consumed the same, *held* immaterial.—*Smart v. State* (Tex. Cr. App.) 810.

The fact that defendant arranged with another to pay his liquor license tax and the other failed to do so was no defense to a prosecution for selling without a license.—*Meroney v. State* (Tex. Cr. App.) 844.

*Facts *held* not to show a sale of liquor.—*Boyd v. State* (Tex. Cr. App.) 845.

*To constitute a violation of the law prohibiting the keeping open of saloons on election days, it is not necessary that the opening of the saloon shall be willful.—*Cranfill v. State* (Tex. Cr. App.) 846.

Facts *held* not to show a sale of liquor in local option territory.—*Ex parte Massey* (Tex. Cr. App.) 1086.

On a prosecution for soliciting in local option territory an order for the sale of intoxicating liquor, facts *held* insufficient to warrant a conviction.—*Bruce v. State* (Tex. Cr. App.) 1092.

§ 5. Criminal Prosecutions—Indictment, information or complaint.

*In a prosecution for keeping open a saloon on election day, indictment *held* sufficiently definite in allegation as to location of barroom.—*Cranfill v. State* (Tex. Cr. App.) 846.

§ 6. — Evidence.

In a prosecution for illegally selling liquor, evidence *held* to sufficiently show the sale within a year next prior to the finding of the indictment, as required by Kirby's Dig. § 2106.—*Stelle v. State* (Ark.) 530.

Under Ky. St. 1903, § 2557b, possession or sticking up of United States special tax stamp at place of business in local option territory *held* prima facie evidence of violation of law.—*Hestand v. Commonwealth* (Ky.) 12.

Evidence on a prosecution of an express company for violation of the prohibition law *held* to show that it had knowledge of the nature of the transaction.—*Adams Express Co. v. Commonwealth* (Ky.) 932.

*On a trial for violating the local option law, the evidence *held* not to show illegal sale.—*Kincaid v. State* (Tex. Cr. App.) 415.

On a prosecution for violation of the local option law, evidence considered and *held* insufficient to connect defendant with the illegal sale.—*O'Neal v. State* (Tex. Cr. App.) 417.

In prosecution for violation of local option law, evidence that accused was told how to get out a package of whisky consigned to him *held* properly excluded.—*McNeely v. State* (Tex. Cr. App.) 419.

Evidence in a prosecution for violation of the local option law *held* sufficient to justify a finding that a transaction constituted a sale, and not a loan.—*Choran v. State* (Tex. Cr. App.) 422.

In a prosecution for violation of the local option law by selling certain bitters, which defendant claimed were not intoxicating, it was not competent for the state to prove that bitters not shown to be of the variety sold by defendant were intoxicating.—*McRoberts v. State* (Tex. Cr. App.) 804.

*In a prosecution for violation of the local option law, certain evidence as to sales other than the one charged *held* admissible.—*McRoberts v. State* (Tex. Cr. App.) 804.

In a prosecution for the illegal sale of liquor, certain evidence *held* admissible.—*McRoberts v. State* (Tex. Cr. App.) 804.

*In a prosecution for violating the local option law, evidence of defendant's refusal to sell beer to others under similar circumstances *held* inadmissible.—*Smart v. State* (Tex. Cr. App.) 810.

*In a prosecution for violating the local option law, evidence that defendant paid an internal revenue license subsequent to the transaction for which he was indicted was inadmissible.—*Lane v. State* (Tex. Cr. App.) 839.

In a prosecution for violating the local option law, evidence *held* sufficient to sustain a conviction.—*Lane v. State* (Tex. Cr. App.) 839.

Evidence examined, and *held* sufficient to support a conviction of keeping open a saloon on an election day.—*Cranfill v. State* (Tex. Cr. App.) 846.

§ 7. — Trial.

In a prosecution under the blind tiger statute (Kirby's Dig. §§ 5140, 5141) for the illegal sale of liquor, certain charge as to defendant's use of the premises in question *held* properly refused.—*Henry v. State* (Ark.) 405.

On a prosecution for violation of the local option law, evidence *held* to authorize the jury to find defendant guilty.—*Hestand v. Commonwealth* (Ky.) 12.

In a prosecution for violation of the local option law, evidence *held* to require an instruction on mistake of fact.—*McRoberts v. State* (Tex. Cr. App.) 804.

In a prosecution for violating the local option law, the jury having been confined to a single count of the information, an instruction requiring them to specify the count under which they found defendant guilty, if at all, was properly refused.—*Smart v. State* (Tex. Cr. App.) 810.

In prosecution for violating the local option law, charge on the subject of sale *held* not full enough, and a requested special charge should have been given.—*Lane v. State* (Tex. Cr. App.) 839.

§ 8. Searches, seizures, and forfeitures.

*A proceeding under Kirby's Dig. § 5137, for the destruction of liquor shipped into a prohibited district to be sold contrary to law, *held* a

*Point annotated. See syllabus.

proceeding in rem.—*Osborne v. State* (Ark.) 406.

In a proceeding under Kirby's Dig. § 5137, to destroy certain liquor then being sold in a prohibited district contrary to law, it was no defense that the owner had no knowledge that it was being so sold against his will by his agent.—*Osborne v. State* (Ark.) 406.

§ 9. Civil damage laws.

A saloon keeper *held* not bound to exercise the same degree of care for the protection of his patrons as is required of an innkeeper and a common carrier.—*Peter Anderson & Co. v. Diaz* (Ark.) 861.

The statute requiring saloon keepers to pay damages occasioned by reason of liquor sold *held* not to impose a liability for personal injuries to a patron by the malicious act of an employé and a third person.—*Peter Anderson & Co. v. Diaz* (Ark.) 861.

*Wife of habitual drunkard may sue on liquor dealer's bond for the act of the dealer in selling liquor to her husband.—*Burlew v. Schiller* (Tex. Civ. App.) 814.

§ 10. Rights of property and contracts.

*A seller of intoxicating liquors pending appeal from a judgment canceling his license *held* not entitled to recover the price.—*Goldman v. Goodrum* (Ark.) 865.

INVESTMENT COMPANIES.

See "Banks and Banking," § 2.

IRON-SAFE CLAUSE.

See "Insurance," §§ 9, 10.

ISSUES.

In criminal prosecutions, see "Indictment and Information," § 5.

Presented for review on appeal, see "Appeal and Error," § 4.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 5.

Plea of former acquittal, see "Criminal Law," § 7.

Prohibition against criminal prosecution on ground of former jeopardy, see "Prohibition," § 1.

JOINDER.

Effect of improper joinder of party on removability of cause, see "Removal of Causes," § 2, 3.

JOINT TORT FEASORS.

Effect of release of one of joint wrongdoers, see "Release," § 2.

JUDGES.

See "Courts"; "Justices of the Peace."

Effect of disqualification on extension of time to file bill of exceptions, see "Exceptions, Bill of," § 1.

Mandamus to judge, see "Mandamus," § 1.

Remarks and conduct at trial, see "Criminal Law," § 17.

§ 1. Rights, powers, duties, and liabilities.

The ground assigned by a circuit judge to call in the judge of another circuit to try a

case *held* sufficient, under Rev. St. 1899, §§ 1678, 1679.—*Dauwalter v. Missouri Pac. Ry. Co.* (Mo. App.) 516.

A judge called in to try a criminal case under Rev. St. 1899, § 2597, *held* not disqualified to sit merely because he had no authority to try criminal cases in his own circuit.—*State v. McCarver* (Mo. Sup.) 684.

§ 2. Disqualification to act.

Under Rev. St. 1899, § 1602, a judge, having been of counsel in the case, was incompetent to sit in the case for the purpose of settling the bill of exceptions. *State ex rel. Gallivan v. Bradley* (Mo. Sup.) 464.

JUDGMENT.

Certiorari to review, see "Certiorari," § 1. Decisions of courts in general, see "Courts," § 2.

Direction of verdict on plea of *res judicata*, see "Trial," § 5.

Effect of stipulation on power of court to enter judgment, see "Stipulations."

In justice's court, see "Justices of the Peace," § 1.

Review, see "Appeal and Error."

Sales under judgment, see "Judicial Sales."

Transfer of suit to set aside, see "Courts," § 5.

Trial of equitable defense as condition precedent to, see "Trial," § 1.

In particular civil actions or proceedings.

See "Divorce," § 3; "Quieting Title," § 2.

Decree in equity, see "Equity," § 3.

For sale of delinquent lands, see "Taxation," §§ 5, 6.

On appeal or writ of error, see "Appeal and Error," § 20.

§ 1. On trial of issues.

*A judgment for the sale of land is not void, where such land can be identified from the description given; nor is the judgment erroneous unless it be shown that the description is so vague as to be misleading, resulting in injury to the owner of the land sold.—*Brumley v. Nichols & Shepherd Co.* (Ky.) 548.

*In an action for personal injuries, there can be no recovery for doctor's fees or loss of time in excess of the amounts claimed in the petition for such items.—*Smoot v. Kansas City* (Mo. Sup.) 363.

Plaintiff *held* not entitled to recover for ejection from defendant's train on a different theory than that pleaded by him.—*Gulf, C. & S. F. Ry. Co. v. Riney* (Tex. Civ. App.) 54.

In action against firm, judgment against member of the firm *held* improper.—*King v. Monitor Drill Co.* (Tex. Civ. App.) 1046.

§ 2. Opening or vacating.

*Where a judgment against one of the defendants was void for want of service, it was proper for the court to vacate the same, though such defendant had no further interest in the controversy.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

§ 3. Equitable relief.

A petition in a suit to set aside a judgment as obtained by fraud *held* not demurrable.—*Crow v. Reliable Jewelry Co.* (Mo. App.) 742.

§ 4. Collateral attack.

Where a judgment recites that defendant had been duly summoned, it will be presumed on collateral attack that such recital is based on evidence before the court.—*Hearn v. Ayres* (Ark.) 768.

In bankruptcy proceedings, court *held* presumptively authorized to render judgment di-

*Point annotated. See syllabus.

recting and approving sale of trust property.—*Fitch v. Gentry* (Ky.) 586.

Where a judgment recited due service by publication and that defendants had made default, it would be presumed *prima facie* that the court made such finding on competent evidence and notice.—*Harbert v. Durden* (Mo. App.) 746.

*Where a judgment on a cross-bill showed that it was rendered without service, it was subject to collateral attack.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

§ 5. Merger and bar of causes of action and defenses.

Recovery by the grantor of a right of way of damages for breach of covenant to put in crossings *held* not to bar recovery for subsequent refusal of the grantee to allow the grantor to put in crossings, right to which was impliedly reserved by the deed.—*Wilson v. Illinois Cent. R. Co.* (Ky.) 602.

*Action in ejectment *held* not a bar to a second action.—*Crowl v. Crowl* (Mo. Sup.) 890.

§ 6. Conclusiveness of adjudication.

Letter of Secretary of Interior to Commissioner of General Land Office *held* inadmissible in action to quiet title to land lying between meander line and main course of river.—*Chapman & Dewey Land Co. v. Bigelow* (Ark.) 534.

*Where tax bills were assigned as collateral to a bank which threatened suit thereon, a judgment against the bank canceling the bills was binding on the assignors.—*City of Carthage ex rel. Cook v. Weesner* (Mo. App.) 178.

*Holders of special tax bills *held* bound by a judgment canceling the bills.—*City of Carthage ex rel. Cook v. Weesner* (Mo. App.) 178.

*Reversal of a judgment by the court of civil appeals, without remanding the cause, destroys the effect of the judgment as an estoppel.—*Stone v. Grand Lodge A. O. U. W.* (Mo. App.) 1143.

Parties *held* not bound by a judgment in an action brought without their authority.—*International & G. N. Ry. Co. v. Brisenio* (Tex. Civ. App.) 998.

A judgment foreclosing the state's lien for delinquent taxes *held* conclusive against all persons who were parties to the suit and who were served with citation.—*Ball v. Carroll* (Tex. Civ. App.) 1023.

§ 7. Suspension, enforcement, and revival.

A revival *held* to be that of a judgment, and not of an action.—*Galloway v. Craig* (Ky.) 320.

An administrator *held* not a necessary party to revival of judgment for sale of land.—*Galloway v. Craig* (Ky.) 320.

Notice to infants for revival of a judgment *held* properly served under Code 1854, § 437.—*Galloway v. Craig* (Ky.) 320.

*An assignee of a judgment *held* without legal capacity to sue out a writ of *scire facias* in his own name to revive the judgment.—*Lawrence County Bank v. Lambert* (Mo. App.) 755.

§ 8. Pleading and evidence of judgment as estoppel or defense.

On a plea of former adjudication, parol testimony *held* admissible to prove that pending

suit and former one arose from same cause of action.—*Latta v. Wiley* (Tex. Civ. App.) 433.

JUDICIAL NOTICE.

By appellate court, as to its own records, see "Appeal and Error," § 9.
In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

As affected by statutes relating to champerty, see "Champerty and Maintenance."

Of property of decedent, see "Executors and Administrators," § 6.

Of property of infant, see "Guardian and Ward," § 2.

On execution, see "Execution," § 3.

Right of person claiming to hold lease of property sold at judicial sale, to be made party, see "Parties," § 2.

Right of purchaser at, to maintain trespass to try title, see "Trespass to Try Title," § 1.

Under Civ. Code Prac. § 125, description of land in a judgment and in the commissioner's report of sale *held* sufficient.—*Downing v. Thompson's Ex'r* (Ky.) 290.

A commissioner's report of the sale of land *held* not defective for failure to state the time and place of the sale.—*Downing v. Thompson's Ex'r* (Ky.) 290.

That a commissioner made his report of a sale of land three days before the time the judgment directed him to report, and that the report was not recorded when made, *held* immaterial.—*Downing v. Thompson's Ex'r* (Ky.) 290.

That land sold at judicial sale is incumbered with a lien for taxes is not ground to set aside the sale, but if the purchaser pays the taxes he is entitled to credit therefor.—*Downing v. Thompson's Ex'r* (Ky.) 290.

Premature revival of a judgment *held* not to make void a sale under it.—*Galloway v. Craig* (Ky.) 320.

Statement as to presumption in favor of a judgment under which defendants claim land, in an action therefor after they have had possession for 20 years.—*Galloway v. Craig* (Ky.) 320.

Sale under a judgment not being void *held* it was not open to collateral attack.—*Galloway v. Craig* (Ky.) 320.

Failure of guardian ad litem to answer in proceedings to revive a judgment against infants *held* not to make void the sale under the judgment.—*Galloway v. Craig* (Ky.) 320.

JURISDICTION.

Amount in controversy, see "Courts," § 3; "Criminal Law," § 27.

Effect of appearance, see "Appearance."

Jurisdiction of particular actions, proceedings, or subjects.

See "Charities," § 1; "Divorce," § 3.

Actions by or against carriers, see "Carriers," § 6.

Criminal prosecutions, see "Criminal Law," § 2.

Special jurisdictions.

See "Equity," § 1.

Appellate jurisdiction, see "Criminal Law," § 27.

Particular courts, see "Courts."

*Point annotated. See syllabus.

JURY.

See "Grand Jury."

Custody and conduct, see "Criminal Law," § 23; "Trial," § 12.

Harmless error in rulings relating to, see "Appeal and Error," § 16.

Instructions in civil actions, see "Trial," §§ 6-11.

Instructions in criminal prosecutions, see "Criminal Law," § 21.

Jury trial in condemnation proceedings, see "Eminent Domain," § 1.

Misconduct of, ground for new trial, see "Criminal Law," §§ 26-30.

Questions for jury in civil actions, see "Trial," § 5.

Questions for jury in criminal prosecutions, see "Criminal Law," § 20.

Taking case or question from jury at trial, see "Trial," § 5.

Verdict in civil actions, see "Trial," § 13.

Verdict in criminal prosecutions, see "Criminal Law," § 24.

§ 1. Right to trial by jury.

Under Shannon's Code, §§ 5739, 6283, 6284, a rule of a chancery court construed to mean that a jury must be applied for on the first day of the term at which the cause is tried.—*Harris v. Bogle* (Tenn.) 849.

If a jury is not demanded in chancery in the pleadings filed by either party under Shannon's Code, § 6283, the case *held* to fall within section 6374, and Chancery Rule 2, § 4, so that no jury can be demanded until the rights of the other party have been fully enjoyed under section 6274 and Rule 2, § 4.—*Harris v. Bogle* (Tenn.) 849.

§ 2. Summoning, attendance, discharge, and compensation.

Where a jury was summoned for each of four or five weeks of a term by jury commissioners, but no jury was summoned for the sixth week of the term, a jury was properly summoned for that week by the sheriff.—*Davis v. State* (Tex. Cr. App.) 256.

§ 3. Competency of jurors, challenges, and objections.

*Under Ky. St. 1903, § 2258, two defendants *held* entitled only to three peremptory challenges, not to three each.—*Pendly v. Illinois Cent. R. Co.* (Ky.) 1.

Where a party objected to ruling permitting three peremptory challenges by each defendant, the error *held* not waived by failure to move to discharge the jury.—*Pendly v. Illinois Cent. R. Co.* (Ky.) 1.

*A juror *held* not disqualified by his opinion.—*State v. McCarver* (Mo. Sup.) 684.

*Challenges to jurors for cause must be specifically stated.—*State v. McCarver* (Mo. Sup.) 684.

*Defendants having conflicting interests are distinct parties within the statute relating to challenges to jurors.—*Sweeney v. Taylor Bros.* (Tex. Civ. App.) 442.

Permission granted to plaintiff's counsel, after the jury had been impaneled, to interrogate a juror as to an opinion expressed derogatory to plaintiff, *held* not error.—*Galveston, H. & S. A. Ry. Co. v. Paschall* (Tex. Civ. App.) 446.

*In trespass to try title, jurors otherwise qualified *held* not disqualified because members of an organization known "as actual settlers."—*Jones v. Wright* (Tex. Civ. App.) 1010.

*Point annotated. See syllabus.

JUSTICES OF THE PEACE.

Costs on appeal, see "Costs," § 3.

Jurisdiction of criminal prosecutions, see "Criminal Law," § 2.

Preliminary proceedings on charge of crime, see "Criminal Law," § 6.

§ 1. Procedure in civil cases.

In a suit commenced in a justice court for breach of contract, it was not necessary that plaintiff allege an acceptance of defendant's offer by conduct in order to entitle it to offer parol proof thereof.—*H. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co.* (Mo. App.) 121.

A complaint before a justice to enforce an agister's lien, under Rev. St. 1899, c. 47, art. 2, must state the facts requisite to give the justice jurisdiction.—*Patchen v. Durrett* (Mo. App.) 721.

If the language of a written complaint filed in a justice court is insufficient, it may be supplemented by oral pleadings.—*Gulf. C. & S. F. Ry. Co. v. Funk* (Tex. Civ. App.) 1032.

Rev. St. 1895, art. 1643, *held* not to render a justice's judgment void because it fails to provide in terms for execution or other process.—*Texas & N. O. R. Co. v. Garrett* (Tex. Civ. App.) 1040.

§ 2. Review of proceedings.

*The circuit court, on appeal from a justice, *held* without jurisdiction to entertain an amended complaint, filed after appeal, in which the value of the property sued for was increased beyond the justice's jurisdiction.—*Rose v. Christinett* (Ark.) 866.

Where the circuit court was without jurisdiction on appeal from a justice to entertain an amended complaint demanding damages in excess of the justice's jurisdiction, such defect could not be cured by a remittitur after judgment.—*Rose v. Christinett* (Ark.) 866.

Under Rev. St. 1899, c. 47, art. 2, and sections 4236, 4079, a complaint before a justice to enforce an alleged agister's lien, failing to contain jurisdictional facts, *held* amendable after appeal to the circuit court.—*Patchen v. Durrett* (Mo. App.) 721.

Under Rev. St. 1899, §§ 4081, 4082, 4083, on appeal from a justice, the action may not be dismissed as to an appellant and judgment rendered against the surety alone.—*Crow v. Reliable Jewelry Co.* (Mo. App.) 742.

Surety on an appeal bond on appeal from a judgment *held* not to have been guilty of negligence in failing to know until after rendition of judgment that judgment had been taken against him alone.—*Crow v. Reliable Jewelry Co.* (Mo. App.) 742.

JUSTIFICATION.

Of homicide, see "Homicide," § 4.

KNOWLEDGE.

Of infancy as affecting criminal responsibility for offenses against infants, see "Infants," § 1.

Of insanity as affecting proceedings by or against insane person, see "Insane Persons," § 2.

Of witness expressing opinion, see "Criminal Law," § 13.

LACHES.

Action against executor, see "Executors and Administrators," § 7.

LANDLORD AND TENANT.

Liabilities for rent on partnership accounting, see "Partnership," § 4.

Limitation of action for breach of contract to repair demised premises, see "Limitation of Actions," § 1.

Mining leases, see "Mines and Minerals," § 1. Presumptions on appeal in action for breach of contract to lease, see "Appeal and Error," § 13.

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

Right of person claiming to hold lease of property sold at judicial sale, to be made party, see "Parties," § 2.

Tenancy of party as affecting maintenance of trespass to try title, see "Trespass to Try Title," § 2.

§ 1. Leases and agreements in general.

In an action for breach of contract of lease, evidence of written contract signed by third person *held* not a variance.—Hlass v. Fulford (Ark.) 862.

A lease *held* void for fraud of the landlord.—Knoepker v. Redel (Mo. App.) 171.

§ 2 Landlord's title and reversion.

*Tenants of property cannot acquire title by limitation under a tax deed.—Dickinson v. Arkansas City Imp. Co. (Ark.) 21.

*Limitations *held* not to run in favor of a tenant who purchased the land at tax sale against its landlord until notice to the latter of its repudiation of the tenancy.—Bryson & Hartgrove v. Boyce (Tex. Civ. App.) 820.

§ 3. Terms for years.

Statement of remedy for subletting in violation of a provision of the lease.—Knoepker v. Redel (Mo. App.) 171.

Provision of a lease against subletting *held* waived.—Knoepker v. Redel (Mo. App.) 171.

§ 4. Premises, and enjoyment and use thereof.

A lease by its description *held* to give an interest in the south half of a section.—Santa Rosa Irr. Co. v. Pecos River Irr. Co. (Tex. Civ. App.) 1014.

§ 5. Rent and advances.

Certain evidence construed as an admission by a lessor of the proper amount of rent due from his lessee.—Dickinson v. Arkansas City Imp. Co. (Ark.) 21.

A provision of a lease as to payment of rent in case of inundation of the land construed.—Knoepker v. Redel (Mo. App.) 171.

*Lien of a landlord on crops to secure advance to the tenant *held* waived as against a buyer from the tenant.—Planters' Compress Co. v. Howard (Tex. Civ. App.) 44.

§ 6. Re-entry and recovery of possession by landlord.

Under Civ. Code Prac. § 452, and Ky. St. 1903, § 2292, one who obtains possession of premises from a tenant under a lease for more than two years *held* subject to dispossession by a forcible detainer.—Haase v. Schickner (Ky.) 949.

LANDS.

See "Public Lands."

LARCENY.

See "Receiving Stolen Goods"; "Robbery." Harmless error, see "Criminal Law," § 30. Instructions in general, see "Criminal Law," § 21.

§ 1. Offenses and responsibility therefor.

Under Kirby's Dig. §§ 1821-1824, defining grand larceny, the stealing of a bank check of the value of \$15 is grand larceny.—Crossland v. State (Ark.) 776.

*A pistol may be the subject of larceny, though its sale within the state is prohibited by Shannon's Code, § 6650.—Osborne v. State (Tenn.) 853.

*Facts *held* insufficient to sustain a conviction for the theft of a mule.—Havard v. State (Tex. Cr. App.) 804.

§ 2. Prosecution and punishment.

In a prosecution for larceny of a check, evidence of previous transactions between defendant and prosecuting witness *held* admissible.—Crossland v. State (Ark.) 776.

Evidence in prosecution for larceny *held* sufficient to support conviction.—State v. Walker (Mo. Sup.) 659.

*On a trial for larceny, the question of the identity of the goods stolen and the goods found in defendant's possession *held* for the jury.—State v. James (Mo. Sup.) 679.

*An indictment for larceny *held* to sufficiently describe the money taken.—Brewin v. State (Tex. Cr. App.) 420.

*An information on a prosecution for larceny properly charged the possession as being in the one who had the custody of the property, although he was not the owner.—Cain v. State (Tex. Cr. App.) 808.

On a prosecution for larceny, evidence considered, and *held* that the question whether defendant took the property for temporary use and not to permanently appropriate the same was for the jury.—Cain v. State (Tex. Cr. App.) 808.

LAST CLEAR CHANCE.

Doctrine of in action for injuries caused by operation of street railroad, see "Street Railroads," § 1.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 19.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

Payment, see "Executors and Administrators," § 5.

LEGATEES.

Garnishment of interest of, see "Garnishment," § 1.

LEGISLATIVE POWER.

See "Municipal Corporations," § 2.

LETTERS PATENT.

For public lands, see "Public Lands," §§ 2, 3.

LEVEES.

Taxation of levee land, see "Taxation," § 2.

* Point annotated. See syllabus.

LEVY.

Of attachment, see "Attachment," § 2.
Of taxes, see "Taxation," § 3.

LEWDNESS.

See "Obscenity."

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.

Petition *held* insufficient to show a libel by defendant against trustee of a hospital.—Phythian v. Raison (Ky.) 591.

LICENSES.

Care required as to licensees, see "Negligence," § 1; "Railroads," § 8.

For practice of medicine or dentistry see "Physicians and Surgeons."

For sale of intoxicating liquors, see "Intoxicating Liquors," §§ 2, 3.

Injuries to licensees, see "Railroads," § 6.

Municipal regulations, see "Municipal Corporations," §§ 3, 9.

Of insurance agent, see "Insurance," § 17.

Of investment companies, see "Banks and Banking," § 2.

Parties on appeal in proceedings to obtain ferry license, see "Appeal and Error," § 3.

To foreign corporations, see "Corporations," § 5.

LIENS.

Effect of sale to bona fide purchaser, see "Sales," § 4.

Enforcement in justice's court, see "Justices of the Peace," §§ 1, 2.

Subrogation to right to lien, see "Subrogation."

Liens acquired by particular remedies or proceedings.

See "Attachment," § 3; "Garnishment," § 3.

Particular classes of liens.

See "Carriers," § 2; "Mechanics' Liens"; "Railroads," § 4.

Landlord's lien for rent, see "Landlord and Tenant," § 5.

Mortgage, see "Chattel Mortgages," § 1.

Of brokers, see "Brokers," § 1.

On cargo, see "Shipping," § 2.

Pledge, see "Pledges."

Vendor's lien on goods sold, see "Sales," § 6.

Vendor's lien on lands sold, see "Vendor and Purchaser," § 6.

Mortgagee in a mortgage executed by a curator on lands of his wards to obtain money to pay a pre-existing incumbrance *held* not entitled to an equitable lien on the property.—Capen v. Garrison (Mo. Sup.) 368.

LIFE ESTATES.

See "Dower."

Creation by deed, see "Deeds," § 2.

Partition of, see "Partition," § 1.

Under Rev. St. 1899, §§ 900, 4506, husband may convey estate to wife, beginning at his death, without creating particular estate.—O'Day v. Meadows (Mo. Sup.) 637.

LIFE INSURANCE.

See "Insurance."

* Point annotated. See syllabus.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Criminal prosecutions, see "Criminal Law," § 4.

Effect of lis pendens, see "Lis Pendens."

Foreclosure, see "Mortgages," § 3.

Sufficiency of title by limitations to authorize specific performance, see "Specific Performance," § 1.

§ 1. Statutes of limitation.

Where a provision in a conveyance imposes on the grantee the payment of certain debts of the grantor, an action thereon is barred by limitations after five years.—Collings v. Collings (Ky.) 577.

An action by a lessee against the purchaser of the premises for his failure to repair the same as required by the written lease executed by the vendor is an action founded on a contract in writing within the four-year statute of limitations.—Houston Saengerbund v. Dunn (Tex. Civ. App.) 429.

An action based on the implied obligation of a landlord to repair a part of the building not under the control of the lessee is barred by the two-year statute of limitations.—Houston Saengerbund v. Dunn (Tex. Civ. App.) 429.

§ 2. Computation of period of limitation.

A purchaser at a sale in a suit by a testamentary trustee, and those claiming under him, *held* to have acquired a perfect title by adverse possession as against the beneficiary and the trustee, by reason of Ky. St. 1903, § 2508.—Watkins v. Pfeiffer (Ky.) 562.

Under Ky. St. 1903, § 2516, an action by an administrator for personal injury received by his intestate *held* barred by limitations.—Wilson's Adm'r v. Illinois Cent. R. Co. (Ky.) 572.

A wife's right to property held by her husband in trust for her *held* not stale nor barred by limitations.—Bohannon v. Bohannon's Adm'r (Ky.) 597.

*Injuries to property abutting on an alley in consequence of a drain pipe therein causing water to flow on the property *held* recoverable within five years.—Town of Central Covington v. Beiser (Ky.) 973.

Under Rev. St. 1899, §§ 657, 659, 672, 676, 865, a certain amendment to a petition *held* properly allowed.—Walker v. Wabash R. Co. (Mo. Sup.) 83.

*Limitations do not begin to run against an action for conversion of property left by a deceased person until the appointment of an executor or administrator.—White v. Blankenbecker (Mo. App.) 503.

Where deceased died without performing her contract to devise land to plaintiff in consideration of plaintiff's services, limitations did not begin to run against plaintiff's right to recover the reasonable value of his services until deceased's death.—Goodloe v. Goodloe (Tenn.) 767.

§ 3. Acknowledgment, new promise, and part payment.

*To cut off the running of the statute of limitations there must be a clear and express promise to pay the claim to which the statute applies, and loose declarations are insufficient.—McGrew's Ex'r v. O'Donnell (Ky.) 301.

§ 4. Operation and effect of bar by limitation.

*Where the right of a trustee holding the legal title to the estate is barred by limitations,

all equitable estates are also barred.—*Watkins v. Pfeiffer* (Ky.) 562.

§ 5. Pleading, evidence, trial, and review.

In an action on a note, a plea of limitations *held* sufficient.—*Evans v. Jackson* (Tex. Civ. App.) 47.

In an action on a note evidence *held* to support a judgment for defendants based on statutes of limitations.—*Evans v. Jackson* (Tex. Civ. App.) 47.

LIMITATION OF LIABILITY.

Of carrier for injury to live stock, see "Carriers," § 3.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Purchaser pendente lite cannot be relieved from effect of judgment establishing title by limitations (Rev. St. 1895, art. 3347), without pleading and proving that the party had not acquired such title.—*Latta v. Wiley* (Tex. Civ. App.) 433.

Change of venue *held* not to affect conclusiveness of judgment as to purchasers pendente lite.—*Latta v. Wiley* (Tex. Civ. App.) 433.

As against purchasers pendente lite, in the absence of showing of fraud or collusion, it is presumed that the court ascertained all facts necessary to its jurisdiction.—*Latta v. Wiley* (Tex. Civ. App.) 433.

Purchaser from plaintiff pending litigation *held* not relieved from rule of lis pendens by defendant's failure to prosecute his claim in reconviction, where judgment is against plaintiff on his petition.—*Latta v. Wiley* (Tex. Civ. App.) 433.

Purchaser of property pendente lite cannot avoid the operation of the doctrine of lis pendens because of vendor's delay in prosecution of suit.—*Latta v. Wiley* (Tex. Civ. App.) 433.

*Purchaser of property actually in litigation for consideration and without notice *held* bound by judgment or decree.—*Latta v. Wiley* (Tex. Civ. App.) 433.

Failure of clerk of court to enter object of suit on docket *held* not to affect rule of lis pendens.—*Latta v. Wiley* (Tex. Civ. App.) 433.

Rule of lis pendens *held* to continue till termination of case, notwithstanding loss of papers in the case.—*Latta v. Wiley* (Tex. Civ. App.) 433.

*Dismissal of an original suit for want of prosecution *held* not to deprive a cross-bill filed of its effect as lis pendens during the time when plaintiff could legally sue out a writ of error on a judgment on such cross-bill.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

*A purchaser of land in controversy by an unrecorded contract of sale of which the plaintiff in the action had no notice at the time suit was brought *held* a purchaser pendente lite.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

*Purchasers of property in litigation between the date of a judgment and the suing out of a writ of error within the time provided *held* purchasers pendente lite.—*Bryson & Hartgrove v. Boyce* (Tex. Civ. App.) 820.

* Point annotated. See syllabus.

LIVE STOCK.

Carriage of, see "Carriers," § 3.
Injuries from operation of railroads, see "Railroads," § 9.

LOAN ASSOCIATIONS.

See "Banks and Banking," § 2; "Building and Loan Associations."

LOCAL LAWS.

See "Statutes," § 1.

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors."

LOGS AND LOGGING.

Instructions in general in actions relating to, see "Trial," § 8.

Parol or extrinsic evidence of contract for sale of timber, see "Evidence," § 8.

Restraining cutting or removal of timber, see "Injunction," § 2.

Sale of lumber in general, see "Sales," §§ 1, 2.
Trover for cutting timber on another's land, see, "Trover and Conversion," § 1.

A contract for the sale of timber 15 inches in diameter and under, standing on certain land, *held* a contract for the sale of timber measuring 15 inches and under at the stump.—*Strother v. American Cooperage Co.* (Mo. App.) 738.

LUMBER.

See "Logs and Logging."

LUNATICS.

See "Insane Persons."

MACHINERY.

Dangerous machinery, see "Negligence," § 1.
Liability of employer for defects, see "Master and Servant," §§ 2, 6.
Production and use of electricity, see "Electricity."

MAINTENANCE.

See "Champerty and Maintenance."

MALICE.

See "Malicious Mischief."

MALICIOUS MISCHIEF.

Purchaser of land removing building after judgment of foreclosure of vendor's lien *held* not guilty of willful injury to real estate.—*Price v. State* (Tex. Cr. App.) 811.

Indictment for willful injury to real estate, forbidden by Pen. Code 1895, art. 791, *held* sufficient as to allegation of value of real estate.—*Price v. State* (Tex. Cr. App.) 811.

MALICIOUS PROSECUTION.

§ 1. Nature and commencement of prosecution.

*One *held* liable for instituting without probable cause proceedings to have one declared a

bankrupt.—King v. D. Sullivan & Co. (Tex. Civ. App.) 51.

§ 2. Actions.

*In an action for wrongfully suing out an attachment, certain evidence *held* admissible to negative malice.—Sehon, Blake & Stevenson v. Whitt (Ky.) 280.

In an action for wrongfully suing out attachments, an instruction that defendants were liable if they procured the attachments without just or legal cause *held* erroneous.—Sehon, Blake & Stevenson v. Whitt (Ky.) 280.

MANDAMUS.

Remedy by mandamus and appeal distinguished, see "Appeal and Error," § 1.
To compel extension of time for filing bill of exceptions, see "Exceptions, Bill of," § 1.

§ 1. Subjects and purposes of relief.

Mandamus will lie to compel the judge of a circuit court to set aside an erroneous order directing a stenographer to take the testimony before the grand jury.—Commonwealth v. Berry (Ky.) 936.

MANDATE.

See "Mandamus."

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 20.

MANSLAUGHTER.

See "Homicide."

MANUFACTURES.

Liability of manufacturer of defective machine for injuries to third person caused thereby, see "Negligence," § 2.

MARKET VALUE.

Evidence of in action for damages, see "Damages," § 5.

MARRIAGE.

See "Bigamy"; "Divorce"; "Husband and Wife."

Hearsay evidence of, see "Evidence," § 6.

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

See "Work and Labor."

Admissions by employé, see "Evidence," § 4.
Declarations of employés as evidence, see "Evidence," § 5.

Employers' liability insurance, see "Insurance," § 12.

Employment of insurance agent, see "Insurance," § 3.

Harmless error in action for death of servant, see "Appeal and Error," § 17.

Instructions in general in action for injuries to, or death of, servant, see "Trial," §§ 6, 9-11.

Liability of carrier for assault on passenger by employé, see "Carriers," § 9.

Liability of manufacturer of defective machine for injuries to employé caused by operation thereof, see "Negligence," § 2.

Objections for purpose of review in action for death of servant, see, "Appeal and Error," § 5.

Removability of suit against, see "Removal of Causes," § 1.

Res gestæ in action for injuries to servant, see "Evidence," § 2.

Review in action for injuries to servant as dependent on issues and questions in lower court, see "Appeal and Error," § 4.

§ 1. Master's liability for injuries to servant—Nature and extent in general.

*Railroad employés engaged in switching cars *held* bound to use ordinary care to protect from injury another employé on the track.—Houston & T. C. R. Co. v. Turner (Tex. Civ. App.) 1074.

§ 2. — Tools, machinery, appliances, and places for work.

An employer *held* not guilty of negligence in furnishing a boat with tight oars in which his servants were transported to their place of work.—Chrismer v. Bell Telephone Co. (Mo. Sup.) 378.

In an action for death of defendant's servant, *held* that defendant was not guilty of negligence with reference to the mode and plan of work.—Chrismer v. Bell Telephone Co. (Mo. Sup.) 378.

Rev. St. 1899, § 6433, requiring belting, etc., to be guarded, *held* inapplicable to a planer which defendants permitted its servants to operate without a hood.—Smith v. Forrester-Nace Box Co. (Mo. Sup.) 394.

In an action for injuries to a servant, the servant's negligence *held* the proximate cause of his injuries.—Kelley v. Lawrence (Mo. Sup.) 1158.

A master, though bound to use reasonable care to furnish safe appliances, *held* not liable for injuries caused by the servant's negligence in using the same.—Kelley v. Lawrence (Mo. Sup.) 1158.

*Acts 1881, p. 238, c. 170, § 8, relating to the employment of a mining boss in coal mines, *held* to make an operator of a coal mine chargeable with the negligence of the mining boss employed.—Smith v. Dayton Coal & Iron Co. (Tenn.) 62.

*One engaged in mining *held* bound to use reasonable care to make the place of work reasonably safe.—Smith v. Dayton Coal & Iron Co. (Tenn.) 62.

§ 3. — Warning and instructing servant.

*In an action for injuries to a servant, defendant *held* not negligent in failing to warn plaintiff of the danger of placing his hand into the space in front of the rollers of a planer while the machine was in operation, the danger of which was obvious.—Smith v. Forrester-Nace Box Co. (Mo. Sup.) 394.

§ 4. — Fellow servants.

*In an action for injuries to a railroad brakeman, evidence *held* insufficient to show that the engineer was in charge of the train at the time of the accident, so as to render master liable.—Carmen's Adm'r. v. Illinois Cent. R. Co. (Ky.) 954.

Where a master had used sufficient care, it was not liable for the death of its servant resulting from the acts of other servants in the absence of defendant's foremen.—Chrismer v. Bell Telephone Co. (Mo. Sup.) 378.

A boatman employed by a master to transport its servants to and from their work *held* not

*Point annotated. See syllabus.

a vice principal.—*Chrismer v. Bell Telephone Co.* (Mo. Sup.) 378.

*Where a servant is injured through the combined negligence of the master and a fellow servant, he may recover from the master.—*Root v. Kansas City Southern Ry. Co.* (Mo. Sup.) 621.

*A servant held within Rev. St. 1899, § 2873, making railroads liable for injuries to servants while operating the railroad owing to the negligence of any other servant.—*Orendorff v. Terminal R. Ass'n of St. Louis* (Mo. App.) 148.

*Certain employes held not fellow servants within the fellow servant act.—*Texas & P. Ry. Co. v. Nichols* (Tex. Civ. App.) 411.

§ 5. — Risks assumed by servant.

*Where a servant was injured in consequence of the master's negligence, the master, in order to show that the servant assumed the risk, must prove that the servant voluntarily subjected himself to the new danger with full appreciation thereof.—*Choctaw, O. & G. R. Co. v. Jones* (Ark.) 244.

*In an action for injury to a servant, a request to modify an instruction held properly refused because a servant does not assume the risk of the master's negligence unless he realizes the danger.—*Choctaw, O. & G. R. Co. v. Jones* (Ark.) 244.

*A servant is presumed to know the ordinary risks of his employment, but he is not presumed to know the risks caused by the master's negligence after he enters the service.—*Choctaw, O. & G. R. Co. v. Jones* (Ark.) 244.

*Where a servant is ordered to assist in doing certain work in a certain manner, the servant may rely on the judgment of the master, unless the danger is so obvious that no prudent person would incur the risk.—*Choctaw, O. & G. R. Co. v. Jones* (Ark.) 244.

*The defense of assumption of risk in an action for injuries to a servant rests on contract arising from the contract of employment that he will assume the ordinary risks of the service.—*Choctaw, O. & G. R. Co. v. Jones* (Ark.) 244.

*An instruction in an action for injuries to a servant held erroneous because ignoring the evidence that the servant was obeying the master's orders.—*Southern Cotton Oil Co. v. Spotts* (Ark.) 249.

An employé driving his team down a steep place on a dump held to have assumed the risk of injury to his team.—*Lindsey v. Hollerback & May Contract Co.* (Ky.) 294.

*A servant who with knowledge of the dangerous condition of the premises undertakes to do the work assigned held to assume the risk.—*Louisville Belt & Iron Co. v. Hart* (Ky.) 951.

Where a servant accepted employment which required his going on the waters of the Missouri river held that he assumed the dangers attending the navigation in question.—*Chrismer v. Bell Telephone Co.* (Mo. Sup.) 378.

*A freight brakeman held not to have assumed the risk arising from combustible material being allowed to accumulate about the trestle, and which became ignited and set fire to the trestle.—*Root v. Kansas City Southern Ry. Co.* (Mo. Sup.) 621.

In an action for injuries to a servant, plaintiff held not to have assumed the risk of a pile of planks falling on him.—*Robertson v. George A. Fuller Const. Co.* (Mo. App.) 130.

*Statement of when an employé assumes the risk of danger brought about by negligence of the master.—*Gulf, C. & S. F. Ry. Co. v. Huyett* (Tex. Sup.) 454.

*An employé held to have assumed a risk, notwithstanding his complaint of snow and the master's promise to remove it.—*Texas & F. Ry. Co. v. Nichols* (Tex. Civ. App.) 411.

*In action for death of track foreman, deceased held not to have assumed risk of negligent manner in which members of switching crew did their work.—*Houston & T. C. R. Co. v. Turner* (Tex. Civ. App.) 1074.

*In action for death of track foreman, deceased held not to have assumed risk of operation of cars on track at a greater speed than six miles per hour.—*Houston & T. C. R. Co. v. Turner* (Tex. Civ. App.) 1074.

§ 6. — Contributory negligence of servant.

A servant employed by railroad held guilty of contributory negligence when injured.—*Southern Ry. Co. in Kentucky v. Thomas* (Ky.) 578.

*In an action for injuries to a servant, defendant's negligence in permitting a planer to be operated without a shield in front of the back rollers held insufficient to sustain a recovery.—*Smith v. Forrester-Nace Box Co.* (Mo. Sup.) 394.

*Where plaintiff was injured by placing his hand in a planer in front of the rear rollers to remove a board, he was not excused from contributory negligence by a custom of employes so to remove sticks and shavings.—*Smith v. Forrester-Nace Box Co.* (Mo. Sup.) 394.

A planer operator held guilty of contributory negligence in attempting to pass a board over instead of through the rear rollers of the machine.—*Smith v. Forrester-Nace Box Co.* (Mo. Sup.) 394.

*Plaintiff held guilty of contributory negligence in attempting to unclog a planer while in operation.—*Smith v. Forrester-Nace Box Co.* (Mo. Sup.) 394.

*A brakeman held not guilty of contributory negligence in jumping from the engine to avoid danger from a burning trestle.—*Root v. Kansas City Southern Ry. Co.* (Mo. Sup.) 621.

*Servant held guilty of contributory negligence as a matter of law.—*Coonce v. National Biscuit Co.* (Mo. App.) 352.

§ 7. — Actions in general.

An express company held not relieved from liability for injuries to an employé resulting from defective premises, by reason of a contract between defendant and a railroad company, under which the latter was charged with the duty of keeping the premises in repair.—*Pacific Express Co. v. Shivers* (Tex. Civ. App.) 48.

§ 8. — Pleading.

Petition in action for death of brakeman held not to show that he assumed risk, so as to render petition demurrable.—*Brown's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co.* (Ky.) 583.

In an action by a servant for personal injuries, certain testimony held outside the issues.—*Root v. Kansas City Southern Ry. Co.* (Mo. Sup.) 621.

*In an action for the death of a servant, the answer held sufficiently specific as to deceased's contributory negligence.—*Ramm v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 426.

§ 9. — Evidence.

In an action for injuries to a servant, a finding of freedom from contributory negligence held warranted.—*Choctaw, O. & G. R. Co. v. Jones* (Ark.) 244.

In an action for injuries to a servant, a finding of negligence held warranted.—*Choctaw, O. & G. R. Co. v. Jones* (Ark.) 244.

*Point annotated. See syllabus.

In an action by a servant for personal injuries, evidence *held* to support a finding for plaintiff.—George T. Stagg Co. v. Brightwell (Ky.) 8.

*In an action for injuries to an employé, certain evidence *held* admissible on the issue whether the employer furnished sufficient appliances.—Louisville Belt & Iron Co. v. Hart (Ky.) 951.

*In an action against the railway company for the death of a switchman alleged to have been caused by negligence of defendant in failing to block its rails in a switchyard, evidence of a custom not shown to be general, to have tracks blocked, *held* not admissible.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

In an action by a servant for personal injuries, evidence of a defective condition several months prior to the injury *held* erroneously admitted in the absence of any showing that the same condition continued up to the time of the injury.—Root v. Kansas City Southern Ry. Co. (Mo. Sup.) 621.

In an action for injuries to a servant, evidence examined, and *held* sufficient to sustain plaintiff's allegation that defendant negligently furnished him with an unsafe place in which to work.—Robertson v. George A. Fuller Const. Co. (Mo. App.) 130.

In an action for wrongful death resulting from decedent's falling down a coal shaft, evidence examined, and *held* to make out a clear case of *res ipsa loquitur*.—Texas & P. Coal Co. v. Daves (Tex. Civ. App.) 275.

In an action for death of section foreman by being struck by car operated on switch track, evidence *held* sufficient to raise issue of excessive speed of car which struck and started the car in question.—Houston & T. C. R. Co. v. Turner (Tex. Civ. App.) 1074.

§ 10. — Questions for jury.

*Whether a servant injured in consequence of the master's foreman assumed the risk arising therefrom *held* for the jury.—Choctaw, O. & G. R. Co. v. Jones (Ark.) 244.

*In an action for injuries to a servant, the question of the servant's contributory negligence *held* for the jury.—Southern Cotton Co. v. Spotts (Ark.) 249.

In an action for injuries to a servant, the question of the master's negligence *held* for the jury.—Southern Cotton Co. v. Spotts (Ark.) 249.

*In an action for injuries received by an employé, the question of the employer's negligence *held* for the jury.—Martin v. South Covington & C. St. Ry. Co. (Ky.) 571.

*In an action for the death of a switchman alleged to have been caused by negligent failure of railway company to block its switches in a switchyard, evidence *held* sufficient, under the laws of Kansas, to require submission to the jury of the question whether deceased was guilty of contributory negligence.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

*In an action for the death of a switchman alleged to have been caused by negligent failure of railway company to block its switches in a switchyard, evidence *held* sufficient, under the laws of Kansas, to require submission to the jury of the question whether deceased was aware of the danger.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

In an action for the death of a switchman alleged to have been caused by negligent failure of railway company to block its switches in a switchyard, evidence *held* sufficient, under the laws of Kansas, to require submission to the jury of the question whether defendant was

negligent.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

Leaving combustible material on the right of way is not necessarily negligence on the part of a railroad company, though the extent of such material and its proximity to the track may justify a jury in finding negligence.—Root v. Kansas City Southern Ry. Co. (Mo. Sup.) 621.

*In an action by a railroad brakeman for injuries resulting from jumping from an engine through fear that it would go through a burning trestle alleged to have been ignited because of the negligence of the railroad company in allowing combustible material to accumulate about it, evidence *held* sufficient, under the law of Arkansas, to justify submission to the jury of the question of defendant's negligence.—Root v. Kansas City Southern Ry. Co. (Mo. Sup.) 621.

In an action by a brakeman for injuries sustained by jumping from an engine through fear that it would go through a burning trestle, evidence *held* sufficient to justify submission to the jury of the question whether the fire was communicated to the trestle through debris which it was alleged defendant negligently allowed to accumulate.—Root v. Kansas City Southern Ry. Co. (Mo. Sup.) 621.

In an action for injuries to a servant, evidence *held* to require a submission of the issues to the jury.—Pacific Express Co. v. Shivers (Tex. Civ. App.) 46.

§ 11. — Instructions.

In an action for injury to a servant, an instruction *held* properly refused because without the servant realizing the danger arising from the doing of the work in a particular manner ordered by the master there was no assumption of risk.—Choctaw, O. & G. R. Co. v. Jones (Ark.) 244.

An instruction on the assumption of risk, in an action for injuries to a servant, *held* erroneous.—Southern Cotton Oil Co. v. Spotts (Ark.) 249.

In an action for negligence causing death of a servant, requested instructions as to assumption of risk *held* properly refused.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

In an action for the death of a servant alleged to have been caused by negligence of the master, reference in an instruction to other instructions defining contributory negligence and assumption of risk when there were no such instructions *held* not error.—Lee v. Missouri Pac. Ry. Co. (Mo. Sup.) 614.

In an action by a servant for personal injuries, an instruction as to the duty of the master with respect to exercising care to avoid the injury *held* misleading.—Root v. Kansas City Southern Ry. Co. (Mo. Sup.) 621.

*In an action for the death of a servant, an instruction that, if the danger or risk was as open to the observation or knowledge of deceased as to defendant, plaintiff could not recover, was proper.—Ramm v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 426.

In an action for injuries to a servant, an instruction *held* not a proper definition of proximate cause.—Galveston, H. & S. A. Ry. Co. v. Paschall (Tex. Civ. App.) 446.

In an action for the death of a servant, an instruction *held* not erroneous as permitting the jury to enter a field of conjecture as to defendant's negligence.—Houston & T. C. R. Co. v. Oram (Tex. Civ. App.) 1029.

In an action for the death of a servant, a requested instruction *held* erroneously refused.—Houston & T. C. R. Co. v. Oram (Tex. Civ. App.) 1029.

*Point annotated. See syllabus.

§ 12. Liabilities for injuries to third persons.

*A railroad company *held* not liable for torts of an independent contractor in constructing the road.—*St. Louis, I. M. & S. Ry. Co. v. Gillihan* (Ark.) 793.

*A saloon keeper *held* not liable for the malicious act of a bartender in assisting another in maliciously setting fire to the foot of a patron while sleeping in the saloon.—*Peter Anderson & Co. v. Diaz* (Ark.) 861.

Whether a brakeman kicking a piece of ice from the platform of a caboose injuring a boy was acting within the scope of his authority *held* for the jury.—*Willis v. Maysville & B. S. R. Co.* (Ky.) 604.

*Master *held* liable for servant's tort.—*Houck v. Chicago & A. Ry. Co.* (Mo. App.) 738.

*Master *held* liable for injury to child invited by servant into engine room.—*Houck v. Chicago & A. Ry. Co.* (Mo. App.) 738.

MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

Of evidence in criminal prosecution, see "Criminal Law," § 8.

MAXIMS.

Of equity, see "Equity," § 1.

MEASURE OF DAMAGES.

See "Damages," § 3.

For fraud, see "Fraud," § 2.

For injuries to live stock in shipment, see "Carriers," § 3.

For nuisance, see "Nuisance," § 1.

MECHANICS' LIENS.**§ 1. Enforcement.**

In a suit to enforce a mechanic's lien, the petition *held* properly dismissed.—*Central Planing Mill & Lumber Co. v. Betz* (Ky.) 591.

MEETINGS.

Of municipal council, see "Municipal Corporations," § 3.

MENTAL ANGUISH.

Recovery for in action against telegraph company, see "Telegraphs and Telephones," § 1.

MERGER.

Of cause of action in judgment, see "Judgment," § 5.

MINES AND MINERALS.

Mine operators as employers, see "Master and Servant," § 2.

§ 1. Title, conveyances, and contracts.

*Under Rev. St. 1899, §§ 8766, 8767, where the lessee of mining land orally permitted plaintiff's assignors to mine thereon without posting rules and regulations, the rights of plaintiff's assignors to mine were limited to a period of three years.—*Arbuthnot v. Eclipse Land & Min. Co.* (Mo. App.) 170.

MINORS.

See "Infants."

Sales of liquor to minors, see "Intoxicating Liquors," § 2.

MISDEMEANOR.

Limitations, see "Criminal Law," § 4.

MISREPRESENTATION.

See "Fraud."

As affecting release, see "Release," § 1.

By agent, see "Principal and Agent," § 2.

MISTAKE.

Effect of mistake on contract of sale, see "Sales," § 1.

MONEY RECEIVED.

Recovery of price paid for land, see "Vendor and Purchaser," § 7.

Grantor *held* entitled to recover from grantee sum deposited to guaranty payment of taxes, notwithstanding transfer of deposit to subsequent grantee under deed subject to taxes.—*Cornet v. Boyle* (Mo. App.) 725.

MORTALITY TABLES.

As evidence in action for damages from personal injuries, see "Damages," § 5.

MORTGAGES.

Declarations as evidence in foreclosure suit, see "Evidence," § 5.

Harmless error in foreclosure suit, see "Appeal and Error," § 16.

Homestead in mortgaged land, see "Homestead," § 1.

Power of building and loan association as to transfer of mortgage loan, see "Building and Loan Associations."

Right of mortgagee, in mortgage executed by curator on lands of ward, to equitable lien, see "Liens," § 1.

Right of mortgagee to have receiver appointed, see "Receivers," § 1.

Subrogation to rights of mortgagee, see "Subrogation."

Taxation of, see "Taxation," § 2.

Mortgages by or to particular classes of parties.

See "Building and Loan Associations"; "Corporation," § 3.

Curators, see "Guardian and Ward," § 1.

Mortgages of particular species of property.

See "Homestead," § 2.

Personal property, see "Chattel Mortgages."

Property of ward, see "Guardian and Ward," § 1.

§ 1. Requisites and validity.

In order to avoid the effect of a deed of trust for grantor's ignorance of certain facts, beneficiary's knowledge of such ignorance must be shown.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1004.

§ 2. Payment or performance of condition, release, and satisfaction.

Provision in deed of trust for release of part of land on part payment *held* not aided by demand of parties giving the deed that a definite part of the tract be released.—*McCormick v. Parsons* (Mo. Sup.) 1162.

*Point annotated. See syllabus.

In deed of trust, provision for release of part of land on part payment *held void* for indefiniteness of description of property.—*McCormick v. Parsons* (Mo. Sup.) 1162.

Where defendants' lien on mortgaged land had expired, they were not parties in interest entitled to contest plaintiff's right to a decree cancelling a release of the mortgage of record.—*Lawrence County Bank v. Lambert* (Mo. App.) 755.

It will be presumed that marginal entries of satisfactions of trust deeds and releases of mortgages were made in compliance with the law.—*Metz v. Wright* (Mo. App.) 1125.

§ 3. Foreclosure by action.

Statement as to venue, under Civ. Code Prac. §§ 62, 65, 66, of an action to foreclose a mortgage on decedent's lands.—*Galloway v. Craig* (Ky.) 320.

Rev. St. 1899, § 4277, construed in connection with section 4278, *held* only to apply to mortgages securing obligations which were barred by limitations at the time the act (Laws 1891, p. 184, §§ 1, 2) took effect.—*Martin v. Teasdale* (Mo. App.) 133.

Rev. St. 1899, § 4276, providing a limitation for proceedings to foreclose mortgages, *held* only to apply to mortgages executed after its adoption as a part of Act Feb. 18, 1891 (Laws 1891, p. 184, § 1).—*Martin v. Teasdale* (Mo. App.) 133.

In a suit to foreclose a deed of trust, evidence of defendant's ignorance of certain provisions of the deed *held* inadmissible in the absence of allegations of fraud or mistake.—*McGaughey v. American Nat. Bank* (Tex. Civ. App.) 1004.

§ 4. Redemption.

Under Rev. St. 1899, §§ 4343, 4344, the act of a beneficiary in a deed of trust in taking possession of the property immediately after purchasing it at the trustee's sale *held* not to render a redemption bond unenforceable.—*Rieger v. Faber* (Mo. App.) 183.

MOTIONS.

Change of venue in civil actions, see "Venue," § 1.

Continuance in civil actions, see "Continuance."

Direction of verdict in civil actions, see "Trial," § 5.

Dismissal or nonsuit on trial, see "Trial," § 5. For assessment of damages on dissolution of injunction, see "Injunction," § 3.

New trial in civil actions, see "New Trial," § 2.

New trial in criminal prosecutions, see "Criminal Law," §§ 26-30.

Presentation of objections for review, see "Appeal and Error," § 5.

Quashing indictment or information, see "Indictment and Information," §§ 2, 7.

Quashing or vacating execution, see "Execution," § 2.

Relating to pleadings, see "Pleading," § 6.

Striking out evidence, see "Trial," § 3.

MOTIVE.

For murder, see "Homicide," § 6.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Care required in operation of railroad trains in streets, see "Railroads," § 8.

Dedication of streets and alleys, see "Dedication," § 1.

Harmless error in action against railroad for obstructing alley, see "Appeal and Error," §§ 17, 18.

Highways in general, see "Highways."

Injunction to restrain wrongful collection of tax by municipality, see "Taxation," § 4.

Instructions in general in actions for obstruction of streets or alleys, see "Trial," § 6.

Jurisdiction of equity to prevent obstruction of street, see "Equity," § 1.

Limitation of action for injuries to abutting owner because of defects in drain, see "Limitation of Actions," § 2.

Obstructions caused in exercise of power of eminent domain, see "Eminent Domain," § 4.

Ordinance providing for furnishing owners of live stock permitting same to run at large, as taking property without due process of law, see "Constitutional Law," § 5.

Ordinances relating to gaming, see "Gaming," § 2.

Regulations as to animals, see "Animals."

Right to justice and remedies for injuries as affecting, validity of ordinance, see "Constitutional Law," § 6.

Street railroads, see "Street Railroads."

Water supply, see "Waters and Water Courses," § 3.

§ 1. Governmental powers and functions in general.

A city cannot regulate the matter of appeals by ordinance; that is alone for the Legislature to do.—*City of Paducah v. Ragsdale* (Ky.) 13.

§ 2. Legislative control of municipal acts, rights, and liabilities.

The police system of the city of St. Louis having been regulated by the state law, it was not within the power of the framers of the city scheme and charter to vest the city police officers with powers inconsistent with those given by the general laws.—*State ex rel. McNamee v. Stoble* (Mo. Sup.) 191.

§ 3. Proceedings of council or other governing body.

Different sections of ordinance to prevent certain animals from running at large in city *held* germane to subject, and not to embrace more than one subject.—*City of Paducah v. Ragsdale* (Ky.) 13.

Under ordinance to prevent cattle running at large in city, plea of not guilty by owner *held* to put burden on prosecution to prove his guilt, so that it was no objection to the validity thereof that it required him to prove his innocence or suffer fine.—*City of Paducah v. Ragsdale* (Ky.) 13.

There is no constitutional or statutory provision requiring previous notice of the enactment of an ordinance before it shall become effective, and it is no objection to the validity of an ordinance that it takes effect immediately.—*City of Paducah v. Ragsdale* (Ky.) 13.

*Under Ky. St. 1903, § 3633, a city council *held* not authorized to hold a meeting in a place different from that designated by ordinance for the holding of its meetings.—*Shugars v. Hamilton* (Ky.) 564.

*Ky. St. 1903, § 3633, *held* to require notice of special meetings of the city council to each member thereof.—*Shugars v. Hamilton* (Ky.) 564.

*Under Ky. St. 1903, § 3634, four members of the council of a city of the fifth class *held* to constitute a quorum for the transaction of business, though the mayor may be absent.—*Shugars v. Hamilton* (Ky.) 564.

Ky. St. 1903, § 3636, *held* not to prohibit a city council from passing an ordinance imposing an occupation tax at the meeting at which it was first introduced.—*Shugars v. Hamilton* (Ky.) 564.

*Point annotated. See syllabus.

Under Kansas City Charter, p. 137, art. 9, rejection of invalid section of sidewalk ordinance *held* to render the ordinance unenforceable.—*Ramsey v. Field* (Mo. App.) 350.

§ 4. Officers, agents, and employés.

Under Sess. Acts 1860-61, p. 448, § 5, Acts 1867, p. 178, § 3, St. Louis City Charter, § 14, (Rev. St. 1899, p. 2467), and Acts 1899, p. 53, § 5, members of the metropolitan police force of the city of St. Louis *held* unauthorized to arrest offenders outside of the city of St. Louis for offenses committed in St. Louis county.—*State ex rel. McNamee v. Stoble* (Mo. Sup.) 191.

§ 5. Public improvements.

Under Ky. St. 1903, § 3458, the court *held* entitled to enter judgment against a city for an improvement for which the owners of the abutting property were not liable.—*Terrell v. City of Paducah* (Ky.) 310.

A city cannot extend a street between high and low water mark of a navigable stream and charge the cost against the owners of the adjacent fee.—*Terrell v. City of Paducah* (Ky.) 310.

Under an ordinance and contract for the improvement of a street, the city *held* exempt from liability for the cost of the improvement only if it had authority to and did bind the owners of abutting property for the cost.—*Terrell v. City of Paducah* (Ky.) 310.

The proviso in Ky. St. 1903, § 3457, relative to the improvement of streets, *held* directory, so that a city may be bound to pay for a street improvement, though the method of making payment is not specified by the ordinance.—*Terrell v. City of Paducah* (Ky.) 310.

*In action for damages from change of grade in street, increased value of plaintiff's land in common with other land in the square *held* to be considered in determining the amount of damages.—*City of Louisville v. Kaye* (Ky.) 554.

*Under Kansas City Charter, p. 137, art. 9, prescribing the width of a sidewalk, is a legislative function which devolves on the city council, and which it cannot delegate to a ministerial officer.—*Ramsey v. Field* (Mo. App.) 350.

Ordinance for construction of sidewalk *held* invalid for uncertainty, under Kansas City Charter, p. 137, art. 9.—*Ramsey v. Field* (Mo. App.) 350.

Ordinance providing for construction of sidewalk not less than five feet in width *held* to comply with Kansas City Charter, p. 137, art. 9, and not to delegate to the city engineer the power to fix the width of the sidewalk.—*Ramsey v. Field* (Mo. App.) 350.

§ 6. Police power and regulations.

Under Ky. St. 1903, § 3490, subssecs. 1, 24, 33, and section 3513, cities of the fourth class have power to pass ordinances to punish persons who engage in gaming.—*White v. Commonwealth* (Ky.) 285.

*A complaint for violation of a municipal ordinance is sufficient if it notifies defendant of the particular ordinance which he is charged with violating, and is sufficient to bar another prosecution for the same offense.—*City of Mexico v. Harris* (Mo. App.) 505.

*Under Rev. St. 1899, §§ 5795, 5805, prosecution for violation of a city ordinance is a civil action, in which the sufficiency of the complaint is tested by the rules applicable in other civil cases.—*City of Mexico v. Harris* (Mo. App.) 505.

It is immaterial whether a complaint for violation of a city ordinance conforms to the affi-

davit upon which it purports to be based or not.—*City of Mexico v. Harris* (Mo. App.) 505.

§ 7. Use and regulation of public places, property, and works.

*Although an alley has been legally vacated, its use by the public for 10 years with the knowledge and consent of the city and the owners of abutting lots will constitute it a public alley again.—*Mitchell v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 111.

*The mere passage of an ordinance declaring an alley vacated is not sufficient to deprive abutting owners of their property rights in the alley.—*Mitchell v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 111.

§ 8. Torts.

*In an action against a city and the owner of a lot for injuries resulting from the tipping over of a pile of lumber, evidence *held* to require submission to the jury of the question of defendant's negligence.—*Snydor v. Arnold* (Ky.) 289.

*City *held* not charged with notice of obstruction of a street at 5 o'clock, rendering it liable for accident occurring at 8 o'clock the same evening.—*Hazelrigg v. Board of Councilmen of City of Frankfort* (Ky.) 584.

*A city is not required to light its streets at night, so that obstructions of which it has no knowledge may be seen at all points by persons traveling on the street.—*Hazelrigg v. Board of Councilmen of City of Frankfort* (Ky.) 584.

*A city *held* liable for injuries sustained in consequence of it permitting the accumulation of filth near a person's premises by reason of its defective sewers.—*City of Madisonville v. Hardman* (Ky.) 930.

*Though a city in the exercise of its governmental functions may construct sewers, it has no right to complete a sewer in such a manner that it will discharge near the property of a person the accumulated filth.—*City of Madisonville v. Hardman* (Ky.) 930.

*An owner *held* entitled to recover actual damages to his property resulting from a city negligently diverting surface water on the property.—*Town of Central Covington v. Beiser* (Ky.) 973.

A petition in an action against a city for injury resulting from the improvement of an alley and the filling up of a drain pipe *held* supported by the proof.—*Town of Central Covington v. Beiser* (Ky.) 973.

A drain pipe *held* a part of a local improvement, requiring the city to keep the same open.—*Town of Central Covington v. Beiser* (Ky.) 973.

A property owner obstructing a street with materials for use in building a sidewalk *held* not relieved from placing lights thereon at night by reason of the custom of the city to light street lights in time to disclose the obstruction.—*Christman v. Meierhoffer* (Mo. App.) 141.

*Rights and duties of property owner with respect to the use of portions of the street for temporarily keeping materials and tools for use in constructing improvements defined.—*Christman v. Meierhoffer* (Mo. App.) 141.

In an action for injuries to a bicyclist from collision with a pile of building material in a street, admission in evidence of city ordinance *held* not objectionable on the ground that it permitted recovery on a ground not pleaded.—*Christman v. Meierhoffer* (Mo. App.) 141.

An ordinance *held* admissible in an action for injuries from collision with an unlighted pile

* Point annotated. See syllabus.

of sidewalk material in a street.—*Christman v. Meierhoffer* (Mo. App.) 141.

*A bicyclist injured by an obstruction in the street *held* not guilty of contributory negligence, as matter of law, in riding along one side of the street instead of in the middle.—*Christman v. Meierhoffer* (Mo. App.) 141.

A bicyclist injured by an obstruction in the street was not guilty of contributory negligence as a matter of law because not carrying a lamp on his wheel.—*Christman v. Meierhoffer* (Mo. App.) 141.

§ 9. Fiscal management, public debt, securities, and taxation.

An ordinance imposing a license fee on an occupation, adopted under the authority conferred by Const. § 181, and Ky. St. 1903, § 3637, *held* not to levy a tax, within Const. § 180.—*Shugars v. Hamilton* (Ky.) 564.

An ordinance imposing a penalty of 15 per cent. for delinquency in the payment of town taxes *held* authorized by Ky. St. 1903, § 3677.—*Carpenter v. Lambert* (Ky.) 607.

MURDER.

See "Homicide."

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 17.

MUTUAL INSURANCE COMPANIES.

See "Insurance," § 2.

NAMES.

Misnomer of parties in action for sale of delinquent land, see "Taxation," § 5.

NAVIGABLE WATERS.

See "Waters and Water Courses."

Ejectment to recover island, see "Ejectment," § 8.

Judicial notice of, see "Evidence," § 1.

Public ownership of island in navigable stream, see "Public Lands," § 1.

§ 1. Rights of public.

*The rights of the public in a navigable river extend to ordinary high-water mark.—*Terrell v. City of Paducah* (Ky.) 310.

§ 2. Riparian and littoral rights.

Owner of certain fractional section of land *held* to take title to certain accretions which formed in the river bounding his section.—*Frederitzie v. Boeker* (Mo. Sup.) 227.

NAVIGATION.

See "Navigable Waters," § 1.

NECESSARIES.

Of insane person, see "Insane Persons," § 1.

NEGLIGENCE.

Causing death, see "Death," § 1.

Cure of defective pleading in action for, see "Pleading," § 7.

Harmless error, see "Appeal and Error," § 18.

Instructions in general in action for, see "Trial," §§ 6, 8.

Measure of damages, see "Damages," § 3.

*Point annotated. See syllabus.

Release of liability for personal injuries, see "Release," §§ 1, 3.

By particular classes of parties.

See "Carriers," §§ 2, 3, 7; "Municipal Corporations," § 8.

Employers, see "Master and Servant," §§ 1-11.

Railroad companies, see "Railroads," §§ 5-10.

Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Condition or use of particular species of property, works, or machinery.

See "Electricity"; "Railroads," §§ 5-10; "Street Railroads," § 1.

Vessels, see "Shipping," §§ 1, 2.

Contributory negligence.

Of owner of animal injured by operation of street railroad, see "Street Railroads," § 1.

Of owner or shipper of live stock, see "Carriers," § 3.

Of passenger, see "Carriers," § 8.

Of person injured by electricity, see "Electricity."

Of person injured by operation of street railroad, see "Street Railroads," §§ 1, 2.

Of person injured on street, see "Municipal Corporations," § 8.

Of person injured or killed by operation of railroad, see "Railroads," § 6-8.

Of servant, see "Master and Servant," §§ 3, 8-10.

§ 1. Acts or omissions constituting negligence.

*One guilty of negligence *held* only liable for such results thereof as might be reasonably foreseen.—*Snyder v. Arnold* (Ky.) 289.

*A laundry company maintaining vat near street *held* not guilty of negligence, rendering it liable to person falling into it.—*Johnson v. Paducah Laundry Co.* (Ky.) 330.

*A manufacturer selling a machine to an employer *held* not liable for injuries to an employé operating the machine.—*Heindirk v. Louisville Elevator Co.* (Ky.) 608.

*Defendant *held* an independent contractor for the erection of a hotel, and liable for damages resulting to third persons from negligent construction, though bound to comply with the plans and specifications of the architect.—*Scharff v. Southern Illinois Const. Co.* (Mo. App.) 128.

The proprietor of premises used for business owes a duty to customers to keep the same reasonably safe, or to warn customers of any danger known to such proprietor and unknown to the customer.—*Shaw v. Goldman* (Mo. App.) 165.

Plaintiff in pursuing a route with which he was unfamiliar through defendant's store *held* a mere licensee, and not entitled to recover for injuries sustained by falling through an unguarded elevator shaft.—*Shaw v. Goldman* (Mo. App.) 165.

To establish actionable negligence, the existence of a duty to protect plaintiff from the injury complained of, defendant's failure to perform the same, and injury resulting from such failure must be shown.—*Shaw v. Goldman* (Mo. App.) 165.

*An engineer who invited a child into the engine room was bound to use care proportionate to the danger for the child's safety.—*Houck v. Chicago & A. Ry. Co.* (Mo. App.) 738.

*Child who entered an engine room on his own motion *held* a trespasser, whom the employes were only bound not to injure after discovering

his presence.—*Houck v. Chicago & A. Ry. Co.* (Mo. App.) 738.

*Certain machinery situated in pump house *held* not a place attractive to children, within the meaning of the law of negligence.—*Houck v. Chicago & A. Ry. Co.* (Mo. App.) 738.

§ 2. Proximate cause of injury.

*If a person is guilty of negligence resulting in injury to another, the fact that a third person concurs or co-operates in producing the injury, or contributes thereto, does not relieve the first tort-feasor of liability.—*Snydor v. Arnold* (Ky.) 289.

*Proximate cause defined.—*Houston & T. C. R. Co. v. Oram* (Tex. Civ. App.) 1029.

§ 3. Contributory negligence.

*The defense of contributory negligence rests on an omission of duty on the part of plaintiff, and is maintainable when the proximate cause of the injury was the negligence of plaintiff.—*Choctaw, O. & G. R. Co. v. Jones* (Ark.) 244.

§ 4. Actions.

*Though petition alleged gross negligence, plaintiff *held* entitled to recover on proof of ordinary negligence.—*Pendly v. Illinois Cent. R. Co.* (Ky.) 1.

In an action for personal injuries resulting from alleged negligence of defendant's employé in leaving open a trap door in plaintiff's house, the question of plaintiff's contributory negligence *held* one for the jury.—*Louisville Gas Co. v. Fuller* (Ky.) 566.

*The mere falling of a wall while being constructed near plaintiff's premises *held* presumptive evidence of negligence.—*Scharff v. Southern Illinois Const. Co.* (Mo. App.) 126.

In an action for damages to an adjoining property owner, an instruction *held* not objectionable as authorizing the jury to find negligence from sources other than "from the evidence."—*Scharff v. Southern Illinois Const. Co.* (Mo. App.) 126.

In an action for death to a servant, a requested instruction *held* properly refused as not a correct definition of proximate cause.—*Houston & T. C. R. Co. v. Oram* (Tex. Civ. App.) 1029.

In an action for the death of a servant *held* not error to fail to define proximate cause.—*Houston & T. C. R. Co. v. Oram* (Tex. Civ. App.) 1029.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY DISCOVERED EVIDENCE.

Ground for new trial in criminal prosecutions, see "Criminal Law," §§ 26-30.

Ground for new trial in civil actions, see "New Trial," § 1.

NEW PROMISE.

Within statute of limitations, see "Limitation of Actions," § 3.

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," §§ 26-30.

Necessity of motion for purpose of review, see "Appeal and Error," § 7; "Criminal Law," § 28.

Opening or vacating judgment, see "Judgment," § 2.

§ 1. Grounds.

*Alleged newly discovered evidence which might by diligence have been procured for first trial *held* not a ground for new trial.—*Gay v. Steele's Adm'rs* (Ky.) 590.

*The granting of a new trial for newly discovered evidence *held* authorized.—*Louisville Belt & Iron Co. v. Hart* (Ky.) 951.

*The trial court has a supervisory power over verdicts, and may set them aside in the interest of justice.—*Morris v. Kansas City* (Mo. App.) 908.

Refusal to grant a new trial for newly discovered evidence *held* error.—*Douglas v. Walker* (Tex. Civ. App.) 1026.

On an application for a new trial for newly discovered evidence, defendant *held* not guilty of negligence in failing to produce the testimony at the trial.—*Douglas v. Walker* (Tex. Civ. App.) 1026.

§ 2. Proceedings to procure new trial.

The dismissal of a motion for a new trial *held* an abuse of discretion, notwithstanding district court rule 71 (67 S. W. xxv).—*Houston Saengerbund v. Dunn* (Tex. Civ. App.) 429.

NOMINAL DAMAGES.

See "Damages," § 1.

NONRESIDENCE.

Validity of assignment by nonresident, see "Assignments," § 1.

NONSUIT.

Before trial, see "Dismissal and Nonsuit." On trial, see "Trial," § 5.

NOTARIES.

Usurpation of office by, see "Officers," § 2.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings.

See "Chattel Mortgages," § 1; "Lis Pendens."

Action or process, see "Process," § 1.

Appointment of receivers, see "Receivers," § 2.

Enactment of ordinances, see "Municipal Corporations," § 3.

Judgment on injunction bond, see "Injunction."

Levy of attachment, see "Attachment," § 3.

Local option elections, see "Intoxicating Liquors," § 2.

Loss insured against, see "Insurance," § 13.

Meetings of city council, see "Municipal Corporations," § 3.

Obstruction of street, see "Municipal Corporations," § 8.

Proceedings to revive judgment, see "Judgment," § 7.

To particular classes of parties.

See "Municipal Corporations," § 8.

Purchaser, see "Vendor and Purchaser," § 5.

NUISANCE.

Interference with surface waters, see "Waters and Water Courses," § 2.

On roads, see "Highways," § 2.

* Point annotated. See syllabus.

§ 1. Private nuisances.

*The measure of damages for permanent and temporary nuisances determined.—*City of Madisonville v. Hardman* (Ky.) 930.

*A nuisance *held* permanent, making the measure of damages the depreciation in the market value of the property injured.—*City of Madisonville v. Hardman* (Ky.) 930.

A verdict in an action for a nuisance *held* not excessive.—*City of Madisonville v. Hardman* (Ky.) 930.

*In an action for maintaining a private nuisance, the measure of damages *held* the diminution in the fair market value of plaintiff's property caused by the injury complained of.—*Central Consumers Co. v. Pinkert* (Ky.) 957.

A right to recover damages for water escaping on plaintiff's land *held* established.—*Central Consumers Co. v. Pinkert* (Ky.) 957.

*A purchaser *held* liable for maintaining a nuisance caused by the operation of a pumping apparatus erected by his vendor without receiving notice asking for the removal thereof.—*Central Consumers Co. v. Pinkert* (Ky.) 957.

Under Rev. St. 1895, arts. 4492, 4493, 4519, the operation of cars on side tracks adjoining depot grounds, in the absence of negligence, *held* not to give rise to a cause of action for personal discomfort to an adjoining landowner.—*St. Louis, S. F. & T. Ry. Co. v. Shaw* (Tex. Sup.) 30.

*Where a nuisance created by a railroad company, together with a similar nuisance on adjoining land for which the railroad company was not responsible, combined to cause plaintiff's injury, the railroad company was liable for its portion of the injury so sustained.—*McFadden v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 989.

NUNC PRO TUNC.

Entry of as part of statement of facts for purpose of review, see "Appeal and Error," § 9.

OBJECTIONS.

For purpose of review, see "Criminal Law," § 28; "Homicide," § 10.

To argument of counsel, see "Criminal Law," § 19.

To evidence, see "Criminal Law," § 18.
Waiver of objections to indictment or information, see "Indictment and Information," § 7.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 3.

OBSCENITY.

An information charging the use of obscene, vulgar, and indecent language in a public place *held* insufficient.—*Huffman v. State* (Tex. Cr. App.) 419.

OBSTRUCTIONS.

Of highways, see "Highways," § 2.

Of street, see "Municipal Corporations," § 8.

OFFER.

Of proof, see "Criminal Law," § 18; "Trial," § 3.

*Point annotated. See syllabus.

OFFICERS.

Bribery, see "Bribery."

Particular classes of officers.

See "District and Prosecuting Attorneys"; "Judges"; "Justices of the Peace"; "Receivers"; "Registers of Deeds"; "Sheriffs and Constables."

Bank officers, see "Banks and Banking," § 1.

Corporate officers, see "Corporations," § 2.

County officers, see "Counties," § 1.

Municipal officers, see "Municipal Corporations," § 4.

§ 1. Appointment, qualification, and tenure.

Acts 1879, p. 65, c. 46, *held* to create the office of entry taker all over the state, which had been abolished by Acts 1875, p. 51, c. 55, whether a county elected to fill the same or not.—*Heard v. Elliott* (Tenn.) 764.

The county surveyor of S. county, without any election as entry taker therefor, between 1881 and April 4, 1887, *held* entry taker de facto, under Acts 1870, p. 115, c. 68, Acts 1875, p. 51, c. 55, and Acts 1879, p. 65, c. 46.—*Heard v. Elliott* (Tenn.) 764.

§ 2. Title to and possession of office.

One exercising the functions of a notary public after appointment as postmaster *held* not guilty of usurpation of office within Ky. St. 1903, § 1364.—*Palmer v. Commonwealth* (Ky.) 588.

One holding office of notary public after appointment as postmaster *held* not to violate Ky. St. 1903, § 1364, relating to holding office after term has expired.—*Palmer v. Commonwealth* (Ky.) 588.

One continuing to exercise office of notary public after appointment as postmaster *held* not to violate Ky. St. 1903, § 1364, relating to holding office after his election or appointment is adjudicated void.—*Palmer v. Commonwealth* (Ky.) 588.

OPENING.

Judgment, see "Judgment," § 2.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 9.

In criminal prosecutions, see "Criminal Law," § 13.

OPINIONS.

Of courts, see "Courts," § 2.

OPTIONS.

Option or sale, see "Sales," § 1.

ORDER OF PROOF.

At trial, see "Trial," § 3.

ORDERS.

For appointment of receivers, see "Receivers," § 2.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

- Municipal ordinances, see "Municipal Corporations," §§ 3, 5, 6, 9.
 Municipal ordinances as evidence in action for injury on street, see "Municipal Corporations," § 8.
 Regulation of street railroads, see "Street Railroads," § 1.
 Relating to gaming, see "Gaming," § 2.

PARENT AND CHILD.

- See "Guardian and Ward"; "Infants."
 Action for death of parent, see "Death," § 1.
 Consideration for note by, see "Bills and Notes," § 1.
 Contributory negligence of child injured by operation of railroad, see "Railroads," §§ 6, 7.
 Harmless error in action for death of parent, see "Appeal and Error," § 16.
 Liability of master for injuries to child, caused by act of servant, see "Master and Servant," § 12.

Under Shannon's Code, §§ 4503, 4504, *held*, that an action for injury to a minor child could not be maintained in the name of a parent.—*Tennessee Cent. Ry. Co. v. Doak* (Tenn.) 853.

PAROL EVIDENCE.

- In civil actions, see "Evidence," § 8.

PARTICULARS.

- Bill of, see "Pleading," § 5.

PARTIES.

- Admissions as evidence, see "Evidence," § 4.
 Persons concluded by judgment, see "Judgment," § 6.

In particular actions or proceedings.

- See "Attachment," § 1; "Judgment," § 1; "Specific Performance," § 2.
 Criminal prosecutions, see "Criminal Law," § 1.
 On appeal or writ of error, see "Appeal and Error," § 3.
 On insurance policy, see "Insurance," § 16.
 To enforce tax by sale of land, see "Taxation," § 5.

§ 1. Plaintiffs.

*One holding the legal title to land as agent *held* entitled, under Civ. Code Prac. § 21, to sue in his own name to restrain a trespass thereon.—*Goff v. Boland* (Ky.) 575.

Under Rev. St. 1899, § 540, a plaintiff *held* entitled to sue on a contract as the real party in interest by an assignment.—*Farmers' Exch. Bank v. Crump* (Mo. App.) 724.

§ 2. New parties and change of parties.

*One claiming to have received a lease of property from the purchasers at judicial sale *held* entitled to be made a party to the action in which the sale was made; a general writ of possession having been awarded against the tenants in favor of the assignee of the purchasers.—*Aull v. Bowling Green Opera House Co.* (Ky.) 943.

PARTITION.

§ 1. Actions for partition.

In partition, where parties claimed from common source, defendant *held* not entitled to defeat action because of the insufficiency of plaintiffs' title.—*Heard v. Cherry* (Ky.) 551.

* Point annotated. See syllabus.

Property belonging to an estate *held* subject to partition between tenants in common, under Civ. Code Prac. § 490, where there were vested estates jointly held, though one of the shares was vested in an infant remainderman (Ky. St. 1903, § 4848) subject to a curtesy interest of her father.—*Stine v. Goodman* (Ky.) 612.

*The record in partition proceedings had while Gen. St. 1865, c. 152, relating to partition, was in force, should show the confirmation of the sale.—*Clark v. Sires* (Mo. Sup.) 224.

Recital in record in partition *held* not to show a confirmation of the sale of the land.—*Clark v. Sires* (Mo. Sup.) 224.

A sheriff's deed in partition proceedings had when Gen. St. 1865, c. 152, was in force, *held* not to pass any title.—*Clark v. Sires* (Mo. Sup.) 224.

The sections of the Code on the subject of partition in kind and of sale for partition are in *pari materia*, and must be construed together.—*Rutherford v. Rutherford* (Tenn.) 1112.

*There can be no partition or sale for partition among contingent remaindermen.—*Rutherford v. Rutherford* (Tenn.) 1112.

*The fact that there can be no partition or sale for partition among contingent remaindermen does not prevent the life tenants from having a partition or a sale for partition.—*Rutherford v. Rutherford* (Tenn.) 1112.

Under Shannon's Code, §§ 5010, 5040, 5042, 5070, relating to partition, sale of land *held* proper, notwithstanding the existence of contingent estate.—*Rutherford v. Rutherford* (Tenn.) 1112.

A commission due to real estate agents cannot be allowed out of a fund arising from a sale of real estate in partition proceedings.—*Rutherford v. Rutherford* (Tenn.) 1112.

On sale of land in partition proceedings, life tenants *held* entitled to allowance out of aggregate fund for their outlay in procuring surrender of premises.—*Rutherford v. Rutherford* (Tenn.) 1112.

Where there is a sale of lands on partition, life estates may be valued and the value paid over to the life tenants under the direct provision of Shannon's Code, § 5056.—*Rutherford v. Rutherford* (Tenn.) 1112.

PARTNERSHIP.

Amendment of pleading in action against, see "Pleading," § 4.

Judgment in general in action against firm, see "Judgment," § 1.

Liability on partnership note, see "Bills and Notes," § 3.

Sales of good will, see "Good Will."

§ 1. The relation.

Recitals as to value in a contract which defendant was induced by false representations to make *held* not binding on him on rescission thereof.—*Caplen v. Cox* (Tex. Civ. App.) 1048.

Representations inducing defendant to enter into a partnership agreement *held* made as a matter of fact, so that defendant was entitled to rely on them.—*Caplen v. Cox* (Tex. Civ. App.) 1048.

Evidence *held* to sustain findings that defendant was induced by fraudulent representations to enter into a partnership agreement with plaintiff.—*Caplen v. Cox* (Tex. Civ. App.) 1048.

*A partnership agreement having been induced by false representations will be rescinded.—Caplen v. Cox (Tex. Civ. App.) 1048.

§ 2. Mutual rights, duties, and liabilities of partners.

*Partners in a firm held not entitled to complain of the insufficiency of the books kept by a copartner.—Shoemaker v. Shoemaker (Ky.) 546.

The failure of a partner to keep proper books held not to raise a presumption against him under the circumstances.—Shoemaker v. Shoemaker (Ky.) 546.

Statement as to liability of parties on an accounting, where a partnership agreement is rescinded for fraudulent representations inducing the making of it.—Caplen v. Cox (Tex. Civ. App.) 1048.

§ 3. Rights and liabilities as to third persons.

*A partner held liable on a check delivered by him in payment of a copartner's individual debt.—Mitchell v. Whaley (Ky.) 556.

*A copartner, asserting that a partner had no authority to execute a note in the firm name, held required to prove the same.—Mitchell v. Whaley (Ky.) 556.

§ 4. Dissolution, settlement, and accounting.

A partner, suing to surcharge the annual firm settlements, held required to show the errors claimed by him.—Shoemaker v. Shoemaker (Ky.) 546.

A purchasing partner executing a note on purchasing the firm assets held entitled to a certain reduction for goods and cash withdrawn from the firm by the selling partner, and not considered in the settlement.—Davis v. Ferguson (Ky.) 968.

One-half of liabilities not included in a firm settlement held required to go to reduce the amount of the note given by the purchasing partner in consideration of the purchase of the firm assets.—Davis v. Ferguson (Ky.) 968.

*Member of partnership held bound to a creditor for money due to creditor and converted by the other member of the firm after dissolution.—Powell v. Roberts (Mo. App.) 752.

*On an accounting by a partnership, plaintiff held not liable for rent of building occupied by firm after the expiration of the partnership contract.—Pardue v. McCollum (Mo. App.) 757.

PART PAYMENT.

Of interest-bearing notes, see "Interest," § 1.

PARTY WALLS.

Party wall agreement as to boundary, see "Boundaries," § 2.

PASSENGERS.

See "Carriers," §§ 4-10.

PATENTS.

For public lands, see "Public Lands," §§ 2, 3.

PAYMENT.

Of interest, see "Interest," § 1.

Of price of land sold, see "Vendor and Purchaser," § 4.

Of tax as defeating title of purchaser at tax sale, see "Taxation," § 6.

Recovery of money paid by purchaser at attachment sale, see "Attachment," § 4.

Subrogation on payment, see "Subrogation."

PENALTIES.

Collection of insurance dues without license, see "Insurance," § 17.

Delinquency in payment of municipal tax, see "Municipal Corporations," § 9.

Failure to execute process, see "Sheriffs and Constables," § 2.

Violation of insurance regulations, see "Insurance," § 1.

Violation of regulations of railroads, see "Railroads," § 5.

PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

PERJURY.

Requests for instructions, see "Criminal Law," § 22.

§ 1. Offenses and responsibility therefor.

Where, in a prosecution for assault with a knife, defendant testified that he had no knife at the time, such evidence was material, and could be made the basis of a charge of perjury, whether defendant was guilty of the assault or not.—Scott v. State (Ark.) 241.

PERMITS.

To foreign corporations, see "Corporations," § 5.

PERSONAL INJURIES.

See "Assault and Battery," § 1; "Limitation of Actions," § 2; "Negligence."

Argument and conduct of counsel at trial of action for, see "Trial," § 4.

Caused by act of employe, see "Master and Servant," § 12.

Caused by operation of street railroad, see "Street Railroads," §§ 1, 2.

Conformity of judgment to pleadings, see "Judgment," § 1.

Direct or remote consequences of injury, see "Damages," § 2.

Excessive damages, see "Damages," § 4.

Grounds for continuance in actions for, see "Continuance."

Harmless error in action for, see "Appeal and Error," §§ 17, 18.

Instructions in general in actions for, see "Trial," §§ 6, 7, 9, 11.

Liability of saloonkeeper for injuries caused by malicious act of employe, see "Intoxicating Liquors," § 9.

Measure of damages, see "Damages," § 3.

Opinion evidence, see "Evidence," § 9.

Pleading, evidence, and assessment of damages, see "Damages," § 5.

Release of liability for, see "Release," §§ 1, 3.

Remittitur of part of recovery on appeal or error, see "Appeal and Error," § 20.

Res gestæ, see "Evidence," § 2.

Review as dependent on issues and questions in lower court, see "Appeal and Error," § 4.

To child, see "Parent and Child."

To employe, see "Master and Servant," §§ 1-11.

To licensee, see "Railroads," § 6.

To passenger, see "Carriers," § 7.

To person on or near railroad tracks, see "Railroads," § 8.

To traveler on highway, see "Highways," § 2; "Municipal Corporations," § 8.

* Point annotated. See syllabus.

To traveler on highway crossing railroad, see "Railroads," § 7.
To trespasser, see "Railroads," § 6.

PERSONAL PROPERTY.

Taxation of, see "Taxation," § 2.

PERUNA.

Conviction for sale of under liquor laws, see "Intoxicating Liquors," § 4.

PETITION.

See "Pleading."

For change of venue, see "Criminal Law," § 3.

PHARMACY.

Special or local laws relating to, see "Statutes," § 1.

PHOTOGRAPHS.

As evidence, see "Criminal Law," § 8.

PHYSICIANS AND SURGEONS.

Authority of agent to employ, see "Principal and Agent," § 2.

Competency as witnesses, see "Witnesses," § 1.

Distribution of governmental powers and functions as affecting validity of regulation of practice of, see "Constitutional Law," § 1.

Indictment or information for offenses by, see "Indictment and Information," § 3.

Regulation of practice of, as deprivation of property, without due process of law, see "Constitutional Law," § 5.

Special or local laws relating to pharmacy, see "Statutes," § 1.

Title of statute relating to dentistry, see "Statutes," § 2.

Vested right to practice, see "Constitutional Law," § 2.

*The Legislature may, in the exercise of the police power, regulate the practice of medicine and surgery.—*Thompson v. Van Lear* (Ark.) 773.

Acts 1903, p. 342, forbidding physicians and surgeons to solicit patients through paid agents, is a valid police regulation.—*Thompson v. Van Lear* (Ark.) 773.

A dentist having received his dental certificate and registered the same in the county of his residence, under Ky. St. 1903, § 2641, prior to its repeal by Acts 1904, p. 92, c. 32, *held* not required to register the same in the county or counties in which he practices, under the latter act.—*Commonwealth v. Nevill* (Ky.) 550.

A nonresident physician, not registered in Missouri, *held* to have practiced medicine in that state, in violation of Acts 1901, pp. 207, 208, §§ 1, 4, 5.—*State v. Davis* (Mo. Sup.) 484.

*An indictment against a dentist for practicing without a license *held* not required to allege the persons on whom he practiced.—*State v. Doerring* (Mo. Sup.) 489.

In a prosecution for practicing dentistry without a license, the fact that the board of dental examiners had improperly refused to issue a license to defendant *held* no defense.—*State v. Doerring* (Mo. Sup.) 489.

PLEA.

In criminal prosecution, see "Criminal Law," § 7.

*Point annotated. See syllabus.

PLEADING.

Amendment of as ground for continuance, see "Continuance."

Amendment of, affecting limitation, see "Limitation of Actions," § 2.

Applicability of instructions to pleadings, see "Trial," § 9.

Conformity of judgment to pleadings, see "Judgment," § 1.

Exceptions for purpose of review, see "Appeal and Error," § 6.

Harmless error in rulings on, see "Appeal and Error," § 16.

In justice's court, see "Justices of the Peace," § 1.

In proceedings on appeal from justice's court, see "Justices of the Peace," § 2.

Objections for purpose of review, see "Appeal and Error," § 5.

Pleading as affecting validity of general verdict, see "Trial," § 13.

Review of discretionary rulings, see "Appeal and Error," § 14.

Rulings on decision on appeal as law of the case, see "Appeal and Error," § 19.

Allegations as to particular facts, acts, or transactions.

See "Damages," § 5; "Release," § 3; "Statutes," § 5.

Ground for removal of action from state court to United States court, see "Removal of Causes," § 3.

Statute of limitations, see "Limitation of Actions," § 5.

In actions by or against particular classes of parties.

See "Carriers," §§ 2, 3, 7; "Corporations," § 3;

"Master and Servant," § 8; "Municipal Corporations," § 8; "Principal and Agent," § 2;

"Railroads," § 8.

In particular actions or proceedings.

See "Ejectment," § 2; "Equity," § 2; "Negligence," § 4; "Trespass," § 1.

Complaint for violation of municipal ordinance, see "Municipal Corporations," § 6.

For breach of contract of lease, see "Landlord and Tenant," § 1.

For breach of warranty, see "Sales," § 7.

For causing death, see "Death," § 1.

For death of servant, see "Master and Servant," § 8.

For delay in transportation and delivery of goods, see "Carriers," § 2.

Foreclosure, see "Mortgages," § 3.

For injuries caused by improvement of highway in city, see "Municipal Corporations," § 8.

For injuries to live stock in transportation, see "Carriers," § 3.

For negligence in delivery or transmission of message, see "Telegraphs and Telephones," § 1.

For personal injuries, see "Railroads," § 8.

Indictment or criminal information or complaint, see "Indictment and Information."

On bill or note, see "Bills and Notes," § 3.

On corporate bonds, see "Corporations," § 3.

Pleas in criminal prosecutions, see "Criminal Law," § 7.

To restrain operation of toll road, see "Turnpikes and Toll Roads," § 2.

To set aside judgment, see "Judgment," § 3.

§ 1. *Form and allegations in general.*

*Denial of garnishee's answer *held* not to state mere conclusions of law.—*Kiernan v. Robertson* (Mo. App.) 138.

§ 2. *Plea or answer, cross-complaint, and affidavit of defense.*

*Where a defendant was not cited to answer his codefendants' cross-action, and never

appeared, answered, nor paid any attention thereto, matters involved in such cross-action could not be submitted to the jury.—*Johnston v. Fraser* (Tex. Civ. App.) 49.

§ 3. Replication or reply and subsequent pleadings.

In trespass, judgment on pleadings for failure of plaintiff to reply *held* properly denied.—*Morgan v. Lewis* (Ky.) 970.

A reply *held* not objectionable as an amendment of the original petition.—*Walker v. Wash R. Co.* (Mo. Sup.) 83.

§ 4. Amended and supplemental pleadings and replender.

Proof that delay in the transportation of plaintiff's cattle was that of a connecting carrier *held* a material variance from the petition, alleging that the delay was that of the initial carrier, requiring an amendment on objection, under Rev. St. § 655.—*Ingwersen v. St. Louis & H. Ry. Co.* (Mo. App.) 357.

In an action against an initial carrier for delay in the transportation of live stock, an amendment charging that the delay was the fault of a connecting carrier was not objectionable under Rev. St. 1899, § 655.—*Ingwersen v. St. Louis & H. Ry. Co.* (Mo. App.) 357.

Amendment of pleading in action against firm on note after rendition of judgment *held* not to justify judgment against member of the firm.—*King v. Monitor Drill Co.* (Tex. Civ. App.) 1046.

*The allowance of an amendment after the parties have announced themselves ready for trial is within the discretion of the court, and its action will not be reversed unless such discretion is abused.—*W. B. Walker & Sons v. Hernandez* (Tex. Civ. App.) 1067.

§ 5. Bill of particulars and copy of account.

In an action against a railroad for the loss of trunks, defendant is entitled to be informed by plaintiff of the several items constituting the contents of the trunks.—*Texas & P. Ry. Co. v. Weatherby* (Tex. Civ. App.) 58.

§ 6. Motions.

*Where a petition states but one substantial cause of action, though in different ways, motion to require election between causes of action *held* properly denied.—*Eversole v. Virginia Iron, Coal & Coke Co.* (Ky.) 593.

§ 7. Defects and objections, waiver, and aid by verdict or judgment.

In an action for negligence causing the death of a citizen of Kansas, an alleged defective petition *held* to have been aided by the answer.—*Lee v. Missouri Pac. Ry. Co.* (Mo. Sup.) 614.

Where an objection to a petition is made for the first time after trial has begun, it should be overruled, if the petition is susceptible of a construction that will constitute a cause of action.—*Lee v. Missouri Pac. Ry. Co.* (Mo. Sup.) 614.

Act of garnishee in replying to the merits of plaintiff's denial of his answer *held* a waiver of defects.—*Kiernan v. Robertson* (Mo. App.) 138.

PLEDGES.

Of community property, see "Husband and Wife," § 3.

Of insurance policy, see "Insurance," § 16.

Priorities between pledge and chattel mortgage, see "Chattel Mortgages," § 1.

A pledgee of commercial paper with power to sell *held* required to use diligence to get the

best price.—*King v. D. Sullivan & Co.* (Tex. Civ. App.) 51.

POLICE.

See "Municipal Corporations," §§ 2, 4.

Prohibition against prosecution of, see "Prohibition," § 1.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 6.

Regulations as to practice of medicine, see "Physicians and Surgeons."

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

Suffrage, see "Elections."

POSSESSION.

See "Adverse Possession."

Of demised premises, see "Landlord and Tenant," § 6.

Of office, see "Officers," § 2.

POST OFFICE.

Authority to hold office as notary after appointment as postmaster, see "Officers," § 2.

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Ejectment"; "Prohibition"; "Quo Warranto," § 2; "Replevin"; "Trespass," § 1; "Trespass to Try Title," § 2.

Condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions.

See "Appearance"; "Continuance"; "Costs"; "Damages," § 5; "Depositions"; "Dismissal and Nonsuit"; "Divorce," § 3; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Stipulations"; "Trial"; "Venue."

Nonsuit, see "Trial," § 5.

Revival of judgment, see "Judgment," § 7.

Verdict, see "Trial," § 13.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.

See "Criminal Law."

For offense against liquor laws, see "Intoxicating Liquors," §§ 5-7.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 1.

Procedure on review.

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 2; "New Trial."

*Point annotated. See syllabus.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," §§ 16-18.
Grounds for review in criminal prosecutions, see "Criminal Law," § 30.

PRELIMINARY EXAMINATION.

On criminal charge, see "Criminal Law," § 6.

PRELIMINARY INJUNCTION.

See "Injunction," § 3.

PREMIUMS.

For insurance, see "Insurance," §§ 6, 9, 10.

PRESCRIPTION.

Acquisition of rights, see "Adverse Possession," § 1; "Waters and Water Courses," § 1.
Establishment of highways, see "Highways," § 1.

PRESENTMENT.

Of claims against estate of decedent, see "Executors and Administrators," § 4.

PRESUMPTIONS.

As to regularity of tax deed, see "Taxation," § 6.
On appeal or error, see "Appeal and Error," § 13; "Criminal Law," § 30.

PRINCIPAL AND ACCESSORY.

See "Criminal Law," § 1.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers."
Admissions by agent, see "Evidence," § 4.
Agency for carrier, see "Carriers," § 2.
Agency of partner for firm, see "Partnership," § 3.
Corporate agents, see "Corporations," § 2.
Effect of misrepresentations by one agent on release obtained by other, see "Release," § 1.
Instructions in general in actions involving, see "Trial," § 6.
Insurance agents, see "Insurance," §§ 3, 5, 10.
Liability for commissions of loan agent on exchange of property, see "Exchange of Property."
Liquor agents, see "Intoxicating Liquors," §§ 1, 4.
Real party in interest, see "Parties," § 1.

§ 1. The relation.

Defendants from whom plaintiff purchased mattresses *held* to have acted as agents of both seller and buyer, though the seller was not informed that plaintiff was the real purchaser.—*Haines v. Neece* (Mo. App.) 919.

§ 2. Rights and liabilities as to third persons.

Occupation of land by wife to boundary under agreement by husband *held* a ratification of the agreement.—*Matthews v. French* (Mo. Sup.) 634.

*The complaint in an action for specific performance *held* to state no cause of action against certain defendants.—*Morrison v. Hazzard* (Tex. Sup.) 33.

Evidence *held* insufficient to show that misrepresentations of an agent were authorized or known of by his principal.—*Gulf, C. & S. F. Ry. Co. v. Huyett* (Tex. Sup.) 454.

*A conductor of a railroad train had no authority to employ a physician to attend a trespasser who had been run over by the train owing to his own negligence.—*Wills v. International & G. N. R. Co.* (Tex. Civ. App.) 273.

In an action by a physician against a railroad for services rendered one run over by a train, facts *held* not to show a ratification by defendant of the employment of plaintiff by a conductor.—*Wills v. International & G. N. R. Co.* (Tex. Civ. App.) 273.

In an action against a railroad company by a physician for services rendered on the employment of a conductor, the burden of proof *held* on plaintiff to show the conductor's authority.—*Wills v. International & G. N. R. Co.* (Tex. Civ. App.) 273.

PRINCIPAL AND SURETY.

See "Guaranty"; "Indemnity."
Decree in suit in equity against sureties, see "Equity," § 3.
Liabilities of sheriffs on bonds on appeal from justice's court, see "Justices of the Peace," § 2.
Liabilities of sureties on bonds in legal proceedings, see "Injunction," § 4.
Liabilities on bonds for performance of duties of trust or office, see "Sheriffs and Constables," § 2.
Pleading in suit in equity against sureties, see "Equity," § 2.

PRIORITIES.

Between landlord's lien and other rights. see "Landlord and Tenant," § 5.
Of mortgages, see "Chattel Mortgages," § 1.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVATE ROADS.

Rights of way, see "Easements."

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 1.

PROCESS.

Effect of appearance, see "Appearance."
In actions against particular classes of parties.
See "Corporations," § 3; "Railroads," § 1.
In particular actions or proceedings.
See "Divorce," § 3.
In criminal prosecutions, see "Criminal Law," § 6.
To enforce tax by sale of land, see "Taxation," § 5.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Prohibition"; "Quo Warranto"; "Replevin."

§ 1. Service.

*Service by publication *held* not defective because neither the affidavit nor the order for

* Point annotated. See syllabus.

publication set out that defendants could not be served within the state.—*Harbert v. Durden* (Mo. App.) 746.

Proof of publication of process *held* not defective under the statute.—*Stuart v. Cole* (Tex. Civ. App.) 1040.

PROHIBITION.

Jurisdiction in general, see "Courts," § 1.
Of traffic in intoxicating liquors, see "Intoxicating Liquors."

§ 1. Nature and grounds.

*Where a court has jurisdiction of the class of cases to which the proceeding sought to be prohibited belongs, and of the subject-matter, the fact that the petition or complaint is defective is not ground for prohibition.—*State ex rel. McNamee v. Stobie* (Mo. Sup.) 191.

That members of a city police force had authority as private citizens to forcibly enter a racing association's inclosure to arrest gamblers *held* no ground for the issuance of prohibition to restrain a justice from assuming jurisdiction of a criminal proceeding against such policemen for breaking such inclosure.—*State ex rel. McNamee v. Stobie* (Mo. Sup.) 191.

That the arrest of certain policemen for breaking the close of a racing association to effect arrests was for the purpose of hindering and impeding them in the performance of their duty, and to protect from arrest persons engaged in violating the law, *held* no ground for the issuance of a writ of prohibition restraining prosecution of such policemen.—*State ex rel. McNamee v. Stobie* (Mo. Sup.) 191.

*A litigant is not entitled to prohibition unless the court or judge sought to be prohibited is assuming to exercise a power not granted.—*State ex rel. McNamee v. Stobie* (Mo. Sup.) 191.

*A writ of prohibition cannot be issued to supply the place of an appeal, writ of error, or certiorari.—*State ex rel. McNamee v. Stobie* (Mo. Sup.) 191.

*The writ of prohibition is granted only to prevent usurpation of judicial power.—*Kalbfell v. Wood* (Mo. Sup.) 230.

Under Laws 1901, p. 156, § 15, the duty of the election commissioners in selecting judges, clerks, and challengers for primary elections *held* administrative and not judicial, so that it cannot be regulated by prohibition.—*Kalbfell v. Wood* (Mo. Sup.) 230.

A writ of prohibition *held* not maintainable to restrain the court having jurisdiction from placing defendants on trial a second time for an offense for which they had once been put in jeopardy.—*State ex rel. Meador v. Williams* (Mo. App.) 151.

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of loss insured against, see "Insurance," § 13.
Of service of process, see "Process," § 1.

PROPERTY.

See "Animals"; "Good Will"; "Intoxicating Liquors," § 10; "Logs and Logging"; "Mines and Minerals"; "Shipping."

Adverse possession, see "Adverse Possession."
Constitutional guaranties of rights of property, see "Constitutional Law," §§ 2, 5.

*Point annotated. See syllabus.

Dedication to public use, see "Dedication."
Protection of rights of property by injunction, see "Injunction," § 2.
Taking for public use, see "Eminent Domain."

PROSECUTING ATTORNEYS.

See "District and Prosecuting Attorneys."

PROSTITUTION.

See "Disorderly House."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," §§ 6-11.
In criminal prosecutions, see "Criminal Law," § 20.

PROVOCATION.

See "Homicide," §§ 1, 2.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 2.
Of injuries to servant, see "Master and Servant," § 2.
Of injury, see "Negligence," §§ 2, 4.
Of injury caused by operation of street railroad, see "Street Railroads," § 1.

PUBLICATION.

Of notice of local option election, see "Intoxicating Liquors," § 2.
Service of process, see "Process," § 1.
Service of process in divorce suit, see "Divorce," § 3.

PUBLIC DEBT.

See "Schools and School Districts," § 1.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 5.

PUBLIC LANDS.

Harmless error in action between applicants to purchase, see "Appeal and Error," § 17.
Objections for purpose of review in action between claimants, see "Appeal and Error," §§ 5.
Proceedings in land office as bar of cause of action, see "Judgment," § 6.

§ 1. Government ownership.

An island in the Missouri river, surveyed by the United States prior to the admission of Missouri into the Union, *held* to belong to the general government, and to have passed under a federal patent.—*Bradshaw v. Edelen* (Mo. Sup.) 691.

§ 2. Survey and disposal of lands of United States.

Land lying between meander line and main channel of river *held* not to pass to grantee of adjoining land by virtue of riparian rights.—*Chapman & Dewey Land Co. v. Bigelow* (Ark.) 534.

*A patent issued by the federal government is *prima facie* evidence that all the prerequisites of the law necessary to its issuance have been complied with.—*Bradshaw v. Edelen* (Mo. Sup.) 691.

§ 3. Disposal of lands of the states.

Release and quitclaim by patentee of public land *held* of no avail to one against whom is set up a different patent, and who is not shown to have been in possession of land referred to in the release.—*Fox v. Cornett* (Ky.) 959.

Patent of public lands *held* not void for failure to refer to and exclude older patents included in it.—*Fox v. Cornett* (Ky.) 959.

An application to purchase school land, made after the land came on the market, *held* sufficient without bearing the indorsement required by Laws 1905, p. 159, § 3.—*Flores v. Terrell* (Tex. Sup.) 32.

Under Rev. St. 1895, arts. 4218f, 4218g, and Act April 15, 1905 (Laws 1905, p. 159, c. 103), the land commissioner, after having notified the county clerk of the appraisal of school lands which had never been leased, *held* without power to fix a date for the receiving of bids on such land different from the date when the clerk was notified.—*Estes v. Terrell* (Tex. Sup.) 407.

Under Sayles' Ann. Civ. St. 1897, arts. 4218j, 4218z, corporation holding original purchaser's right to forfeited land *held* not entitled to prior right to purchase of the land.—*Mound Oil Co. v. Terrell* (Tex. Sup.) 451.

Under Sayles' Ann. Civ. St. 1897, art. 4218f, application for purchase of forfeited public lands, accompanied by obligation for insufficient amount, *held* not to prevent reinstatement of original purchaser.—*Mound Oil Co. v. Terrell* (Tex. Sup.) 451.

Under Sayles' Ann. Civ. St. 1897, art. 4218f, application for purchase of forfeited land by third person, accompanied by proper payment, *held* sufficient to prevent reinstatement of original purchaser, though by mistake a part of the payment accompanying the application was repaid.—*Mound Oil Co. v. Terrell* (Tex. Sup.) 451.

Statement of Land Commissioner that a purchaser of public lands was in good standing *held* not to estop the state to declare a forfeiture for a prior nonpayment of interest.—*Mound Oil Co. v. Terrell* (Tex. Sup.) 451.

In absence of statute, failure of Commissioner of Land Office to give notice that claim for land is subject to forfeiture for nonpayment of interest *held* not to estop the state to declare forfeiture.—*Mound Oil Co. v. Terrell* (Tex. Sup.) 451.

Evidence examined, and *held* to show that at the time of plaintiff's application to purchase certain public lands defendant had acquired a superior right thereto.—*Winans v. McCabe* (Tex. Civ. App.) 817.

Under Acts 27th Leg. p. 294, § 3, an instruction in trespass to try title to certain school lands, defining temporary abandonment under fear of death or serious bodily injury, *held* proper.—*Jones v. Wright* (Tex. Civ. App.) 1010.

Where defendant was not an actual settler on a home section of school lands at the time additional land was awarded to her, such award was ineffective.—*Jones v. Wright* (Tex. Civ. App.) 1010.

In trespass to try title to certain school lands, it was not error for the court to refuse to charge that the act of the Commissioner of the General Land Office in awarding the land to defendant was *prima facie* evidence that she was an actual settler on her home section.—*Jones v. Wright* (Tex. Civ. App.) 1010.

In trespass to try title, an instruction authorizing the jury to consider defendant's acts

and misconduct before and after the date of her application to purchase school lands for the purpose of determining the good faith of her settlement *held* proper.—*Jones v. Wright* (Tex. Civ. App.) 1010.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 3.

PUNISHMENT.

Assessment by jury, see "Criminal Law," § 24.

QUANTUM MERUIT.

See "Work and Labor."

QUASHING.

Execution, see "Execution," § 2.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 5.
In criminal prosecutions, see "Criminal Law," § 20; "Homicide," § 9.

QUIETING TITLE.

Costs in general, see "Costs," § 1.

§ 1. Right of action and defenses.

*In action to quiet title to unoccupied lands, plaintiff must succeed on the strength of his own title.—*Chapman & Dewey Land Co. v. Bigelow* (Ark.) 534.

A decree affecting land, rendered in a suit between strangers to the true title, does not constitute a cloud on the title of the true owner.—*Haggart & McMahsters v. Chapman-Dewey Land Co.* (Ark.) 792.

Ky. St. 1903, § 11, *held* not to require plaintiff to show that he is in possession of land, where defendants have attempted to convert his right thereto to their own use.—*Eversole v. Virginia Iron, Coal & Coke Co.* (Ky.) 593.

*Where claim to have title quieted is asserted as counterclaim by defendant, whose title has been wrongfully converted, Ky. St. 1903, § 11, *held* not to require proof of possession by him.—*Fox v. Cornett* (Ky.) 959.

§ 2. Proceedings and relief.

Evidence in action to quiet title to land between meander line and main course of river *held* to show that its elevation had not been changed since the running of the meander line.—*Chapman & Dewey Land Co. v. Bigelow* (Ark.) 534.

In action between parties claiming to be adjoining owners of land to determine their rights, claim of third person to land between them *held* immaterial.—*Matthews v. French* (Mo. Sup.) 634.

In an action to quiet title, a judgment *held* properly rendered in favor of plaintiff for the rental value of the land during defendants' pos-

* Point annotated. See syllabus.

session, as provided by Rev. St. 1895, art. 5273.
—Bryson & Hartgrove v. Boyce (Tex. Civ. App.) 820.

QUO WARRANTO.

As concurrent remedy with injunction, see "Injunction," § 1.

§ 1. Nature and grounds.

*A corporation may be proceeded against by quo warranto for misuse or perversion of its franchises, notwithstanding its officers and agents may also be amenable to the criminal law for the offense complained of.—State ex inf. Hadley v. Delmar Jockey Club (Mo. Sup.) 185.

Trial of officers of a corporation guilty of criminal conduct in the management of its business *held* not a prerequisite to quo warranto against the corporation.—State ex inf. Hadley v. Delmar Jockey Club (Mo. Sup.) 185.

§ 2. Jurisdiction, proceedings, and relief.

*A demurrer to an information in the nature of a quo warranto to oust a corporation from the exercise of its franchises admits every material allegation in the information other than mere conclusions of the pleader.—State ex inf. Hadley v. Delmar Jockey Club (Mo. Sup.) 185.

RAILROADS.

See "Street Railroads."

Argument and conduct of counsel at trial in actions by or against, see "Trial," § 4.

As affected by regulations relating to commerce, see "Commerce," § 2.

As employers, see "Master and Servant."

Authority of conductor to employ physicians to attend person injured by operation of, see "Principal and Agent," § 2.

Carriage of goods and passengers, see "Carriers."

Construction of drains by, in general, see "Drains," § 1.

Exercise of power of eminent domain, see "Eminent Domain," §§ 2, 4.

Expert testimony in action for injuries from fire caused by operation of, see "Evidence," § 9.

Foreign companies in general, see "Corporations," § 5.

Former judgment as bar of right of action in proceedings to allow putting in of crossings, see "Judgment," § 6.

Grounds for continuance of actions by or against, see "Continuance."

Harmless error in action against railroad for obstructing alley, see "Appeal and Error," §§ 17, 18.

Instructions in general in actions by or against, see "Trial," §§ 6, 8.

Interference with surface waters, see "Waters and Water Courses," § 2.

Liability for obstructing highway, see "Highways," § 2.

Liability over of telegraph company to railroad company for negligence causing injuries, see "Indemnity."

Operation of, as nuisance, see "Nuisance," § 1.

Trespass by, see "Trespass," § 1.

§ 1. Railroad companies.

*Under Civ. Code Prac. § 73, an action against railroad for injuries at a crossing may be brought in the county in which the plaintiff resides, if the carrier has a track extending into that county.—Louisville, H. & St. L. R. Co. v. Sander's Adm'r (Ky.) 937.

Evidence *held* to justify finding that persons on whom process was served were agents of de-

fendant.—Choctaw, O. & G. Ry. Co. v. Locke (Tex. Civ. App.) 258.

§ 2. Construction, maintenance, and equipment.

Railroads are not required to fence roads which are public highways *de facto*.—Dow v. Kansas City Southern Ry. Co. (Mo. App.) 744.

*Railroad companies are not required by the common law to fence their right of way.—Mangold v. St. Louis, M. & S. E. Ry. (Mo. App.) 753.

Evidence *held* not to show a landowner entitled to a right of action, under Rev. St. 1899, § 1105, against a railroad company for failure to fence.—Mangold v. St. Louis, M. & S. E. Ry. (Mo. App.) 753.

*The failure of a railroad company to place cattle guards at the points where its track entered a pasture *held* a violation of the statute.—Southwestern Telegraph & Telephone Co. v. Krause (Tex. Civ. App.) 431.

The purpose of the statute relating to railroads erecting cattle guards *held* to include the protection of the owner of land against the escape of cattle.—Southwestern Telegraph & Telephone Co. v. Krause (Tex. Civ. App.) 431.

§ 3. Sales, leases, traffic contracts, and consolidation.

*Where a railroad was sold to defendant under Rev. St. 1899, § 1060, and the deed contained no assumption of liability for the grant or's torts, defendant was not liable therefor.—Porter v. Illinois Southern Ry. Co. (Mo. App.) 744.

§ 4. Indebtedness, securities, liens, and mortgages.

*Complainant *held* not entitled to a lien on a railroad, under Rev. St. 1899, § 4239, for powder furnished to a contractor with which to quarry crushed stone from the contractor's land, to be sold to the railroad.—Indiana Powder Co. v. St. Louis, K. C. & O. R. Co. (Mo. App.) 150.

§ 5. Operation—Statutory, municipal, and official regulations.

Acts 1891, p. 213, requiring operatives of railroads to keep a lookout for persons and property on the track, *held* to apply to persons operating engines and cars in a railroad yard.—Little Rock & H. S. W. R. Co. v. McQueeney (Ark.) 1120.

In a prosecution against a railroad company for violation of Ky. St. 1903, § 786, requiring signals at crossings, evidence *held* to support a conviction.—Mobile & O. R. Co. v. Commonwealth (Ky.) 299.

§ 6. — Injuries to licensees or trespassers in general.

Railroad which constructed steps over its right of way fence and invited the public to use the same *held* liable for its negligence in failing to keep the steps in a safe condition.—St. Louis, I. M. & S. Ry. Co. v. Dooley (Ark.) 789.

In an action for injuries to plaintiff while unloading a car in a railroad yard, evidence *held* to justify an instruction that under certain circumstances defendant owed plaintiff the duty not to injure him, while in defendant's yards, by the negligent acts of its employees.—Little Rock & H. S. W. R. Co. v. McQueeney (Ark.) 1120.

*Employees in a railroad yard *held* bound to use ordinary care to prevent injuring the boys riding on the trains there.—Davis v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 831.

*Whether a boy between eight and nine years old was guilty of contributory negligence in

*Point annotated. See syllabus.

riding on cars in a railroad yard *held* for the jury.—*Davis v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 831.

*In an action against a railway company for injuries received by a child while riding on cars in a railway yard, the question of the company's negligence *held* for the jury.—*Davis v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 831.

§ 7. — Accidents at crossings.

In an action for injuries at a crossing, an instruction *held* not to have imposed the degree of care upon defendant required by Ky. St. 1903, § 786.—*Nashville, C. & St. L. Ry. Co. v. Higgins* (Ky.) 549.

In an action for injuries at a crossing, it is not necessary to allege specific acts of negligence, but a general allegation is sufficient.—*Nashville, C. & St. L. Ry. Co. v. Higgins* (Ky.) 549.

*Under Ky. St. 1903, §§ 786, 466, a certain instruction relative to the giving of signals *held* proper, in an action against a railroad company for injuries received in a crossing accident.—*Louisville, H. & St. L. R. Co. v. Sander's Adm'r* (Ky.) 937.

*In an action against a railroad company for death caused by a collision at a road crossing, evidence *held* insufficient to require submission to the jury of the question whether defendant's servants could have stopped the train in time to have avoided the accident after discovering the peril of deceased.—*Walker v. Wabash R. Co.* (Mo. Sup.) 83.

Under Rev. St. 1899, § 1102, rebuttal evidence that a whistling post was more than 80 rods from a railroad crossing *held* proper in action against the railroad company for a crossing accident.—*Walker v. Wabash R. Co.* (Mo. Sup.) 83.

*In an action against a railroad company for the death of a 14-year old boy who was struck by a train while driving a team over a crossing, evidence *held* to show, as a matter of law, that deceased was guilty of contributory negligence.—*Walker v. Wabash R. Co.* (Mo. Sup.) 83.

In an action for injuries sustained in a crossing accident, evidence *held* such that a verdict should have been directed for defendant.—*Sims v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

*Where the negligence of plaintiff injured in a crossing accident concurred with that of the motorman, plaintiff could not recover.—*Sims v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

*Plaintiff in an action for injuries sustained in a crossing accident *held* guilty of contributory negligence.—*Sims v. St. Louis & S. Ry. Co.* (Mo. App.) 909.

In an action for injuries at a crossing, charge on contributory negligence *held* erroneous.—*Missouri, K. & T. Ry. Co. of Texas v. Sissom* (Tex. Civ. App.) 271.

*One using bridge over railroad crossing which he knew to be defective *held* guilty of contributory negligence.—*Houston & T. C. R. Co. v. Evans* (Tex. Civ. App.) 1077.

§ 8. — Injuries to persons on or near tracks.

A boy injured by being struck by ice kicked from the platform of a passing caboose *held* not guilty of contributory negligence.—*Willis v. Maysville & B. S. R. Co.* (Ky.) 604.

Whether a brakeman kicking a piece of ice from the platform of a caboose and injuring a boy was negligent *held* for the jury.—*Willis v. Maysville & B. S. R. Co.* (Ky.) 604.

* Point annotated. See syllabus.

In action for injuries to trespasser on railroad bridge, exclusion of evidence as to distance within which train could be stopped *held* not injurious to plaintiff.—*Beiser v. Chesapeake & O. Ry. Co.* (Ky.) 928.

That a railroad bridge is located within city limits does not impose a lookout duty on the railroad company as to trespassers on the bridge, where it is about 30 feet above the grade of the streets.—*Beiser v. Chesapeake & O. Ry. Co.* (Ky.) 928.

*Railroad company *held* only required to exercise reasonable care to prevent injuring trespasser on track after actually discovering his presence.—*Beiser v. Chesapeake & O. Ry. Co.* (Ky.) 928.

*Person using railroad bridge notwithstanding sign warning against trespassing *held* no less a trespasser because others trespassed on the same bridge.—*Beiser v. Chesapeake & O. Ry. Co.* (Ky.) 928.

*Where a licensee walking near a railroad track was struck and injured by a brake shoe which flew from a passing train, the railroad company was guilty of no negligence.—*Carr v. Missouri Pac. Ry. Co.* (Mo. Sup.) 874.

*A railroad company owes to a licensee walking on its right of way no greater duty than not to negligently or wantonly injure him.—*Carr v. Missouri Pac. Ry. Co.* (Mo. Sup.) 874.

One injured by being struck by a railroad train on the right of way *held* not a trespasser.—*Houston & T. C. Ry. Co. v. O'Donnell* (Tex. Sup.) 409.

*The operatives of a railroad train who see one walking upon the right of way have a right to treat him as a person in possession of his senses, and the fact that he is deaf charges them with no duty arising from the infirmity.—*Houston & T. C. Ry. Co. v. O'Donnell* (Tex. Sup.) 409.

*The care required of train operatives for the protection of one guilty of contributory negligence in walking on a railroad right of way stated.—*Houston & T. C. Ry. Co. v. O'Donnell* (Tex. Sup.) 409.

In action for injuries while walking on a railroad right of way, evidence as to obstructions of the view of the right of way from a highway *held* erroneously admitted.—*Houston & T. C. Ry. Co. v. O'Donnell* (Tex. Sup.) 409.

In an action for the death of a night watchman run over by a train in a railroad cut, evidence *held* to justify directing verdict for defendant.—*Hancock v. Gulf, C. & S. F. Ry. Co.* (Tex. Sup.) 456.

In an action against a railroad for the death of a person walking on its track, certain charge on contributory negligence should have been given.—*International & G. N. R. Co. v. Hall* (Tex. Civ. App.) 996.

*Railroad operating trains in the streets of a town *held* bound to exercise only ordinary care.—*International & G. N. R. Co. v. Hall* (Tex. Civ. App.) 996.

§ 9. — Injuries to animals on or near tracks.

Evidence in an action for the killing of horses by a train reviewed, and *held* sufficient to support a verdict in favor of plaintiff.—*St. Louis, I. M. & S. Ry. Co. v. Courtney* (Ark.) 231.

Whether a railroad company sued for the killing of an animal on its track negligently failed to construct a proper fence and cattle guards *held* a question of fact.—*Conrad v. Illinois Southern Ry. Co.* (Mo. App.) 752.

*Both the failure of a railway company to erect cattle guards at the points where its track entered a pasture and the act of a telegraph company in cutting the fence inclosing the right of way *held* to operate to bring about a loss of cattle escaping from the pasture.—*Southwestern Telegraph & Telephone Co. v. Krause* (Tex. Civ. App.) 431.

§ 10. — Fires.

*A railroad company is not absolutely bound to use the safest and best appliances to prevent the escape of sparks from its locomotives, but only to use reasonable care to supply the best and safest contrivances.—*St. Louis, I. M. & S. Ry. Co. v. Dawson* (Ark.) 27.

*Evidence that a fire was caused by sparks from a locomotive raised a presumption of negligence on the part of the railroad company.—*St. Louis, I. M. & S. Ry. Co. v. Dawson* (Ark.) 27.

*Evidence that a building near a railroad right of way was discovered to be on fire a few minutes after an engine passed *held* sufficient to justify a finding that the fire was caused by sparks from the engine.—*St. Louis, I. M. & S. Ry. Co. v. Dawson* (Ark.) 27.

RAPE.

Verdict in general, see "Criminal Law," § 24.

§ 1. Prosecution and punishment.

*Evidence on a prosecution for statutory rape *held* sufficient to show the female was under the age of 12 years.—*Clark v. Commonwealth* (Ky.) 573.

*Evidence offered on a prosecution for carnally knowing a female under the age of 12 years *held* incompetent to show her bad character.—*Clark v. Commonwealth* (Ky.) 573.

*An indictment for assault with intent to rape *held* sufficient, though it failed to charge the manner, means, or mode of the assault.—*State v. Payne* (Mo. Sup.) 461.

Evidence *held* sufficient to sustain a conviction of assault with intent to rape.—*State v. Payne* (Mo. Sup.) 461.

RATIFICATION.

Of act of agent, see "Principal and Agent," § 2.

REAL ACTIONS.

See "Ejectment"; "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

REASONABLE DOUBT.

See "Criminal Law," § 21.

RECEIVERS.

Review in general of order appointing, see "Appeal and Error," § 12.

Review in proceeding for appointment as dependent on record on appeal or error, see "Appeal and Error," § 9.

§ 1. Nature and grounds of receivership.

A mortgagee *held* to possess such interest in the mortgaged premises as to justify the appointment of a receiver thereof on his application.—*Cotton v. Rand* (Tex. Civ. App.) 266.

A petition praying for the appointment of a receiver of real estate *held* to show plaintiff's probable interest sufficient to justify the ap-

pointment within Rev. St. 1895, art. 1463.—*Cotton v. Rand* (Tex. Civ. App.) 266.

A receiver of real estate *held* properly appointed.—*Cotton v. Rand* (Tex. Civ. App.) 266.

Under Rev. St. 1895, arts. 1465, 1403, *held* error to appoint a receiver where plaintiff's rights were sufficiently protected by an injunction order.—*Haywood v. Scarborough* (Tex. Civ. App.) 815.

§ 2. Appointment, qualification, and tenure.

An order appointing a receiver of real estate *held* to sufficiently describe the premises.—*Cotton v. Rand* (Tex. Civ. App.) 266.

An appointment of a receiver *held* in effect a reappointment after a hearing, and valid, though the original appointment was illegal because made without notice.—*Cotton v. Rand* (Tex. Civ. App.) 266.

A receiver *held* properly appointed without notice.—*Cotton v. Rand* (Tex. Civ. App.) 266.

In the absence of statutory provision, rules of equity governing proceedings for the appointment of a receiver require that notice of the application therefor shall be given except in certain cases.—*Cotton v. Rand* (Tex. Civ. App.) 266.

*In order to justify the ex parte appointment of a receiver, facts showing the necessity for such action should be disclosed.—*Haywood v. Scarborough* (Tex. Civ. App.) 815.

RECEIVING STOLEN GOODS.

Evidence *held* sufficient to corroborate accomplice's testimony.—*Sexton v. State* (Tex. Cr. App.) 37.

RECITALS.

In conveyance as notice to purchaser, see "Vendor and Purchaser," § 5.

RECOGNIZANCES.

On appeal, see "Criminal Law," § 27.

RECORDS.

As evidence, see "Evidence," § 7.

As notice to purchaser, see "Vendor and Purchaser," § 5.

Estoppel by record, see "Estoppel," § 1.

Of judicial proceedings.

See "Partition," § 1.

Abstract for purpose of review, see "Appeal and Error," § 9.

Transcript on appeal or writ of error, see "Appeal and Error," § 9; "Criminal Law," § 29.

Of particular instruments.

See "Chattel Mortgages," § 1.

Transfer of corporate stock, see "Corporations," § 1.

REDELIVERY.

Of property taken in replevin, see "Replevin," § 2.

REDEMPTION.

From mortgage, see "Mortgages," § 4.

REFERENCE.

See "Arbitration and Award."

*Point annotated. See syllabus.

REFORMATION OF INSTRUMENTS.

§ 1. Proceedings and relief.

In suit to reform deed, allegation of mistake of scrivener, while evidence showed that deed was made to husband instead of wife by his direction, *held* not to prevent relief to her heirs in that suit.—*Siling v. Hendrickson* (Mo. Sup.) 105.

REFRESHING MEMORY.

See "Witnesses," § 1.

REGISTERS OF DEEDS.

Under Ky. St. 1903, §§ 510, 511, a deed which is acknowledged before and certified by a county clerk may properly be recorded by his successor in office.—*Hunt v. Nance* (Ky.) 6.

REHEARING.

See "New Trial."

RELEASE.

Equitable defenses in action relating to, see "Action," § 1.

Of mortgage, see "Mortgages," § 2.

Of liability for injury to passenger, see "Carriers," § 7.

§ 1. Requisites and validity.

In an action for injuries, evidence examined, and *held* sufficient to show that a release of damages was procured from plaintiff by fraud.—*Robertson v. George A. Fuller Const. Co.* (Mo. App.) 130.

*One who had executed a release *held* estopped to attack it for fraud, though he sued to recover an additional amount.—*Memphis St. Ry. Co. v. Giardino* (Tenn.) 855.

*Where, in an action for injuries, the defense was a release, and the replication attacked it for fraud, it was necessary for plaintiff to tender the amount paid him with his replication.—*Memphis St. Ry. Co. v. Giardino* (Tenn.) 855.

*Statement of when misrepresentations of an agent will not affect a settlement made by another agent.—*Gulf, C. & S. F. Ry. Co. v. Huyett* (Tex. Sup.) 454.

§ 2. Construction and operation.

A settlement by one of two joint tort-feasors *held* to have extinguished the right of action against the other.—*Chicago Herald Co. v. Bryan* (Mo. Sup.) 902.

§ 3. Pleading, evidence, trial, and review.

In an action for injuries, an instruction as to the effect of a release pleaded in defense *held* not erroneous.—*Robertson v. George A. Fuller Const. Co.* (Mo. App.) 130.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 2.

REMAINDERS.

See "Life Estates."

Creation by deed, see "Deeds," § 2.

Creation by will, see "Wills," § 3.

Partition between remaindermen, see "Partition," § 1.

*Point annotated. See syllabus.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 20.

Of cause removed from state court, see "Removal of Causes," § 4.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Injunction," § 1.

REMITTITUR.

Of part of recovery on appeal from justice's court, see "Justices of the Peace," § 2.

Of part of recovery on appeal or error, see "Appeal and Error," § 20.

REMOVAL.

Of fence, see "Fences."

Of trustee, see "Trusts," § 2.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 1.

Effect in state court of decisions of federal courts as to right to remove, see "Courts," § 2.

Transfer of causes between state courts, see "Courts," § 5.

§ 1. Origin, nature, and subject of controversy.

Under Act Cong. Aug. 13, 1888, c. 866, §§ 1, 2, 25 Stat. 434 [U. S. Comp. St. 1901, pp. 508, 509], an action against an employer and an employee *held* not removable to the federal court on the ground that the employer is a corporation existing under the acts of Congress.—*Texas & P. Ry. Co. v. Huber* (Tex. Sup.) 832.

§ 2. Citizenship or alienage of parties.

*Joinder of a citizen defendant against whom no cause of action is alleged is no obstacle to a removal of the cause to the federal courts by a noncitizen defendant.—*Eastin & Knox v. Texas & P. Ry. Co.* (Tex. Sup.) 838.

§ 3. Proceedings to procure and effect of removal.

Joinder by a citizen defendant in a petition by his codefendant, a noncitizen, to remove the cause of the federal courts, *held* not to confer federal jurisdiction on the ground of diverse citizenship.—*Eastin & Knox v. Texas & P. Ry. Co.* (Tex. Sup.) 838.

Where a cause of action is stated against a citizen defendant, alleged to have been fraudulently joined with a noncitizen to prevent removal to the federal courts, the petition must allege facts showing a fraudulent purpose to justify a removal.—*Eastin & Knox v. Texas & P. Ry. Co.* (Tex. Sup.) 838.

§ 4. Remand or dismissal of cause.

Where a case has, on defendant's petition, been transferred to a federal court and remanded by it to the state court, the acceptance of jurisdiction by the latter does not deprive the defendant of any of its constitutional rights.—*Walker v. Wabash R. Co.* (Mo. Sup.) 83.

REMOVAL OF CLOUD.

See "Quieting Title."

RENT.

See "Landlord and Tenant," § 5.

REPEAL

Of statute, see "Statutes," § 3.

REPLEVIN.

Liability of sheriff or constable for property seized under replevin, see "Sheriffs and Constables," § 1.

§ 1. Right of action and defenses.

In replevin of cattle defendant held not entitled to set up a counterclaim for trespass committed by the cattle, though Ky. St. 1903, § 4646, relating to stock, is in force.—Linn v. Hagan's Adm'r (Ky.) 11.

In replevin, defendant held not justified in his refusal to deliver the property on the ground stated.—Mason v. Rogers (Mo. App.) 745.

§ 2. Proceedings for taking and redelivery of property.

Property seized by a sheriff under a writ of replevin is to be regarded as in custodia legis from the date of seizure under the writ.—Hearn v. Ayres (Ark.) 768.

Under Kirby's Dig. § 6863, property seized by a sheriff under a replevin writ in contemplation of law is regarded in the sheriff's possession until turned over to plaintiff.—Hearn v. Ayres (Ark.) 768.

In an action on a sheriff's bond for a false return, such return held only prima facie evidence of the fact.—Hearn v. Ayres (Ark.) 768.

§ 3. Trial, judgment, enforcement of judgment, and review.

Defendant in replevin held liable for the costs that accrued prior to the service of the writ.—Mason v. Rogers (Mo. App.) 745.

Defendant in replevin held liable for costs that accrued after service of the writ.—Mason v. Rogers (Mo. App.) 745.

Under Rev. St. 1899, § 3916, in replevin value of special interest of defendant in the property should have been submitted to the jury.—Watkins v. Green (Mo. App.) 1181.

REPLICATION.

See "Pleading," § 3.

REPLY.

See "Pleading," §§ 3, 7.

REPORTS.

Of judicial sales, see "Judicial Sales."

REPUTATION.

Of witness, see "Witnesses," § 3.

REQUESTS.

For instructions in civil actions, see "Trial," § 10.

For instructions in criminal prosecutions, see "Criminal Law," § 22.

RESCISSION.

Of contract, see "Contracts," § 3.

Of contract between husband and wife, see "Husband and Wife," § 1.

Of contract for sale of goods, see "Sales," § 2.

Of contract for sale of land, see "Vendor and Purchaser," § 3.

Of insurance policy, see "Insurance," § 8.
Of partnership agreements, see "Partnership," §§ 1, 2.

RES GESTÆ.

In civil actions, see "Evidence," § 2.

In criminal prosecutions, see "Criminal Law," § 9.

RES JUDICATA.

See "Judgment," §§ 5, 6, 8.

Decision on appeal, see "Appeal and Error," § 19.

Direction of verdict on plea of, see "Trial," § 5.

RESULTING TRUSTS.

See "Trusts," § 1.

RETURN.

Liability of sheriff or constable for false return, see "Sheriffs and Constables," § 2.

Of process in general, see "Process," § 1.

Of writ of replevin, see "Replevin," § 2.

REVENUE.

See "Internal Revenue"; "Taxation."

REVERSIONS.

Of lessor, see "Landlord and Tenant," § 2.

Of title of property dedicated to public use, see "Dedication," § 2.

To grantor on conveyance by deed, see "Deeds," § 2.

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," § 27; "Justices of the Peace," § 2.

REVIVAL.

Of judgment, see "Judgment," § 7.

REVOCATION.

Of attorney's right to practice law, see "Attorney and Client," § 1.

Of dedication, see "Dedication," § 1.

RIGHT OF WAY.

See "Easements."

RIPARIAN RIGHTS.

See "Navigable Waters," § 2; "Waters and Water Courses," § 1.

RISKS.

Assumed by employé, see "Master and Servant," §§ 5, 11.

Within insurance policy, see "Insurance," § 11.

ROADS.

See "Highways"; "Turnpikes and Toll Roads." Streets in cities, see "Municipal Corporations," §§ 7, 8.

ROBBERY.

*Under Pen. Code 1895, art. 856, the forcible taking from another of the property of the taker

* Point annotated. See syllabus.

is not robbery if the taker at the time believed the thing taken to be his own.—Glenn v. State (Tex. Cr. App.) 806.

Evidence *held* insufficient to support a conviction of robbery because not showing that the defendant did not believe the property taken to be his own.—Glenn v. State (Tex. Cr. App.) 806.

RULES.

Of carrier, see "Carriers," § 9.
Of telegraph companies, see "Telegraphs and Telephones," § 1.

RULES OF COURT.

Assignments of error, see "Appeal and Error," § 10.
Briefs, see "Appeal and Error," § 11.
Record on appeal or error, see "Appeal and Error," § 9.

SALES.

Admissions as evidence in action for breach of contract for sale of goods, see "Evidence," § 4.
As affected by champerty, see "Champerty and Maintenance."
In restraint of trade, see "Contracts," § 1.
Instructions in general in action for price of goods, see "Trial," § 11.
Interstate commerce, see "Commerce."
Of community property, see "Husband and Wife," § 3.
Of corporate bonds, see "Corporations," § 3.
Of corporate stock, see "Corporations," § 1.
Of intoxicating liquors, see "Intoxicating Liquors."
Of property of decedent under order of court, see "Executors and Administrators," § 6.
Of property of infant under order of court, see "Guardian and Ward," § 2.
Of public lands, see "Public Lands," § 3.
Of railroads, see "Railroads," § 3.
Of realty, see "Vendor and Purchaser."
On execution, see "Execution," § 3.
On order or judgment of court, see "Judicial Sales."
Partition sales, see "Partition," § 1.
Requirements of statute of frauds, see "Frauds, Statute of," § 2.
Sale of corporate office, see "Corporations," § 2.
Specific Performance of contract for sale of land, see "Specific Performance," § 1.
Tax sales, see "Taxation," §§ 5, 6.
Validity of note for price of goods, see "Bills and Notes," § 1.

§ 1. Requisites and validity of contract.

Transaction *held* to constitute sale of drilling machine, and not mere option.—Star Drilling Mach. Co. v. McLeod (Ky.) 558.

In a suit for breach of an alleged contract for the sale of certain lumber, plaintiff *held* not entitled to recover in the absence of a finding that the contract of sale had actually been made between the parties.—H. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co. (Mo. App.) 121.

Where plaintiff's offer to purchase certain lumber was accepted subject to a number of variances, plaintiff was entitled to signify its acceptance of defendant's offer containing such variances by plaintiff's conduct in accepting lumber furnished thereunder.—H. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co. (Mo. App.) 121.

An offer for the sale of flour *held* to disclose a mistake on its face, precluding plaintiff from creating a binding contract of sale

by acceptance.—Buckberg v. Washburn-Crosby Co. (Mo. App.) 733.

A letter *held* to constitute an offer to fill plaintiff's order at the price quoted.—Buckberg v. Washburn-Crosby Co. (Mo. App.) 733.

Purchaser of goods by written contract *held* bound by the agreement.—Paris Mfg. & Importing Co. v. Carle (Mo. App.) 743.

§ 2. Modification or rescission of contract.

In an action for breach of a contract for the sale of certain lumber, a finding that a certain letter written by defendant to plaintiff did not amount to a rescission of the contract *held* error.—H. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co. (Mo. App.) 121.

§ 3. Performance of contract.

*In an action for delay in delivering certain goods, defendant *held* not to have waived his right to recover compensation by receiving the goods after the time agreed on.—Murmman v. Wissler (Mo. App.) 355.

*Acceptance of goods after the expiration of the time in which they were to be delivered *held* only prima facie evidence of the buyer's waiver of the delay.—Murmman v. Wissler (Mo. App.) 355.

*Plaintiffs, having contracted to deliver 50 bales of cotton, having tendered only 49 bales, *held* not entitled to recover for refusal to accept.—Inman, Akers & Inman v. Elk Cotton Mills (Tenn.) 760.

§ 4. Operation and effect.

Where plaintiff bought cotton for defendants, reserving a lien for money advanced, a sale of the cotton by defendants to a bona fide purchaser for value passed title freed from the lien.—O'Neal v. Richardson (Ark.) 1117.

*Defendants *held* to have no title to certain cotton which they could transfer to an innocent purchaser for value.—O'Neal v. Richardson (Ark.) 1117.

*Title to goods *held* not to pass under the contract of sale.—Tingle v. Kelly (Ky.) 303.

§ 5. Warranties.

*Sale of grapes to be shipped from New York to Arkansas and resold at destination *held* to raise implied warranty that they were in proper condition to stand shipment.—Truschel v. Dean (Ark.) 781.

§ 6. Remedies of seller.

In action for price of grapes in which defense was breach of warranty, evidence *held* not to require verdict for plaintiff.—Truschel v. Dean (Ark.) 781.

On the refusal of a buyer of personality to preform the contract, the seller *held* entitled under the terms thereof to a lien on certain property of the buyer.—Barnard & Leas Mfg. Co. v. Smith (Ark.) 858.

*Seller's lien for price *held* to have priority over attachment by general creditors.—Star Drilling Mach. Co. v. McLeod (Ky.) 558.

Under contract for sale of drilling machine, seller *held* to have lien for unpaid portion of price.—Star Drilling Mach. Co. v. McLeod (Ky.) 558.

In an action for the price of goods, instructions *held* erroneous as leaving out of view the question whether defendant was fraudulently imposed upon by plaintiff's salesman.—Paris Mfg. & Importing Co. v. Carle (Mo. App.) 743.

*Measure of damages for breach of contract of sale by buyer *held* the profit the seller would

*Point annotated. See syllabus.

have made if the contract had been performed.—*Gardner v. Deeds & Hirsig* (Tenn.) 518.

*Where the buyer's cancellation of the contract before delivery was repudiated by the seller, such cancellation did not excuse failure to tender.—*Inman, Akers & Inman v. Elk Cotton Mills* (Tenn.) 760.

§ 7. Remedies of buyer.

Under a contract for the sale of certain machinery, the buyer *held* not entitled to recover certain damages for alleged defects.—*Barnard & Leans Mfg. Co. v. Smith* (Ark.) 858.

*Title to goods *held* not to pass under the contract of sale.—*Tingle v. Kelly* (Ky.) 303.

In an action for breach of contract to sell, certain evidence *held* inadmissible.—*Tingle v. Kelly* (Ky.) 303.

*A petition *held* based on the breach of an express, and not an implied, warranty of grade and quality of the article sold.—*Haines v. Neece* (Mo. App.) 919.

Where, in an action to recover for breach of a contract to deliver cattle, plaintiff proved the contract price and the market price of the cattle, no further burden rested on him.—*McKay v. Elder* (Tex. Civ. App.) 268.

*The measure of damages for breach of a contract to deliver cattle is the difference between the contract price and the market price of the cattle.—*McKay v. Elder* (Tex. Civ. App.) 268.

§ 8. Conditional sales.

Plaintiff, transferring cattle, but retaining title to secure price and performance of collateral contract, *held* to have waived right to claim forfeiture of contract and to retake the cattle because of nonperformance by defendant.—*Carpenter v. Crow* (Ark.) 779.

Plaintiff who sold cattle *held* not to have waived right to refuse rebate offered by him by acceptance of performance of contract by defendant.—*Carpenter v. Crow* (Ark.) 779.

SATISFACTION.

See "Release."

Of mortgage, see "Mortgages," § 2.

SCHOOLS AND SCHOOL DISTRICTS.

Restraining interference with school teacher, see "Injunction," § 2.

School lands, see "Public Lands," § 3.

Trespass to try title, to school lands, see "Trespass to Try Title," § 2.

§ 1. Public schools.

Under Ky. St. 1903, § 4445, a contract between a school teacher and the school trustees *held* void.—*Treadway v. Daniels* (Ky.) 981.

Under Const. art. 10, § 12, and Rev. St. 1899, § 5157, as amended by Acts 1901, p. 52, *held* that the action of a school district in executing certain refunding bonds was not unconstitutional.—*State ex rel. Proctor v. Walker* (Mo. Sup.) 69.

SCIRE FACIAS.

To revive judgment, see "Judgment," § 7.

SEARCHES AND SEIZURES.

Under laws relating to intoxicating liquors, see "Intoxicating Liquors," § 8.

* Point annotated. See syllabus.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 3.

SELF-DEFENSE.

See "Homicide," §§ 4, 6, 9.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 2.

SEQUESTRATION.

Ouster by writ of, as affecting trespass to try title, see "Trespass to Try Title," § 2.

SERVICE.

Of process, see "Process," § 1.

SERVICES.

See "Work and Labor."

Instructions in general in action for, see "Trial," § 6.

Liability on note for, see "Bills and Notes," § 3.
To insane person as necessaries, see "Insane Persons," § 1.

SERVITUDES.

See "Easements."

SET-OFF AND COUNTERCLAIM.

Counterclaim in replevin, see "Replevin," § 1.

Jurisdictional amount, see "Courts," § 3.

Set-off of benefits against damages for injuries to property for public use, see "Eminent Domain," § 2.

SETTLEMENT.

See "Release."

By partners, see "Partnership," § 4.

By turnpike companies, see "Turnpikes and Toll Roads," § 1.

Of statement of facts on appeal, see "Criminal Law," § 29.

SEWERS.

Defects or obstructions, see "Municipal Corporations," § 8.

SHERIFFS AND CONSTABLES.

Summoning jury by sheriff, see "Jury," § 2.

Duties of, as to attachment, see "Attachment," § 3.

Return of writ of replevin by, see "Replevin," § 2.

§ 1. Powers, duties, and liabilities.

Where a sheriff seized property under a writ of replevin, he thereby became privy to the prosecution of the suit.—*Hearn v. Ayres* (Ark.) 768.

*A sheriff, having taken personal property into his possession under a replevin writ, *held* bound to show that he made such disposition of it as the law directs, or that its loss was not the result of his negligence.—*Hearn v. Ayres* (Ark.) 768.

*A sheriff, having taken property found to belong to plaintiff into his possession under re-

plevin writ, *held* not entitled thereafter to question plaintiff's title or right to possession.—*Hearn v. Ayres* (Ark.) 768.

In an action on a sheriff's bond for a false return, an instruction that the only way he could have delivered the property replevined to plaintiff was by placing him in actual exclusive control thereof *held* proper.—*Hearn v. Ayres* (Ark.) 768.

§ 2. Liabilities on official bonds.

*Plaintiff, in an action on a sheriff's bond for false return, *held* not entitled to recover \$50 penalty imposed by Kirby's Dig. § 4487, subd. 6, for failure to execute process.—*Hearn v. Ayres* (Ark.) 768.

*A sheriff *held* liable in an action for false return on a replevin writ for the reasonable value of the property at the time it should have been delivered to plaintiff, independent of the value alleged in plaintiff's complaint in replevin.—*Hearn v. Ayres* (Ark.) 768.

SHIPPING.

§ 1. Carriage of passengers.

*Certain passenger on boat *held* rightfully upon the hurricane deck.—*Evers v. Wiggins Ferry Co.* (Mo. App.) 118.

*Breaking of hurricane deck of boat resulting in injury to passenger *held* prima facie evidence of negligence on part of carrier.—*Evers v. Wiggins Ferry Co.* (Mo. App.) 118.

*Passenger *held* not negligent in remaining on hurricane deck after giving of general orders, which he did not hear, to go below.—*Evers v. Wiggins Ferry Co.* (Mo. App.) 118.

§ 2. General average.

*The owner of a ship is not entitled to contribution from the owners of the cargo to defray expenses incurred in rescuing the vessel from the results of negligence, but is entitled to contribution where such expenses are caused solely by the perils of navigation.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.* (Mo. App.) 714.

A consignee of goods rescued from destruction by perils incident to navigation cannot be compelled to execute an average bond containing unreasonable conditions.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.* (Mo. App.) 714.

Final carrier *held* entitled to demand of consignee, as condition of delivering the goods, the execution of a general average bond required by a previous carrier.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.* (Mo. App.) 714.

The execution of a general average bond does not preclude the obligor from denying liability on the bond on the ground that the wreck occurred from negligence, and was not the subject of general average.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.* (Mo. App.) 714.

Consignee of goods *held* to have waived any possible objection to terms of general average bond tendered him to sign.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.* (Mo. App.) 714.

Ship owner's right to general average constitutes a lien on the cargo, and may be enforced by requiring a deposit of money or an average bond.—*Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.* (Mo. App.) 714.

SIDEWALKS.

See "Municipal Corporations," §§ 3, 4.

* Point annotated. See syllabus.

SIGNALS.

Railroad signals, see "Railroads," §§ 5, 7.

SLANDER.

See "Libel and Slander."

SMALLPOX.

Power of county to levy tax to defray expenses of suppressing, see "Taxation," § 1.

SPECIAL LAWS.

See "Statutes," § 1.

SPECIAL TAX.

See "Taxation," §§ 1, 3.

SPECIFIC PERFORMANCE.

Compensation of attorney for services in prosecution of suit for, see "Attorney and Client," § 2.

Of contract made by agent, see "Principal and Agent," § 2.

Parol or extrinsic evidence, see "Evidence," § 8.

§ 1. Good faith and diligence.

*Where a vendor in a contract for the sale of land is possessed of an indefeasible title under the statute of limitations, equity will enter a decree in his favor specifically enforcing the contract.—*Watkins v. Pfeiffer* (Ky.) 562.

§ 2. Proceedings and relief.

*In an action for specific performance of a contract made in behalf of several owners of distinct parcels of land, all of such owners *held* properly joined as parties defendant.—*Morrison v. Hazzard* (Tex. Sup.) 33.

SPEED.

Regulation as to speed of street railroads, see "Street Railroads," § 1.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STAMP TAX.

See "Internal Revenue."

STARE DECISIS.

See "Courts," § 2.

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 3.

Of case or facts for purpose of review, see "Appeal and Error," §§ 9, 29.

STATES.

Courts, see "Courts."

Effect of decisions of courts of other states, see "Courts," § 2.

Executive power, see "Constitutional Law," § 1.

Legislative power over municipal corporation, see "Municipal Corporations," § 2.

Public lands, see "Public Lands," § 3.

STATUTES.

Change in construction of, as impairing obligation of contract, see "Constitutional Law," § 3.

Laws impairing obligation of contracts, see "Constitutional Law," § 3.

Provisions relating to particular subjects.

See "Animals," "Appeal and Error," § 9; "Attachment," § 3; "Attorney and Client," § 1; "Banks and Banking," § 2; "Bigamy," "Carriers," §§ 1, 6, 7; "Champerty and Maintenance," "Commerce," § 2; "Depositions," "Descent and Distribution," "Dismissal and Nonsuit," § 1; "District and Prosecuting Attorneys," "Drains," § 1; "Elections," § 1; "Eminent Domain," § 1; "Gaming," § 1; "Indictment and Information," § 2; "Infants," § 1; "Injunction," § 1; "Insane Persons," § 2; "Insurance," §§ 2, 5; "Intoxicating Liquors," "Judges," § 1; "Judicial Sales," "Jury," § 1; "Landlord and Tenant," § 6; "Larceny," § 1; "Life Estates," "Limitation of Actions," § 1; "Master and Servant," §§ 2, 4; "Mechanics' Liens," "Municipal Corporations," §§ 3, 4, 6; "Nuisance," § 1; "Officers," § 1; "Partition," § 1; "Physicians and Surgeons," "Process," § 1; "Railroads," §§ 1, 2, 4, 5; "Schools and School Districts," § 1; "Street Railroads," § 1; "Sunday," "Taxation," §§ 1-3; "Telegraphs and Telephones," § 1; "Trial," § 2; "Turnpikes and Toll Roads," § 1; "Waters and Water Courses," § 1.

Allowance to surviving husband, see "Executors and Administrators," § 3.

Nature and form of actions and defenses, see "Action," § 1.

Redemption from mortgage, see "Mortgages," § 4.

Revenue laws, see "Internal Revenue."

Statute of frauds, see "Frauds, Statute of."

Venue of action to foreclose mortgage, see "Mortgages," § 3.

§ 1. General and special or local laws.

*The statute regulating the practice of pharmacy, and applicable only to druggists or pharmacists in towns of 1,000 inhabitants or more, held not unconstitutional as a special statute.—*Green v. State* (Tex. Cr. App.) 847.

Gen. Laws 29th Leg. p. 91, c. 64, regulating storage of liquors, held not a local act in violation of Const. art. 3, §§ 56, 57.—*Ex parte Massey* (Tex. Cr. App.) 1083.

§ 2. Subjects and titles of acts.

Act March 21, 1905, prohibiting book making and pool selling, held not in violation of Const. art. 4, § 28, as containing more than one subject.—*State ex. inf. Hadley v. Delmar Jockey Club* (Mo. Sup.) 185.

Acts 1897, p. 168, repealing Acts 1883, p. 114, regulating the practice of dentistry, held not in violation of Const. art. 4, § 28, requiring such bills to have but one subject, which shall be clearly expressed in its title.—*State v. Doering* (Mo. Sup.) 489.

§ 3. Repeal, suspension, expiration, and revival.

Acts 1873, p. 100, c. 64 (Shannon's Code, §§ 4067, 6028), held not to impliedly repeal the provisions of the Code relating to the administration of insolvent estates.—*Key v. Harris* (Tenn.) 235.

§ 4. Construction and operation.

*The rule relating to the construction of a statute adopted from another state held subject to the qualification that the judicial construction of the statute by the state of its origin does not contravene the policy prevailing in the adopting state.—*Smith v. Dayton Coal & Iron Co.* (Tenn.) 62.

§ 5. Pleading and evidence.

*Where plaintiff relies for his cause of action on the law of another state, that law is to be pleaded and proven as a fact.—*Lee v. Missouri Pac. Ry. Co.* (Mo. Sup.) 614.

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In proceedings before grand jury, see "Grand Jury."

STIPULATIONS.

A stipulation of counsel *held* not to have affected the power of the court to enter a judgment on a special verdict and undisputed facts not in conflict therewith.—Pinto v. Rintleman (Tex. Civ. App.) 1003.

STOCK.

Corporate stock, see "Corporations," § 1.

STOLEN GOODS.

See "Receiving Stolen Goods."

STREET RAILROADS.

Carriage of Passengers, see "Carriers."

Instructions in general, in action for injuries to animals caused by operation of, see "Trial," §§ 9, 11.

Res gestæ in action for injuries to animals caused by operation of, see "Evidence," § 2.

§ 1. Regulation and operation.

In an action against a street railroad company for the killing of a hog, plaintiff was not entitled to recover in the absence of evidence that the hog went on the track in front of the motorman in time for him to have stopped the car before striking it had he seen it and used all the means in his power to that end.—Little Rock Ry. & Electric Co. v. Newman (Ark.) 864.

Where, in an action against a street railroad company for the killing of a hog, it appeared that the hog was outside of the stock limit, it was not contributory negligence for it to be running at large.—Little Rock Ry. & Electric Co. v. Newman (Ark.) 864.

Kirby's Dig. § 6773, making railroads responsible for all damages to property caused by the running of trains, is not applicable to street railroads.—Little Rock Ry. & Electric Co. v. Newman (Ark.) 864.

*Plaintiff *held* guilty of contributory negligence in failing to look for the approach of a street car, by which he was struck, which followed closely after a car he permitted to pass, before stepping on the track.—Moore v. St. Louis Transit Co. (Mo. Sup.) 390.

In an action for injuries to a pedestrian by being struck by a street car, evidence *held* to warrant a finding that the proximate cause of plaintiff's injury was the negligence of defendant's motorman, and not plaintiff's contributory negligence in failing to observe the car.—Moore v. St. Louis Transit Co. (Mo. Sup.) 390.

*Operation of a street car, by which plaintiff was struck at a crossing, at a speed exceeding that prescribed by a speed ordinance, *held* negligence per se.—Moore v. St. Louis Transit Co. (Mo. Sup.) 390.

In an action for injuries to plaintiff while walking across street railway tracks *held* that plaintiff's contributory negligence defeated his right to recover.—Boring v. Metropolitan St. Ry. Co. (Mo. Sup.) 655.

*Person alighting from street car passing around rear end of car and struck by car coming from opposite direction *held* guilty of contributory negligence.—Hornstein v. United Rys. Co. (Mo. Sup.) 884.

*It is negligence per se to run a street car at a speed prohibited by a city ordinance.—Heintz v. St. Louis Transit Co. (Mo. App.) 353.

*Where one injured by being struck by a street car saw the car approaching, the failure of the motorman to ring the bell afforded no ground of complaint.—Heintz v. St. Louis Transit Co. (Mo. App.) 353.

*In an action for injuries to plaintiff by his vehicle being struck by a street car, plaintiff *held* guilty of contributory negligence in failing to wait a sufficient length of time for a car, which he permitted to pass in front of him, to get out of his line of vision of cars approaching from the opposite direction.—Rodgers v. St. Louis Transit Co. (Mo. App.) 1154.

*Where a motorman by the exercise of reasonable care, if he had been keeping a vigilant watch and had taken steps to check the speed of his car on the first appearance of danger, could have avoided collision with plaintiff's wagon, plaintiff was entitled to recover, notwithstanding his own contributory negligence.—Rodgers v. St. Louis Transit Co. (Mo. App.) 1154.

§ 2. — Actions for injuries.

*In an action against a street railroad company for the killing of a hog, the burden is on plaintiff to show that the hog was killed through the negligence of defendant.—Little Rock Ry. & Electric Co. v. Newman (Ark.) 864.

In an action against a street railway for the killing of a hog, a requested instruction *held* properly refused.—Little Rock Ry. & Electric Co. v. Newman (Ark.) 864.

In an action for the death of a child by the operation of a street railroad, whether the accident resulting in the death was inevitable *held* question for jury.—Koenig v. Union Depot Ry. Co. (Mo. Sup.) 497.

*In an action for death of a child by the operation of a street railroad, whether defendant was negligent *held* question for jury.—Koenig v. Union Depot Ry. Co. (Mo. Sup.) 497.

*In an action for injuries to a driver while attempting to cross a track in front of a street car, *held*, that the question of contribu-

*Point annotated. See syllabus.

tory negligence was for the jury.—Heintz v. St. Louis Transit Co. (Mo. App.) 353.

In an action for injuries in a collision between a street car and plaintiff's wagon, evidence *held* to justify an inference that, had the motorman exercised ordinary care when he first saw plaintiff's horse on the track, he could have stopped the car in ample time to have avoided the collision.—Rodgers v. St. Louis Transit Co. (Mo. App.) 1154.

STREETS.

See "Highways"; "Municipal Corporations," §§ 4, 7, 8.

SUBLETTING.

See "Landlord and Tenant," § 3.

SUBMISSION.

To arbitration, see "Arbitration and Award," § 1.

SUBROGATION.

One furnishing money for the payment of debts assumed by a grantee *held* not entitled to be subrogated to the lien of the debts assumed.—Collings v. Collings (Ky.) 577.

A mortgagee in a mortgage executed by a curator on the land of his wards for the purpose of securing money to satisfy a pre-existing mortgage *held* not entitled to be subrogated to the rights of the mortgagee in the mortgage so satisfied.—Capen v. Garrison (Mo. Sup.) 368.

SUBSCRIPTIONS.

To corporate stock, see "Corporations," § 1.

SUIT.

See "Action."

SUMMARY PROCEEDINGS.

Recovery of possession by landlord, see "Landlord and Tenant," § 6.

SUMMONS.

See "Process."

SUNDAY.

Former jeopardy in prosecution for violation of Sunday law, see "Criminal Law," § 5.

*The Sunday law is not violative of Const. art. 16, § 20, known as the local option section of the Constitution.—Bennett v. State (Tex. Cr. App.) 415.

The Sunday law is not suspended as to a licensed liquor dealer by reason of his license.—Bennett v. State (Tex. Cr. App.) 415.

SUPREME COURTS.

See "Courts," §§ 2, 4.

SURCHARGE.

Of partnership account, see "Partnership," § 4.

SURFACE WATERS.

See "Waters and Water Courses," § 2.

SURRENDER.

Of insurance policy, see "Insurance," § 8.

SURVEYS.

Establishment of boundaries, see "Boundaries," § 1.

SUSPENSION.

Of attorney, see "Attorney and Client," § 1.

SWAMP LANDS.

See "Public Lands," § 2.

SWINE.

See "Animals."

TAXATION.

See "Internal Revenue."

Conclusiveness of judgment canceling tax bills, see "Judgment," § 6.

Conclusiveness of judgment foreclosing tax lien, see "Judgment," § 6.

Municipal regulations as to license taxes, see "Municipal Corporations," § 3.

Payment of taxes to sustain adverse possession, see "Adverse Possession," § 1.

Purchase of tax title by tenant, see "Landlord and Tenant," § 2.

Recovering deposit to guarantee payment of taxes in action for money received, see "Money Received."

Tax deed as color of title, see "Adverse Possession," § 1.

Local or special taxes.

See "Municipal Corporations," § 9; "Schools and School Districts," § 1.

Assessments for municipal improvements, see "Municipal Corporations," § 5.

Occupation or privilege taxes.

See "Intoxicating Liquors," § 3.

§ 1. Nature and extent of power in general.

Under Shannon's Code, §§ 503, 1394, 6041, 6050, 6053, defining the purposes for which a county may levy special taxes, a county has no power to levy a special tax to defray expenses incurred in suppressing an epidemic of smallpox, or to repay a loan.—Southern Ry. Co. v. Hamblen County (Tenn.) 238.

§ 2. Liability of persons and property.

Lands purchased by a levee district at a sale for unpaid levee taxes continue subject to taxation after their acquisition by the district.—Bonner v. Board of Directors of St. Francis Levee Dist. (Ark.) 1124.

Acts 1894, p. 212, c. 95, as amended by Acts 1900, p. 39, c. 10, relative to the taxation of personal property, was repealed by the general revenue law of March 29, 1902, incorporated in Ky. St. 1903, p. 1414, regulating in a general way the whole subject of revenue and taxation.—Callahan v. Singer Mfg. Co. (Ky.) 581.

*Under Ky. St. 1903, § 4039, notes and mortgages kept outside of the state covering property in the state *held* not subject to taxation in the county where the mortgaged property is located.—Callahan v. Singer Mfg. Co. (Ky.) 581.

§ 3. Levy and assessment.

Ky. St. 1903, § 1409, subsec. 14, and section 4039, in relation to listing trees for the pur-

*Point annotated. See syllabus.

poses of taxation, *held* to apply only to trees which are branded.—*Callahan v. Dean Tie Co.* (Ky.) 582.

*Under Const. art. 2, § 29, Laws 1903, p. 599, c. 257, and Shannon's Code, §§ 503, 1394, 5992, 6041, 6050, 6053, a levy of a special tax without stating its purpose *held* void.—*Southern Ry. Co. v. Hamblen County* (Tenn.) 238.

A report of the chairman of a county court *held* insufficient to show the purpose for which a special tax was levied.—*Southern Ry. Co. v. Hamblen County* (Tenn.) 238.

§ 4. Collection and enforcement against persons or personal property.

In an action by a taxpayer to restrain the collection of a tax *held* proper to ignore statements in a reply referring to matters not referred to in the petition.—*Carpenter v. Lambert* (Ky.) 607.

§ 5. Sale of land for nonpayment of tax.

*A tax sale of land made for an excessive amount is void.—*Dickinson v. Arkansas City Imp. Co.* (Ark.) 21.

A tax sale of land for the whole of the taxes assessed when part of the taxes thereon have been paid is void.—*Dickinson v. Arkansas City Imp. Co.* (Ark.) 21.

Under Kirby's Dig. §§ 6076, 7024, 7083, 7085, a sale of part of a tract of lands assessed as a whole is void.—*Bonner v. Board of Directors of St. Francis Levee Dist.* (Ark.) 1124.

*A tax judgment cannot be collaterally attacked by one who was a defendant and who was properly served either personally or by publication.—*Evarts v. Missouri Lumber & Mining Co.* (Mo. Sup.) 372.

An order for publication of process directed to a nonresident owner of land sought to be sold for taxes in the name of "H. E. Evarts" *held* insufficient to divest title from the owner, whose name was "Henry E. Evarts."—*Evarts v. Missouri Lumber & Mining Co.* (Mo. Sup.) 372.

Under Rev. St. 1899, §§ 575, 9303, an unverified petition in a back tax suit, alleging that defendant was a nonresident, *held* sufficient to sustain an order for the publication of process.—*Evarts v. Missouri Lumber & Mining Co.* (Mo. Sup.) 372.

In a suit under the delinquent tax act, all parties claiming any interest in the property must be made parties and be served with citation.—*Ball v. Carroll* (Tex. Civ. App.) 1023.

§ 6. Tax titles.

*A tax sale and deed *held* void because of imperfect and uncertain description of property sold.—*Dickinson v. Arkansas City Imp. Co.* (Ark.) 21.

*Where a tax deed regular on its face is introduced in evidence, it carries a presumption that no essential to its validity was omitted.—*Hughes v. Owens* (Ky.) 595.

Fraud of a back tax attorney in bringing suit for taxes after he knew the taxes were paid *held* not available for the purpose of vacating the title of a bona fide purchaser of the land sold under the tax judgment.—*Evarts v. Missouri Lumber & Mining Co.* (Mo. Sup.) 372.

A purchaser at a tax sale under a tax judgment against the record owner acquires title as against the holder of an unrecorded

deed from the apparent owner.—*Evarts v. Missouri Lumber & Mining Co.* (Mo. Sup.) 372.

Payment of taxes before suit, before judgment, or before sale, *held* not to defeat the title of the purchaser of land sold under a tax judgment.—*Evarts v. Missouri Lumber & Mining Co.* (Mo. Sup.) 372.

The fact that a deed at a delinquent tax sale only purported to convey the interest of an owner named and his unknown heirs *held* not to affect the claim of the purchaser under the unknown owners, made parties.—*Ball v. Carroll* (Tex. Civ. App.) 1023.

A judgment in a suit to foreclose a delinquent tax lien *held* a judgment against all of the parties to the suit.—*Ball v. Carroll* (Tex. Civ. App.) 1023.

TAXATION OF COSTS.

See "Costs," § 2.

TEACHERS.

See "Schools and School Districts," § 1.

TELEGRAPHS AND TELEPHONES.

Identity of person at telephone as question for jury, see "Trial," § 5.

Liability of telegraph company for injuries from electricity, see "Electricity."

Liability over of telegraph company to railroad company for negligence causing injuries, see "Indemnity."

§ 1. Regulation and operation.

In an action against a telegraph company for delay in delivering a message, a requested instruction *held* properly refused because misleading.—*Western Union Telegraph Co. v. Ford* (Ark.) 528.

Evidence in an action against a telegraph company for delay in delivering a message *held* to support a finding of actionable negligence on the company's part.—*Western Union Telegraph Co. v. Ford* (Ark.) 528.

The statute authorizing a recovery for mental anguish for failure to deliver a telegraphic message *held* to authorize a recovery for mental anguish, where the negligence occurred and the injury was sustained in the state.—*Western Union Telegraph Co. v. Ford* (Ark.) 528.

A rule of a telegraph company fixing the office hours on holidays *held* reasonable.—*Western Union Telegraph Co. v. Ford* (Ark.) 528.

*In an action against a telegraph company for delay in delivering a message, a finding of negligence on the part of the sender in failing to give a specific address of the sendee does not excuse the company from a negligent failure to deliver.—*Western Union Telegraph Co. v. Ford* (Ark.) 528.

*A message *held* to inform the telegraph company of the importance of a prompt delivery, rendering it liable for delay.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1036.

In an action against a telegraph company for failure to deliver a message announcing the death of a brother of the wife of plaintiff, a certain fact *held* required to be proved in order to obtain a judgment.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1036.

A petition in an action against a telegraph company for delay in delivering a message *held* insufficient for failing to contain a certain allegation.—*Western Union Telegraph Co. v. Bell* (Tex. Civ. App.) 1036.

* Point annotated. See syllabus.

TENDER.

As condition precedent to action for breach of contract of sale, see "Sales," § 6.
Necessity of tender back of consideration of release, to procure its cancellation, see "Release," § 1.

TERMS.

Of leases, see "Landlord and Tenant," § 3.

TESTAMENT.

See "Wills."

TESTAMENTARY CAPACITY.

See "Wills," § 1.

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See "Larceny."

THREATS.

Evidence of in prosecutions for homicide, see "Homicide," § 6.

TICKETS.

For carriage of passengers, see "Carriers," § 5.

TIMBER.

See "Logs and Logging."

TIME.

Allegation as to time of commission of offense in indictment or information, see "Indictment and Information," § 3.
For payment of interest, see "Interest," § 1.

TITLE.

Color of title, see "Adverse Possession."
Of municipal ordinances, see "Municipal Corporations," § 3.
Of statutes, see "Statutes," § 2.
Removal of cloud, see "Quieting Title."
Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 4.
Sufficiency of title of vendor of land to authorize specific performance, see "Specific Performance," § 1.
Tax titles, see "Taxation," § 6.
Title of lessor, see "Landlord and Tenant," § 2.

Particular matters affecting title.

See "Dedication," § 2; "Sales," §§ 4, 7.

Particular species of property or rights.

Office, see "Officers," § 2.

Title necessary to maintain particular actions.

See "Ejectment," § 1; "Partition," § 1.

On bill or note, see "Bills and Notes," § 3.

TOLLS.

Toll roads, see "Turnpikes and Toll Roads."

TOOLS.

Liability of employer for defects, see "Master and Servant," § 2.

TORTS.

Causing death, see "Death," § 1.
Effect of release of one of joint wrongdoers, see "Release," § 2.
Liability of purchaser of railroad for torts of grantor, see "Railroads," § 3.
Measure of damages, see "Damages," § 3.

By particular classes of parties.

See "Municipal Corporations," § 8.
Employés, see "Master and Servant," § 12.
Officer or agent of bank, see "Banks and Banking," § 1.

Particular remedies for torts.

See "Trespass," § 1; "Trove and Conversion," § 1.

Particular torts.

See "Assault and Battery," § 1; "Conspiracy," § 1; "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass"; "Trove and Conversion."
Civil damages from sale of liquors, see "Intoxicating Liquors," § 9.

TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

TRANSCRIPTS.

Of record for purpose of review, see "Criminal Law," § 29.

TRANSFERS.

See "Assignments."
Power of building and loan associations as to transfer of loans, see "Building and Loan Associations."

TREES.

See "Logs and Logging."
Taxation of, see "Taxation," § 3.

TRESPASS.

By animals, see "Animals."
Care required as to trespasser, see "Negligence," § 1.
Counterclaim for in action for replevin of animals, see "Replevin," § 1.
Ejection of trespasser, see "Carriers," § 9.
Injuries to trespassers, see "Railroads," §§ 6, 8.
Real party in interest in action to restrain, see "Action," § 1.
Reply in action for, see "Pleading," § 3.
Restrain trespass to real property, see "Injunction," § 2.
To the person, see "Assault and Battery," § 1.
§ 1. **Actions.**

In trespass against a railroad company for damages to plaintiff's land by defendant's agent in constructing the road, it was error to admit evidence of liability of the company under a contract right to replace the fences in time to protect the crops.—St. Louis, I. M. & S. Ry. Co. v. Gillihan (Ark.) 793.

TRESPASS TO TRY TITLE.

See "Ejectment."
Adverse possession as a defense, see "Adverse Possession," §§ 1, 2.

* Point annotated. See syllabus.

By assignee of vendor's lien note, see "Vendor and Purchaser," § 6.
Competency of jurors, see "Jury," § 3.
Documentary evidence, see "Evidence," § 7.
Examination of witness, see "Witnesses," § 1.
Expert testimony, see "Evidence," § 9.
Reception of evidence in, see "Trial," § 3.
To establish boundary, see "Boundaries," § 2.
To public lands, see "Public Lands," § 3.

§ 1. Right of action and defenses.

One claiming land under a purchaser at a sale of the foreclosure of the vendor's lien held not required to pay the purchase price in order to recover the land in trespass to try title.—*Club Land & Cattle Co. v. Wall* (Tex. Sup.) 984.

§ 2. Proceedings.

In action of trespass to try title it was proper to show defendant's possession, claim of ownership, and ouster by writ of sequestration.—*Latta v. Wiley* (Tex. Civ. App.) 433.

In trespass to try title to certain school land, evidence held admissible on the issue of the good faith of defendant's alleged prior settlement.—*Jones v. Wright* (Tex. Civ. App.) 1010.

One claiming land under vendee who had not paid purchase-money notes and had abandoned the land held not entitled to a presumption that the note was barred by limitations.—*Staley v. Stone* (Tex. Civ. App.) 1017.

In trespass to try title, certain evidence held collateral to the issue and inadmissible.—*Staley v. Stone* (Tex. Civ. App.) 1017.

In trespass to try title, certain charge held within the issues, and not reversible error.—*Staley v. Stone* (Tex. Civ. App.) 1017.

In trespass to try title, certain charge held proper, although the facts stated therein were not specifically pleaded.—*Staley v. Stone* (Tex. Civ. App.) 1017.

In trespass to try title, certain charge held not on the weight of the evidence.—*Staley v. Stone* (Tex. Civ. App.) 1017.

A plaintiff in trespass to try title held required to show that the land in controversy was not included in a deed to his grantor, as having been previously disposed of.—*Ball v. Carroll* (Tex. Civ. App.) 1023.

A plaintiff in trespass to try title held not to have shown title to the land in controversy sufficient to warrant a judgment in his favor.—*Ball v. Carroll* (Tex. Civ. App.) 1023.

*In trespass to try title, lease held admissible to prove that defendants were tenants under plaintiff.—*Camp v. League* (Tex. Civ. App.) 1062.

§ 3. Damages, use and occupation, improvements, and taxes.

One who acquires land with the hope that he may perfect title by the statute of limitations does not act in such good faith as to entitle him to reimbursement for improvements made by him.—*Staley v. Stone* (Tex. Civ. App.) 1017.

TRIAL.

See "New Trial"; "Witnesses."

Harmless error in rulings, see "Appeal and Error," §§ 16, 18.

Instructions as to adverse possession, see "Adverse Possession," § 2.

Instructions as to release, see "Release," § 3.
Instructions in actions to establish boundaries, see "Boundaries," § 2.

Objections at trial for purpose of review, see "Appeal and Error," § 5.

Questions for jury as to construction and operation of contract, see "Contracts," § 2.

Questions for jury as to performance or breach of contract, see "Contracts," § 4.

Questions for jury in boundary suits, see "Boundaries," § 2.

Review of proceedings in criminal prosecutions, see "Criminal Law," § 27.

Trial of right to property levied on, see "Attachment," § 4.

Trespass to try title to real property, see "Trespass to Try Title."

Proceedings incident to trials.

See "Continuance."

Entry of judgment after trial of issues, see "Judgment," § 1.

Place of trial, see "Venue," § 1.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 2.

Trial of actions by or against particular classes of parties.

See "Attorney and Client," § 2; "Brokers," § 2; "Carriers," §§ 2, 3, 7-10; "Master and Servant," §§ 10-12; "Municipal Corporations," § 8; "Railroads," §§ 6-9.

Mortgagors and mortgagees, see "Chattel Mortgages," § 2.

Water company, see "Waters and Water Courses," § 3.

Trial of particular civil actions or proceedings.

See "Ejectment," § 3; "Fraud," § 2; "Malicious Prosecution," § 2; "Negligence," § 4; "Nuisance," § 1; "Replevin," § 3; "Trespass to Try Title," § 2.

For breach of contract, see "Contracts," § 5.
For breach of pasturage contract, see "Animals."

For broker's compensation, see "Brokers," § 2.
For damages, see "Damages," § 5.

For death caused by operation of railroad, see "Railroads," §§ 7, 8.

For death of servant, see "Master and Servant," § 11.

For delay in transportation and delivery of goods, see "Carriers," § 2.

For injuries caused by operation of railroads, see "Railroads," § 8.

For injuries from insufficient water supply, see "Waters and Water Courses," § 3.

For injuries to animals caused by operation of railroads, see "Railroads," § 9.

For injury to live stock in transit, see "Carriers," §§ 2, 3.

For negligence in transmission or delivery of message, see "Telegraphs and Telephones," § 1.

For personal injuries, see "Carriers," §§ 7-9; "Master and Servant," §§ 10-12; "Municipal Corporations," § 8; "Railroads," §§ 6, 7; "Street Railroads," § 2.

For possession of mortgaged property, see "Chattel Mortgages," § 2.

For price of goods, see "Sales," § 6.

For services, see "Work and Labor."

On award of arbitrators, see "Arbitration and Award," § 2.

On insurance policy, see "Insurance," § 16.

On liquor dealer's bond, see "Intoxicating Liquors," § 3.

To establish boundary, see "Boundaries," § 2.

Trial of criminal prosecutions.

See "Assault and Battery," § 1; "Bribery"; "Burglary," § 1; "Criminal Law," §§ 16, 17-25; "Homicide," § 9; "Larceny," § 2.

For keeping disorderly house, see "Disorderly House."

For obstructing road, see "Highways," § 2.

For offense against liquor laws, see "Intoxicating Liquors," § 7.

*Point annotated. See syllabus.

§ 1. Notice of trial and preliminary proceedings.

*In an ordinary action properly commenced as such, a purely equitable defense must be tried by the court and disposed of before a judgment can be rendered.—*Davis v. Ferguson* (Ky.) 968.

§ 2. Dockets, lists, and calendars.

*The pleadings in an action of ejectment *held* to justify the transfer of the case to the equity docket, under Civ. Code Prac. § 6, subsec. 1 and section 10, subsec. 4.—*Hunt v. Nance* (Ky.) 6.

Civ. Code Prac. § 14, when read in connection with sections 13, 113, 363, 364, *held* not to deny a defendant the right to plead an equitable defense, though unable to give bond for the performance of an adverse judgment.—*Davis v. Ferguson* (Ky.) 968.

Where, in an ordinary action, the equitable defense is of a character embraced within Civ. Code Prac. § 10, subsec. 4, as amended in 1890, the trial court has discretion whether it will transfer the action to the equity docket without the execution of the bond required by section 14.—*Davis v. Ferguson* (Ky.) 968.

Under Civ. Code Prac. § 10, subsec. 4, as amended in 1890, the refusal to transfer a cause to the equity docket unless the bond required by section 14 was given *held* an abuse of the court's discretion.—*Davis v. Ferguson* (Ky.) 968.

§ 3. Reception of evidence.

A party objecting to certain evidence *held* not required, after the inadmissibility of the evidence became apparent, to renew the objection by motion to strike out.—*Root v. Kansas City Southern Ry. Co.* (Mo. Sup.) 621.

Under Rev. St. 1899, § 933, proof of execution of deed need not be made before admission of certified copy in evidence.—*Ming v. Olster* (Mo. Sup.) 898.

Certified copy of deed *held* properly admitted in evidence without first admitting evidence of opposite party that deed was a forgery.—*Ming v. Olster* (Mo. Sup.) 898.

*In trespass to try title to certain land, it was no abuse of discretion for the court to permit the introduction of certain evidence by plaintiff after defendant had closed her case.—*Jones v. Wright* (Tex. Civ. App.) 1010.

*In trespass to try title, evidence of statements by defendant, who afterwards testified, *held* properly confined to question of good faith.—*Camp v. League* (Tex. Civ. App.) 1062.

*The refusal of the court to allow parties to introduce matters which were already in evidence was proper.—*Camp v. League* (Tex. Civ. App.) 1062.

§ 4. Arguments and conduct of counsel.

In an action against a railroad company for personal injuries, error, if any, in permitting certain argument by plaintiff's counsel, *held* not cause for reversal.—*Louisville, H. & St. L. R. Co. v. Sander's Adm'r* (Ky.) 937.

*Improper statements of counsel *held* not reversible error in the absence of a special request for an instruction that the statement was not proper for the consideration of the jury.—*Jones v. Wright* (Tex. Civ. App.) 1010.

*Argument of counsel in an action against a railroad company for injuries at a crossing *held* reversible error.—*Galveston, H. & S. A. Ry. Co. v. Washington* (Tex. Civ. App.) 1054.

*In an action for personal injuries caused by frightening of team by locomotive, *held* error to permit counsel to make statement in argument contrary to admission made to prevent continu-

ance.—*St. Louis Southwestern Ry. Co. of Texas v. Hall* (Tex. Civ. App.) 1079.

§ 5. Taking case or question from jury.

*If there is evidence tending to establish a matter in issue, the court should not grant peremptory instruction.—*Snydor v. Arnold* (Ky.) 289.

*A demurrer to the evidence admits every fact which the jurors might infer if the evidence was submitted to them.—*Moore v. St. Louis Transit Co.* (Mo. Sup.) 390.

*On demurrer to plaintiff's evidence, such evidence must be taken as absolutely true, and every reasonable inference therefrom be drawn in plaintiff's favor.—*Robertson v. George A. Fuller Const. Co.* (Mo. App.) 130.

Under the evidence *held* that defendant's request for the direction of a verdict at the close of all the evidence should have been granted.—*Dow v. Kansas City Southern Ry. Co.* (Mo. App.) 744.

*Where plaintiff's evidence made out defendant's case, a verdict for him should have been directed on request at the close of plaintiff's case.—*Dow v. Kansas City Southern Ry. Co.* (Mo. App.) 744.

*Where letters which passed between the parties did not amount to a compact, the inference to be drawn therefrom was for the jury, and not for the court.—*Carp v. Queen Ins. Co.* (Mo. App.) 1137.

Where defendant relied solely on a plea in bar of *res judicata*, which it failed to sustain, plaintiff was entitled to a direct verdict.—*Stone v. Grand Lodge A. O. U. W.* (Mo. App.) 1143.

*The court, in a case of conflicting testimony depending on the credibility of witnesses, *held* required to submit it to the jury.—*Kinney v. Yazoo & M. V. R. Co.* (Tenn.) 1116.

The question of the identity of the person telephoning to a witness testifying to a telephone communication *held* for the jury.—*American Nat. Bank v. First Nat. Bank* (Tex. Civ. App.) 439.

§ 6. Instructions to jury—Province of court and jury in general.

In an action for fraud, instruction *held* erroneous as invading the province of the jury.—*McDonough v. Williams* (Ark.) 783.

In an action against an executor for services rendered to decedent, an instruction *held* erroneous because assuming that the amount, if any, due to plaintiff, was greater than an amount due from plaintiff to decedent upon certain notes.—*McGrew's Ex'r v. O'Donnell* (Ky.) 301.

In condemnation proceedings, instructions *held* not erroneous as assuming damages, because of failure to repeat the words "if any."—*Southern Missouri & A. Ry. Co. v. Woodward* (Mo. Sup.) 470.

*In an action against a railroad for obstructing an alley by constructing its road therein, it was not error for the court to assume in an instruction that the railroad obstructed the alley.—*Mitchell v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 111.

*In an action for injuries by a defect in a highway, the court's assumption that a highway existed at the point in question, as to which the evidence was not in conflict, *held* not error.—*San Antonio & A. P. Ry. Co. v. Wood* (Tex. Civ. App.) 259.

In an action for the death of a servant, instruction *held* not erroneous as assuming that deceased was guilty of negligence.—*Ramm v.*

*Point annotated. See syllabus.

Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 428.

In action for injuries to live stock in shipment, failure of charge to impose on carrier higher degree of care in carrying live stock than in carrying dead freight *held* not error.—Waggoner v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 1028.

In an action for the death of a servant, an instruction *held* not erroneous as on the weight of the evidence.—Houston & T. C. R. Co. v. Oram (Tex. Civ. App.) 1029.

In an action for conversion of certain timber, an instruction *held* properly refused as assuming that H., who had cut the timber, was defendant's agent, and as requiring defendant to have informed H. of the boundary line between defendant's land and that belonging to plaintiff, though H. was otherwise informed of such boundary.—Messer v. Walton (Tex. Civ. App.) 1037.

§ 7. — Necessity and subject-matter.

In an action on a note, where the defense was duress, *held* that the court should have given a certain instruction as to the threats alleged to have been communicated to defendant.—Ditto v. Slaughter (Ky.) 2.

*In an action for injuries by an obstruction in a highway, refusal of the court to grant an instruction submitting to the jury the issue as to whether the road in question was a public highway *held* not error.—San Antonio & A. P. Ry. Co. v. Wood (Tex. Civ. App.) 259.

§ 8. — Form, requisites, and sufficiency.

*Under Const. art. 7, § 23, it was not error for the court to give an additional oral instruction, in the absence of a request or demand that it be reduced to writing.—O'Neal v. Richardson (Ark.) 1117.

An instruction inviting undue attention to a particular part of the evidence tending to support plaintiff's claim is improper.—Drake v. Holbrook (Ky.) 297.

In an action for negligence causing death, an instruction as to exemplary damages *held* improper.—Southern Ry. in Kentucky v. Scanlon's Adm'r (Ky.) 927.

In an action against a railroad for constructing its road in an alley, charges on damages *held* not in conflict.—Mitchell v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 111.

Instruction authorizing jury to assess damages received by plaintiff as the direct result of the negligence of the defendant, without further reference to the issues, *held* erroneous.—Kohr v. Metropolitan St. Ry. Co. (Mo. App.) 1145.

In an action against a carrier for damages to a shipment of cattle, there was no error in a charge that, if the jury found for plaintiff, the damages should not exceed the amount claimed in the petition, especially as the verdict was for much less than that amount.—Gulf, C. & S. F. Ry. Co. v. Funk (Tex. Civ. App.) 1032.

The use of the word "evidence," instead of the word "testimony," in an instruction directing the jury not to consider the evidence of certain witnesses, *held* not misleading.—Houston & T. C. R. Co. v. Craig (Tex. Civ. App.) 1033.

In an action involving the location of a boundary line, an instruction *held* erroneous because leading the jury to attach undue importance to a certain survey.—Giddings v. Thompson (Tex. Civ. App.) 1043.

In an action involving the location of a boundary line, an instruction *held* not erroneous as

withdrawing a certain matter from the consideration of the jury and exaggerating the importance of another.—Giddings v. Thompson (Tex. Civ. App.) 1043.

§ 9. — Applicability to pleadings and evidence.

In an action for fraud and deceit, instructions *held* not applicable to evidence.—McDonough v. Williams (Ark.) 783.

In an action for wrongful attachment, an instruction *held* erroneous as not based on the evidence.—Terry v. Clark (Ark.) 788.

In an action against a street railway company for the killing of a hog, an instruction *held* erroneous as not warranted by the evidence.—Little Rock Ry. & Electric Co. v. Newman (Ark.) 864.

Defendants are not entitled to an instruction that certain facts constitute a complete defense, when they did not plead such facts as a defense.—Sehon, Blake & Stevenson v. Whitt (Ky.) 280.

*In an action for injuries causing the death of the servant, an instruction as to contributory negligence *held* erroneous.—Southern Ry. in Kentucky v. Scanlon's Adm'r (Ky.) 927.

In action for injuries to a servant, an instruction *held* within the allegations of the complaint.—Robertson v. George A. Fuller Const. Co. (Mo. App.) 130.

Where in a suit on a note plaintiff cast the interest due to December 10, 1890, and prayed judgment for the interest from that date on the amount so ascertained, it was error to direct the jury to allow interest from 1893.—Dunlap v. Kelly (Mo. App.) 140.

*In action by attorney for services, instruction in fixing amount of verdict to take into consideration plaintiff's standing and character in the legal profession *held* erroneous under the evidence.—Smith v. Couch (Mo. App.) 1143.

*In an action for injuries by an obstruction in a highway, refusal of the court to submit the question whether plaintiff was a trespasser on defendant's property at the time *held* not error.—San Antonio & A. P. Ry. Co. v. Wood (Tex. Civ. App.) 259.

The giving of an instruction *held* erroneous because of absence of evidence to support it.—Stanford v. Wright & Green (Tex. Civ. App.) 269.

In an action on an award of arbitrators, an instruction *held* erroneous for disregarding the evidence showing defendant's withdrawal from the verbal agreement to submit to arbitration.—Houston Saengerbund v. Dunn (Tex. Civ. App.) 429.

Where there was no evidence that defendant directed H. to cut any timber from plaintiff's land, a request to charge that, if H. cut the timber in question "by direction of defendant on plaintiff's land," etc., *held* properly refused.—Messer v. Walton (Tex. Civ. App.) 1037.

In an action for death of a section foreman, instruction denying right of recovery if deceased was in a safe place but for the fact that he stepped on loose dirt, causing his foot to slip, *held* erroneous under the evidence.—Houston & T. C. R. Co. v. Turner (Tex. Civ. App.) 1074.

§ 10. — Requests or prayers.

*Where instructions are given which taken together fully cover every proposition raised by the respective parties, which are necessary to direct the jury in arriving at their verdict, error cannot be predicated on the refusal to give a requested instruction.—Koenig v. Union Depot Ry. Co. (Mo. Sup.) 497.

* Point annotated. See syllabus.

*It is proper to refuse an instruction partly erroneous.—*McManus v. Metropolitan St. Ry. Co.* (Mo. App.) 176.

In an action for injuries to a servant, a request to charge on the issue of plaintiff's contributory negligence *held* fully covered by the charge of the court.—*Missouri, K. & T. Ry. Co. of Texas v. Parrott* (Tex. Sup.) 795.

*It is not error for the court to refuse to give a special instruction on an issue sufficiently covered by the charge given.—*San Antonio & A. P. Ry. Co. v. Wood* (Tex. Civ. App.) 259.

Defendant *held* not entitled to object to the sufficiency of instructions submitting the issue of assumed risk, in the absence of a request for further instructions on such issue.—*Galveston, H. & S. A. Ry. Co. v. Paschall* (Tex. Civ. App.) 446.

*It is not error to refuse special charges covered by the main charge.—*St. Louis Southwestern Ry. Co. of Texas v. Bryant* (Tex. Civ. App.) 813.

*In view of the facts a party *held* required to request a special charge if he desired a charge on a subject.—*Houston & T. C. R. Co. v. Craig* (Tex. Civ. App.) 1033.

§ 11. — Construction and operation.

In action for price of grapes, refusal of instruction as to implied warranty of condition *held* not cured by other instruction given.—*Truschel v. Dean* (Ark.) 781.

In an action for injuries, an instruction *held* not objectionable as withdrawing plaintiff's evidence of contributory negligence from the jury.—*Little Rock & H. S. W. R. Co. v. McQueeney* (Ark.) 1120.

Error in an instruction in an action for breach of an express warranty in failing to define such term *held* cured by another instruction.—*Haines v. Neece* (Mo. App.) 919.

In an action for injuries to plaintiff while driving over a street car track by collision between a car and plaintiff's wagon, an instruction eliminating plaintiff's contributory negligence *held* cured by other instructions.—*Rodgers v. St. Louis Transit Co.* (Mo. App.) 1154.

An imbuguity in an instruction in an action for injuries to an employe *held* not ground for reversal in view of other charges given.—*International & G. N. R. Co. v. Von Hoessen* (Tex. Sup.) 798.

§ 12. Custody, conduct, and deliberations of jury.

An instruction given the jury after the submission of the case to them *held* erroneous.—*Little Rock Ry. & Electric Co. v. Newman* (Ark.) 864.

*On return of the jury for further instructions, it was improper for the court to state to them that it was necessary for some or all of them to make concessions.—*O'Neal v. Richardson* (Ark.) 1117.

§ 13. Verdict.

General verdict *held* not erroneous, although petition contained two counts, where the court directed a verdict for defendant on the second count.—*Mitchell v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 111.

Where parties requested a submission of the case on special issues, they should have prepared appropriate charges.—*Johnston v. Fraser* (Tex. Civ. App.) 49.

TRIAL OF RIGHT OF PROPERTY.

See "Attachment," § 4.

TROVER AND CONVERSION.

Conversion of mortgaged property, see "Chat-tel Mortgages," § 2.
Instructions in general, see "Trial," § 6.
Limitation of action in general, see "Limitation of Actions," § 2.

§ 1. Actions.

Trust in assets of a decedent's estate cannot be enforced in an action for conversion against the decedent's administrator.—*White v. Blankenbeckler* (Mo. App.) 503.

*Where defendant's employes cut timber on plaintiff's land believing it to belong to defendant, defendant was liable only for the value of the timber at the time it was cut; but if such employes were negligent, or the trespass was intentional, defendant was liable for the value of the timber in its converted condition.—*Messer v. Walton* (Tex. Civ. App.) 1037.

TRUST COMPANIES.

See "Banks and Banking," § 2.

TRUSTS.

Charitable trusts, see "Charities."

Effect of trust on limitation, see "Limitation of Actions," § 2.

Enforcement of in trover, see "Trover and Conversion," § 1.

Foreign trust companies, see "Corporations," § 5.

Limitation of action against purchaser at sale of trustee, see "Limitation of Actions," § 2.

Limitation of action by or against trustees in general, see "Limitation of Actions," § 4.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

*A husband *held* to hold property under an express trust in favor of the wife, which was capable of being established by parol, and was not affected by the statute of frauds.—*Bohannon v. Bohannon's Adm'r* (Ky.) 597.

Evidence *held* to establish an agreement that defendant should redeem plaintiff's land, which had been sold on execution, and hold the title to secure advances as trustee for plaintiff.—*Carter v. Dotson* (Ky.) 600.

*Husband, who took title in his own name to property acquired by exchange of property of wife, *held* a trustee for the benefit of her and her heirs.—*Siling v. Hendrickson* (Mo. Sup.) 105.

§ 2. Appointment, qualification, and tenure of trustee.

*Irregularities of a solvent trustee with ample bond *held* not sufficient to authorize his removal.—*Lowe v. Montgomery* (Mo. App.) 916.

Certain acts of a trustee *held* not to show an intent to injuriously affect the property of the trust estate, and not to justify his removal.—*Lowe v. Montgomery* (Mo. App.) 916.

§ 3. Management and disposal of trust property.

A trustee cannot justify his failure to perform the duties of the trust by showing that no one asked him to perform them.—*Cotton v. Rand* (Tex. Civ. App.) 266.

TURNPIKES AND TOLL ROADS.

Restraining collection of tolls, see "Injunction," § 1.

Restraining exaction of tolls on public road, see "Highways," § 2.

* Point annotated. See syllabus.

§ 1. Establishment, construction, and maintenance.

An indictment of a turnpike road company, under Ky. St. 1908, § 4718, for failure to make the annual settlement required by statute, *held* defective.—*Commonwealth v. Hustonville & C. M. Turnpike Road Co. (Ky.)* 941.

An indictment for violation of the statute requiring annual settlements by turnpike companies *held* insufficient.—*Lyon v. Commonwealth (Ky.)* 942.

*Acts Feb. 27, 1851 (Laws 1850-51, p. 403), and March 20, 1872 (Laws 1871-72, p. 227), did not grant perpetual franchises, but the duration of the company was controlled by Rev. St. 1845, c. 34, art. 1, § 1, and Rev. St. 1885, c. 62, respectively.—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co. (Mo. App.)* 153.

*Under Rev. St. 1889, § 2697, and Rev. St. 1899, § 1227, a gravel road company must obtain consent of the county court before taking possession of a public highway.—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co. (Mo. App.)* 153.

A grant by a county court of the right to construct an electric railway over an old gravel road *held* to confer no right to operate a gravel road and collect tolls.—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co. (Mo. App.)* 153.

On the expiration of the charter rights of a toll road company the road vested in the public, and the subsequent conveyance of the rights and franchises of the corporation gave the grantee no right to exact tolls.—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co. (Mo. App.)* 153.

§ 2. Regulation and use for travel.

In an action to restrain the operation of a gravel road and the collection of tolls, petition *held* sufficient.—*State ex rel. Jump v. Louisiana, B. G. & A. Gravel Road Co. (Mo. App.)* 153.

ULTRA VIRES.

Acts of building and loan association, see "Building and Loan Associations."

UNITED STATES.

Courts, see "Removal of Causes."

Public lands, see "Public Lands," § 2.

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

USE AND OCCUPATION.

Recovery for in action of trespass to try title, see "Trespass to Try Title," § 3.

VACATION.

Of alley in city, see "Municipal Corporations," § 7.

Vacating particular proceedings.

See "Execution," § 2; "Injunction," § 3; "Judgment," § 2; "Judicial Sales."

Sale of property of estate of decedent, see "Executors and Administrators," § 6.

VALUE.

Harmless error in rulings on evidence of, see "Appeal and Error," § 17.

Limits of jurisdiction, see "Appeal and Error," § 2; "Courts," § 3; "Criminal Law," § 27.

Proof of in action for damages, see "Damages," § 5.

VARIANCE.

Between pleading and proof in civil actions, see "Pleading," § 4.

Between pleading and proof in criminal prosecutions, see "Indictment and Information," § 5.

VENDOR AND PURCHASER.

See "Exchange of Property"; "Sales."

Best and secondary evidence of contract for sale of land, see "Evidence," § 3.

Effect of pendency of action relating to property conveyed, see "Lis Pendens."

Execution against interest of vendor, see "Execution," § 1.

Malicious removal of building by purchaser after foreclosure of vendor's lien, see "Malicious Mischief."

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Right of, to maintain trespass to try title, see "Trespass to Try Title," § 2.

Sale of homestead, see "Homestead," § 2.

Specific performance of contract, see "Specific Performance."

§ 1. Requisites and validity of contract.

*A purchaser *held* guilty of fraud warranting the setting aside of the conveyance.—*Smith v. Woodson (Ky.)* 980.

§ 2. Construction and operation of contract.

A contract between the vendors of land and a cemetery company construed, and *held* to mean that the vendors were to sell lots and have the proceeds up to a specified sum, and that the surplus land should belong to the company.—*Brann v. Falmouth Riverside Cemetery Co. (Ky.)* 579.

Evidence *held* not to show that a purchaser assumed to pay a creditor of the vendor.—*Moore v. Faris (Ky.)* 592.

§ 3. Modification or rescission of contract.

*Facts *held* to authorize a finding that the vendee of land had consented to a rescission of the contract of sale.—*Staley v. Stone (Tex. Civ. App.)* 1017.

§ 4. Performance of contract.

Where a land contract required the vendor to convey a free title, and the vendee to pay the balance of the price, the parties could waive an actual tender and the actual discharge of existing incumbrances prior to the transfer.—*Davis v. Barada-Ghio Real Estate Co. (Mo. App.)* 113.

A contract for the sale of real estate *held* only to entitle the vendor to retain so much of the payments made as was necessary to reimburse it for damages sustained by the vendee's default.—*Davis v. Barada-Ghio Real Estate Co. (Mo. App.)* 113.

*A vendor *held* not entitled to insist on full payment before discharging incumbrances, he having agreed to convey a clear title on payment of the price.—*Davis v. Barada-Ghio Real Estate Co. (Mo. App.)* 113.

Vendee in contract for sale of land *held* to have waived necessity of performance by vendor within the time limited by the contract.—*Metz v. Wright (Mo. App.)* 1125.

Under Rev. St. 1899, § 3054, absence of patent to public land which has been duly entered upon *held* not to vitiate the title.—*Metz v. Wright (Mo. App.)* 1125.

* Point annotated. See syllabus.

§ 5. Rights and liabilities of parties.

*Actual notice of the existence of a deed, even though it be unrecorded, defeats the right of a purchaser of the land at subsequent judicial sale, unless the deed is fraudulent.—*Hunt v. Nance* (Ky.) 6.

Previous recorded deed by vendor of land still in possession *held* to furnish constructive notice thereof to subsequent purchasers, though vendor never held legal title.—*Eversole v. Virginia Iron, Coal & Coke Co.* (Ky.) 593.

One claiming under a quitclaim deed given by the grantee in a deed on the foreclosure of a trust deed is charged with notice of the contents of the trust deed, and of the constitution and by-laws of the building and loan association which was the beneficiary in the trust deed, to which constitution and by-laws reference was made therein.—*Cobe v. Lovan* (Mo. Sup.) 93.

*Record of deed showing that grantor had retained a lien for the purchase money *held* to charge a purchaser from heirs of the grantee with notice of that fact.—*Staley v. Stone* (Tex. Civ. App.) 1017.

§ 6. Remedies of vendor.

*In a suit by a vendor for the price, *held*, under the facts, that the vendee was not entitled to an abatement of the price.—*Johnson v. Green* (Ky.) 939.

A vendor *held* to have had a right to sue the purchaser from the vendee on his assumption of the indebtedness due from the vendee to the vendor.—*Farmers' Exch. Bank v. Crump* (Mo. App.) 724.

A suit on notes for the purchase price of land *held* not to deprive the assignee thereof and the holder of the vendor's interest in the land of the right to sue in trespass to try title.—*Rutherford v. Mothershed* (Tex. Civ. App.) 1021.

An assignee of notes given for the purchase price of land secured by a vendor's lien, and a grantee of the vendor's interest, has the same right to recover the land on the nonpayment of the notes as the original vendor would have.—*Rutherford v. Mothershed* (Tex. Civ. App.) 1021.

The right of an assignee of purchase-money notes and the grantee of the vendor's interest in the land to recover the land on the nonpayment of the notes *held* defeated only by paying or tendering the balance of the purchase money represented by the notes.—*Rutherford v. Mothershed* (Tex. Civ. App.) 1021.

§ 7. Remedies of purchaser.

*Vendee's obligation to pay the balance of the price and the vendor's obligation to convey a clear title *held* concurrent conditions, requiring the vendee to tender the price before he could sue for breach of contract.—*Davis v. Barada-Ghio Real Estate Co.* (Mo. App.) 113.

A contract to convey land *held* in effect a bond for title, entitling the vendee to rights superior to subsequent attachment and judgment liens, though the deed pursuant to the contract was defective, and the purchase price had not been paid over at the time the land was attached.—*Haynie Mercantile Co. v. Miller* (Tex. Civ. App.) 262.

VENUE.

Effect of change on *lis pendens*, see "*Lis Pendens*."

Harmless error in rulings on motion for change, see "*Appeal and Error*," § 16.

Review of discretionary rulings, see "*Appeal and Error*," § 14; "*Criminal Law*," § 30.

Of particular actions or proceedings.

Against foreign corporation, see "*Corporations*," § 5.

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Foreclosure, see "*Mortgages*," § 3.

§ 1. Change of venue or place of trial.

The burden of proof to establish at least one of the grounds on which a change of venue was sought *held* on the defendant.—*Jones v. Wright* (Tex. Civ. App.) 1010.

VERDICT.

Directing verdict in civil actions, see "*Trial*," § 5.

In civil actions, see "*Trial*," § 13.

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Review on appeal or writ of error, see "*Appeal and Error*," § 15; "*Criminal Law*," § 30.

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Landlord's lien, see "*Landlord and Tenant*," § 5.

Right of action for fraud, see "*Fraud*," § 2.

Under bill of lading in shipment of live stock, see "*Carriers*," § 3.

* Point annotated. See syllabus.

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Of dangers to servant, see "Master and Servant," § 3.

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For arrest, see "Criminal Law," § 6.

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Covenants of, see "Covenants."

On sale of goods, see "Sales," §§ 5, 7.

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Nuisance caused by escaping water, see "Nuisance," § 1.

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Water courses in cities, see "Municipal Corporations," § 8.

§ 1. Natural water courses.

Gen. Laws 1888-89, p. 100, c. 88, and Gen. & Sp. Laws 1893, p. 47, c. 44, providing for appropriation of waters. *held* not unconstitutional.—*Santa Rosa Irr. Co. v. Pecos River Irr. Co.* (Tex. Civ. App.) 1014.

Prescriptive right to waters of a stream *held* not acquired as against certain lands by its use through a canal.—*Santa Rosa Irr. Co. v. Pecos River Irr. Co.* (Tex. Civ. App.) 1014.

A plaintiff in a suit to enjoin diversion of waters *held* entitled to show a title acquired after commencement of suit, but before he became a party by the filing of an amended petition.—*Santa Rosa Irr. Co. v. Pecos River Irr. Co.* (Tex. Civ. App.) 1014.

One interested in waters of a stream *held* entitled to have its diversion enjoined.—*Santa Rosa Irr. Co. v. Pecos River Irr. Co.* (Tex. Civ. App.) 1014.

§ 2. Surface waters.

A railroad company *held* not liable for surface water naturally accumulating on its right of way and not held there by any works made by the railroad company.—*McFadden v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 989.

*Where railroad construction caused surface water to collect and stand on the railroad's right of way and become a nuisance to an adjoining property owner, the railroad was liable for the damage sustained, regardless of its negligence.—*McFadden v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 989.

In an action against a railroad company for insufficient drainage of its right of way, an instruction that the railroad was liable for damage resulting from failure to maintain sufficient culverts and sluices, required by the natural lay of the land, *held* improperly refused.—*McFadden v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 989.

In an action for injuries from an alleged nuisance on a railroad right of way, evidence of statements made to defendant's servants prior to suit brought *held* admissible to show notice.—*McFadden v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 989.

In an action against a railroad company for a nuisance, an instruction *held* objectionable as

submitting defendant railroad company's responsibility for the alleged nuisance without a statement of facts showing such responsibility.—*McFadden v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 989.

§ 3. Public water supply.

In an action against a waterworks company for loss from fire on the ground that it occurred by reason of the company's failure to have a sufficient supply of water, the court *held* required to give a certain charge.—*Shelbyville Water & Light Co. v. McDade* (Ky.) 568.

In an action against a waterworks company for loss from fire for failure to furnish water, certain evidence *held* admissible to prevent the jury from inferring that there was a want of water in the stand pipe.—*Shelbyville Water & Light Co. v. McDade* (Ky.) 568.

In an action against a waterworks company for loss from fire for its failure to furnish a supply of water, certain evidence *held* admissible.—*Shelbyville Water & Light Co. v. McDade* (Ky.) 568.

WAYS.

Private rights of way, see "Easements."

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WEAPONS.

Use of in assault with intent to kill, see "Homicide," § 3.

*One who has a pistol on his person while sitting in a buggy is guilty of carrying a pistol on or about the person.—*Prewitt v. State* (Tex. Cr. App.) 800.

In a prosecution for carrying a pistol about the person, evidence *held* sufficient to support a conviction.—*Prewitt v. State* (Tex. Cr. App.) 800.

WIDOWS.

Dower, see "Dower."

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Charitable bequests and devises, see "Charities." Construction and execution of trusts, see "Trusts."

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Garnishment of interest of legatee, see "Garnishment," § 1.

Requirements of statute of frauds as to contracts to devise, see "Frauds, Statute of," § 1.

§ 1. Testamentary capacity.

*Evidence of the condition of testator's mind at a previous time is only to be considered in determining his condition when the will was made.—*Threlkeld v. Bond* (Ky.) 606.

§ 2. Requisites and validity.

Deeds whereby husband conveyed land through third person to wife *held* to convey vested interest in estate described.—*O'Day v. Meadows* (Mo. Sup.) 637.

*Devise exists by implication when testator uses words manifesting an intention to give land.—*Metz v. Wright* (Mo. App.) 1125.

Certain clause of law *held* to constitute a devise of land.—*Metz v. Wright* (Mo. App.) 1125.

§ 3. Construction.

*Where residuary bequest was sustained by court, *held* error to charge plaintiff's costs and

* Point annotated. See syllabus.

attorney's fees against the residuary legatee.—Trustees of Home for Poor Catholic Men v. Coleman (Ky.) 342; Coleman v. Amiss' Ex'r, Id.

A will *held* to create an estate in tail, converted by the statute into a fee simple.—Watkins v. Pfeiffer (Ky.) 562.

*Will reciting that testator has deeded land *held* not to constitute devise by implication.—Koger v. Koger (Ky.) 1167.

*In construing a will, effect is to be given to intention of testator.—Metz v. Wright (Mo. App.) 1125.

Will *held* to create contingent remainder, the ultimate owners of which would not be determined until death of both life tenants.—Rutherford v. Rutherford (Tenn.) 1112.

WITNESSES.

See "Depositions"; "Evidence."

Continuance for absence, see "Criminal Law," § 16.

Credibility, as question for jury, see "Trial," § 5.

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Perjury, see "Perjury."

Presumptions on appeal as to permission to allow witnesses to remain in court, see "Appeal and Error," § 13.

Testimony of accomplices, see "Criminal Law," § 13.

§ 1. Competency.

Under Kirby's Dig. § 3095, husband *held* incompetent to testify as to value of horses for the killing of which the wife sued.—St. Louis, I. M. & S. Ry. Co. v. Courtney (Ark.) 251.

Under the express provisions of Civ. Code Prac. § 606, in an action which might have been brought against a wife if she had been unmarried, either the husband or wife may testify, but not both of them.—Ditto v. Slaughter (Ky.) 2.

An assignee of a life policy, made defendant by the insured's administrator bringing action thereon, is competent to testify as to transactions with deceased in behalf of the company denying the validity of the policy.—Bromley's Admr v. Washington Life Ins. Co. (Ky.) 17.

*Information by observation acquired by a physician prior to the establishing of the relation of physician and patient is not privileged, under Rev. St. 1899, § 4659.—Smoot v. Kansas City (Mo. Sup.) 363.

*Information acquired by a physician from observation of his patient is privileged, under Rev. St. 1899, § 4659.—Smoot v. Kansas City (Mo. Sup.) 363.

*Where the wife is incompetent to testify against her husband, the testimony of the third person as to her declarations in the presence of her husband is not admissible against him.—State v. Richardson (Mo. Sup.) 649.

In an action by a married woman against her husband and an executor, plaintiff *held* not a competent witness, under Rev. St. 1899, § 4652.—Scott v. Burfeind (Mo. App.) 175.

*Where a marriage was illegal, no matter how confidential the relationship between the parties, and however much the woman may have regarded the man as her husband, the state had a right, on a prosecution against him, to introduce her testimony against him.—Young v. State (Tex. Cr. App.) 841.

§ 2. Examination.

*Where a record made by a witness did not refresh his recollection, and he testified that he

could not swear to the facts except from the record, his evidence was properly excluded.—Ft. Worth & D. C. Ry. Co. v. Garlington (Tex. Civ. App.) 270.

*In trespass to try title, testimony as to whether witness had surveyed the tract described in the petition *held* admissible.—Camp v. League (Tex. Civ. App.) 1062.

§ 3. Credibility, impeachment, contradiction, and corroboration.

It is not competent to impeach a witness in a criminal case by asking him whether he was not asked certain questions before the magistrate.—Crossland v. State (Ark.) 776.

*Where a witness does not testify to certain facts as expected, it is not competent to prove that he had stated such facts out of court.—Threlkeld v. Bond (Ky.) 606.

The general reputation of defendant, in a criminal prosecution, who testifies as a witness, as being quarrelsome, is not admissible to affect his credibility.—State v. Richardson (Mo. Sup.) 649.

*Testimony of a party who has merely taken a deposition, but not introduced it, cannot be objected to as contradicting such witness.—King v. Phoenix Ins. Co. (Mo. Sup.) 892.

*Testimony about an immaterial matter *held* not competent to impeach a witness.—Honeycutt v. State (Tex. Cr. App.) 421.

*In a criminal case *held* error to permit the state to show the facts in regard to the testimony of a witness before the grand jury concerning incriminating statements of accused and the witness' determination that he was mistaken in his testimony before the grand jury.—Ware v. State (Tex. Cr. App.) 1093.

Examination of an impeaching witness *held* error for eliciting matters beyond the scope of the predicate laid for impeachment.—St. Clair v. State (Tex. Cr. App.) 1095.

WORK AND LABOR.

Liens for work and materials, see "Mechanics' Liens."

In an action against an executor for personal services rendered to decedent, *held*, that an instruction limiting the effect of certain evidence should have been given.—McGrew's Ex'r v. O'Donnell (Ky.) 301.

*In an action against an executor for personal services rendered to decedent, plaintiff *held* entitled to recover the reasonable value of the services rendered, and not such a sum as would reasonably compensate her for the services.—McGrew's Ex'r v. O'Donnell (Ky.) 301.

In an action against an executor for personal services rendered to decedent, *held*, that a certain instruction should have been modified.—McGrew's Ex'r v. O'Donnell (Ky.) 301.

*Where near relatives live together as members of the same family, and services are performed by one for the other, it is presumed that no charge will be made therefor.—Key v. Harris (Tenn.) 235.

One performing services for her sister *held* entitled to compensation therefor.—Key v. Harris (Tenn.) 235.

*Plaintiff being unable to enforce specific performance of a parol contract to devise land in consideration of the rendition of plaintiff's services, he was entitled to recover the reasonable

*Point annotated. See syllabus.

value thereof against deceased's personal representatives.—*Goodloe v. Goodloe* (Tenn.) 767.

WRITS.

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93	89	74	256	89	333	363	89	360	453	79	481	551	89	1094	633	91	58	715	91	1023
97	89	65	266	89	596	372	89	575	460	89	905	558	90	116	643	93	300	723	90	1089
109	89	564	274	89	357	374	89	1042	467	89	907	562	90	123	652	90	400	728	90	751
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